

MEDICAL PRACTITIONERS BOARD
OF VICTORIA

Re: Dr Cynthia Weinstein [2005] MPBV 3

Reasons for Decision

Before: Dr I R Freckelton, Chairman
Dr J M McNamara
Dr A Bendrups

Appearances:

Assisting the Panel: Mr A Clements of Counsel, instructed by Minter Ellison, Lawyers.

For the Practitioner: Mr R Galbally of Counsel, instructed by Galbally Rolfe, Lawyers.

Date of Hearing: 5 October 2004

Date of Decision: 10 March 2005

Finding:

Pursuant to section 45A(1)(a) of the *Medical Practice Act 1994*, Dr Weinstein engaged in unprofessional conduct of a serious nature having been convicted of an indictable offence, namely defrauding the Commonwealth by billing Medicare for work that she improperly delegated to others.

Determinations:

- (1) Pursuant to section 45A(2)(c) of the *Medical Practice Act 1994*, Dr Weinstein is reprimanded for dishonestly delegating her responsibilities as a medical practitioner and facilitating a practice whereby unqualified persons provided medical services to patients that should only have been provided by a registered medical practitioner.
- (2) Pursuant to section 45A(2)(f) of the *Medical Practice Act 1994*, Dr Weinstein is fined \$2,000, the full amount to be paid to the Board within two months.

- (3) Pursuant to section 45A(2)(e) of the *Medical Practice Act 1994*, Dr Weinstein's registration be subject to the following conditions:
- (a) That no less than twice per year for three years, and thereafter no less than once per year for a further three years, she receive and co-operate with a random practice audit by a dermatologist whose identity is agreed upon between Dr Weinstein and the Deputy Chief Executive Officer of the Board or, in default of agreement, nominated by the Board, to assess, at Dr Weinstein's cost, the sufficiency and appropriateness of her provision of treatment to patients and the appropriateness of any delegation by Dr Weinstein of treatment responsibilities and billing practices. The audit should extend to practice appointment and procedure booking schedules, Health Insurance Commission claim forms, patient records, observations of the practice and discussion with Dr Weinstein, her practice manager and such other staff members as the auditor deems appropriate.
 - (b) That Dr Weinstein do all things necessary to facilitate the auditor providing, at Dr Weinstein's expense, a report to the Board after each audit of her practice.

Reasons for Decision

- [1] The Board convened a Panel of three to undertake a formal hearing into the conduct of Dr Weinstein, in particular, to determine, on the basis of a Notice of Hearing, dated 17 September 2004, whether she had engaged in “unprofessional conduct” within the meaning of section 3(1) of the *Medical Practice Act 1994* (“the Act”) in that:

“At the County Court of Victoria at Melbourne on 23 March 2004 she was found guilty and convicted of an indictable offence of defrauding the Commonwealth, as proscribed by section 29D of the *Crimes Act 1914* (Cth).”

Evidence of Dr Weinstein’s criminal offences

- [2] The Panel was informed at the outset that Dr Weinstein conceded the criminal conviction from the County Court and admitted that she had engaged in unprofessional conduct of a serious nature.
- [3] The Panel was informed that Dr Weinstein received the sum of \$11,323.25 from 203 Medicare claims in respect of 15 patients.
- [4] On 3 March 2004 the Health Insurance Commission notified the Board of Dr Weinstein’s appearance in the Magistrates’ Court of Victoria at Melbourne. In that jurisdiction she received from Deputy Chief Magistrate Popovic a bond under section 19B of the *Crimes Act 1914* (Cth) to be of good behaviour for 12 months on a recognisance of \$2,000. She was also ordered to pay \$1,000 to the court fund and \$535 costs. No reparation was ordered as she provided a cheque for \$11,235.25 to the Health Insurance Commission.
- [5] The Director of Public Prosecutions appealed the sentence of the Magistrates’ Court. On 1 April 2004 the Health Insurance Commission notified the Board of the result of the appeal, namely that the sentence of the Magistrates’ Court was quashed and Dr Weinstein was convicted and fined \$1,000 by Judge Douglas.
- [6] On 7 April 2004 Galbally Rolfe, Lawyers on behalf of Dr Weinstein, alerted the Board to the penalty imposed and noted for the Board’s assistance that, because the matter was a Commonwealth crime, the County Court on appeal had no power to fine without recording a conviction.

