## NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Allen Phillip Denys, this is notice that the Discipline Committee ordered that that there shall be a ban on publication of the names and any information that could disclose the identity of patients referred to orally or in the exhibits filed at the hearing under subsection 45(3) 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.

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… 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. Denys,**
2019 ONCPSD 28

**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 E N:**

**THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO**

**- and -**

**DR. ALLEN PHILLIP DENYS**

**PANEL MEMBERS:**

**MR. P. PIELSTICKER**
**DR. C. CLAPPERTON**
**MR. M. KANJI**
**DR. Y. VERBEETEN**
**DR. S. WOODER**

**COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:**

**MS. JESSICA AMEY**

**COUNSEL FOR DR. DENYS:**

**MS. CAROLYN BRANDOW**
**MS. SARAH MARTENS**

**INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:**

**MS JENNIFER McALEER**

# PUBLICATION BAN

**Hearing Date:** **May 13, 2019**
**Decision Date:** **May 13, 2019**
**Written Decision Date:** **July 3, 2019**

## DECISION AND REASONS FOR DECISION

The Discipline Committee (the "Committee") of the College of Physicians and Surgeons of Ontario heard this matter at Toronto on May 13, 2019**.** At the conclusion of the hearing, the Committee released a written order stating its finding that Dr. Allen Phillip Denys committed an act of professional misconduct and setting out its penalty and costs order with written reasons to follow.

## THE ALLEGATIONS

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

1. under paragraph 1(1)2 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* ("O. Reg. 856/93"), in that he has failed to maintain the standard of practice of the profession; and

2. under paragraph 1(1)33 of O. Reg. 856/93, in that he has engaged in conduct or 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.

The Notice of Hearing also alleged that Dr. Denys is incompetent as defined by subsection 52(1) of the Health Professions Procedural Code (the "Code"), which is Schedule 2 to the *Regulated Health Professions Act, 1991*.

## RESPONSE TO THE ALLEGATIONS

Dr. Denys admitted the first and second allegations in the Notice of Hearing, that he has failed to maintain the standard of practice of the profession, and 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. The College withdrew the allegation of incompetence.

## THE FACTS

The following facts were set out in an Agreed Statement of Facts and Admission, which was filed as an exhibit and presented to the Committee:

## PART I – FACTS

### A. DR. ALLEN PHILLIP DENYS

1. Dr. Denys is a 68-year-old respirologist practising in Windsor, Ontario, who received his certificate of registration authorizing independent practice in 1977. At the relevant times, Dr. Denys practised both sleep medicine and respirology.

### B. BACKGROUND

2. On August 24, 2016, the College received information from a physician who had previously practised under the supervision of Dr. Denys at the Windsor Sleep Disorders Clinic. The physician expressed concern that Dr. Denys routinely ordered pulmonary function tests without appropriate clinical indication for patients referred to the Windsor Sleep Disorders Clinic.

3. On the basis of this information, the Inquiries, Complaints and Reports Committee of the College (the "ICRC") approved the appointment of investigators under section 75(1)(a) of the Health Professions Procedural Code which is Schedule 2 to the *Regulated Health Professions Act, 1991* (the "Code") in order to conduct a broader investigation into Dr. Denys' practice.

## C. INVESTIGATION INTO DR. DENYS' PRACTICE

### i) Facilities in which Dr. Denys and his family members have or had an interest

4. At the relevant times, Dr. Denys was the Quality Advisor and an interpreting physician at a sleep medicine clinic known as the Windsor Sleep Disorders Clinic. The Windsor Sleep Disorders Clinic is an Independent Health Facility, which is permitted pursuant to a license to bill facility fees to OHIP. Dr. Denys' daughter Jennifer Cruikshanks was the sole shareholder of the corporation that held the license to operate this Independent Health Facility. A copy of the Conflict of Interest declaration form submitted by Dr. Denys to the College on August 16, 2017 confirming Ms. Cruikshanks' ownership of the Windsor Sleep Disorders Clinic and her relationship to Dr. Denys is attached at Tab 1 to the Agreed Statement of Facts and Admission.

