IN THE MATTER OF: THE REGULATED HEALTH PROFESSIONS ACT ("RHPA");

AND IN THE MATTER OF: DR. DAVID HOWELL AMES, a member of the College of Physicians & Surgeons of Manitoba

Inquiry Panel:
Dr. Lewis Samuels, Chairperson
Dr. Hillel Sommer
Ms. Diana Yelland, Public Representative

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REASONS FOR DECISION OF AN INQUIRY PANEL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF MANITOBA

REASONS FOR DECISION

INTRODUCTION

On Monday April 26th, 2021, pursuant to Part 8 of the Regulated Health Professions Act, (the "RHPA"), a hearing proceeded before an Inquiry Panel (the Panel) of the College of Physicians and Surgeons of Manitoba (the College). The purpose of the hearing was to conduct an inquiry into allegations against Dr. David Howell Ames, as more particularly outlined in an Amended Notice of Inquiry dated February 12th, 2020.

At a previous hearing, in relation to the same allegations, which occurred on January 11th, 2021, Dr. Ames, through his counsel, had admitted his membership in the College and had acknowledged service of the original Notice of Inquiry and of the Amended Notice of Inquiry. Dr. Ames, through his counsel also acknowledged that all other jurisdictional requirements under the RHPA had been met.

At the hearing on April 26th, 2021, Dr. Ames was present, represented by legal counsel. Counsel for the Investigation Committee of the College was also present. Certain exhibits were entered into evidence by consent, including the original Notice of Inquiry, (exhibit 1), the Amended Notice of Inquiry, (exhibit 2), a binder of Agreed Documents, (exhibit 3), and a Statement of Agreed Facts, (exhibit 4).

Dr. Ames waived the reading of the Amended Notice of Inquiry and entered a plea of not guilty to the allegations in the Amended Notice of Inquiry.

The allegations against Dr. Ames were set forth in three separate counts, which are reproduced below:

"1. During the course of your practice of medicine, from in or about December 2018 until in or about May or June 2019, you violated your ethical obligations to Patient A and contravened sections 1 and 12 of the Code of Ethics of the College and/or Section 8 of the College's Standards of Practice in that you failed to maintain appropriate professional

boundaries and or exploited Patient A for your personal advantage and thereby committed acts of professional misconduct and or engaged in conduct unbecoming a member. Particulars include one or more of the following:

a. From in or about December 2018 through in or about May or June 2019, you inappropriately communicated with Patient A, including one or more of the following:

i) You complimented Patient A about her physical appearance during clinical encounters and/or made comments of a sexual nature;

ii) You inappropriately communicated with Patient A via text on an instant messaging mobile application and/or by telephone, including making comments of a sexual nature to Patient A;

iii) You sent Patient A a photograph of what you purported to be your genitals; and/or

iv) You encouraged Patient A to send and/or implied that you were receptive to Patient A sending you photographs of herself, including nude photographs.

b. On or about May 28, 2019, you made sexual contact with Patient A during a physical examination in that you inserted your fingers in her vagina without a medical purpose for doing so.

2. You attempted to mislead the College both in your written communications and in your interview with the Investigator thereby committing acts of professional misconduct and engaging in conduct unbecoming a member in that you initially concealed the sexual nature and extent of your communications with Patient A, including misrepresenting the nature, duration and frequency of the texts you and Patient A exchanged. Particulars include one or more of the following:

a. You withheld relevant information and/or made false and misleading statements to the College when you described your communications with Patient A as follows:

i) In your letter to the College dated July 26, 2019, you described your communications as including an exchange of texts on KIK “a few times” and failed to acknowledge that any comments from you were sexual; and

ii) In your letter to the College dated August 16, 2019, in response to the letter of complaint from Patient A dated August 4, 2019, in which she described her communications with you:

1. You failed to disclose your actions in relation to inappropriate or sexual communications with Patient A; and

2. You expressly stated that' "[Patient A] states that I sent her a picture of my genitalia. This is not true".

b. In your interview with the Investigator on September 10, 2019, you:

i) falsely stated that you did not send Patient A any pictures; and

ii) failed to mention that some of your communications with Patient A were sexual.

c. In your letter to the College dated September 15, 2019, but not sent to the College until September 19, 2019, you:

i) described texts exchanged with Patient A between December 2018 to May or June 2019 as having progressed from "flirty" to being "more provocative in nature"; and

ii) stated that you sent a picture of your genitals to Patient A sometime between May and June of 2019, which picture you now state was not of your genitals, but that when you sent the picture, you did so purporting it to be a picture of your own genitals.

3. By reason of one or more of the foregoing, you have demonstrated unfitness to practice medicine."

THE BACKGROUND FACTS - COUNT 1

The evidentiary portion of the hearing proceeded from April 26th to April 30th, 2021, inclusive. Thereafter, the parties provided written submissions to the Panel in June 2021 and supplemented those submissions with oral arguments delivered on June 28th, 2021.

Many of the background facts relating to the interactions between Dr. Ames and Patient A are contentious. However, some of the background facts are not disputed and were outlined in the Statement of Agreed Facts as follows:

"3. Dr. Ames was born in 1971. He began medical school in 2005. He attended the University of Manitoba and completed his medical degree in 2009. He has been registered with the College of Physicians and Surgeons (the "College") as a specialist in orthopedic surgery since 2014.

4. Patient A is a female born in 1971.

5. In August 2018, Dr. Ames worked out of the Manitoba Clinic. Since November 2018 Dr. Ames has worked out of the Fort Whyte Orthopedics (the "Clinic").

6. On April 30th, 2018, Patient A underwent an arthroscopy performed by Dr. James Langstaffe and by letter dated June 7th, 2018, Patient A was referred to Dr. Ames for consultation by Hip and Knee Central Intake at the WRHA surgery program.

7. On August 17th, 2018, Patient A was seen by Dr. Ames for an initial consultation in relation to her severe osteoarthritis requiring bilateral total hip arthroplasty or THA (hip replacements). She attended that appointment with FRIEND.

8. Patient A subsequently underwent left total hip replacement surgery on December 3rd, 2018, and then right total hip replacement surgery on February 28th, 2019. Both of these surgeries were performed by Dr. Ames at the Grace Hospital.

9. Dr. Ames' records demonstrate that he saw Patient A on the following dates and at the following locations:

a. August 17th, 2018 - Initial Consultation - Manitoba Clinic;
b. December 3rd, 2018 - Left Total Hip Arthroplasty - Grace Hospital;
c. December 19th, 2018 - Staple Removal - Grace Hospital Cast Clinic;
d. January 29th, 2019 - Routine Follow Up - Fort Whyte Orthopedics;
e. February 28th, 2019 - Right Total Hip Arthroplasty - Grace Hospital;
f. March 22nd, 2019 - Staple Removal - Grace Hospital Cast Clinic;
g. April 25th, 2019 - Routine Follow Up - Fort Whyte Orthopedics;
h. May 28th, 2019 - Office Visit - Fort Whyte Orthopedics.

10. Patient A also attended at Dr. Ames' clinic to sign forms for the right total hip replacement surgery. There is no chart note but the forms are dated January 25th, 2019".

In addition to the foregoing, the following facts relating to the interactions between Dr. Ames and Patient A were established by the evidence introduced at the hearing:

1. Dr. Ames and Patient A had not met each other prior to August 17th, 2018, the date of the initial consultation at the Manitoba Clinic. Patient A's osteoarthritis was causing her to experience extreme pain and was significantly limiting her activities and her enjoyment of life. She was very anxious to undergo surgery which would reduce her pain and allow her to resume a more active and rewarding life.

2. Patient A was accompanied by a FRIEND [this term has been used in place of the friend's name and other information about her has been removed to protect her identity] to the initial consultation.

3. FRIEND and Dr. Ames were well known to each other. They had a past romantic/ sexual relationship that ended, but they continued to have intermittent communications, usually through an exchange of text messages. These communications were often sexual in nature and included flirtatious banter and an exchange of photographs. FRIEND recalled that in some of those exchanges, Dr. Ames suggested a “threesome”. Dr. Ames acknowledged he may have done so.

4. With respect to Dr. Ames and Patient A, while their testimony as to their interactions differed significantly in many respects, it was consistent to the extent that they both acknowledged that they had exchanged text messages which were not related to clinical care, and which included messages that were of a sexual nature (neither of them retained those communications). They also both referred to communications between themselves on KIK (a messaging application) which neither of them retained. In addition, Dr. Ames sent a photograph to Patient A of genitals which she might have reasonably believed were his genitals, although he asserted in his testimony that it should have been obvious that the exaggerated image was not of his genitals. Dr. Ames also encouraged or made it clear that he was receptive to Patient A sending nude photographs of herself to him.

It is also useful to identify the significant differences between the testimony of Dr. Ames and Patient A relating to their interactions. A convenient way of doing so is by referring to the dates on which the medical records of Dr. Ames indicate they saw each other and referring to their contradictory evidence as to the events which allegedly occurred on those dates or within the time frames established by those dates.

August 17th, 2018 - Initial Consultation - Manitoba Clinic

Both Dr. Ames and Patient A testified that the initial consultation (at which FRIEND was present) was positive from a clinical perspective. Patient A was impressed by Dr. Ames' professionalism and his immediate recognition that she needed to have both hips replaced. She was also impressed by his willingness to initiate the steps to have her left hip replaced as soon as possible, and to discuss the prospect of replacing her right hip within a reasonable time thereafter. Patient A was delighted that Dr. Ames and FRIEND knew each other and were on friendly terms. Patient A left the initial consultation in high spirits, excited that surgical interventions were being planned which, if successful, would significantly enhance the quality of her life.

At the initial consultation, Dr. Ames and Patient A discussed Patient A's possible participation in a pilot program, relating to certain types of joint replacements (including hip joint replacements) in which the surgery would be performed early in the day and the patient would be discharged to their home later that day. Patients were required to meet various criteria to be eligible for the pilot program. Patient A had previously undergone several unrelated surgeries, and had a condition known as Von Willebrand's disease, being a blood clotting disorder. There was a possibility that having such a condition might render Patient A ineligible for the pilot program. Dr. Ames thought that possibility was unlikely, given Patient A's prior positive surgical experiences.

Patient A testified that Dr. Ames told her not to mention her Von Willebrand's condition to anyone, because doing so might disqualify her from the pilot program. Dr. Ames denied doing so and pointed out that he had mentioned Von Willebrand's disease in the context of the day surgery program in his letter dated August 17th, 2018, to Patient A's family physician (Dr. X).

Shortly after the initial consultation ended, while Patient A and FRIEND were driving home together, Dr. Ames initiated a text exchange with FRIEND. In his testimony Dr. Ames stated that he did not realize that Patient A and FRIEND had driven together to the

consultation and that he therefore did not consider that they might be driving home together while he was texting FRIEND. Dr. Ames' text exchange with FRIEND on August 17th, 2018, was sexualized. FRIEND testified that Dr. Ames sent her a picture of his penis. Dr. Ames testified that he did not recall doing so, but it was possible. He recalled that he had sent FRIEND a picture of his boxer shorts. FRIEND also testified that in that text exchange, Dr. Ames commented that Patient A was "beautiful" or "hot" and suggested a "threesome" involving Patient A. In cross examination Dr. Ames stated, "I don't recall that", but later acknowledged "I suppose it's possible". He denied that he had any expectation (if he had suggested a threesome) that his suggestion would be acted upon.