Witnesses called on behalf of Dr Weinstein

- [7] A series of witnesses were called on behalf of Dr Weinstein – both in relation to her past and present administrative arrangements within her practice and in relation to her contributions to a practice in Preston.
- [8] Ms Smith, a retired bookkeeper who had worked with Dr Weinstein, was called. She had stopped work in 2002. She stated that when she joined Dr Weinstein’s practice it was extremely busy. It gave the appearance of running well, but in fact, of the 14 or 15 staff, only one (Dr Weinstein) was medically trained. Ms Smith said that Dr Weinstein had little to do with the running of the practice. In 1999 she (Ms Smith) installed the MYOB accounting package to replace the antiquated manual system and implemented a new computer system. She learned in the course of her work that through administrative incompetence in the office Dr Weinstein had waived something in the order of \$71,000 of Medicare claims during 1997-1998.
- [9] Ms Smith stated that around 1998 to 2000 Dr Weinstein was extremely busy in the practice, seeing in excess of 20 patients per day and also travelling extensively overseas as a guest speaker, panellist, demonstrator and lecturer. However, Ms Smith said that she knew nothing at the relevant time about the system for submission of claim forms to Medicare from Dr Weinstein’s rooms.
- [10] Mrs Spillane, Dr Weinstein’s officer manager, was also called as a witness. She said that she had commenced work with Dr Weinstein in 2001 during a period when the practitioner was suspended for six months. She said that when she commenced work the office was very disorganised and messy. She consulted software experts to make the office run better and checked that every referral was in order. She maintained that the office now runs “like clockwork.”¹ Moreover, Dr Weinstein now takes a more active role in relation to administrative matters, especially in respect of financial matters.

¹ Transcript at p.14

- [11] Dr Fox, a medical practitioner who has known Dr Weinstein for 10 years, was called as a witness before the Panel. He regarded her in the early years as “hyperactive to the extreme to the point of almost being manic.”² However, he described her as having calmed down and steadied in recent times. He said that he was aware of her current circumstances and continues to refer patients to Dr Weinstein.
- [12] Mrs Ahmad, a solicitor, was also called as a witness. She said that she had been married to a dermatologist, Dr Fewings, who had carried on a practice in Preston. She tried to carry on her husband’s practice after he passed away tragically and unexpectedly, but she encountered very significant logistical problems until the intervention of Dr Weinstein, who has assisted at the practice by working two days per week.
- [13] Ms Cantatore, the office manager at Mrs Ahmad’s practice, was also called as a witness. She said that Dr Weinstein began to work for the practice in 2002 and had continued to do so since that date. The practice encountered very serious difficulties in encouraging other doctors, including those who had known the late Dr Fewings, to assist in spite of the plight that his widow and children faced. However, Dr Weinstein’s intervention has been very positive. The patients and general practitioners in the area like her very much. She paid great attention to detail including to her obligations to Medicare.

The Prior Matters

- [14] The Panel was informed that Dr Weinstein had previously been found by a Panel of the Board to have engaged in unprofessional conduct of a serious nature, including professional misconduct. This related, in summary, to having:
- performed a brow lift without obtaining consent;
 - performed cosmetic procedures without exercising proper care and skill;
 - failed to provide adequate post-operative care to a patient;
 - failed to maintain adequate clinical notes;
 - provided incorrect and misleading information to the Board;
 - recommended treatment in respect of a patient with abdominal obesity that was inappropriate;

² Transcript at p.15

- failed to provide this patient with relevant information in relation to liposuction and in fact given her incorrect and misleading information;
- performed liposuction in circumstances where it was likely that it would result in deformity and a significant and persistent abdominal apron; and
- once again provided substandard post-operative care and misleading information to the Board.