5. Dr. Denys is the Quality Advisor and the main interpreting physician at a pulmonary function lab known as Essex County Respiratory Services, an Independent Health Facility. Dr. Denys' daughter Nicole Miller is the sole shareholder of the corporation that holds the license to operate this Independent Health Facility. A copy of the Conflict of Interest declaration form submitted by Dr. Denys to the College on August 16, 2017 confirming Ms. Miller's ownership of Essex County Respiratory Services and her relationship to Dr. Denys is attached at Tab 2 to the Agreed Statement of Facts and Admission.

6. Dr. Denys is also the Quality Advisor and the main interpreting physician for pulmonary function tests at a pulmonary function and diagnostic imaging facility known as Essex County Diagnostic Services, an Independent Health Facility. Ms. Miller is the sole shareholder of the corporation that holds the license to operate this Independent Health Facility. A copy of the Conflict of Interest declaration form submitted by Dr. Denys to the College on August 16, 2017 confirming Ms. Miller's ownership of Essex County Diagnostic Services and her relationship to Dr. Denys is attached at Tab 3 to the Agreed Statement of Facts and Admission.

7. In addition, Dr. Denys' brother, Gary Denys, is the sole shareholder of the corporation known as Denys Sleep Supplies and Services Inc., which is operated from the same location as the Windsor Sleep Disorders Clinic and which is described as a "Patient liaison to facilitate the purchase of sleep equipment and sleep supplies for treatment of sleep apnea". A copy of the Conflict of Interest declaration form submitted by Dr. Denys to the College on August 16, 2017 confirming Gary Denys' ownership of Denys Sleep Supplies and Services Inc. and his relationship to Dr. Denys is attached at Tab 4 to the Agreed Statement of Facts and Admission.

**ii) Failure to Maintain the Standard of Practice of the Profession**

8. The College retained Dr. Raymond Gottschalk, a respirologist who practices both sleep medicine and respirology, to opine on Dr. Denys' care and treatment of patients at the Windsor Sleep Disorders Clinic. Dr. Gottschalk conducted a review of 50 patient charts of patients from the Windsor Sleep Disorders Clinic, along with those patients' OHIP data, and interviewed Dr. Denys on August 17, 2017. His report was received by the College on August 30, 2017, and is attached at Tab 5 to the Agreed Statement of Facts and Admission.

9. Dr. Gottschalk noted that in almost every chart reviewed, patients were booked for a pulmonary function test immediately upon referral to the Windsor Sleep Disorders Clinic. Dr. Gottschalk opined that there was no clinical indication for such testing evident on the face of the referral nor had the patient been evaluated in person by Dr. Denys. In addition, although routine pulmonary function tests were booked on almost all patients, Dr. Gottschalk opined that the results of such testing were not addressed in the consultation reports to the referring physicians nor were abnormalities identified or treatments recommended.

10. In addition, Dr. Gottschalk opined that there were other significant areas of concern with Dr. Denys' sleep medicine practice, including that:

- There was no effective initial triage process to distinguish between severe patients and routine patients. All patients appeared to be treated with the same

strategy without evaluating the severity of the condition for which they were referred;

- There was a failure to report unsafe drivers to the Ministry of Transportation or to recommend to patients that they not drive;

- The presenting complaint was not addressed in the consultation report provided by Dr. Denys to the referring physician;

- There was no effective triage following sleep studies, with the result that some patients with extremely severe sleep apnea experienced 6-9 month delays in getting treatment;

- The quality of the sleep study reports and consultation reports provided to the referring physician was poor, with nearly identical assessments and recommendations regardless of the issues or severity of concerns identified in the sleep study;

- In some cases there was no evidence that the patient had attended for a consultation with Dr. Denys following the sleep study, nor any evidence that attempts had been made to contact the patient or that the referring physician was advised that the patient did not attend for the consultation.

