

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Viet Cuong Dao, this is notice that the Discipline Committee ordered a ban on the publication, including broadcasting, of the name or any information that could identify the complainant pursuant to subsection 47(1) of the Health Professions Procedural Code (the Code), which is Schedule 2 to the *Regulated Health Professions Act, 1991*.

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 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. Dao,
2018 ONCPSD 56**

**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. VIET CUONG DAO

PANEL MEMBERS: **MR. P. GIROUX (CHAIR)**
 DR. M. GABEL
 DR. W. KING
 MR. M. KANJI
 DR. S. WOODER

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

MS A. CRANKER

COUNSEL FOR DR. DAO:

MS G. BURT
MR. D. GOUDGE

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MS J. McALEER

PUBLICATION BAN

Hearing Date: **September 10, 2018**
Decision Date: **September 10, 2018**
Release of Reasons Date: **November 9, 2018**

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 September 10, 2018. At the conclusion of the hearing, the Committee released a written order stating its finding that the member committed an act of professional misconduct (the “Order”). The Order also set out the Committee’s penalty and costs order with written reasons to follow.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Viet Cuong Dao 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 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. Dao entered a plea of no contest to the allegations in the Notice of Hearing.

THE FACTS

The following facts were set out in the Statement of Uncontested Facts, which was filed as an exhibit:

PART I - FACTS

A. Background

1. Dr. Viet Cuong Dao is a 41-year-old physician, practising in Toronto, in the area of chronic pain. Dr. Dao has practised exclusively chronic pain medicine since 2014. Dr. Dao received his certificate of registration authorizing independent practice from the College of Physicians and Surgeons of Ontario (“the College”) on July 5, 2011.
2. One of the clinics at which Dr. Dao practises is a Health Centre in Toronto, Ontario.

B. Patient A: Dr. Dao’s Comments of a Sexual Nature

3. Dr. Dao saw and treated Patient A on four occasions at the Health Centre in January and February, 2017. The dates of Patient A’s visits were on two dates in January, and two dates in February, 2017.
4. Patient A was referred to Dr. Dao by her treating rheumatologist for treatment of chronic pain, in particular, chronic back pain (related to degenerative disc disease) and fibromyalgia. At the time of the treatments Patient A was in her 40’s.
5. On each of Patient A’s visits, Dr. Dao administered injections in Patient A’s lumbar spine, sacroiliac joints, sciatic nerves, and sacroiliac fascia. Dr. Dao massaged numbing anesthetic into the sites of injection during the treatment at each visit. Patient A’s bare buttocks were exposed during the treatments administered by Dr. Dao.
6. At the first visit in January, 2017, Patient A was accompanied by a friend. At this visit, Dr. Dao commented to Patient A’s friend about a tattoo that Patient A has on her lower back. Patient A commented that she would not have gotten the tattoo on her lower back if she had known it was called a “tramp stamp.” Dr. Dao commented that it was a sexy place to put a tattoo.

7. At the second visit in January, 2017, which Patient A attended alone, Dr. Dao asked, when Patient A moaned from the pain of the injections, whether “it hurt.” Patient A confirmed it did. Dr. Dao then said: “It’s going to feel good.” Patient A responded by saying: “Yeah, it’s one of those things that feels good.” Dr. Dao commented it was “kind of like S&M” and asked: “Do you know what S&M is?” Patient A indicated she knew what it was, and Dr. Dao asked: “Do you like S&M?”
8. At the third visit in February, 2017, which Patient A attended alone, Dr. Dao asked Patient A if she knew what a sugar daddy is. Patient A confirmed she did. Dr. Dao asked if sugar daddies take care of women’s children. Patient A responded: “Well, I guess if the mother’s taken care of, then I guess the kids are taken care of too.” Dr. Dao responded that that was true.
9. Later at the same appointment, Dr. Dao asked her if she knew what a “rub and tug” is. Patient A indicated she did and commented: “You probably go there every day on your lunch hour, and that’s inappropriate, you shouldn’t be talking to me like that.” When Dr. Dao chuckled, Patient A told Dr. Dao that was enough, and got up and left.
10. At the fourth visit in February, 2017, Patient A attended with another friend. About ten minutes into this appointment, Dr. Dao asked: “So, the...rub and tug is for guys? Is anything equivalent like that for women?” Patient A responded she could not say, adding that she does not go to “those places.” Dr. Dao commented that he has two family friends who work as massage therapists and that they do not do “those things.”

PART II- NO CONTEST

11. Dr. Dao does not contest the facts in paragraphs 1 to 10 above, nor that these facts constitute professional misconduct in that he made remarks of a sexual nature and has thereby engaged in the sexual abuse of Patient A and 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,

contrary to paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991*.