Patient A was present in the car with FRIEND while those exchanges were occurring and had a general awareness of the nature of the exchanges but did not see the specific texts sent by either Dr. Ames or FRIEND. By this time, Patient A was aware of the past relationship between Dr. Ames and FRIEND. The text exchange between Dr. Ames and FRIEND was relatively protracted occurring throughout the time that Patient A was driving home with FRIEND and continuing while they were parked in a driveway upon arriving home. In some respects the testimonies of Patient A and FRIEND were inconsistent. FRIEND indicated that Dr. Ames had sent her a photograph of his genitals and she had sent him a picture of one of her exposed breasts. She also stated that she had shown those photographs to Patient A who responded by giggling. Patient A testified she had not seen the texts or the photographs.

December 3rd, 2018, left hip arthroplasty- Grace Hospital

The surgery performed by Dr. Ames on December 3rd, 2018, went well. It was performed on a day surgery basis, as part of the pilot program. There is no allegation that Dr. Ames conducted himself inappropriately on that day.

Dr. Ames testified that he gave his cell phone number to Patient A on December 3rd in order that she could call him with any concerns or if any problems developed after she was discharged from the hospital. He indicated that it was his practice then (which he has

since discontinued) to give his cell phone number to some of his day surgery patients in case any problems developed after their discharge.

Patient A denied that Dr. Ames provided her with his cell phone number on December 3rd, indicating that he provided his cell phone number to her in January 2019 in entirely different circumstances.

December 19th, 2018 - staple removal - Grace Hospital Cast Clinic

The staple removal was uneventful. There is no allegation against Dr. Ames in relation to the December 19th, 2018, attendance. Another friend of Patient A's had driven her to that appointment. The interactions between Dr. Ames and Patient A on that day were brief. Dr. Ames recalled that Patient A had advised him that her mother had died on December 3rd, 2018, the date of Patient A's surgery. Dr. Ames expressed his condolences and may have given Patient A a hug in that context.

January 25th, 2019, - Fort Whyte Orthopedics

Patient A attended at the Fort Whyte Clinic on January 25th, 2019, to sign the consent forms related to the right hip replacement surgery. A Surgical Office Assistant at the clinic, C., was involved in that process

Patient A testified that she was alone with Dr. Ames before C. entered the room with the necessary forms, and that while they were alone, Dr. Ames told her that she was "beautiful" and "hot". Dr. Ames denied that he did so, explaining that he was never alone with Patient A on January 25th, and that C. was present in the room with Patient A at all times when he was in the room. C. testified that she took Patient A into the room where the forms were signed and stayed with her while the forms were signed. C. could not remember whether Dr. Ames saw Patient A at all on that day.

January 29th, 2019 - routine follow up - Fort Whyte Orthopedics

Patient A's father accompanied her to this appointment. Her father waited for Patient A in the reception area of the clinic, while Patient A met with Dr. Ames in one of the examination rooms at the Clinic. Patient A testified that by this time she had begun to ask various people to accompany her to appointments with Dr. Ames because she was feeling uncomfortable about some of his interactions with her.

According to Patient A, on January 29th, while alone with her in an examination room, Dr. Ames commented favorably on her physical appearance using phrases such as "you are beautiful", and you are "double take hot". Patient A also testified that she thought it was at this meeting that Dr. Ames gave her his cell phone number.

At various stages of her testimony, Patient A emphasized that although her recollection of events was clear, she was uncertain of the specific dates on which particular events occurred. She stated that, to the best of her recollection, it was during the January 29th attendance that she had a conversation with Dr. Ames about KIK and that he took her phone and discovered she had KIK on her phone, and he explained to her that they could use KIK to communicate privately.

Patient A also testified that on January 29th, after giving her his cell phone number, he asked her to send him a text so that he would have her number. She did as he requested. Shortly thereafter, while she was still in her car travelling home from the appointment, she received a text from Dr. Ames asking, "Do you want to play with me?". Patient A also asserted that over the next couple of weeks, she and Dr. Ames exchanged texts which were initiated by Dr. Ames and which invariably started with the phrase "Do you want to play with me?". In one of those exchanges, Dr. Ames asked that Patient A send him a picture of her vagina. Patient A recalled that she exchanged approximately 10 to 12 text messages with Dr. Ames between the January 29th appointment and on or shortly after February 28th, 2019, the date of her second surgery.

Patient A also testified that she was confused and ashamed by these exchanges and tried to discourage their sexualized content by indicating that she was a happily married woman. However, she also explained that getting her second hip done was “the highest priority ever”, and she did not want to do anything to annoy Dr. Ames, which she feared might interfere with having her right hip replaced on an expedited basis.

In Dr. Ames’ testimony, he stated that the January 29th attendance was routine and uneventful. He reviewed the X-rays of Patient A's left hip, which had been taken that morning, with Patient A and performed some standard range of motion tests. He was pleased with Patient A’s clinical progress. Dr. Ames denied that he and Patient A exchanged cell phone numbers, or that they discussed KIK, or that he physically handled her phone. He also adamantly denied that he had sent her sexualized texts on January 29th or in the weeks thereafter. It was Dr. Ames’ position that he had no communications whatsoever with Patient A between January 29th and February 28th, 2019.

February 28th, 2019 - right total hip arthroplasty - Grace Hospital

The surgery proceeded satisfactorily. Patient A's husband was present with Patient A prior to the surgery (he and Dr. Ames exchanged pleasantries) and her husband was with her soon after the surgery was performed.

The testimony of Patient A and Dr. Ames differed considerably with respect to events which allegedly occurred immediately after the surgery had been performed.

Patient A testified that while she was recovering (she recalled lying in a bed in a hallway close to a nursing station) Dr. Ames walked up to her left side, bent over her and whispered into her ear “she looked beautiful”. Patient A understood this to be a reference to her vagina and she felt disgusted and dirty as a result.

Dr. Ames’ version of the post-operative events was starkly different. He recalled that Patient A was in a large recovery room. He was at her bedside, reviewing the post-

operative x-ray. An x-ray technician and the attending nurse were in close proximity. Patient A asked “where is my surgeon?”, to which Dr. Ames replied “you have a matching pair”. At that point, according to Dr. Ames, Patient A stated, “I hope you appreciated that I shaved for you”. Dr. Ames explained that he attributed that comment to “post- op disinhibition”.

Dr. Ames denied making any reference to Patient A’s vagina.

Interactions in early March 2019

Patient A testified that after the February 28th surgery, Dr. Ames sent her some texts of a sexual nature, again inquiring if she wanted to play with him and asking her to send him a picture of herself.

Dr. Ames recalled that sometime around the first or second weekend in March, Patient A texted him about a bump or a lump around the incision site on the right hip. Dr. Ames testified that she thought that she might have a “post-op infection”. Dr. Ames texted her back inquiring about “constitutional symptoms” and asking her to send him a picture of the incision, which she did. Dr. Ames saw nothing untoward in the picture and accordingly asked her to send another picture “displaying a tangential view”, which might better enable him to see a lump in the area of the incision.

Dr. Ames testified that between three to five minutes later he received a picture from Patient A, disrobed from the waist down, lying in bed. Dr. Ames’ response was to send a text stating “whoa, that made my day”. According to Dr. Ames his text precipitated an exchange of flirty, sexualized texts between himself and Patient A. During their exchange, Dr Ames asked if he could call Patient A, and she replied that she would call him in five or 10 minutes. She did so and they then had a conversation for about 10 or 15 minutes, maybe longer. During that call, Patient A asked questions about Dr. Ames’ relationship with FRIEND. They also discussed various things which they both enjoyed sexually. Thereafter Dr. Ames indicated they exchanged some further sexual texts, which he

described as a fun, flirty, fantasy exchange. He testified that he understood that neither of them wanted their partners to get hurt, and that “this wasn't a real-life situation”.

Patient A denied ever sending a nude photograph of herself, or a picture of herself naked from the waist down lying in bed, to Dr. Ames and also denied any telephone call with Dr. Ames on the first or second weekend of March.

March 22nd, 2019 - staple removal - Grace Hospital Cast Clinic

Patient A's husband accompanied her to this appointment. Patient A recalled that she had likely sent a photo of her right hip to Dr. Ames shortly prior to this attendance.

Nothing unusual or untoward occurred associated with the staple removal.

April 25th, 2019 -routine follow up - Fort Whyte Orthopedics

Patient A's father accompanied her to this appointment and attended in the examination room while Dr. Ames met with Patient A. Dr. Ames recalled that he reviewed recent x-rays of Patient A’s right hip with her, and that she took a picture of that X-ray. She also complained about pain in one of her knees and was worried about the potential onset of arthritis in that knee. Accordingly an x-ray of that knee was also taken and reviewed. No arthritis was detected. In all other respects Dr. Ames said the attendance was uneventful. He stated that he left the examination room first, before Patient A and her father.

Patient A testified that as the attendance was ending, her father left the examination room first, whereupon Dr. Ames looked at her and mouthed the words “you are beautiful, you're hot”.

May 26th, 2019, telephone call

Patient A continued to be concerned about a bump near the incision site on her right hip. She texted Dr. Ames on Sunday May 26th, expressing her concern. Dr. Ames telephoned her in response to her text.

Dr. Ames recalls that Patient A's complaint was that she was experiencing pain, which she said was very different from what she had experienced with her left hip. She also expressed concern about infection. He advised her that if she was seriously concerned, she should attend at the Grace Hospital Emergency Department, but if her concern was not urgent, she should call to make an appointment to see him at the Fort Whyte Clinic.

There is no material disagreement between Patient A and Dr. Ames with respect to the content of the call on May 26th, except that Patient A asserts that she never expressed a concern at any time about infection. She simply indicated she was worried about a bump or lump at the incision site.

May 28th, 2019 - office visit - Fort Whyte Orthopedics

Patient A made an appointment to see Dr. Ames at 1:00 PM on May 28th, 2019, at the Fort Whyte clinic. She was at work that day and went to the appointment from her place of work. She was not accompanied by anyone and felt uncomfortable about being alone with Dr. Ames.

Patient A testified that she was directed to an examination room and she was alone with Dr. Ames in that examination room. She recalled that she was wearing a sun dress. Dr. Ames directed her to lie down on an examination table. She did so but stated that she was not offered a drape or other type of covering before the physical examination commenced.

While she was lying on her back on the examination table, Dr Ames performed a series of maneuvers, during which Patient A tried to position her dress between her legs so that she was not exposed. She testified that while performing one of the maneuvers, one of Dr. Ames' hands was between her legs, very close to her underwear. She told him that she was uncomfortable, to which he allegedly replied that he was simply showing her how to get rid of the lump.

According to Patient A, when she got off the examination table, she returned to a chair where she had left her purse, and as she bent over to pick up her purse, Dr. Ames grabbed her from behind by putting both hands on her hips, turned her around and kissed her on the lips. Patient A pushed back and asked Dr. Ames what he was doing. She then sat down. She indicated she was angry and fearful and did not know what to do.