11. Dr. Gottschalk opined that Dr. Denys failed to meet the standard of practice of the profession in his care and treatment of patients in 45 of the 50 patient charts reviewed, that Dr. Denys demonstrated a lack of knowledge, skill and/or judgment in 44 of the 50 patient charts reviewed, and that Dr. Denys' clinical practice exposed, or was likely to expose, patients to a risk of harm in 25 of the 50 patient charts reviewed.

12. Dr. Denys provided responses outlining the changes to his practice to address the concerns of Dr. Gottschalk. Dr. Gottschalk reviewed Dr. Denys' responses, with reference to

the specific patient charts, and delivered addendum reports dated November 24, 2017 and January 7, 2018. Copies of Dr. Gottschalk's addendum reports are attached at Tabs 6 and 7 to the Agreed Statement of Facts and Admission.

**(iii) Disgraceful, dishonourable and unprofessional conduct**

13. As indicated in the reports of Dr. Gottschalk, Dr. Denys ordered pulmonary function tests without appropriate clinical indication. Dr. Denys' daughters own the licenses of Essex County Respiratory Services and Essex County Diagnostic Services, the Independent Health Facilities where the pulmonary function tests were performed, and Dr. Denys is the main interpreting physician for pulmonary function tests at both facilities.

14. Referring patients for testing without appropriate clinical indication and from which he and his family members received a benefit constitutes disgraceful, dishonourable and unprofessional conduct.

15. In addition, Dr. Denys failed to comply with conflict of interest requirements, which also constitutes disgraceful, dishonourable and unprofessional conduct. Section 17 of Ontario Regulation 241/94 made under the Medicine Act, 1991, provides that:

> 17. (1) It is a conflict of interest for a member to order a diagnostic or therapeutic service to be performed by a facility in which the member or a member of his or her family has a proprietary interest unless,
>
> (a) the fact of the proprietary interest is disclosed to the patient before a service is performed; or
>
> (b)the facility is owned by a corporation, the shares of which are publicly traded through a stock exchange and the corporation is not wholly, substantially or actually owned or controlled by the member, a member of his or her family or a combination of them.

(2) A member who or whose family has a proprietary interest in a facility where diagnostic or therapeutic services are performed shall inform the College of the details of the interest.

16. Dr. Denys failed to inform the College of his conflicts of interest in respect of Windsor Sleep Disorders Clinic, Essex County Respiratory Services, Essex County Diagnostic Services and Denys Sleep Supplies and Services Inc. until he submitted the Conflict of Interest declaration forms on August 16, 2017.

**D. INTERIM UNDERTAKING**

17. On March 6, 2018, the ICRC directed that Dr. Denys enter into an Undertaking in lieu of imposing an Order pursuant to s. 25.4(1) of the Code (the "Section 25.4 Undertaking").

18. The Section 25.4 Undertaking provides that Dr. Denys must practise sleep medicine under the supervision of a Clinical Supervisor until the disposition of the allegations referred to the Discipline Committee.

**PART II - ADMISSION**

19. Dr. Denys admits the facts at paragraphs 1-18 above, and admits that, based on these facts he engaged in professional misconduct:

(a) under paragraph 1(1)2 of O Reg. 856/93, in that he failed to maintain the standard of practice of the profession in his care of patients; and

(b) under paragraph 1(1)33 of O Reg. 856/93, in that he engaged in acts or omissions relevant to the practice of medicine that would be regarded by members as disgraceful, dishonourable or unprofessional by ordering pulmonary function testing without appropriate clinical indication in respect of which he and members of his

family obtained a benefit, and by failing to comply with the Conflict of Interest Regulation by failing to submit forms to the College declaring his conflicts of interest until August 16, 2017.

**FINDINGS**

The Committee accepted as correct all of the facts set out in the Agreed Statement of Facts. Having regard to these facts, the Committee accepted Dr. Denys' admission and found that he committed an act of professional misconduct in that, he has failed to maintain the standard of practice of the profession, and 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.

