

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Sameh Adly Fikry, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity of the complainants, or any information that could identify the complainants, under subsection 47(1) of the Health Professions Procedural Code (the "Code"), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

Further, this is notice that the Discipline Committee ordered that no person shall publish certain photographs entered as exhibits in the hearing, and that there shall be no public access to such photographs.

Subsection 93(1) of the Code, which is concerned with failure to comply with these orders, reads:

Every person who contravenes an order made under ... section 45 or 47... is guilty of an offence and on conviction is liable,

(a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or

(b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

INDEXED AS: ONTARIO (COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO) V. FIKRY,
2019 ONCPSD 53

THE DISCIPLINE COMMITTEE OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

IN THE MATTER OF a Hearing directed by the Inquiries, Complaints and Reports Committee of the
College of Physicians and Surgeons of Ontario
pursuant to Section 26(1) of the **Health Professions Procedural Code**
being Schedule 2 of the **Regulated Health Professions Act, 1991**, S.O. 1991, c. 18, as amended.

B E T W E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. SAMEH ADLY FIKRY

PANEL MEMBERS:

**DR. PAUL CASOLA, CHAIR
MR. PIERRE GIROUX
DR. JOHN RAPIN
MS. CHRISTINE TEBBUTT
DR. PAUL GARFINKEL**

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

**MR. P. WARDLE
MR. E. RANKIN**

COUNSEL FOR DR. FIKRY:

**MS J. McKENDRY
MR. R. McKECHNEY
MR. A. BOURASSA**

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

**MS J. McALEER (October 23-24, 2019)
MS Z. LEVY (November 11, 2019)**

**Hearing dates: October 23 and 24, 2019, and November 11, 2019
Decision date: November 11, 2019
Release of Reasons Date: December 23, 2019**

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario heard this matter on October 23 and 24, 2019, and November 11, 2019. The Committee heard motions on the following dates: October 21, 2019; April 22 and 23, 2019; and November 14, 2017.

At the conclusion of the hearing on November 11, 2019, the Committee stated its finding that Dr. Sameh Adly Fikry committed an act of professional misconduct in that he has engaged in an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional with respect to Patient A, and delivered its penalty and costs order with written reasons to follow.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Fikry committed an act of professional misconduct:

1. under clause 51(1)(b.1) of the Health Professions Procedural Code which is schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18 (the “Code”) in that he engaged in sexual abuse of a patient; and
2. under paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O. Reg. 856/93”), in that he has engaged in an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

RESPONSE TO THE ALLEGATIONS

Dr. Fikry initially denied all allegations in the Notice of Hearing.

On October 23 and 24, the College called evidence through a witness, Patient B. On November 11, the College then filed the Uncontested Statement of Facts, as described below.

On November 11, 2019, Dr. Fikry changed his plea and entered a plea of no contest to the allegation of professional misconduct in that he has engaged in an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, with respect to Patient A.

Also on November 11, counsel for the College advised the Committee that the College did not seek a finding regarding the allegation of sexual abuse in respect of Patient A or Patient B, or regarding the allegation of disgraceful, dishonourable or unprofessional conduct in respect of Patient B as outlined in the Notice of Hearing. The only finding sought by the College was with respect to the allegation of disgraceful, dishonourable or unprofessional conduct in respect of Patient A, as set out in the Uncontested Statement of Facts and Plea of No Contest.

THE FACTS

The following facts were set out in a Statement of Uncontested Facts and Plea of No Contest, which was filed as an exhibit and presented to the Committee:

FACTS

1. Dr. Sameh Adly Fikry (“Dr. Fikry”) is a family physician who received his certificate of registration in 2010. Throughout the relevant time period, Dr. Fikry practised in the Kitchener-Waterloo area. Dr. Fikry has no prior discipline history.
2. Patient A became a patient in Dr. Fikry’s family medicine practice in January 2015. She was seen by Dr. Fikry on three occasions in January and February 2015. The first occasion, on January 22, 2015, was for a routine “meet ‘n’ greet”. The second occasion, on February 9, 2015, was for a complete physical examination. The third occasion, on February 19, 2015, related to Patient A’s respiratory difficulties.
3. At the appointment on February 19, 2015, Patient A attended at Dr. Fikry’s office with complaints associated with asthma exacerbation. The patient reported having been seen in the Emergency Department for treatment of her asthma six days prior, but her symptoms persisted. She also advised Dr. Fikry that she had called his office the previous Friday afternoon before going to the Emergency Department, but it was closed. Dr. Fikry asked Patient A to enter his cellphone number into her phone for Patient A to use in the event of a future emergency, noting that he occasionally saw patients after hours. Patient A did so.
4. Dr. Fikry then took an appropriate medical history, Patient A’s shirt was lifted, and Dr. Fikry conducted a lung examination. Patient A was wearing a bra. At the end of the examination, Patient A’s shirt was put back down.
5. Dr. Fikry prescribed a new medication to treat Patient A’s symptoms.
6. At the end of the clinical encounter as Patient A was leaving Dr. Fikry’s examination room, Dr. Fikry said to Patient A, “I have something to tell you, but please don’t slap my face for it. Your bra, it is very elegant.” Dr. Fikry made no other comments to Patient A, and she left his office.