[15] In 2000 the Panel adjourned the hearings concerning Dr Weinstein's treatment of a number of other patients to a date to be fixed.

[16] The Panel imposed the following determinations:

- (1) That Dr Weinstein's registration be suspended for a period of six (6) months commencing 27 October 2000;
- (2) That as from 19 October 2000 Dr Weinstein's registration be subject to the following conditions:
 - (i) conditions in the same terms as those set out in the undertaking;
 - (ii) that Dr Weinstein undergo counselling as required by the Board in relation to inter alia communication skills, the need for comprehensive, contemporaneous notes and entries in the medical records maintained by her, the need to properly discharge her duty to her patients in relation to obtaining their consent to medical treatment examination or procedure, the need to appropriately delegate patient care to nursing staff and to ensure that pre, intra and post operative clinical care be performed to a standard acceptable to the Board.
 - (iii) that Dr Weinstein, at her cost, submit to an audit of her clinical practice and management by a person or persons approved by the Board every 3 to 6 months for 2 years then annually, as determined by the Board.

The conditions numbered 2(i)-(iii) above will hereafter be referred to as "conditions on registration".

- (3) That any breach of any of the conditions on registration, which shall itself constitute unprofessional conduct within the meaning of s. 3(1)(i) of the

Act, shall entitle the Board to bring back on for formal hearing the adjourned matters or one or more of them upon reasonable notice or to take such other action as the Board determines.

- (4) These conditions shall remain as conditions on Dr Weinstein's registration until such time as they are removed or varied by the Board.
- (5) Upon each occasion that Dr Weinstein applies to renew her registration pursuant to Part 2 of the Act, she shall provide the Board with a statutory declaration in accordance with a form provided by the Board stating that she has fully complied with the conditions on registration at all times applicable to the period between each such renewal of registration.
- (6) In the event Dr Weinstein applies to vary the conditions on registration the Board shall be at liberty to bring back on for formal hearing and determination upon their merits the adjourned matters, or one or more of them upon reasonable notice.

[17] Dr Weinstein undertook:

- (a) to restrict her medical practice to the field of clinical dermatology, that is the diagnosis, treatment and prevention of skin diseases.
- (b) not to undertake any cosmetic surgical procedures or other surgical procedures involving incisional/excisional surgery other than as described in (c) below and being procedures directly related to her practice of clinical dermatology;
- (c) to perform only the following procedures:
 - (i) laser re-surfacing;
 - (ii) removal of benign and/or malignant lesions of the skin (including subcutaneous lesions) by means of surgical excision by scalpel, laser, curettage or liquid nitrogen;
 - (iii) laser treatment of facial and leg veins and laser treatment of benign pigmented lesions;
 - (iv) laser treatment of tattoos;
 - (v) laser treatment of hair on the surface of the skin;
 - (vi) chemical peels;
 - (vii) sclerotherapy of leg veins;
 - (viii) hair transplantation by grafting;
 - (ix) *the administration of botox collagen and hylaform injections.

*Amended by Medical Practitioners Board of Victoria on 18 October 2001 to read "the administration of botox, collage, dysport, perlane and restylane/restylane fine line injectable is permitted."