**AGREED STATEMENT OF FACTS RELEVANT TO PENALTY**

The following Agreed Statement of Facts Relevant to Penalty was filed and presented to the Committee:

1. On April 12, 2019, Dr. Denys entered into an Undertaking with the College in which he agreed to cease practising sleep medicine in all jurisdictions and to never resume doing so. A copy of the Undertaking is attached at Tab 1 to the Agreed Statement of Facts Relevant to Penalty.

**PENALTY AND REASONS FOR PENALTY**

Counsel for the College and counsel for the member made a joint submission as to an appropriate penalty and costs order, which included: suspending Dr. Denys` certificate of registration for a period of four months; a public reprimand; imposing terms, conditions and limitations on Dr. Denys' certificate of registration, namely, that he participate and pass the PROBE Ethics and Boundaries Program within 6 months; and payment of costs to the College in the amount of $6,000.00.

In assessing the jointly proposed penalty, the Committee was guided by the principle of public protection. Further, the penalty should serve as a general deterrent to the profession and a specific deterrent to the member. It should express the profession's denunciation of the misconduct and be proportionate to the nature and seriousness of the misconduct. The penalty should uphold the honour and reputation of the profession and maintain the public's confidence in the College's ability to regulate the profession in the public interest. Additionally, to the extent possible, the penalty should rehabilitate the member.

The Committee was also mindful that it should not depart from a joint submission on penalty unless the proposed penalty would bring the administration of justice into disrepute, or is contrary to the public interest (*R. v. Anthony-Cook*, 2016 SCC 43).

In considering the joint submission on penalty, the Committee reviewed the Agreed Statement of Facts and prior cases of this Committee set out in a Joint Book of Authorities. The Committee also considered factors in aggravation or mitigation of the penalty proposed.

**The Nature of the Misconduct**

Dr. Denys failed to maintain the standard of practice in a number of aspects of his sleep medicine practice. He failed to triage new referrals according to issue severity; performed inadequate assessments of patients' sleep studies; and made identical recommendations regardless of patients' presenting issues. Dr. Denys failed to report unsafe drivers to the Ministry of Transportation and did not follow-up with patients, or their referring physician, if they did not attend for post sleep-study consultations. The Committee is concerned that the methods employed in Dr. Denys' practice put patients at risk, and harm could have ensued.

Dr. Denys ordered pulmonary function tests without appropriate clinical indication. These tests were conducted at Independent Health Facilities owned by his daughters, who in turn benefited financially.

Dr. Denys had no regard for the need to be prudent in ordering tests. He ordered pulmonary function tests for patients whom he had not seen for an initial consultation. In most cases, there was no clinical indication for the pulmonary function tests he ordered. In a province in which

health care resources are limited, the Committee finds Dr. Denys' self-serving and needless ordering of tests particularly egregious.

**Mitigating Factors**

Dr. Denys was cooperative with the College's investigation and took steps to address the issues raised with respect to his practice. By admitting to the misconduct, Dr. Denys saved the time and expense of a contested hearing. It is notable that on April 12, 2019, prior to the hearing of this matter, Dr. Denys entered into an undertaking with the College in which he agreed to cease practising sleep medicine in all jurisdictions and to never resume doing so.

**Prior Cases**

The Committee was provided with a Joint Book of Authorities containing three prior decisions of this Committee. Although the Committee's prior decisions are not binding as precedent, the Committee accepts as a principle of fairness that like cases should be treated alike.

In *CPSO v. Botros* (2015), deficiencies were found in Dr. Botros' sleep medicine practice including the inadequate interpretation of sleep study results, insufficient consultation reports and patient-follow-up, and a lack of attention to reporting unsafe drivers to the Ministry of Transportation. Dr. Botros was recalcitrant and rude in dealing with College investigators, and uncooperative in dealing with the College in general. The Committee ordered a six-month suspension, a reprimand, and terms, conditions and limitations on Dr. Botros' certificate of registration, including restricting him from practising sleep medicine. Dr. Botros was ordered to pay costs to the College.

