

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Robert B. Miller, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the names of patients, or any information that would identify 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 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. Miller, 2020 ONCPSD 39

**DISCIPLINE COMMITTEE
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**
which is Schedule 2 of the **Regulated Health Professions Act, 1991**,
S.O. 1991, c. 18, as amended.

B E T W E E N:

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. ROBERT BARRY MILLER

PANEL MEMBERS:

**DR. MELINDA DAVIE (Chair)
MR. JOHN LANGS
DR. JAMES WATTERS
MR. PIERRE GIROUX
DR. PEETER POLDRE**

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

MS JESSICA AMEY

COUNSEL FOR DR. MILLER:

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INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MS JENNIFER McALEER

**Hearing Date and Decision Date: July 28, 2020
Release of Reasons Date: September 21, 2020**

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario (“the College”) heard this matter via videoconference on July 28, 2020. At the conclusion of the hearing, the Committee released a written order stating its finding that the member committed an act of professional misconduct, and setting out its penalty and costs order with written reasons to follow.

THE ALLEGATION

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

1. 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 ALLEGATION

As set out below, Dr. Miller entered a plea of no contest to the allegation in the Notice of Hearing.

THE FACTS

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

PART I – FACTS

1. Dr. Robert Barry Miller (“Dr. Miller”), is a 67-year-old otolaryngologist who practices in Toronto, Ontario. He received his certificate of independent practice in Ontario in 2007.

Interaction with a health care professional

2. On January 7, 2018, a patient of Dr. Miller’s attended a pharmacy with a prescription for hydrocodone syrup. That medication was not available at the pharmacy as it was on backorder. Accordingly, the pharmacist on duty contacted Dr. Miller by telephone to discuss alternatives available at the pharmacy.
3. Dr. Miller, in speaking with the pharmacist, insisted that the medication prescribed must contain hydrocodone, a controlled substance.
4. The Pharmacist advised Dr. Miller that he must then supply a new written prescription for an alternative medication containing hydrocodone as prescriptions for controlled substances cannot be provided verbally over the phone.
5. Dr. Miller expressed irritation and then attended the pharmacy in person. In the presence of the pharmacy technician, he called the pharmacist stupid multiple times, threatened that he would tell his patients not to come to that pharmacy, accused the pharmacist of withholding treatment to the patient, and

then grabbed the pharmacist by the neck, pulled him close, and whispered in the pharmacist's ear "you are stupid".

Patient A

6. Patient A was referred by her family physician to Dr. Miller for a consultation regarding her ear drums, which had burst previously. She attended the consultation with her mother.
7. As explained by Patient A and her mother, Dr. Miller was short and curt in his assessment of Patient A. He then told Patient A to lie down on the table without explaining what was going to happen. Patient A told Dr. Miller that she was nervous and advised him that it did not instill confidence when he did not explain what he was going to do. Dr. Miller replied that "it does not instill confidence in me when you won't lie down and stay still".
8. Patient A and her mother elected to leave, and Dr. Miller threw down his instrument and said "then leave and continue to have problems with your ears".
9. Dr. Miller's consultation note to the referring physician stated in part:

...She became quite fearful, in fact she was crying in my office. Mother then stepped in, and enabled her to continue this "performance". Mother said "do you want to go home" and the young lady said yes I do. They left. For a 20-year-old, in spite of being quite fearful, this type of behaviour is really unacceptable. As you know I am quite gentle and explained what I am doing at each step. However this hysterical [sic] behaviour was only enabled by the mother...

PART II - PLEA OF NO CONTEST

10. Dr. Miller does not contest the facts set out at paragraphs 1 –9 above and does not contest that, based on these facts, he engaged in professional misconduct in that he engaged in 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, under paragraph 1(1)33 of O. Reg. 856/93, made under the *Medicine Act, 1991*.

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:

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 Facts and Plea of No Contest. Having regard to these facts, the Committee accepted Dr. Miller's plea of no contest and found that he committed an act of professional misconduct under paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991*, in that he has engaged in 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.

PENALTY AND REASONS FOR PENALTY

FACTS ON PENALTY

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

1. In December 2011, the Inquiries, Complaints and Reports Committee of the College (the "ICRC") considered a complaint that Dr. Miller was rude and abrupt in his communications when a patient questioned the cleanliness of a nasopharyngoscope. The ICRC required Dr. Miller to participate in a Specified Continuing Education and Remediation Program consisting of a preceptorship in infection control and a reassessment. A copy of the ICRC's Decision and Reasons dated December 7, 2011 is attached at Tab 1 to the Agreed Statement of Facts on Penalty.
2. In June 2013, the ICRC considered a complaint that Dr. Miller was rude and abrupt in his communications during an examination of the complainant's ear. The Committee noted that Dr. Miller had received prior complaints about communications and stated its expectation that physicians conduct themselves in a professional manner at all times and clearly explain all

procedures to the patient. A copy of the ICRC's Decision and Reasons dated June 13, 2013 is attached at Tab 2 to the Agreed Statement of Facts on Penalty.