Submissions on behalf of Dr Weinstein

- [18] Mr Galbally informed the Panel that Dr Weinstein is currently 49 years of age and separated from her husband of 22 years. She has two children who live with her and is running her own medical practice.
- [19] Mr Galbally emphasised to the Panel that the success of the appeal by the Director of Public Prosecutions to the County Court was not on the basis that a mistake had been made in the Deputy Chief Magistrate's assessment of how chaotic Dr Weinstein's practice had been when the offending occurred. He noted that no fictitious entities had been utilised by Dr Weinstein; rather the vice was that Dr Weinstein did not herself provide treatment to the patients on the relevant occasions. She knew all of the patients and had treated them at various times but on the specific occasions it had been nurses who had provided treatment to the patients.
- [20] Mr Galbally informed the Panel that Dr Weinstein's offending occurred over a period of 132 weeks between 15 January 1998 and 1 August 2000. During that time approximately 17,000 patient visits took place at a rate of approximately 25.75 patients per day. While not seeking to minimise the seriousness of Dr Weinstein's transgressions, Mr Galbally emphasised that his client had not gone systematically about trying to rort Medicare by dishonestly fictionalising clients or treatments.
- [21] Mr Galbally informed the Panel that the major item that constituted the work done by nurses instead of Dr Weinstein was "item 105", namely an attendance subsequent to a first consultation. He said that this was advice about skin care and ultrasound to the body, acne treatments, treatment of pigmentation with bleaching motions and silhouette (massage machine for scarring). This took place on 167 occasions. Item 30224 was percutaneous drainage of a deep abscess using interventionist techniques. He said that Division 1 nurses did these. He acknowledged too that on 13 occasions a claim was made by Dr Weinstein under item 45024 which is abrasive therapy for severely disfiguring scarring resulting from trauma, burns or acne.

[22] On instructions, Mr Galbally informed the Panel that the “only explanation for it is that there was – this was a hectic busy practice and it was chaotic and things were being delegated and she was the only medical practitioner in the practice taking on too much and neglecting her duties.”³

[23] Mr Galbally contended that since the conclusion of Dr Weinstein’s suspension, namely from 1 April 2001, she has completely reorganised her practice, as well as the way she applies herself to her practice. He said that Dr Weinstein has functioned in the intervening period “without violation”⁴ and maintained that this should give the Panel some comfort in terms of the likelihood of Dr Weinstein offending again and placing the public at risk. He reminded the Panel that the offending occurred between four and six years ago. He stated that the passage of time should dissuade the Panel from utilising Dr Weinstein as a vehicle for general deterrence.

[24] Mr Galbally informed the Panel that for some time the Health Insurance Commission has been auditing Dr Weinstein’s practice, obtaining her practice statistics and visiting and interviewing patients, reviewing 100 files at a time. He stated that Dr Weinstein had conformed with the previous orders in relation to counselling. The upshot of the various measures, most particularly the changes to her practice administration, he said, was that the likelihood of Dr Weinstein’s re-offending was nil. He drew attention to the delay in the matter coming before the Panel, Dr Weinstein’s remorse, and her precarious personal and financial circumstances. He contended that a reprimand is not an insignificant determination by a Panel of this Board and that it was apposite in the present circumstances.

Submissions by Counsel Assisting the Panel

[25] Mr Clements contended that there was a significant risk inherent in the criminal offending by Dr Weinstein. This was because of the provision of service by unqualified personnel in Dr Weinstein’s name on in excess of 200 occasions.

[26] He pointed out that the matters before the Panel involved fraud in Dr Weinstein’s conduct as a medical practitioner and that this in itself is serious, especially when it is perpetrated over an extensive period. He queried whether the reason for the

³ Transcript at p.24

⁴ Transcript at p.43

offending was the disorganised and chaotic status of the practice between 1998 and 2000. He emphasised the number of patients involved and the number of instances of dishonesty.

[27] Mr Clements also drew attention to the fact that conduct of the kind in which Dr Weinstein engaged compromises the integrity of Medicare. He pointed out that the Medicare system depends on the submission by doctors of accurate claim forms. Dr Weinstein by her dishonesty, he said, had abused her position of trust.

[28] Mr Clements argued that the focus of Deputy Chief Magistrate Popovic and Judge Douglas was quite different from that of this Panel.