In *CPSO v. Savic* (2015), the Committee found that Dr. Savic engaged in disgraceful, dishonourable or unprofessional conduct by placing himself in a conflict of interest. Specifically, Dr. Savic ordered diagnostic tests for some patients, to be performed at his clinic. Dr. Savic did not disclose this proprietary interest to the College. Additionally, Dr. Savic was found to have failed to maintain the standard of practice of the profession in relation to his documentation practices. The Committee ordered a two-month suspension, a reprimand, and terms, conditions and limitations on Dr. Savic's certificate of registration. Dr. Savic was ordered to pay costs to the

College. This was an agreed statement of facts case and the Committee accepted the joint submission on penalty.

In *CPSO v. Powell* (2017), the Committee found that Dr. Powell, a psychiatrist, failed to maintain the standard of practice of the profession and engaged in disgraceful, dishonourable, or unprofessional conduct by failing to maintain a frame in the psychotherapeutic relationship and by engaging in inappropriate OHIP billing practices. The Committee ordered a four-month suspension, a $20,000 fine to the Minister of Finance, a reprimand, and terms, conditions and limitations on Dr. Powell's certificate of registration. Dr. Powell was also required to pay costs to the College.

The Committee found that the penalty proposed by the parties fell within the range of penalties imposed in similar cases.

**Conclusion**

The Committee accepted the parties' joint submission on penalty as an appropriate penalty in the circumstances of this case. The penalty is proportionate to the nature and severity of the misconduct. The four-month suspension and reprimand act as specific and general deterrents, signalling to the public and the profession that this type of misconduct will not be tolerated. The penalty provides for public protection, as does the undertaking that Dr. Denys has entered into with the College. The requirement that Dr. Denys successfully complete a course in boundaries and ethics will provide for Dr. Denys' rehabilitation.

**ORDER**

The Committee stated its findings in paragraphs 1 and 2 of its written order of May 13, 2019. In that order, the Committee ordered and directed on the matter of penalty and costs that:

3. Dr. Denys to attend before the panel to be reprimanded.

4. The Registrar suspend Dr. Denys' certificate of registration for a period of four (4) months, commencing from May 14, 2019 at 12:01 a.m.

5. The Registrar place the following terms, conditions and limitations on Dr. Denys' certificate of registration:

> Dr. Denys will participate in and pass the PROBE Ethics & Boundaries Program offered by the Centre for Personalized Education for Professionals (CPEP), with a report or reports to be provided by CPEP to the College regarding Dr. Denys' progress and compliance. Dr. Denys will complete this requirement within 6 months, or, if it is not possible to do so within 6 months, at the first available PROBE Ethics & Boundaries program for which Dr. Denys is eligible.

6. Dr. Denys pay costs to the College in the amount of $6,000.00 within 30 days of the date of this Order.

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

# TEXT of PUBLIC REPRIMAND
# Delivered May 13th, 2019
# in the case of the
# COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO
# and
# DR. ALLEN PHILLIP DENYS

Dr. Denys,

It is reprehensible and inexcusable to put patients with severe medical conditions at risk by not providing timely treatment and communicating with referring physicians. Patients were put at risk by your failure to properly investigate, triage and treat. In addition, your failure to notify patients and the Ministry of Transport when they are deemed unfit to drive is disgraceful.

Your actions are contrary to the ethics of our profession. You have engaged in the flagrant abuse of power for the purpose of financial gain, and in so doing, you put patients at risk. Three other family members were involved in what can only be described as an unconscionable conflict of interest.

You've lost respect of the public, which you serve, and your colleagues. Dishonourable, disgraceful and unprofessional aptly describes your behaviour. This is not only a matter between you and your patients, but reflects poorly on the entire medical profession. You certainly have disregarded your duty as a physician.

We hope this exercise has been a learning experience, and that you will exercise better judgment in your practice in the future.