3. In January 2016, the ICRC considered a complaint that Dr. Miller was rude and abrupt in his communications when performing an endoscopic procedure on the complainant. The ICRC directed Dr. Miller to attend to be cautioned in person regarding his communications and his record-keeping. In addition, the ICRC required Dr. Miller to participate in a Specified Continuing Education and Remediation Program consisting of one-on-one instruction in Communications with Dawn Martin, clinical supervision focused on record-keeping, and a reassessment. A copy of the ICRC's Decision and Reasons dated January 13, 2016 is attached at Tab 3 to the Agreed Statement of Facts on Penalty.
4. Since January 2016, the ICRC has considered three subsequent complaints about Dr. Miller's communications, not including the incidents at issue in this proceeding.

SUBMISSIONS ON PENALTY

The parties made a joint submission on penalty and costs.

The parties agreed that the penalty should include a reprimand, a three-month suspension of Dr. Miller's certificate, and a requirement that Dr. Miller complete a one-on-one program acceptable to the College in anger management and impulse control. The parties also agreed that Dr. Miller should pay costs in the amount of \$10,370.00 for a one-day hearing.

Although the Committee has discretion to accept or reject a joint submission on penalty, the law provides that 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).

ANALYSIS

The protection of the public is the paramount principle guiding the imposition of penalty. Other key considerations are: maintaining public confidence in the integrity of the profession and the profession's ability to regulate itself in the public interest; denouncing wrongful conduct; specific deterrence as it applies to the member; general deterrence in relation to the membership as a whole; and, where appropriate, remediating the member.

A penalty which is fair, reasonable and appropriate must take into account the facts and circumstances of the case and weigh the penalty principles. The penalty should be proportionate to the misconduct. Aggravating and mitigating factors need to be considered. Like cases should be treated alike and the Committee should have regard to penalties imposed in cases with similar attributes, although it is not bound by its prior decisions.

Nature of the misconduct

Dr. Miller engaged in very serious misconduct in respect of the pharmacist on January 7, 2018 and Patient A in or around January 2019.

Dr. Miller's behaviour in respect of the pharmacist was shocking. The pharmacist's communication with Dr. Miller was consistent with the pharmacist's own professional responsibilities. With no justification, Dr. Miller responded by going in person to the pharmacy where, in the presence of the pharmacist's colleague, he repeatedly insulted, threatened and made unfounded accusations against the pharmacist. He then grabbed the pharmacist by the neck and whispered in his ear that he was stupid. Such behaviour is absolutely intolerable. It is antithetical to the respectful interactions between professionals that are both expected and essential to proper, effective relationships in health care settings, which are often fast-paced, intense, and stressful.

In respect of Patient A, Dr. Miller failed to explain what he was doing and was “short and curt” in his assessment, despite her telling him that she was nervous and that he had not told her what was going to happen. He reacted with hostility when Patient A and her mother found the encounter so unsatisfactory that they chose to leave without having Patient A’s clinical issue addressed. In addition, Dr. Miller’s consult letter to the referring physician indicates that he had no insight into his own role in the encounter. To the contrary, he mocked Patient A’s behaviour as “histrionic” and reprimanded her mother for enabling what he termed Patient A’s “performance”. The public rightly expects that physicians, who are in a position of power and authority, will make an effort to understand their individual circumstances, concerns and needs. Further, establishing trust and respectful communication are basic to an effective clinical relationship. Dr. Miller failed in both regards. His conduct was wholly unacceptable.

Aggravating factors

Prior College Interactions

In a relatively short time, i.e., since 2011, Dr. Miller has had six separate complaints to the College about his conduct, not including the events of concern in the present matter. The Inquiries, Complaints and Reports Committee (“ICRC”) considered the complaints. In each instance, issues with Dr. Miller’s communication skills were raised. In the three complaints for which any detail is available, Dr. Miller was described as having been rude and abrupt with patients.