The Panel's Reasons for its Findings and Determinations

[28] The conduct engaged in and the subject of the sentencing by Judge Douglas of the County Court was very serious. It amply satisfies the criteria for unprofessional conduct of a serious nature and professional misconduct. It involved a sustained defrauding of Medicare by nurses undertaking the provision of clinical services that should have been provided by Dr Weinstein. By her pleas of guilty and by the submissions on her behalf before this Panel, Dr Weinstein admitted her responsibility for this criminal conduct, namely that it deceived the Commonwealth and enriched the practice, and thereby herself, illegitimately. The Panel's focus, though, is upon the risk that Dr Weinstein's behaviour posed to the public – namely that it consisted of the provision of a variety of forms of medical practice by persons who were unqualified to undertake it. In other words, it was provision of unacceptable patient care, just as were the matters previously before a Panel of the Board and relating to the 1995-1997 period.

[30] Dr Weinstein has been punished by the County Court, amongst other things by the imposition of the stigma of a criminal conviction. That is not the role of this Panel.⁵ Nor is it to uphold the law of Victoria or to punish practitioners who have committed criminal offences. The role of this Panel is "to ensure that a member of the profession

⁵ *Ha v Pharmacy Board of Victoria* (2002) 18 VAR 465; [2002] VSC 322 at [86].

adheres to the high standards expected of a member of the profession” or, to put it another way, “disciplinary proceedings against members of a profession are intended to maintain proper ethical and professional standards, primarily for the protection of the public, but also for the protection of the profession.”⁶

[31] Thus, the task of this Panel is to assess the seriousness of the unprofessional conduct and then to evaluate the likelihood of its repetition so as to protect both the general community and the standing and good name of the medical profession.

[31] As to the seriousness of the conduct, as already indicated, it involved dishonesty, breach of trust, it was perpetrated against an important state institution, it took place over an extended period of time in respect of 15 patients on 203 occasions and it posed, at least in principle, a significant risk to the public by reason of the fact that it involved the provision of clinical services by unqualified personnel. This was grossly professionally negligent. It is apparent that Dr Weinstein’s practice was ill organised during the relevant time frame. However, it is also to the point that Dr Weinstein was seeing a very considerable number of patients to her own financial advantage. It was incumbent upon her as the sole medical practitioner at the time in the practice to ensure that it worked not only administratively efficiently, so that the Commonwealth was not being defrauded by wrong billing practices, but safely so that only the practice’s medical practitioner was providing medical services to patients.

[33] The Panel is unable to conclude whether the criminal offending took place because of the administrative disorganisation that appears to have characterised the practice during the mid-and late-1990s. However, it did take place in a context of administrative dysfunctionality for which Dr Weinstein was responsible. From the perspective of this Panel, it is more important that what occurred was characteristic of inadequate provision of proper quality care by Dr Weinstein to her patients and that it occurred to her financial advantage by reason of health services being provided by unqualified personnel, leaving Dr Weinstein herself free to do other remunerative work.

⁶ *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 at 637; see also *Craig v Medical Board of South Australia* (2001) 79 SASR 545; [2001] SASC 169 at [41].

[34] The question that has particularly preoccupied this Panel is the risk that continues to be posed by Dr Weinstein to the public. Evidence before this Panel established that since returning to practice after suspension she has taken proper responsibility for the administration of her practice. She has employed new personnel and ensured that billing arrangements are functioning efficiently and as they should. It appeared to be submitted too that nurses have ceased undertaking work beyond their proper province. Two other doctors have been employed part-time at the practice. This measure presumably takes some of the pressure off Dr Weinstein and enables her to attend to her clinical responsibilities. In addition, Dr Weinstein has worked for only modest remuneration at the practice of a deceased dermatologist, apparently paying due attention to her administrative obligations.