RULE 3.02 OF THE DISCIPLINE COMMITTEE'S RULES OF PROCEDURE

Rule 3.02 of the Discipline Committee's Rules of Procedure 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 true all of the facts set out in the Statement of Uncontested Facts. Having regard to these facts, the Committee accepted Dr. Dao's plea of no contest and found that he committed an act of professional misconduct, in that he has engaged in sexual abuse of a patient, 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.

PENALTY AND REASONS FOR PENALTY

Counsel for the College and counsel for Dr. Dao made a joint submission as to an appropriate penalty and costs order. They proposed that the penalty in this case consist of a reprimand, a

three month suspension and that the Registrar impose specific terms, conditions and limitations on Dr. Dao's certificate of registration, including that: Dr. Dao successfully complete one-on-one instruction in Communication Education; he successfully complete the PROBE course in ethics and professionalism by obtaining an unconditional pass, at his own expense, or any alternate course in ethics and professionalism approved by the College; he not engage in any professional encounters unless in the presence of a Practice Monitor; and he post a sign in all waiting rooms, examination rooms and consulting rooms, in all of his practice locations, in a clearly visible and secure location, stating that Dr. Dao has agreed not to have professional encounters, in person or otherwise, with patients, of any age, unless in the continuous presence and under the continuous observation of a practice monitor. Further, they proposed that Dr. Dao reimburse the College for funding provided to Patient A under the program required under section 85.7 of the Code, by posting an irrevocable letter of credit or other security acceptable to the College in the amount of \$16,060.00. The parties also advised that they were in agreement that Dr. Dao pay costs to the College in the amount of \$6,000.

The Committee heard from counsel for the parties and independent legal counsel that the Supreme Court of Canada has set a high bar for rejecting a jointly submitted penalty. A joint submission on penalty must be accepted by the Committee, unless to do so would bring the administration of justice into disrepute, or is otherwise not in the public interest (*R v. Anthony-Cook*, 2016 SCC 43).

Mitigating Factors

The Committee noted that Dr. Dao cooperated fully with the College investigation. He was open and honest in all of his communications with the College. He expressed sincere regret and advised the College that it was not his intention to cause harm or show disrespect to Patient A.

By admitting to his misconduct, Dr. Dao avoided the necessity of a contested hearing and spared Patient A from the stress of having to testify at the hearing.

In addition, the Committee noted that Dr. Dao had already taken steps to address his misconduct. He had commenced one-on-one coaching regarding professional communication. He also took steps to enrol in the PROBE course.

The Committee also noted that this was Dr. Dao's first appearance before the Discipline Committee. This is a mitigating factor.

The Committee did not accept that the fact that English is Dr. Dao's second language constitutes a mitigating factor. The Committee found that it was Dr Dao's responsibility to know the meaning and impact of his remarks to Patient A, which were clearly of a sexual nature. Further, there was no evidence to suggest that Dr. Dao did not understand the meaning of the comments attributed to him.

Aggravating Factors

Dr. Dao was in a position of power with regard to Patient A. She had the right to assume that he would act only in her best interests and would not sexualize the doctor / patient relationship with inappropriate comments. Dr. Dao took advantage of the doctor / patient relationship by attempting to engage Patient A in sexually explicit discussions that had absolutely nothing to do with Patient A's clinical care.

Penalty Principles

In considering the penalty jointly proposed by the parties, the Committee also had regard to well-accepted penalty principles. Those principles include protection of the public, specific deterrence of the member, general deterrence of the profession, maintaining the integrity of the profession and public confidence in the College's ability to regulate the profession in the public interest and, where appropriate, the rehabilitation of the physician.

The Committee found that the proposed penalty should act as a deterrent, both for Dr. Dao and for the profession at large. Physicians must recognize that it is never appropriate to make

remarks of a sexual nature to a patient and that such remarks can have very adverse consequences for patients. Given the facts of this case, the period of suspension proposed by the parties should send this message to Dr. Dao, the profession and the public.

The Committee found that the parties' joint submission regarding penalty took into account the mitigating and aggravating factors in this case. A three-month suspension of Dr. Dao's certificate of registration and a reprimand should serve to deter Dr. Dao from engaging in such professional misconduct in the future. The proposed penalty also demonstrates to the membership how seriously the Committee regards sexual remarks made to a patient. In addition, the Committee is satisfied that the penalty, including the terms, conditions and limitations placed on Dr. Dao's certificate of registration, will serve to protect the public and should demonstrate to the public that the College is serious about protecting patients from sexual comments by physicians.

Therefore, the Committee accepted the parties' joint submission on penalty and costs.