Dr. Ames then indicated he had one more exercise he wanted to show her. He indicated he needed to see her leg. At this point he was also sitting in a chair. He moved his chair closer to Patient A, putting her right leg between his legs. Patient A testified that he placed his left hand on the outside of her right leg and put his right hand on the inside of her inner thigh and inserted one or more of his fingers into her vagina. She jumped up, asked him what he was doing, took her purse and promptly left the clinic without talking to any of the staff.

Patient A stated that she was very upset and went to her car. While she was sitting in her car, Dr. Ames sent her a picture, using the KIK application, of an exposed penis, which she presumed was his penis. She became even more upset and deleted the picture and deleted the KIK application.

Dr. Ames' testimony with respect to the events of May 28th was strikingly different from the testimony of Patient A. He testified that May 28th was a very busy day for him at the clinic, and he was double booked for most of the day. He was double booked when seeing Patient A, because she had made the appointment on short notice. She was scheduled in, for 1.00 P.M., at the same time that Dr. Ames had an appointment with another patient.

According to Dr. Ames, he saw Patient A for only 8 to 9 minutes. He had a brief conversation with her in the examination room and performed three standard maneuvers on the examination table to determine whether she might be experiencing tendonitis. He could not recall specifically whether he had offered her a drape prior to examining her, but he emphasized that she was not exposed during any part of the May 29th appointment.

Dr. Ames also indicated that at some point during the May 29th appointment he visualized, but did not touch, the incision. He described the incision as being well-healed. He did not see any bump at or near the incision site.

During at least one of the maneuvers he performed, Patient A experienced some pain and discomfort. He was also aware that the two hip replacements had resulted in both of Patient A's hips having "big offsets", and he recognized that some tendonitis was possible. He recommended that Patient A use an oral non-steroidal anti-inflammatory and a topical heat application to address any pain or discomfort she was experiencing.

Dr. Ames stated that during the May 28th examination neither of his hands were ever above Patient A's knees. He also stated he did not purport to show her any exercises. He strongly denied kissing her, inserting his finger or fingers into her vagina, or touching her in any inappropriate manner. She appeared to him to be in good spirits as she left the appointment and he recalled seeing her speaking to the receptionist, K., on her way out of the clinic.

Dr. Ames also testified that as he was leaving the examination room, Patient A asked him if he used "KIK messenger", because she would prefer to use KIK moving forward to avoid the risk of her husband seeing their exchange of texts. In response, Dr. Ames gave her his name on KIK so that she could communicate with him using KIK.

Communications in late May- early June 2019

Dr. Ames acknowledged that at the end of May or the beginning of June 2019, he and Patient A texted back and forth using KIK. He testified that Patient A had sent him a picture of her genitalia and that he had responded with a picture of an erect penis, which he had accessed from the Internet. He explained that he had sent an accompanying message stating "You should get this from your husband". He also recalled that Patient A had responded humorously stating something like "I wish".

According to Dr. Ames, approximately one week later Patient A sent a KIK message saying "I have something for you" and forwarded a picture of herself, disrobed from the waist down, saying "I am at work". Dr. Ames stated that at that point he felt sick and overwhelmed with guilt. He deleted their exchange of messages, "blocked" Patient A on KIK and deleted the KIK application from his phone.

In her testimony, Patient A strenuously denied that she had suggested using the KIK application to Dr. Ames and that she had had any text communications with Dr. Ames after the May 28th attendance at the Fort Whyte clinic. Patient A also denied that she had sent a photograph of herself to Dr. Ames using KIK or any other application.

THE BACKGROUND FACTS- COUNT 2

There is very little factual dispute between the parties as to the facts alleged in Count 2 of the Amended Notice of Inquiry. Most of the specific factual allegations in Count 2 against Dr. Ames have been admitted by Dr. Ames and had been admitted prior to the hearing which commenced on April 26, 2021.

The Statement of Agreed Facts contained the following facts under the heading "The Investigation":

"12. On July 17 and 19, 2019, the College received information from Patient A's primary care physician concerning sexual misconduct by Dr. Ames. The College initiated an investigation.

13. On July 23, 2019:

a. Dr. Ames was contacted by the Acting Investigation Chair by telephone and advised of the allegations against him and that a letter would be couriered to him about those allegations.

b. Dr. Ames arranged to pick up the letter from CPSM that same afternoon...

14. On July 26, 2019:

a. Dr. Ames provided his written response to the Registrar's Referral.

b. Dr. Ames counsel provided statements from members of the Fort Whyte Orthopedics office staff in which they describe the office layout and their recollection of the Patient And the events of the day on May 28, 2019.

15. Patient A filed a written complaint providing further information by letter dated August 4, 2019 (the "Complaint") ....

17. Dr. Ames states that when he received the complaint he reviewed his phone and inadvertently called Patient A and discontinued the call as soon as he realized it had dialled....

19. The Complaint was sent to Dr. Ames for a response by letter dated August 16, 2019.

20. Dr. Ames' counsel provided his written response to the Complaint by letter dated August 16, 2019....

23. On September 10, 2019, Dr. Ames was interviewed by the College's investigator...

24. At the time of Dr. Ames' interview on September 10, 2019, he provided photographs of the Fort Whyte Orthopedics offices, along with log summary information from the EMR…

25. By letter dated September 18, 2019, Dr. Ames was advised that the investigation had been expanded.

26. On September 19, 2019 the College received a letter dated September 15, 2019 from Dr. Ames in relation to the statements he made at his interview on September 10, 2019. Dr. Ames states that he prepared and signed it on September 15th.

27. By letter dated September 19, 2019, Dr. Ames' counsel provided the College with both the September 15, 2019 letter and an additional letter signed September 18, 2019, in relation to the expanded investigation.

28. The College arranged for forensic analysis of devices of both Patient A and Dr. Ames. Nothing relevant was recovered from any of the devices analysed...."

The Statement of Agreed Facts also contained the following admissions by Dr. Ames under the heading "Misleading the College":

"36. Dr. Ames admits that, in his written response to the Registrar's Referral letter, dated July 25th, 2019, he advised the College that he and Patient A had exchanged texts and communicated by KIK. He admitted that these communications were inappropriate. He did not mention that he had sent a picture of male genitalia to Patient A. He did not disclose that they were sexual in nature.

37. Dr. Ames admits that, in his written response to Patient A's complaint dated August 16th, 2019, he did not disclose that he had sent messages of a sexual nature to Patient A and denied sending a picture of male genitalia to Patient A.

38. Dr. Ames admits that he was interviewed by the College's investigator on September 10th, 2019 and was asked what about his communications with Patient A was

inappropriate. He failed to disclose that he had sent messages of a sexual nature to Patient A and denied sending any pictures to Patient A.
39. Dr. Ames, in his letter dated September 15th, 2019, admitted to the College that he had not accurately described the communications he had with Patient A. He disclosed that he had in fact sent Patient A a photograph of male genitalia purporting it to be his own, and that he had sent inappropriate messages of a sexual nature to Patient A.
40. Dr. Ames admits that he attempted to mislead the College in his interview with the investigator and in his letter of August 16th, 2019, thereby committing acts of professional misconduct and engaging in conduct unbecoming a member."

However, Dr. Ames has pleaded not guilty to the allegations against him in Count 2, submitting that the College has mischaracterized the nature of his communications with the College from late July to mid-September 2019. Dr. Ames acknowledges that his initial responses to the College were neither comprehensive nor completely accurate but asserts that he attempted to correct any misstatements which he made or any misinformation which he provided to the College at a relatively early stage of the investigation. Accordingly he asserts that he did not refuse to cooperate with the College's investigation and he denies that he consistently misled the College during its investigation.

It is important to note that Dr. Ames has not been charged with a failure to cooperate with the College's investigation. The Panel recognizes that he did respond to the College's letters to him within the time limits which had been set, that he presented himself for an interview as required, and that he cooperated in providing his phone for forensic examination. Rather than being charged with a failure to cooperate, Dr. Ames has been charged with attempting to mislead the College in the manner particularised in Count 2 of the Amended Notice of Inquiry.

PROCEDURAL FAIRNESS

In their written submissions, counsel for Dr. Ames argued that the College owed a duty to investigate the Complaint with an open mind and failed to do so in several respects. Counsel further argued that the deficiencies in the investigation were sufficiently serious

to give rise to an apprehension of bias during the investigation, thereby tainting the "credibility and reliability of the evidence presented by the College".

The deficiencies identified by counsel for Dr. Ames were that:

a) the Investigation Committee did not visit Dr. Ames' offices to properly investigate issues such as the gap between the floor and the bottom of the doors to the examination rooms or the proximity of the work areas of the receptionist and other Clinic Staff relative to the examination rooms;
b) the investigator did not interview K. or C.;
c) the Investigation Committee did not attempt to obtain the phone records of Patient A until a request was made on behalf of Dr. Ames for the Committee to do so;
d) the Investigation Committee did not obtain medical records from the Grace Hospital relating to the post-operative events of February 28th, 2019, and whether Patient A was scheduled as an in-patient with respect to the second surgery;
e) the Investigation Committee did not seek Patient A's medical records relating to when and why she may have been on antidepressants or psychotropic drugs;
f) the Investigation Committee did not request a further interview with Dr. Ames following his letter of September 15th, 2019.

The Panel does not agree that the deficiencies, if any, in the College's investigation give rise to an apprehension of bias or that any such deficiencies undermine the credibility and reliability of the evidence presented by the College. Its reasons are outlined below.

Dr. Ames introduced photographs and diagrams of the layout of the Fort Whyte Clinic without objection from the Investigation Committee. Dr. Ames also obtained statements from K. and C. and provided those statements to the College well in advance of the hearing. The College was therefore aware of the evidence those individuals would likely give at the hearing. There is no basis to conclude that the College did not consider their evidence as part of its decision to proceed.

The forensic analysis of the phone records of Patient A was provided to Dr. Ames well in advance of the hearing.

It is unlikely that the Grace Hospital records would have contained any reference to the comments which Patient A and Dr. Ames may have made to each other after the February 28th, 2019 surgery. Patient A's status as either an in-patient or a day surgery patient was not directly relevant to any of the matters at issue in these proceedings.

Dr. Ames and his counsel had ample opportunity after September 15th, 2019 to clarify his position on any of the issues relating to the investigation.

The Panel is satisfied that Dr. Ames was not disadvantaged or prejudiced by any of the alleged deficiencies in the investigation identified by Dr. Ames. Following the issuance of the original Notice of Inquiry, he was fully aware of the allegations against him and was able to put forward a robust defence to those allegations.

ANALYSIS AND CONCLUSION – COUNT 2

The significant challenge which Dr. Ames faces in defending Count 2 is that all the detailed factual allegations contained in subparagraphs a, b, and c in Count 2 have either been admitted by him or otherwise proven through the evidence introduced at the hearing.

The Investigation Committee of the College submits that once those factual allegations have been admitted and/or proven, it follows logically that Dr. Ames was attempting to mislead the College, thereby committing acts of professional misconduct and engaging in conduct unbecoming a member.