7. These comments caused Patient A great deal of distress. She did not wish to return to see Dr. Fikry and de-enrolled herself as his patient.

PLEA OF NO CONTEST

1. Dr. Fikry pleads no contest to the facts set out above and does not contest that the conduct described constitutes acts or omissions relevant to the practice of medicine that having regard to all the circumstances would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

RULE 3.02 – PLEA OF NO CONTEST

Rule 3.02 of the Rules of Procedure of the Discipline Committee regarding a plea of no contest states as follows:

3.02(1) Where a member enters a plea of no contest to an allegation, the member consents to the following:

- (a) that the Discipline Committee can accept as correct the facts alleged against the member on that allegation for the purposes of College proceedings only;
- (b) that the Discipline Committee can accept that those facts constitute professional misconduct or incompetence or both for the purposes of College proceedings only; and
- (c) that the Discipline Committee can dispose of the issue of what finding ought to be made without hearing evidence.

FINDING

The Committee accepted as correct all of the facts set out in the Statement of Uncontested Facts and Plea of No Contest. Having regard to these facts, the Committee found that Dr. Fikry committed an act of professional misconduct, in that he has engaged in an act or omission relevant to the practice of medicine that, having

regarding to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

PENALTY AND REASONS FOR PENALTY

The Committee is aware of the public interest test regarding a joint submission on penalty: that is, the Committee should not depart from a joint submission, unless the proposed penalty would bring the administration of justice into disrepute, or is otherwise not in the public interest (*R. v. Anthony-Cook* 2016 SCC 43).

Counsel for the parties jointly submitted that an appropriate penalty in this case would consist of a two-month suspension of Dr. Fikry's certificate of registration, and a reprimand. Counsel also jointly submitted that this is an appropriate case in which to require Dr. Fikry to pay costs to the College in the amount of \$10,370.00.

Penalty Principles

The Committee took into account a number of principles in assessing the proposed penalty. Protection of the public is paramount. The penalty should also serve to denounce the misconduct, maintain public confidence in the integrity of the profession and in the College's ability to regulate its members in the public interest. General deterrence of the profession and specific deterrence of the member are also important. When appropriate, the penalty should also consider rehabilitation of the member. The penalty should also be proportionate to the misconduct.

Aggravating Factors

Aggravating factors are those that increase the seriousness of or culpability for misconduct. In this case the aggravating factor was the nature of the misconduct, insofar as it was a boundary violation with a vulnerable patient.

Mitigating Factors

Mitigating factors are factors that lessen the seriousness of or culpability for misconduct. In this case, mitigating factors include that Dr. Fikry entered a plea of no contest, saving Patient A the potentially emotionally-draining experience of testifying at the hearing. By pleading no contest, he has also saved the College time and expense.

Further, Dr. Fikry has been in independent practice in Ontario since 2010 and has no prior history before the Discipline Committee.

Case Law

The Committee is not bound by its prior decisions. Each case must be decided on its own facts. The Committee recognizes, however, that prior cases involving conduct of a similar nature may serve as a guide to the appropriate range of penalties.

Dr. Phillip Choptiany, a general practitioner, had three patients complain about his behavior (*CPSO v Choptiany*, 2011). He had commented to one patient about her “tan lines” during a breast examination. With a second patient, he did not maintain appropriate spatial boundaries and made inappropriate comments about her sexual relationship with her husband. The third patient also complained that Dr. Choptiany made inappropriate comments with regard to her sexual relationship with her husband. The Committee found that Dr. Choptiany had engaged in disgraceful, dishonourable or unprofessional conduct. The Committee accepted a joint submission on penalty and ordered a reprimand, terms, conditions and limitations on his certificate of registration, and a two-month suspension of his certificate of registration.