One patient (whose complaint was considered by ICRC in June 2013) stated that Dr. Miller failed to explain the procedure he was doing, was rough in his examination, and caused excruciating pain. In its decision, the ICRC noted that this was the third complaint about Dr. Miller’s communication with patients and stated its expectation that physicians conduct themselves in a professional manner at all times and clearly explain all procedures to their patients.

Another patient (whose complaint was considered by ICRC in January 2016) stated that she was anxious about having an endoscopic exam and had significant pain when Dr. Miller tried to do the procedure. She described him as very angry when he was unable to do the procedure because she was “all clenched up”. She was very upset and left his office in tears. In its decision, the ICRC noted that Dr. Miller’s communication with patients had been the subject of previous complaints and that expectations about professional communication had been expressed to him before. The ICRC required Dr. Miller to attend at the College to be cautioned in person about his communication with patients, as well as his record-keeping. Further, Dr. Miller was required to complete a course of one-on-one instruction in communication skills and to prepare a written summary of how the content of the College’s *Practice Guide: Medical Professionalism and College Policies* might apply to his circumstances.

The Committee does not rely on the ICRC decisions for the truth of the conduct alleged by the complainants. Rather, the ICRC’s decisions show that Dr. Miller was made aware repeatedly of the College’s expectations about his professional communications with patients. The degree of the ICRC’s concerns should have been obvious to him from the in-person caution he was given and from the imposition of a mandatory educational program. Further, Dr. Miller received explicit guidance and support in improving his communication skills, in the form of one-on-one instruction and his review of the relevant material in the *Practice Guide*.

A prudent physician would have learned from this experience, recognized the seriousness of the College’s concerns and the impact of his behaviour on his patients, and taken steps to address his deficiencies.

The Committee views Dr. Miller’s prior history with the ICRC as a significant aggravating factor in that Dr. Miller has not taken advantage of the direction he received from the College on those occasions and the opportunities for remediation.

Pattern of Behaviour

Dr. Miller's conduct in this matter is not simply two isolated incidents in the working life of a very busy physician. Instead, the Committee finds that, taken in the context of multiple complaints, repeated guidance and required remediation, Dr. Miller's current misconduct is representative of a pattern of behaviour on his part. The Committee considers this to be an aggravating factor.

Mitigating Factors

In pleading no contest to the allegations, Dr. Miller reduced the time and cost of the discipline process to the College, and avoided the burden on witnesses who may have been called to testify. The Committee puts limited weight on this in mitigation in this case, however, as the agreement between the parties was reached only a short time before a contested hearing was scheduled to commence. As well, the Committee heard no evidence to suggest that Dr. Miller is remorseful or accepts responsibility for his behaviour.

Prior Cases

Counsel for the College and for Dr. Miller provided a joint book of authorities.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Bhatt*, 2016 ONCPSD 10 ("*Bhatt*"), the physician was a general internist who had engaged in disruptive, demeaning, aggressive, and unprofessional behaviour towards colleagues, staff and patients, especially towards women, over a number of years. The physician successfully completed a period of workplace monitoring but resumed his improper behaviour subsequently and continued it even following his referral to the Discipline Committee. The physician admitted the facts and that he had engaged in disgraceful, dishonourable or unprofessional conduct. The jointly-proposed penalty, which the Committee imposed, included a reprimand; a four-month suspension; completion of an intensive course on

communications, workplace interactions and boundaries; workplace monitoring; ongoing psychiatric care; and various practice restrictions.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Waddell*, 2020 ONCPSD 9 (“*Waddell*”), the physician’s local health authority declined to renew his privileges. The physician then sent emails to a wide audience that were unprofessional and offensive and could be perceived as threatening and harassing to specific individuals. As well, he wrote a number of social media posts, widely accessible to the public, that contained unprofessional, far-reaching and unfounded allegations against the health authority, its senior management and some medical staff. Some of the posts disclosed patients’ personal health information without their consent. These actions eroded trust among physicians, the health authority and the community, and undermined the provision of health care in an already under-served region. The physician admitted the facts and that he had engaged in disgraceful, dishonorable, or unprofessional conduct and in conduct unbecoming a physician. The jointly proposed penalty, which the Committee imposed, included a reprimand, a three-month suspension, and individualized instruction in professionalism and communications.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Brand*, 2016 ONCPSD 44 (“*Brand*”), the physician dragged a patient in a long-term care home by his feet along the floor to the patient’s bedroom after the patient refused to have a haircut. The patient was a man in his 70s with severe developmental delays and serious behavioural challenges. The physician admitted the facts and that he had engaged in disgraceful, dishonourable or unprofessional conduct. The jointly proposed penalty, which the Committee imposed, included a reprimand, a two-month suspension, individualized instruction in professional behavior and managing difficult patients, and self-study in medical ethics.