ORDER

The Committee stated its finding of professional misconduct in paragraph 1 of its Order of September 10, 2018. In the Order, the Committee ordered and directed on the matter of penalty and costs that:

2. the Registrar suspend Dr. Dao's certificate of registration for a period of three (3) months effective October 1, 2018.
3. Dr. Dao attend before the panel to be reprimanded.
4. the Registrar impose the following terms, conditions and limitations on Dr. Dao's certificate of registration:
 - (i) Dr. Dao will successfully complete one-on-one instruction in Communication Education by an instructor approved by the College, at his own expense, and shall provide proof of completion to the College;

- (ii) Dr. Dao will successfully complete the PROBE course in ethics and professionalism by obtaining an unconditional pass, at his own expense, or any alternate course in ethics and professionalism approved by the College. Dr. Dao will provide proof of completion to the College.

Practice Monitor

- (iii) Dr. Dao shall not engage in any professional encounters, in person or otherwise ("Professional Encounters"), with patients of any age, in any jurisdiction, unless the Professional Encounter takes place in the continuous presence and under the continuous observation of a monitor who is a regulated health professional acceptable to the College (the "Practice Monitor").
- (iv) At all times, Dr. Dao shall ensure that the Practice Monitor shall:
 1. provide reports (as described in the Practice Monitor's undertaking attached hereto as Appendix "A" to the Order) to the College on at least a monthly basis;
 2. remain present at all times during all Professional Encounters with all patients;
 3. carefully observe all of his Professional Encounters with patients, including but not limited to physical and internal examinations. Dr. Dao shall ensure the Practice Monitor's view of all of his Professional Encounters with patients, including physical and internal examinations, is unobstructed at all times;
 4. refrain from performing any other functions, except those required in the Practice Monitor's undertaking attached as Appendix "A", while observing Dr. Dao in all of his Professional Encounters with patients;
 5. maintain a log of all Professional Encounters with patients in the form attached to this Order as Appendix "B" (the "Log");
 6. initial all corresponding entries in the records of patients noted in the Log; and
 7. submit the on final Log to the College on a monthly basis.
- (v) Dr. Dao, shall maintain an up to date copy of the Log, by ensuring a copy is made at the end of each business day, and to make it available to the College upon request.
- (vi) Dr. Dao, shall inform the College of each and every location where he practises or has privileges including, but not limited to, hospital(s), clinics) and office(s), in any

jurisdiction (collectively my "Practice Locations") within five (5) days of commencing practice at that location.

Posting a Sign

- (vii) Dr. Dao, shall post a sign in all waiting rooms, examination rooms and consulting rooms, in all of his Practice Locations, in a clearly visible and secure location, in the form set out in Appendix "C" to the Order that states: "Dr. Viet Cuong Dao has agreed not to have Professional Encounters, in person or otherwise, with patients, of any age, unless in the continuous presence and under the continuous observation of a Practice Monitor acceptable to the College of Physicians and Surgeons of Ontario. Dr. Viet Cuong Dao must not be alone during any Professional Encounter with any patient. Further information may be found on the College website at www.cpsso.on.ca".
- (viii) Dr. Dao shall post a certified translations) in any languages) in which he provides services, of the sign described in section (vii), in all waiting rooms, examination rooms and consulting rooms, in all of his Practice Locations, in a clearly visible and secure location, in the form set out at Appendix "C" to the Order.
- (ix) Dr. Dao shall ensure that each patient with whom he has a Professional Encounter is directly notified, prior to the Professional Encounter, that he has agreed not to have professional encounters, in person or otherwise, with patients of any age, unless in the continuous presence of a practice monitor acceptable to the College of Physicians and Surgeons of Ontario.
- (x) With respect to patients with whom Dr. Dao has appointments that are scheduled at least seven (7) days in advance, Dr. Dao, shall ensure that each patient is directly notified, within seven (7) days after the appointment is scheduled, of the details of the restriction described in section 4(iii) above.
- (xi) The requirement to practise with a practice monitor as set out in clauses 4(iii)-(x) above, shall remain in place until the College has received proof of successful completion of the Communication Education and the PROBE course, as set out in 4(i) and (ii) above.
- (xii) Dr. Dao shall be responsible for any and all costs associated with implementing the terms of this Order.

5. Dr. Dao reimburse the College for funding provided to Patient A under the program required under section 85.7 of the Code, by posting an irrevocable letter of credit or other security acceptable to the College, within thirty (30) days of the date of this Order, in the amount of \$16,060.00.

6. Dr. Dao pay the College costs in the amount of \$6,000 within thirty (30) days from the date of this Order.

At the conclusion of the hearing, Dr. Dao through his counsel 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 September 10, 2018
in the case of the
COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO
and
DR. VIET CUONG DAO

Dr. Dao,

We trust you have learned through this process that professional communications with patients must avoid language that contains any sexual comment or innuendo. The courses that you are undertaking, or will undertake, will give you guidance on how to better communicate with your patients in a professional setting.

The language you used was hurtful and demeaning and certainly inappropriate during a patient encounter. Physicians are in a position of trust and sworn to individual patients and to society in general. With that comes an increased level of responsibility to act honourably and professionally. The medical profession expects nothing less.

We hope and trust that you will never appear before a discipline panel again.