Although Dr. Ames admitted at the hearing, both in direct examination and in cross examination, that some of his responses to the College involved deliberate attempts to mislead the College on certain important issues, he sought to provide an alternate context

in which his communications with the College should be assessed. During his testimony at the hearing, he explained that:

a. In July, August, and September 2019 and thereafter, he was very stressed, upset and anxious as a result of being falsely accused by Patient A of sexually assaulting her;
b. He was very fearful of the consequences which could result if Patient A's allegations against him were accepted by the College. He was also embarrassed and ashamed of some of his communications with Patient A;
c. As a result he provided incomplete, but generally accurate, information to the College in an attempt to lessen his responsibility for the boundary violations which had occurred, while improperly suggesting that Patient A was largely responsible for what had occurred;
d. After his interview with the College on September 10th, 2019 and before becoming aware that the College was expanding its investigation based on the text messages which he had exchanged with FRIEND on August 17th, 2018, he recognized that he needed to set the record straight by correcting some of the inaccurate information he had provided in his interview. He attempted to do so by his letter dated September 15th, 2019 and has been cooperative and forthcoming with the College since that time;
e. Any inaccurate information provided by him to the College on or after September 15th, 2019 resulted from errors in his memory and did not constitute a deliberate attempt to mislead the College.

In his letter to the College dated November 18th, 2019, Dr. Ames stated that he felt the College had not properly recognized the anxiety-producing effects of what he insists are false allegations of sexual assault against him, nor has the College recognized his sincere attempts to promptly correct any inaccurate information which he had provided to the College during the initial stages of its investigation. He expressed similar sentiments during his testimony.

The Investigation Committee strenuously rejects Dr. Ames' characterizations of his own behavior in relation to the College's investigation.

Both in their written submissions and in their oral arguments on June 28th, 2021, counsel for the Investigation Committee emphasized that members of the College are statutorily obliged to cooperate with investigations into their conduct, and that those obligations are reinforced by the Code of Ethics. Members must be diligent in their communications with the College and must respond to requests for information from the College in a complete and forthright manner. Providing misleading information during an investigation demonstrates a serious lack of professionalism and integrity and significantly undermines the College's ability to properly regulate the medical profession

During the cross examination of Dr. Ames and in their final submissions and oral arguments, counsel for the Investigation Committee pointed out that between late July 2019 and the third week of September 2019, Dr Ames had multiple opportunities to provide a comprehensive and accurate response to the concerns raised by the College in its letter dated July 23rd,2019 (based on Dr. X's initial report) and as specifically articulated by Patient A in her own letter dated August 4th, 2019. Between late July and the third week of September 2019, Dr. Ames provided three letters to the College outlining his response to the complaints (dated July 26th, 2019, August 16th, 2019, and September 15th, 2019) and participated in a lengthy interview conducted by the College's investigator on September 10th, 2019 (the transcript of which was in excess of 70 pages). Prior to writing each of those letters Dr. Ames had received legal advice. He was also represented by counsel at the interview of September 10th.

Notwithstanding those multiple opportunities to provide comprehensive and accurate information to the College with respect to the complaint, Dr Ames' narrative as to what actually happened changed several times and continued to change up to and including the hearing in April 2021. By way of example, prior to the hearing it was Dr. Ames' position that there had been no sexualized communication between himself and Patient A until

after the May 28th, 2019 appointment, but at the hearing Dr. Ames testified that such communications first occurred in March 2019.

Counsel for the Investigation Committee emphasized that the changes in Dr Ames' position were not limited to the correction of innocent errors but were part of a pattern of misleading the College by minimizing his own misconduct.

In both their written submissions and in their closing arguments Counsel for the Investigation Committee was painstakingly thorough in reviewing the incomplete and inaccurate communications which Dr Ames had with the College. It is not necessary to review all of those matters herein, but the following facts illustrate the legitimacy and correctness of the Investigation Committee's position.

1. Dr. Ames letter of July 26th, 2019 omitted material facts which Dr. Ames would clearly have understood were relevant to the College's inquiries. He neglected to advise the College of the sexual communications he had exchanged with Patient A. He also failed to advise the College that he had sent a picture of male genitalia to Patient A. The inescapable conclusion is that he omitted those facts to avoid the consequences of his own boundary violations.

2. Dr. Ames' letter of August 16th, 2019 was written in response to Patient A's letter of August 4th, in which she alleged Dr. Ames had sent her multiple texts of a sexual nature and had asked her if "she wanted to play". Dr. Ames would have understood that the College required a truthful and comprehensive response to those allegations. He admitted in his testimony that he did not disclose a sexual fantasy call with Patient A (which he now says occurred in March 2019) in his Aug 26th, 2019 letter. Equally concerning is that Dr Ames' letter of August 26th contained the following deceptive passage, "Patient A states that I had sent a picture of my genitalia. This is not true".

Ultimately, at the hearing in April 2021, Dr Ames acknowledged that he should have disclosed to the College that he had sent a picture of male genitalia to Patient A but he

did not. He also acknowledged that he had mischaracterized Patient A in his letter of August 26th and when doing so he was attempting to mislead the College.

3. Dr. Ames contends that his letter of September 15th, 2019 was a genuine attempt to correct the record and to be forthcoming to the College. In his letter of September 15th, he acknowledged he had sent a picture of male genitalia to Patient A (not having mentioned it in his first two letters to the College and having denied doing so in his interview). His letter of September 15th also referred to a telephone call and other communications with Patient A. Those communications were described in generalities, but a reasonable interpretation of Dr. Ames' letter of September 15th is that he was admitting that some of those communications constituted boundary violations. Nonetheless he provided a distinctly incomplete account of his sexualized exchanges with Patient A. His letter dated September 15th, 2019 also provided different information to the College with respect to the timing of some of those exchanges and with respect to the number of suggestive photographs he had received from Patient A than he provided in his testimony at the April 2021 hearing. Furthermore, in his letter dated September 15th, he continued to describe Patient A in a way which was intended to deflect responsibility for his own misconduct onto Patient A.

Interestingly in cross examination it was suggested to Dr. Ames that he wrote his September 15th letter to the College, not because of a genuine desire to be fully forthcoming, but because he had been asked by the College in his interview of September 10th to provide his electronic devices to the College so that a forensic examination could be conducted to potentially extract data, to better determine the nature and extent of his text exchanges with Patient A. It was put to Dr. Ames that he wrote his letter of September 15th because he was worried about what the College might discover through such data extraction.

Dr. Ames denied that was his motivation.

The Panel is unable to make a finding with respect to Dr. Ames' reasons for writing his letter of September 15th, 2019. The Panel recognizes that he may have had more than one reason for writing that letter. Nonetheless the possibility that he may have been influenced in writing the letter by his concerns about what a forensic examination of his electronic devices might reveal about his text exchanges with Patient A means that the Panel is sceptical of his claim that he wrote the letter in order to be as transparent and forthcoming with the College as possible. This is particularly so given that his letter of September 15th did not provide a full account of his sexualized exchanges with Patient A.

In assessing the allegations against Dr Ames outlined in Count 2 of the Amended Notice of Inquiry, the Panel has been mindful that members of the College are statutorily obliged to cooperate with investigations into their conduct. The Panel accepts the Investigation Committee's arguments that members of the College must be diligent in their communications and respond to requests for information in a complete and forthright manner. Intentionally or recklessly providing misleading information during an investigation demonstrates a serious lack of professionalism and integrity and frustrates the College's ability to ensure public confidence in the medical profession.

The Panel also accepts and endorses the following statements of the Ontario Court of Appeal in *Law Society of Ontario v. Diamond 2021 ONCA 255 (CanLII)* with respect to the responsibilities of members of a regulated profession to be honest and cooperative in their communications with their governing body:

"66. The reputation of the legal profession rests on the public's confidence that self-regulation is taken seriously by the legal profession. This can only occur where the legal profession has at hand effective and efficient tools by which to achieve accountability among its members. This is fundamental to the health and vibrancy of the legal profession.
67. Returning to the duty to cooperate, rule 7.1-1 of the rules of professional conduct is designed to ensure that there is a complete response and no inordinate delays in investigations by the self-regulated authority. It requires nothing more than prompt ad complete responses when requested, which are essential to moving investigations forward...

72… This is perhaps most clearly articulated by the vice-chair when he concluded, in relation to the general receipts journal and the general disbursements journal, that the appellant had engaged in a "cat and mouse game" that has no place in the relationship between licensee and regulator". This type of game stands as the antithesis of good faith dealings or, put another way, of honest, open, and helpful dealings."

Dr. Ames' changing narrative as to what happened between himself and Patient A displays the elements of a strategic "cat and mouse game" as opposed to being an earnest attempt to be honest, open, and helpful.

Given the foregoing, the Panel has concluded that it is more probable than not that Dr. Ames attempted to mislead the College in his written communications and in his interview with the Investigator, as particularised in Count 2 of the Amended Notice of Inquiry. Dr. Ames thereby committed acts of professional misconduct and engaged in conduct unbecoming a member of the College by initially concealing the sexual nature and extent of his communications with Patient A and by misrepresenting the nature and duration of the texts he exchanged with Patient A.

CREDIBILITY ASSESSMENTS

Based on the summary of the differences between the evidence of Dr. Ames and Patient A, which was outlined earlier in these Reasons, it is clear that a determination of Dr. Ames' guilt or innocence relating to the allegations against him in Count 1 of the Amended Notice of Inquiry, will depend, to a significant extent, on credibility assessments of both Dr Ames and Patient A.

The parties' counsel provided the Panel with helpful submissions and authorities with respect to assessing credibility, all of which the Panel has reviewed and considered.

In making credibility assessments with respect to Count 1, the Panel has been mindful that there are two general elements constituting credibility. These elements are the honesty of the witness (the willingness of the witness to speak the truth) and the reliability

of the witness (the ability of the witness to accurately observe, recall and describe the events on which they are giving evidence).

The Panel has also been cognizant that in making credibility assessments, they should not limit their assessment to an evaluation of the demeanor of Dr. Ames and Patient A and nor should they consider the evidence of these two individuals in isolation. Rather they should consider their evidence in relation to all the evidence in the proceedings, to determine whether the evidence in question is consistent with other reliable evidence and with the "preponderance of probabilities which a practical and informed person would recognize as reasonable in the circumstances" – (see *Faryna v. Chorny [1952] 2 D.L.R. 354*).

In this case that process will involve assessing the evidence of both Dr. Ames and Patient A in relation not only to the evidence of the other, but also in relation to the entire documentary record (the documents marked as exhibits in these proceedings) and to the testimony of the other witnesses in these proceedings. Those witnesses were FRIEND and Patient A's father, who were called by the Investigation Committee of the College, and K. and C. (two individuals employed by the Fort Whyte Orthopedics Clinic at the material time as a receptionist and as a Surgical Office Assistant respectively), who were called by Dr. Ames.

When undertaking the credibility assessment required in this case, the Panel is also entitled to consider the facts outlined in the Statement of Agreed Facts (subject to the comments outlined below with respect to paragraph 33 (b) thereof. Specifically, the Panel is entitled to consider the facts outlined in paragraphs 36 to 40 inclusive of the Statement of Agreed Facts in the section entitled "Misleading the College".