Each of the cases is distinguishable from the present matter, but they represent a range of somewhat similar misconduct and circumstances relevant to the consideration of penalty in the present matter. The misconduct in *Bhatt* occurred over a longer period of

time and involved many patients and professional colleagues. The misconduct in *Brand* was physical in nature as it is, in part, in the present matter. In *Brand*, the physician had a prior finding of disgraceful, dishonourable or unprofessional conduct. There was no such history in *Bhatt* or *Waddell*, nor is there in the present matter. In *Bhatt*, the Committee found that the physician had accepted responsibility for his actions, and, in *Brand*, that the physician had recognized that his behaviour was unacceptable and shown full insight. By contrast, Dr. Miller did not admit the allegations against him, but instead pleaded no contest.

CONCLUSION

The Committee is satisfied that the jointly proposed penalty is appropriate, proportionate, and in keeping with the range in prior decisions.

The three-month period of suspension is a significant sanction and, together with the reprimand, will serve as a specific deterrent to the member. In addition, it will make the profession aware that such misconduct as Dr. Miller's is wholly unacceptable and will not be tolerated.

The reprimand will allow the Committee to express, in a public forum, its abhorrence of Dr. Miller's behaviour. The reprimand and suspension should reassure the public that such serious misconduct will be appropriately dealt with, and should assist in maintaining public confidence in the integrity of the profession and the College's ability to regulate the profession in the public interest.

There is a public interest in effective remediation of a physician, and the Committee accepts this as an appropriate goal in this matter. Dr. Miller's successful completion of a one-on-one program in anger management and impulse control should assist him in this regard.

Public protection will be served by remediation of Dr. Miller's professional behaviour, by deterrence of further misconduct on his part, and by the imposition of a suspension of his certificate of registration.

The parties agree, and the Committee accepts, that Dr. Miller's suspension should begin on October 3, 2020, at his request. This deferral will allow him two months in which to see and/or make appropriate arrangements for the patients in his specialty practice, a number of whom have had their care delayed during the current public health emergency arising from the COVID-19 virus pandemic.

COSTS

The Committee finds that this is an appropriate case in which to award costs, and accepts the submissions of the parties that Dr. Miller pay costs to the College in the amount of \$10,370.00.

ORDER

The Committee stated its findings in paragraph 1 of its written order of July 28, 2020. In that order, the Committee ordered and directed on the matter of penalty and costs as follows:

2. **THE DISCIPLINE COMMITTEE ORDERS** Dr. Miller to attend before the panel to be reprimanded.
3. **THE DISCIPLINE COMMITTEE DIRECTS** the Registrar to suspend Dr. Miller's certificate of registration for a period of three (3) months, commencing on October 3, 2020 at 12:01 a.m.
4. **THE DISCIPLINE COMMITTEE DIRECTS** the Registrar to place the following terms, conditions and limitations on Dr. Miller's certificate of registration effective immediately:

- a. Dr. Miller shall comply with the College Policy “Closing a Medical Practice”;
 - b. Dr. Miller shall successfully complete a one-on-one program acceptable to the College in anger management and impulse control. The program may include formal instruction, treatment/counselling, or a combination thereof, must include a written report to the College by the professional offering the program upon completion of the program, and must be completed within six (6) months from the date of this Order.
5. **THE DISCIPLINE COMMITTEE ORDERS** Dr. Miller to pay costs to the College in the amount of \$10,370.00 within ninety (90) days from the date of this Order.

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

**TEXT of PUBLIC REPRIMAND
Delivered July 28, 2020
in the case of the
COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO
and
DR. ROBERT BARRY MILLER**

Dr. Miller,

Ontarians and your regulator expect professionalism from our physicians at all times. This is not your first complaint; in fact the patient complaint in this case was very similar to six other complaints regarding your communication style over the last few years. This is a longstanding pattern with rudeness, abruptness and shortness in your patient encounters.

You have been given repeated opportunities to improve, including one-on-one communication training and you have not. In fact, your appalling behaviour has escalated to physical contact with a pharmacist colleague. The facts surrounding that event are utterly reprehensible.

The profession and the public expect and deserve civil behaviour and you crossed the line.

It is extremely disappointing to the Committee that you didn't learn from the opportunities your regulator gave you in the past. It reflects very poorly on you.

This significant sanction of a three-month suspension and the reprimand must impress upon you, and the profession, that rudeness, impolite conduct, and certainly physical altercations are not acceptable and will not be tolerated.

This is not an official transcript