Dr. Wycliffe Baird was alleged to have made inappropriate sexual comments to a patient he had been assessing for a knee injury, and also to have made inappropriate comments to a nurse who was working with him in an emergency room (*CPSO v Baird*,

2017). Dr. Baird entered a plea of no contest to the allegations. The parties agreed that an appropriate penalty would include a reprimand and costs, but the parties disagreed on the length of the suspension (one month versus three months). The Committee ordered a two-month suspension of the physician's certificate of registration.

The case of Dr. Chinniah Krishnalingam (*CPSO v Krishnalingam*, 2005) involved a psychiatrist who asked inappropriate and insensitive questions about sexual relationships during an initial patient interview. He held and caressed a second patient's hand, which he had intended as a supportive gesture, and gave this patient a brief hug at their final session. The Committee found that Dr. Krishnalingam had engaged in disgraceful, dishonourable and unprofessional conduct and ordered a penalty of a reprimand and costs, together with a two-month suspension of his certificate of registration.

Two other cases involved somewhat more serious misconduct and resulted in three-month suspensions of the physicians' certificates of registration; in both cases, the parties made joint submissions on penalty. Two patients complained about Dr. Jerry Tennen, a psychiatrist (*CPSO v Tennen*, 2013). The first patient noted that Dr. Tennen at times ended a therapy session by putting his arm around her shoulder and giving her a hug. He commented on her perfume and on one occasion kissed her on the lips. Dr. Tennen exchanged brief hugs with the second patient and kissed her on the cheek. While she was in the midst of an erotic transference, he asked to see a surgical incision on her back. Another case that the Committee reviewed was *CPSO v Dao* (2018). Here a pain medicine physician made sexualized comments to his patient on four occasions. He entered a plea of no contest and received a three-month suspension as well having terms, conditions and limitations on his certificate of registration.

CONCLUSION

The Committee finds that the misconduct in this case, taking into account the aggravating and mitigating factors, falls at the lower end of the range of similar cases. The reprimand allows the Committee to express its denunciation of the misconduct. The reprimand and the two-month suspension should serve to deter both Dr. Fikry and the profession at large. Further, the proposed penalty should maintain the integrity of the profession and confidence in the College's ability to regulate the profession in the public interest by demonstrating that boundary violations, including remarks such as those in this case, are always inappropriate.

The Committee also agreed that this was an appropriate case in which to order Dr. Fikry to pay costs in the amount of \$10,370.00, the current tariff rate for a one-day hearing

ORDER

The Committee stated its findings in paragraph 1 of its written order of November 11, 2019. In that order, the Committee ordered and directed on the matter of penalty and costs that:

2. Dr. Fikry attend before the panel to be reprimanded;
3. The Registrar suspend Dr. Fikry's certificate of registration for a period of two (2) months, to commence on November 19, 2019, at 12:01 a.m.;
and

4. Dr. Fikry pay costs to the College in the amount of \$10,370.00 within thirty (30) days of the date of the Order.

At the conclusion of the hearing, Dr. Fikry waived his right to an appeal under subsection 70(1) of the Code and the Committee administered the public reprimand.

Dated this 23rd day of December, 2019.

TEXT of PUBLIC REPRIMAND
November 11, 2019
in the case of the
COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO
and
DR. SAMEH ADLY FIKRY

Dr. Fikry,

The Committee is disappointed with your unprofessional conduct as it demeans you and reflects poorly on the profession.

The public who we as physicians serve, expect all physicians to practise in a professional manner and respect the patients whom we serve.

The nature of your interaction with your patient was a serious boundary violation. The patient was clearly upset by your comments and chose to withdraw from your practise. This patient's medical care therefore was negatively impacted by your behaviour.

Patients expect physicians to maintain boundaries with their patients. We in the profession see maintaining boundaries as a cornerstone to establishing trust and providing ethical treatment.

The Committee recognizes that your involvement with this committee has been a long process and has had unfortunate consequences professionally, personally and financially. However, in the end, physicians are held to a higher standard and need to be scrupulous in maintaining professional relationships with their patients. It was your failure to do so that has brought you before the Committee.

This is not an official transcript

The Committee does recognize that you have not appeared previously before this Committee and we hope that we never see you before this Committee again.

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