THE STATEMENT OF AGREED FACTS – SUB-PARAGRAPH 33 (b)

As noted above, a credibility assessment of Dr. Ames and Patient A will necessarily involve a review and consideration of all of the exhibits filed in these proceedings, including the Statement of Agreed Facts and the binder of Agreed Documents.

Before undertaking that credibility assessment, it is necessary to consider an issue relating to the Statement of Agreed Facts which was raised by the parties at the outset of the hearing on April 26th, 2021.

Subparagraph 33 (b:) of the Statement of Agreed Facts states:

"Both Dr. Ames and Patient A agree that:
b) there were no texts or other communications between the two of them that were outside of an expected physician/patient relationship until after the second surgery which took place on February 28th, 2019;"

On April 23rd, 2021, counsel for the Investigation Committee wrote to counsel for the Inquiry Panel, with a copy to counsel for Dr. Ames, advising that she had agreed to paragraph 33 (b) in error, based on her recollection of the background information and without consulting with Patient A before doing so.

The preamble to the Statement of Agreed Facts contained the following statements:

"1. The parties have agreed that:
(a) the contents of this document constitute admissible evidence and may establish the facts stated herein and may form the basis of findings of fact by the Panel;
(b) the testimony of witnesses in direct and cross examination may be relied on by either party to supplement, explain or provide context to certain of the facts contained herein."

At the outset of the hearing on April 26th, both parties addressed this issue. Counsel for Dr. Ames argued that an agreed fact in a Statement of Agreed Facts is an admission and cannot be withdrawn without leave of the Panel. Absent a withdrawal of the admission, evidence inconsistent with the Statement of Agreed Facts should be deemed inadmissible as being irrelevant.

Counsel for the Investigation Committee argued that the facts referred to in subparagraph 33 (b) of the Statement of Agreed Facts had been included in error, and in any event those facts do not constitute “admissions”. Therefore, contrary evidence could be introduced by the Investigation Committee pursuant to paragraph 1 (b) of the preamble to the Statement of Agreed Facts, and in the interests of the overall fairness of the process.

Counsel for the Investigation Committee also made it clear that they were not applying to withdraw the facts referred to in subparagraph 33 (b) nor were they otherwise seeking to amend the Statement of Agreed Facts.

The hearing proceeded on the basis that both parties were maintaining their respective positions, and that the Investigation Committee would be permitted to introduce evidence contrary to the facts referred to in subparagraph 33 (b) of the Statement of Agreed Facts, subject to the objection of counsel for Dr. Ames, and that the Panel would decide whether or not it could accept and rely on any such contrary evidence, following the conclusion of the hearing, and after receiving the final submissions of the parties.

The Panel found it useful to receive the evidence introduced by the Investigation Committee which was contrary to the facts referred to in sub-paragraph 33 (b) of the Statement of Agreed Facts. By receiving that evidence the Panel was able to better understand the importance of the issue and to properly evaluate the potential effect of the contrary evidence.

The Panel also appreciated the candid and forthright acknowledgement of counsel for the Investigation Committee that sub-paragraph 33 (b) had been included as a result of an error on her part, in that she had relied on her own understanding of the background facts without reviewing that sub-paragraph with Patient A.

There are compelling and persuasive authorities, as referenced by counsel for Dr. Ames, which stand for the proposition that a fact in a Statement of Agreed Facts is an admission

which cannot be withdrawn without leave, and that any contrary evidence should be ruled inadmissible.

However, the Panel is also aware of its responsibility to provide for a fair hearing, both from the perspective of Dr. Ames and from the perspective of the Investigation Committee, which has the duty to protect the interest of the community in upholding the standards of the medical profession.

In that regard, the Panel adopts the reasoning of the Manitoba Court of Appeal in the criminal case of *R v. Herntier (2020) M. J. No. 223*, in two respects.

Firstly, with respect to fairness, the Court wrote as follows:

"104. First, it must be noted that the prejudice and unfairness that are at issue here are not engaged merely because the change in the Crown's position increases the likelihood of conviction. Rather, what is at issue is trial fairness. This was explained by McLachlin J (as she then was) in *R v. Harrer, (1995) 3 SCR 562* (at para 45):

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R v. Lyons, (1987) 2 SCR 309* at page 362 per LaForest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused."

Secondly the Court in that case emphasized that with respect to a change in an undertaking given by Crown counsel as to the alleged date of a murder, the correct issue to be determined when deciding whether the Crown should be permitted to make such a change was whether the accused was prejudiced in his defence by the change in the Crown's position.

The Panel decided that similar reasoning should be applied in this case. In other words, the Panel should consider whether Dr. Ames has been or will be prejudiced in his defence, if the Panel considers and weighs evidence from Patient A that there were texts or other

communications between the two of them that were outside of an expected physician/patient relationship prior to the second surgery which proceeded on February 28th, 2019.

The Panel has concluded that Dr. Ames has not and will not be prejudiced by the Panel considering and weighing such evidence from Patient A, for the reasons outlined below:

1. Dr. Ames and his counsel had adequate notice of the Investigation Committee's change in position with respect to sub-paragraph 33(b) and therefore had adequate time to prepare themselves to deal with that change at the hearing.
2. Dr. Ames was able to clearly outline his position relating to the timing of his problematic communications with Patient A in his direct examination.
3. Counsel for Dr. Ames was able to cross-examine Patient A and conducted a robust and effective cross-examination. She specifically cross-examined Patient A with respect to various apparent changes in Patient A's recollection of the timing of various events, including any problematic phone calls and text exchanges.
4. Credibility is an important issue in this case, particularly as it relates to the factual particulars outlined in Count 1 of the Amended Notice of Inquiry. An examination of the totality of that evidence will assist the Panel in "getting to the truth" relating to the interactions between Dr. Ames and Patient A.
5. Considering and weighing the evidence of Patient A with respect to the nature of the communications between her and Dr. Ames prior to February 28th, 2019 is not necessarily harmful to Dr. Ames' position. A consideration of that evidence will allow the Panel to reflect on and consider whether that evidence is inconsistent with Patient A's previous accounts, and if so, the significance of that inconsistency.
6. Throughout the course of the College's investigation there has been imprecision on the part of both Patient A and Dr. Ames as to the timing and sequence of various occurrences, all of which should be considered and weighed by the Panel in reaching its ultimate conclusions.

In the result the Panel has determined that the testimony of Patient A relating to texts or other communications between her and Dr. Ames outside of an expected physician/patient relationship prior to February 28th, 2019 will be admitted into evidence and will be considered and weighed by the Panel in reaching its ultimate conclusions.

ANALYSIS – COUNT 1

Count 1 consists of two sub-paragraphs. Sub-paragraph (a) covers the entire period of the clinical relationship between Dr. Ames and Patient A from December 2018 to May or June 2019 and contains four related but separate allegations (that Dr. Ames commented about Patient A's physical appearance and made comments of a sexual nature during clinical encounters, that Dr. Ames exchanged inappropriate communications with Patient A via text or by telephone, that Dr. Ames sent Patient A a photograph of what purported to be his genitals, and Dr. Ames encouraged Patient A ,or implied that he was receptive to Patient A sending photographs, including nude photographs of herself to him). Sub-paragraph (b) contains a narrower, more specific allegation, namely that on May 28th, 2019, Dr. Ames made sexual contact with Patient A by inserting his fingers into her vagina without a medical purpose for doing so.

The Panel is satisfied that the evidence in these proceedings clearly establishes on the balance of probabilities that Dr. Ames failed to maintain appropriate professional boundaries and exploited Patient A for his personal advantage, thereby committing acts of professional misconduct and engaging in conduct unbecoming a member as particularised in subparagraphs 1 (a) (ii) (iii) and (iv) of Count 1.

The Panel recognizes that there is contradictory evidence relating to the timing and content of some of the text and telephone communications and with respect to whether the photograph of male genitals sent by Dr. Ames was a photograph of his genitals. However, even on the basis of Dr. Ames' own admissions, the text exchanges, regardless of their timing, constituted serious boundary violations for which Dr. Ames, as indicated earlier in these Reasons, is responsible. With respect to the photograph of male genitals,

the unsavory nature of the image and the fact that it was transmitted by Dr. Ames to Patient A, and the lack of clarity as to its source, are sufficient to support a finding of professional misconduct and conduct unbecoming a member by Dr. Ames. Having considered the evidence of Dr. Ames and Patient A, the Panel has also concluded that Dr. Ames encouraged Patient A to send, or implied that he was receptive to her sending him, nude photographs of herself.

The issues which remain to be determined are therefore whether the Investigation Committee has proven on a balance of probabilities that Dr. Ames complimented Patient A about her physical appearance or made comments of a sexual nature in any of their clinical encounters and the allegation in Count 1 (b) relating to whether Dr. Ames made sexual contact with Patient A on May 28th, 2019. Such determinations require a thorough credibility assessment to be undertaken.

As noted above, such a credibility assessment requires a consideration of the totality of the potentially relevant evidence, not simply the testimony of Dr. Ames and the testimony of Patient A.

The authorities provided by counsel for the parties have identified many factors to be considered when undertaking a credibility assessment. Some of the factors which may be particularly germane in this case include:

a) A witness's ability and opportunity to observe events.
b) The quality of the witness's memory.
c) The objectivity of the witness and the extent of his or her personal interest in the outcome of the proceedings.
d) Whether the witness has changed his or her pre-hearing evidence in significant respects at the hearing, or during the course of his or her testimony.
e) The plausibility of the witness; credibility will be in doubt if the testimony of the witness defies logic or common sense.

In this case the Panel has also been mindful of the following additional factors:

1. Some inconsistencies may be relatively minor and should not significantly undermine the credibility of a witness. However, a series of inconsistencies, even if each is relatively minor in isolation, may become significant when considered in their totality.
2. When a witness has lied previously, particularly in relation to the same events, credibility will be seriously undermined.
3. In relation to the allegations of sexual contact on May 28th, 2019 in Count 1 (b) of the Amended Notice of Inquiry, corroborative evidence would certainly be helpful, but is not a legal requirement. In cases of allegedly inappropriate sexual contact, corroborative evidence will often not be available.
4. The Panel must avoid making adverse credibility findings based on stereotypical assumptions of how people may be expected to react to a sexual assault. This is particularly so in relation to the timing of the disclosure of an alleged incident and the level of detail provided at the time of the initial disclosure.

The credibility assessment in this case is a challenging exercise, made even more so by:

a) the stark conflicts between the evidence of Dr. Ames and Patient A with respect to many of their interactions; and
b) the varying accounts which have been put forward by both Dr Ames and Patient A during the College's investigation and at the hearing itself;
c) a shortage of independent, corroborative evidence.

There are reasonable grounds to question the reliability of the evidence of both Dr Ames and Patient A.

Before outlining the Panel's assessment of some of the specific aspects of the evidence of both Patient A and Dr. Ames, it is important that the Panel address two other issues namely:

a) the suggestion by counsel for Dr. Ames that this is a case in which certain adverse inferences should be drawn as a result of evidence not being called by the Investigation Committee;
b) the lack of definitive forensic evidence relating to the text messages and telephone calls which were exchanged between Dr. Ames and Patient A.

ADVERSE INFERENCES

Counsel for Dr. Ames submitted that adverse inferences should be drawn to negatively impact the evidence of Patient A with respect to two distinct issues.