[35] Justice Gillard has held that the exhibition of remorse and the detrimental impact of a practitioners' behaviour upon a complainant's career "are irrelevant to the question of the protection of the public or the image of the profession. They would be factors relevant to punishment."⁷ It is not open to this Panel to take into account what is said to be Dr Weinstein's remorse, save to the extent that it may impact upon the likelihood of her re-engaging in inappropriate professional conduct. Nor is it proper for the Panel to take into account her personal, domestic or financial hardships. The focus of the Panel must be upon protection of the community and the standing of the profession.

[36] However, it is clear that an aspect of the exercise of the Board's supervisory jurisdiction over medical practitioners involves an imposition of a determination that will deter both the particular practitioner and others from like conduct. This is a key component of the Board's obligation to protect the public by stating clearly what constitute unacceptable and acceptable forms of behaviour on the part of doctors. As Sheller JA held in *Law Society of New South Wales v Bannister*.⁸

"the Tribunal must also act so as to deter the offender in the future and any other practitioner minded to behave in like manner. ... Subjective considerations which would mitigate the sentence imposed by a criminal court may be significant if the protective exercise being undertaken by the Tribunal requires that they be taken into account. For example, a solicitor who reports

⁷ *Mullany v Psychologists Registration Board*, unreported, Supreme Court of Victoria, 22 December 1997 per Gillard J at p14.

⁸ Unreported, NSW Court of Appeal, 27 August 1993.

his misconduct to the Law Society immediately may be treated differently from one who does not, simply to encourage solicitors guilty of misconduct promptly to report it. On the whole, however, mitigating circumstances are of considerably less significance than in the criminal sentencing process.”

[37] The Panel has given earnest consideration to whether it should once again suspend Dr Weinstein for conduct that has constituted an unacceptable risk to members of the community. Ultimately, it has decided against this course and has opted for reprimanding her, fining her and imposing conditions on her registration directed toward enabling the public to have confidence in the ongoing quality of her practice. Dr Weinstein has once again brought undeserved discredit on the profession of medicine but, we have some confidence that by this combination of measures Dr Weinstein will be brought to understand the impropriety of her behaviour as a professional, will be deterred from its repetition, and will be encouraged to ensure that the standards of her practice must be kept to suitable standards over the years to follow. While none of this panel’s determinations can bind another Panel, we would confidently expect that any breach of these orders by Dr Weinstein and any further unprofessional conduct of Dr Weinstein that placed the public at risk would result in the cancellation of Dr Weinstein’s name from the medical register.

[38] Accordingly, the Panel imposes the following determinations:

- (1) Pursuant to section 45A(2)(c) of the *Medical Practice Act 1994*, Dr Weinstein is reprimanded for dishonestly delegating her responsibilities as a medical practitioner and facilitating a practice whereby unqualified persons provided medical services to patients that should only have been provided by a registered medical practitioner.
- (2) Pursuant to section 45A(2)(f) of the *Medical Practice Act 1994*, Dr Weinstein is fined \$2,000, the full amount to be paid to the Board within two months.
- (3) Pursuant to section 45A(2)(e) of the *Medical Practice Act 1994*, Dr Weinstein’s registration be subject to the following conditions:
 - (a) That no less than twice per year for three years, and thereafter no less than once per year for a further three years, she receive and co-operate with a random practice audit by a dermatologist whose identity is agreed upon between Dr Weinstein and the Deputy Chief Executive Officer of the Board or, in default of agreement, nominated by the Board, to assess, at Dr Weinstein’s cost, the sufficiency and appropriateness of her provision of treatment to patients and the appropriateness of any delegation by Dr Weinstein of treatment responsibilities and billing practices. The audit should extend to practice appointment and procedure booking schedules, Health Insurance Commission claim forms, patient records, observations of the practice and discussion with Dr Weinstein, her practice manager

and such other staff members as the auditor deems appropriate.

- (b) That Dr Weinstein do all things necessary to facilitate the auditor providing, at Dr Weinstein's expense, a report to the Board after each audit of her practice.

Dr I R Freckelton
Chairman
14 April 2005