Firstly, Counsel points out that Patient A's husband would have been able to provide relevant evidence on several issues. Those issues included whether he took the photograph of his wife's hip which was sent to Dr. Ames, whether he was the "friend" who told Patient A about KIK being on her phone and whether he and Patient A had discussed Dr. Ames by text. Counsel for Dr. Ames asserted that since Patient A's husband was not called to testify, the Panel should infer that the evidence he would have given would have contradicted the evidence of Patient A.

The Panel is not prepared to draw such an adverse inference. The Investigation Committee's decision as to which witnesses to call in support of their case would be based on various factors, not the least of which would be whether any potential witness would provide helpful and probative evidence in relation to the issues identified in the Amended Notice of Inquiry. None of the topics which counsel for Dr. Ames has identified as being within the knowledge of Patient A's husband are topics which are directly relevant to the factual determinations which must be made by the Panel. Therefore any evidence to be given by the patient's husband would not have been helpful or probative with respect to those determinations.

To the extent that counsel for Dr. Ames was suggesting that her husband's evidence would have been important as part of an assessment of Patient A's credibility, that

argument is speculative and is based on a presumption that her husband would have had a clear and reliable recollection of the relevant events. The Panel is not prepared to make that presumption.

Secondly, counsel for Dr. Ames submitted that to the extent Patient A's mental health is an issue in these proceedings (i.e. if, when, and why Patient A took antidepressant or psychotropic medications) an adverse inference should be drawn from the failure of the Investigation Committee to present evidence of Patient A's mental health, either through DPIN or her treating physicians.

The Panel will draw no such adverse inference because it does not consider Patient A's mental health to be an issue in these proceedings.

THE FORENSIC EVIDENCE

The College arranged for forensic analyses of various electronic devices used at the material times by Dr. Ames and by Patient A to be conducted. Those forensic analyses were conducted by Computer Forensics Inc. (CFI). Two reports prepared by CFI were put into evidence in the proceedings.

The CFI report relating to their examination of Patient A's devices stated:

"A small number of communications were observed between Patient A and Patient A's husband aka "Hubby" where Dr. Ames is mentioned, however there were no communications with Dr. Ames observed on either the iPhone X or the iPad used by Patient A. CFI also did not observe Dr. Ames as present for previous contact on either device.

It should be noted however, that with the introduction of IOS version 11.1 Apple ensures a much more efficient purging method of old records in various databases on the phone which prevent forensic recovery. For this reason, recovery of deleted information from Apple devices using IOS version 11.1 or higher is not common."

The CFI report relating to their examination of Dr. Ames' devices stated:

"A manual review was conducted for the presence of a contact named "Patient A" with the phone number of "204-XXX-XXXX, as well as aliases thereof. A contact with this name or a variation of this name at this phone number was not observed on Dr. Ames' phone in either present or deleted form.

Therefore, several electronic searches were conducted on the iPhone XS Max used by Dr. Ames for the following terms and various combinations thereof:

1. Patient A
2.
3. 204-XXX-XXXX

The above electronic searches did not yield any communications to, from, or about Patient A on Dr. Ames' iPhone. However, three references to the number "204- XXX-XXXX" were observed in three separate operating system files known as "plists" ....

These "plist" files do not store communications and therefore no communications with this number were extracted, however the presence of the phone number "204-XXX-XXXX" in these files suggests that Dr. Ames' phone had contact with the number "204-XXX-XXXX" at a previous date.

It should also be noted, that with the introduction of IOS version 11.1 Apple ensures a much more efficient purging method of old records in various databases on the phone which prevent forensic recovery. For this reason, recovery of deleted information from Apple devices using iOS version 11.1 or higher is often unsuccessful."

The lack of evidence arising from the above-noted forensic examinations has hindered the Panel in its ability to make findings of fact as to when various text and telephone communications occurred. This lack of evidence also means that the very limited findings of CFI cannot be reasonably used to either corroborate or to discredit the evidence of either Dr. Ames or Patient A relating to their text and telephone communications.

THE CREDIBILITY ASSESSMENT

The credibility assessments to be undertaken in this case will necessarily involve an appraisal of the evidence of Patient A and Dr. Ames.

Patient A

With respect to Patient A's evidence relating to the period from August 17th, 2018 (her initial consultation with Dr. Ames) to December 3rd, 2018 (the date of the first surgery) three aspects of that evidence warrant comment.

Firstly, there was inconsistency between the evidence of Patient A and FRIEND with respect to when Patient A became aware that FRIEND and Dr. Ames had a previous sexual relationship. There was also inconsistency as to whether Patient A had seen the text messages and photographs exchanged between Dr. Ames and FRIEND, while Patient A and FRIEND were driving home from the August 17th, 2018 consultation. Neither individual's recollection of these events is likely to be perfect, and nothing of substance in these proceedings depends on which of them may have the better recollection of those events.

Secondly, the evidence of Patient A and Dr. Ames differed as to the nature of their discussions about her Von Willebrand's condition during the August 17th, 2018 consultation. The Panel considers it unlikely that Dr. Ames would have told Patient A not to disclose to the administrators of the pilot program that she suffered from that condition. Dr. Ames' version of their conversation is also supported by his letter to Dr. X. However, given the fact that her Von Willebrand's condition was discussed in the context of Patient A's eligibility for the pilot program, it is also possible that Patient A was legitimately confused about what direction, if any, she received from Dr. Ames on that topic.

Thirdly, there was contradictory evidence as to when Dr. Ames provided his cell phone number to Patient A. Dr. Ames indicated he provided it to her immediately after the December 2018 surgery so that she could call him if she experienced any problems after being discharged from the day surgery. He testified that at that time he was providing his number to a significant number of day surgery program participants. Patient A testified that Dr. Ames provided his cell phone number to her in late January 2019 in an entirely different context. Nothing in these proceedings turns on when the cell phone number was

provided, but the Panel found Dr. Ames' testimony that he did so in December, for the reasons he stated, to be logical and plausible.

The Panel has concluded that each of the above-noted three aspects of Patient A's testimony relate to tangential issues which are not, either individually or collectively, of significance in these proceedings. However, they may become of greater importance when considering the evidence in its totality.

Although the timing of when Dr. Ames gave Patient A his cell phone number is not of much importance, the context in which he provided it is of greater significance.

Patient A testified that by late January 2019 she was beginning to feel uncomfortable about some of Dr. Ames' interactions with her. She attributed this in part to flirtatious comments he made to her on January 25th about her appearance, while she was signing the consent forms for the second surgery. Dr. Ames denies making any such comments on January 25th and his evidence is supported in part by C. who had taken Patient A into the room where the forms were signed and stayed with her during the signing procedure.

Patient A says that Dr. Ames repeated such comments when he was alone with her in an examination room on January 29th. She recalled, but could not be certain, that he gave her his cell phone number on that day and that at his request she sent him a text providing him with her number. She testified that immediately thereafter and between January 29th and February 28th he sent her several inappropriate texts.

Dr. Ames adamantly denies this chronology and is insistent that inappropriate communications did not occur until after Patient A's second surgery on February 28th, 2019.

The Panel is mindful that Patient A's testimony as summarized in the preceding paragraphs is inconsistent with the Statement of Agreed Facts. However, the Panel also notes that counsel for the Investigation Committee has explained that sub-paragraph 33

(b) was included in error without reviewing it with Patient A. The Panel further notes that Patient A's chronology as outlined in the preceding paragraphs is consistent with the information she provided to the College on that issue in her letter dated August 4th, 2019.

The Panel it is also cognizant that Dr. Ames has been inconsistent in his communications with the College relating to the timing of his inappropriate communications with Patient A. For example, in his letter to the College dated September 15th, 2019, Dr. Ames stated that there was a 20-minute flirtatious telephone call and some text exchanges "around January or February", not in early March as he testified at the hearing.

Based on the conflicting evidence relating to when those communications occurred, the Panel is unable to reach a definitive conclusion as to the precise timing of the events. The absence of forensic evidence compounds the problem.

However, much more important than the issue of the timing of those communications is the fact that they occurred. Although there is additional disagreement between Patient A and Dr. Ames as to the content of their communications and the photographs which were exchanged, both of them are in agreement that at least one suggestive phone call and a sexualized exchange of texts occurred.

Dr. Ames is responsible for those inappropriate communications. There is a recognized power imbalance in the physician/patient relationship. It is the physician who is absolutely responsible for ensuring that no boundary violations occur. It is beyond doubt that the telephone call and text exchange between Dr. Ames and Patient A constituted serious boundary violations.

Whether those inappropriate communications occurred between late January and late February 2019, or in the first half of March is largely immaterial. Accordingly the Panel is not prepared to make an adverse credibility finding against Patient A based on her recollection of the timing of those events.

Patient A and Dr. Ames have also put forward starkly different versions of the conversation they had immediately after the surgery of February 28th, 2019. In terms of where Patient A was recovering, the Panel considers it likely that Patient A was in a large recovery room, as indicated by Dr. Ames, not in a hallway as indicated by Patient A. In terms of the words which were exchanged between them, the Panel is unable to make a specific finding given the contradictory evidence. According to both of their versions any conversation between them was brief and although there were likely other people in the immediate vicinity the words allegedly said by Dr. Ames could have been uttered quietly so that only Patient A would hear them.

Whatever discussion occurred is not directly relevant to the issues which the Panel must determine. No adverse credibility finding will be made against either Patient A or Dr. Ames based on the evidence relating to their post-operative discussions on February 28th,2019.

Another area of contentious evidence relates to the timing of the discussions between Dr. Ames and Patient A about using KIK to communicate and the discovery by Patient A that she had previously had the KIK application on her phone. The Panel is doubtful that Patient A handed Dr. Ames her phone at his request, as she claimed, or that he spent time accessing her phone and discovering that she had previously had KIK on her phone. Her description of those events lacked coherence and plausibility.

On the other hand, neither Patient A's familiarity or lack of familiarity with KIK, nor the timing of her conversations with Dr. Ames about KIK are directly relevant to the issues in these proceedings. The evidence is not sufficient to enable the Panel to make a finding with respect to when those events occurred. To the extent that those issues are relevant to a credibility assessment, the lack of coherence and plausibility of Patient A’s version of those background facts diminish her credibility to some extent.

However, both Dr. Ames and Patient A were willing to use KIK to communicate with each other with some expectation of preserving the privacy of those communications. To the

extent that such motivations can be attributed to Dr. Ames, his credibility is also somewhat undermined.

Patient A's account of what occurred at the visit of May 28th, 2019 is critically important to an assessment of her credibility. Similarly Dr. Ames' account of that visit is critically important to an assessment of his credibility.

There are concerning elements to Patient A's account of those events. She claimed to be concerned about Dr. Ames' interactions with her beginning in January 2019 and as a result she began bringing people with her to her medical appointments. However, she had no one accompany her to the May 28th, 2019 visit, nor did she ask a receptionist or a SOA to come with her into the examination room so she would not be alone with Dr. Ames.

Patient A claims that Dr. Ames kissed her on the lips during that appointment, but Dr. X, Patient A's family physician, made no mention of a kiss in her report to the College. Nor did Patient A refer to a kiss during that appointment in her letter to the College dated August 4th, 2019. The Panel does not place much reliance on those omissions recognizing that victims of sexual assaults frequently will not provide all the specific details of the surrounding events during their initial disclosure of those events.

The Panel is more concerned by the apparent illogic of Patient A being alarmed and offended by the kiss, and yet continuing with the appointment and allowing Dr Ames to place his hands on her leg while she was sitting opposite to him in a chair.

Conversely Patient A was consistent in her description of Dr. Ames' second sexual contact with her in both her direct and cross-examination. Her account of when and how Dr. Ames inserted his finger or fingers into her vagina is also in accordance with her description of those events in her letter to the College of August 4th, 2019. Those factors enhance her credibility.

The Panel's comments on Dr. Ames' testimony with respect to the events of May 28th will be outlined in the next subsection of these Reasons.

Dr. Ames

There were also concerning aspects of Dr. Ames' evidence and his participation in these proceedings.

Very troubling were his attempts to mislead the College in his written communications in July, August, and September 2019 and in his interview with the College's Investigator on September 10th, 2019. His misleading communications with the College have been discussed elsewhere in these Reasons. His provision of false, incomplete and selective information to the College, which he subsequently admitted was intended to lessen the nature and extent of his boundary violations with Patient A, are indicative of a propensity to provide inaccurate and incomplete information to protect his own interests.

His admitted willingness to mischaracterize some of Patient A's behaviors and to suggest she had been a keen participant in their sexualized communications and that she was therefore partly responsible for the boundary violations which had occurred, also suggests that Dr. Ames is capable of putting his own interests before those of others. Those facts also indicate that at the material time he had a flawed understanding of his duties and responsibilities in the physician/patient relationship.

The Standards of Practice of the College (8 (1) (a) and (b)) are explicit in providing that a member of the College must maintain appropriate professional boundaries in any interactions with a current patient and that prohibited conduct includes either initiating any form of sexual advance toward a patient or responding sexually to advances made by a patient.

Dr. Ames' own accounts of his text and telephone communications with Patient A, which he says occurred in the first or second week of March 2019 and in late May or early June

2019, constituted serious boundary violations under Standard 8 (1) (a) and (b) and Standard 8 (2) which states: “a member must not sexualize any interaction with a current patient.”

Panel members were troubled by an answer given by Dr. Ames in cross-examination to a question about whether he ever considered the appropriateness of his sexualized texts with Patient A in the context of her being a patient. His answer was: “I did afterwards”. Since a consideration of a patient’s well-being should have been foremost in his mind, the Panel was very disappointed that Patient A’s interests were secondary to his desire for some lecherous excitement.

There were also elements of Dr. Ames’ testimony that were implausible and contrary to common sense, while being somewhat self-serving. Two such examples are provided below:

1. When asked by the College’s Investigator about what happened to his phone, he initially replied that it had been replaced with a new phone in June 2019. He explained that he had accidentally driven over the phone with his truck, but that some data had been transferred to his new phone. In his letter to the College of September 15th, 2019, he stated that some damage had occurred prior to the phone being replaced in February 2019. His position changed again at the hearing when he repeated that the damage had occurred in February 2019 but stated that he could not recall how the damage had occurred.

The Panel recognizes that neither the date nor the manner of the damage to Dr. Ames’ cell phone is directly relevant to the issues which the Panel must decide. However, the different versions put forward by Dr. Ames as to how and when the damage occurred, and the implausibility of some of his answers, raise questions about the reliability of his evidence, at least on those points.

2. Dr. Ames' evidence relating to the photo of genitals which he sent to Patient A is also disquieting. His story on that topic has also changed over time. Dr. Ames did not disclose having sent the photograph in his first two letters to the College, denied having done so in his interview with the College, and stated in his letter to the College of September 15th that: "she had sent a picture of her genitals and I responded with the same". After the issuance of the original Notice of Inquiry he indicated through his counsel that the photograph was not of his own genitals but was a photo he had obtained off the Internet. At the hearing he described the photo as being of an exaggerated erect penis of a man in a suit, which he had obtained off the Internet, suggesting that it should have been clear that the photo was not of his penis.

Dr. Ames' prevarication on this topic is a factor which the Panel has considered as part of its overall credibility assessment. The transmission of a photograph of genitals to Patient A is a specific fact alleged against Dr. Ames in Count 1 of the Amended Notice of Inquiry. Dr. Ames' evidence on this issue can be reasonably regarded as another attempt to serve his own interests and to minimize his misconduct.

Another issue relevant to the credibility assessment required in this case relates to Dr. Ames' testimony with respect to events occurring around the first or second weekend in March 2019. His testimony at the hearing was the first time he had specified that his sexualized communications with Patient A occurred at that time. According to him the inappropriate communications took place after Patient A had sent him a salacious photograph of herself.

The Panel considers the following factors to be noteworthy about Dr. Ames testimony relating to the alleged phone call and associated text exchange:

a) In view of the directly contradictory evidence of Patient A, it is very difficult for the Panel to make a finding about whether the communications occurred when Dr. Ames said they did and took place as he said they did.

b) There are no phone records to either prove or disprove the call or the related text exchange. However, given the qualification in the CFI reports relating to Apple's efficient purging methods, the lack of a record of the call or text messages cannot be used to discredit Dr. Ames' credibility.
c) The content of the communications is much more important than their timing. Even accepting Dr. Ames' description of the content of the communications, they constituted clear boundary violations of the physician/patient relationship, for which Dr. Ames is entirely responsible. If Patient A sent a salacious photograph of herself to him, he eagerly responded to it and engaged in a tasteless inappropriate fantasy exchange with Patient A, who was then a current patient. This was a clear violation of the College's Standards of Practice.

With respect to the events of May 28th, 2019 Dr. Ames strenuously denied that he kissed Patient A or that he inserted one or more of his fingers into her vagina. Nonetheless in some respects what happened during the May 28th appointment is not contentious.

There is agreement that there was a brief preliminary conversation between Dr. Ames and Patient A in the examination room. Following that conversation Patient A, as directed by Dr. Ames, lay on the examination table while Dr. Ames performed certain maneuvers which, as described by Dr. Ames, were appropriate to determine if Patient A had some tendonitis in her hip. The parties disagree as to the placement of Dr. Ames' hands during those maneuvers; he denies that either of his hands was above Patient A's knee and that either of his hands was placed close to her underwear.

After the maneuvers on the examination table were complete, both Dr. Ames and Patient A returned to their respective chairs adjacent to a desk used by Dr. Ames.

As part of Dr. Ames' defence his counsel emphasized that the appointment was brief and that Dr. Ames' interactions with Patient A on that day likely occurred during a period of eight to nine minutes. The appointment started at approximately 1.00 PM and based on

the EMR Dr. Ames made a chart note at 1:10 PM, by which time the appointment had concluded.

Counsel for Dr. Ames argued that there was scarcely time within that interval, given the examination which was conducted and the conversations which occurred, for anything untoward to have happened.

However, the Panel recognizes that the appointment may have commenced shortly before 1:00 PM and therefore it may have lasted longer than eight or nine minutes. Furthermore the alleged sexual contacts would have taken place very quickly and would not have prolonged the length of the appointment to a significant degree. Moreover, according to Dr. Ames, after the examinations on the table had taken place, he had a conversation with Patient A about practical measures she could take to deal with the suspected tendonitis, and they also had a conversation about using KIK (which Patient A denied). Any conversation about using KIK would have taken at least as much time as the alleged sexual contact.

Accordingly the evidence available to the Panel relating to the length of the May 28th appointment is not helpful in disproving that sexual contact occurred.

Counsel for Dr. Ames also argued that given the space under the pocket door of the examination room and other sound-proofing issues associated with the Clinic, staff located immediately outside the examination room would have heard raised voices, or otherwise been aware of something inappropriate happening in the examination room. K., who was employed as a receptionist at the Clinic, testified that from her work area she could hear conversations emanating from the examination room in question, “not word for word”, but she would be aware that a conversation was taking place. She also indicated that if she tried to listen she could generally hear most of any conversation taking place in an examination room. She testified that on May 28th, 2019 she heard nothing unusual coming from the examination room during Patient A's appointment with Dr. Ames.

K. also testified that she remembered Patient A because of her friendly outgoing personality. K. stated that when Patient A left the May 29th appointment she was cheerful and said she "was very happy with Dr. Ames".

With respect to K.'s evidence, it is important and must be considered in the overall credibility assessment. However its impact was lessened somewhat in cross-examination in which K. acknowledged that although she had been trained to be available to the doctors to provide them with what they may need, and to be attentive to which doctors are with specific patients in particular examination rooms, she was not attempting to listen to what was happening between Dr. Ames and Patient A on May 28th, 2019.

K.'s evidence that when Patient A left on May 28th, she appeared happy and complimented Dr. Ames, must be assessed against Patient A's evidence that she was distraught when she left the appointment and left in a hurry without speaking to K. In her testimony K. incorrectly described the clothes Patient A was wearing on May 28th, suggesting that she may have confused Patient A's behavior and demeanor on May 28th with her behavior and demeanor on previous visits.

The Panel has reviewed Dr. Ames' medical records relating to his clinical interactions with Patient A to determine if there is anything in those records to either support or undermine his accounts of those interactions. The Panel has noted that Dr. Ames uses various templates and that his notes are generally brief. In some instances they arguably lack the level of detail contemplated by current standards relating to medical record-keeping. It is notable that there is no notation in the medical record in March 2019 of any concern or discussions about infection. Similarly, there is no notation in the medical record with respect to the May 28th, 2019 appointment relating to Patient A experiencing pain. In his testimony, Dr. Ames stated that infection was discussed and considered by him in his interactions with Patient A in March 2019 and that pain was part of Patient A's complaint and was evident in his examination of her on May 28th, 2019. His notations in the medical record do not provide support for his testimony on those issues and therefore could be

regarded as diminishing his credibility to some degree. However, the Panel also recognizes that the lack of information in the medical record may be a function of his fragmented charting practices.

The Panel has also carefully considered Dr. Ames' evidence relating to the communications he allegedly had with Patient A using KIK in late May or early June 2019. The Panel recognizes that if the communications took place as described by Dr. Ames, that would seriously undermine Patient A's narrative that she was devastated by what had occurred on May 28th and wanted no further contact with Dr. Ames.

The Panel's observations relating to Dr. Ames' evidence about the alleged events of late May or early June are:

a) they must be weighed against Patient A's adamant denials that any such communications took place;
b) the communications as described by Dr. Ames are a discredit to him and constitute further boundary violations, including sending Patient A a photograph of a man's genitals;
c) this aspect of his evidence could be regarded as a self-serving attempt to place his own serious misconduct in a more favorable light.

CREDIBILITY CONCLUSIONS

Having considered the totality of the evidence, with reference to the evidence specifically noted above, and having undertaken a credibility assessment of both Patient A and Dr. Ames, within the context of all of the evidence, and applying the balance of probabilities standard, the Panel has concluded that it is more probable than not that Dr. Ames complimented Patient A about her physical appearance during clinical encounters or made comments to her of a sexual nature during those encounters. However, the Panel is unable to conclude that it is more probable than not that Dr. Ames made sexual contact

with Patient A during a physical examination on May 28th, 2019 by inserting his fingers into her vagina.

The Panel engaged in a detailed consideration of a large amount of conflicting evidence and will not attempt to outline its reasoning with respect to each item of evidence. Its overriding reasons for accepting the evidence of Patient A and rejecting the evidence of Dr. Ames relating to Dr. Ames' complimenting Patient A's physical appearance or making comments to her of a sexual nature during clinical encounters from in or about December 2018 to May or June 2019 can be summarized as follows:

a) notwithstanding several inconsistencies in Patient A's testimony and some evidence which seemed implausible or illogical, her evidence relating to most of her interactions with Dr. Ames, which are the subject of the allegations against him in the Amended Notice of Inquiry, was in accord with much of the other evidence, including the Statement of Agreed Facts and admissions made by Dr. Ames;
b) in terms of Dr. Ames' credibility, he has a significant personal interest in the outcome of these proceedings, much more so than Patient A. Dr. Ames is not a disinterested party;
c) portions of Dr. Ames' evidence, as noted earlier in these Reasons, were illogical, implausible, and self-serving;
d) Dr. Ames' poor or imprecise memory of certain events and his changing narrative of events up to and including the hearing raise doubts about the reliability of his evidence overall;
e) Dr. Ames' attempts to mislead the College, as particularised in Count 2 of the Amended Notice of Inquiry, which have been proven in these proceedings, can be considered in relation to the facts alleged in Count 1. Those attempts demonstrate that at an earlier stage of the proceedings Dr. Ames was willing to put forward false and incomplete information to minimize his involvement and to avoid the negative consequences of his own behavior. He was also willing to mischaracterize Patient A in an attempt to deflect responsibility for his own misconduct onto Patient A. His

actions and behaviors in relation to Count 2 seriously undermine his credibility in relation to the entirety of his evidence;

f) similarly Dr. Ames' disregard for, or his flawed understanding of, his professional obligations in relation to boundary violations, as evidenced by his telephone and text communications with Patient A reflect a willingness to disregard professional responsibilities and to breach the Standards of the College to satisfy his own desires without regard for the consequences for his patient or for himself;

g) FRIEND's evidence was that immediately after Patient A's consultation with Dr. Ames on August 17th, 2018, Dr. Ames was texting FRIEND commenting that Patient A was "beautiful" or "hot" and suggesting a threesome involving Patient A. In cross-examination Dr. Ames indicated he did not recall that text but conceded it was possible he had sent such a text. The Panel found FRIEND to be a credible witness and accepts her evidence on that point. Her evidence, coupled with patient A's testimony as to her interactions with Dr. Ames at various appointments, notwithstanding Dr. Ames' denials, support a finding that Dr. Ames did not respect physician/patient boundaries with Patient A during their clinical encounters.

Accordingly, the Panel has concluded that it is more probable than not, that Dr. Ames complimented Patient A's appearance or made comments to her of a sexual nature during one or more of their clinical encounters between December 2018 and May or June 2019.

With respect to the allegations in Count 1 (b) of the Amended Notice of Inquiry, relating to the May 28th, 2019 appointment, the Panel is acutely aware of the credibility findings it has made against Dr. Ames, particularly those summarized in the immediately preceding paragraphs. The Panel also recognizes that the findings which it has made against Dr Ames in relation to the allegations in Count 1 (a) and Count 2 (a), (b), and (c) constitute breaches of professional standards which are grave and egregious. However, the Panel also recognizes its responsibility to be rigorous in ensuring that the Investigation Committee has proven all the allegations against Dr. Ames pursuant to the applicable evidentiary standard, the balance of probabilities.

In determining whether the Investigation Committee has done so, the Panel considered the following:

i. Patient A's testimony with respect to Dr. Ames inserting his fingers in her vagina on May 28th, 2019 was unwavering and consistent throughout the proceedings;
ii. although Patient A's evidence relating to the sexual contact on May 28th, 2019 is not corroborated, there is no legal requirement that it be corroborated. Corroboration is frequently unavailable in these types of cases;
iii. however there were inconsistencies and illogical aspects of Patient A's testimony as outlined earlier in these Reasons. Some of those aspects directly relate to the events of May 28th, 2019, such as attending the appointment alone, and staying in the examination room after Dr. Ames had allegedly kissed her on the lips against her will;
iv. Dr. Ames' steadfast denial throughout the investigation and his testimony that he ever had sexual contact with Patient A;
v. the evidence of K. that she heard nothing untoward from the examination room on May 28th and that she recalled Patient A leaving the appointment in good spirits. K.'s evidence is not conclusive but is supportive of Dr. Ames' version of what occurred, or did not occur, during the May 28th, 2019 appointment.

All of the foregoing leaves the Panel in the position of not being able to determine what happened or did not happen between Dr. Ames and Patient A on May 28th, 2019. The Panel simply cannot make a decision with respect to which version of those events is more probable. It is certainly possible that Patient A's account is true and accurate, but the Panel is unable to conclude that her version is more likely to be true and accurate then the version of Dr. Ames.

In such circumstances the Panel's decision is that the Investigation Committee has not proven the allegations against Dr. Ames outlined in Count 1 (b) of the Amended Notice of Inquiry according to the applicable evidentiary standard.

ANALYSIS – COUNT 3

Count 3 alleges that by virtue of the allegations in Counts 1 and 2, Dr. Ames has demonstrated an unfitness to practice medicine. Cases in which a member of a Medical College has been found to be unfit to practice medicine frequently involve multiple instances of unprofessional conduct in a variety of different circumstances and/or examples of breaches of standards which compromised or had the potential to compromise patient care. There were no allegations in these proceedings relating to Dr. Ames' clinical knowledge or skills.

The Panel recognizes that it is possible for a physician to be found to be unfit to practice medicine on the basis of a single act or an isolated series of acts towards one patient involving a flagrant breach of standards or a blatant disregard for a patient's well-being. In this case, although the Panel is greatly disturbed by Dr. Ames' conduct and is troubled by his deeply flawed understanding of his responsibility to maintain appropriate physician/patient boundaries, the Panel has concluded that the evidence does not demonstrate that Dr. Ames is unfit to practice medicine.

DECISION

1. Pursuant to S.122 of the Regulated Health Professions Act, there shall be no disclosure of the names or other identifying information relating to Patient A or any of the other witnesses called to testify by the Investigation Committee or of Patient A's family physician.

2. Pursuant to S.124 of the Regulated Health Professions Act, the Panel finds that Dr. Ames is guilty of violating his ethical obligations to Patient A and of contravening Sections 1 and 12 of the Code of Ethics of the College and Section 8 of the College's Standards of Practice by failing to maintain

appropriate professional boundaries and by exploiting Patient A for his personal advantage, thereby committing acts of professional misconduct and engaging in conduct unbecoming a member of the College, as particularised in Count 1 (a) (i) to (iv) of the Amended Notice of Inquiry.

3. Pursuant to S.124 of the Regulated Health Professions Act, the Panel finds that Dr. Ames is guilty of attempting to mislead the College In both his written communications and in his interview with the Investigation Committee, thereby committing acts of professional misconduct and engaging in conduct unbecoming a member, as particularised in Count 2 (a), (b), and (c) of the Amended Notice of Inquiry.

4. A further hearing before this Panel will be convened as soon as reasonably practical for the purpose of receiving the parties' submissions with respect to the order or orders which should be issued by the Panel pursuant to the Regulated Health Professions Act.

Dated this 23rd day of September 2021.

IN THE MATTER OF: THE REGULATED HEALTH PROFESSIONS ACT ("RHPA");

AND IN THE MATTER OF: DR. DAVID HOWELL AMES, a member of the College of Physicians & Surgeons of Manitoba

RESOLUTION AND ORDER

WHEREAS on February 12th, 2020, a Notice of Inquiry was issued by the Registrar of the College of Physicians and Surgeons of Manitoba (the College), pursuant to part 8 of the Regulated Health Professions Act (the "RHPA") alleging that Dr. David Howell Ames (Dr. Ames) had been guilty of professional misconduct, of contravening the Standards of Practice of Medicine, of contravening the Code of Ethics, of demonstrating an unfitness to practice medicine and of conduct unbecoming a member of the College;

AND WHEREAS the Inquiry was originally scheduled to proceed before an Inquiry Panel of the College (the "Panel") commencing on January 11th, 2021;

AND WHEREAS in January 2021, the Notice of Inquiry was amended and the Inquiry was adjourned, at the request of Dr. Ames, and rescheduled to proceed before the Panel on April 26th, 2021 into allegations contained in an Amended Notice of Inquiry also dated February 12th, 2020;

AND WHEREAS in January 2021, Dr. Ames admitted his membership in the College, admitted that he had been served with the Notice of Inquiry and the Amended Notice of Inquiry and acknowledged that all other procedural requirements under the RHPA had been fulfilled;

AND WHEREAS in January 2021, Dr. Ames consented to an order pursuant to S 122 of the RHPA that there should be no disclosure of the names or other identifying information of Patient A or of any of the witnesses called by the investigation committee of the College, or of Patient A's family physician;

AND WHEREAS the Inquiry was convened by video conference, in the presence of the parties and in the presence of counsel for the parties on April 26th, 2021;

AND WHEREAS on April 26th, 2021, Dr. Ames, through his counsel, waived the reading of the allegations contained in the Amended Notice of Inquiry and entered a plea of not guilty to all of the allegations contained in the Amended Notice of Inquiry;

AND WHEREAS the Inquiry proceeded and the Panel received the evidence introduced by the parties from April 26th to April 30th, 2021 inclusive;

AND WHEREAS the parties provided written submissions to the Panel in June 2021;

AND WHEREAS the Panel reconvened the Inquiry on June 28th, 2021 by video conference in the presence of the parties and their counsel and received additional oral submissions from counsel for the parties;

AND WHEREAS the Panel has reviewed and considered the evidence introduced at the Inquiry and has reviewed and considered the submissions of the parties:

Now therefore the Inquiry Panel hereby orders and resolves that:

1. Pursuant to S.122 of the Regulated Health Professions Act, there shall be no disclosure of the names or other identifying information relating to Patient A or any of the other witnesses called to testify by the Investigation Committee or of Patient A's family physician.

2. Dr. Ames is guilty of violating his ethical obligations to Patient A and of contravening Sections 1 and 12 of the Code of Ethics of the College and Section 8 of the College's Standards of Practice by failing to maintain appropriate professional boundaries and by exploiting Patient A for his personal advantage, thereby committing acts of professional misconduct and engaging in conduct unbecoming a member of the College, as particularised in Count 1 (a) (i) to (iv) of the Amended Notice of Inquiry.

3. Dr. Ames is guilty of attempting to mislead the College In both his written communications and in his interview with the Investigation Committee, thereby committing acts of professional misconduct and engaging in conduct unbecoming a member, as particularised in Count 2 (a), (b), and (c) of the Amended Notice of Inquiry.

4. A further hearing before this Panel will be convened as soon as reasonably practical for the purpose of receiving the parties' submissions with respect to the order or orders which should be issued by the Panel pursuant to the Regulated Health Professions Act.

Dated this 23rd day of September 2021.