NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Joseph Siu-Kan Lee, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity and any information that would disclose the identity of two patients, who were witnesses in prior proceedings before the Committee, whose names were disclosed at the hearing, pursuant to 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.

The Committee also made an order to prohibit the publication of the identity of the complainant witnesses and any information that could disclose their identity pursuant to subsection 47(1) of the *Code*.

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 to a fine of not more than $10,000 for a first offence and not more than $20,000 for a subsequent offence.

Indexed as: Lee (Re)

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

IN THE MATTER OF a Hearing directed
by the Complaints Committee of
the College of Physicians and Surgeons of Ontario
pursuant to Section 26(2) 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. JOSEPH SIU-KAN LEE

PANEL MEMBERS:	DR. L. THURLING D. EATON-KENT DR. S. YOUNG DR. B. TAA (Ph.D.) DR. M. GABEL
Hearing Dates:	**November 12-14, 2008**
Decision Release Date:	**June 10, 2009**
Release of Written Reasons:	**June 10, 2009**

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee of the College of Physicians and Surgeons (the "Committee") heard this matter at Toronto on November 12 to 14, 2008. At the conclusion of the hearing, the Committee reserved its decision with respect to the allegations.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Joseph Siu-Kan Lee committed acts of professional misconduct:

1. 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; and

2. 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 the sexual abuse of a patient.

RESPONSE TO THE ALLEGATIONS

Dr. Lee denied the allegations as set out in the Notice of Hearing.

FACTS AND EVIDENCE

(a) Overview of the Issues

The allegations in this case arise from the alleged conduct of Dr. Lee, who is a gynecologist, in relation to one patient, Patient A, during her appointments with Dr. Lee on two dates in May, 2006.

Patient A alleged that Dr. Lee touched her breasts in a non-medical manner, inappropriately commented on them multiple times, grabbed and licked one of her breasts, suggested inappropriately how her husband should be performing oral sex on her,

told her about his own sexual practices with his wife, and placed his face close to her vagina and made licking sounds.

Dr. Lee denied any memory of Patient A's visits beyond what his chart stated and denied all aspects of the allegations against him. He supported his denials by reference to his chart and his office procedures and the testimony of his office "nurse".

The case raises the following issues:

(1) Did Dr. Lee engage in the conduct that has been alleged against him; and

(2) If he did, did his conduct constitute sexual abuse and/or conduct that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional?

A key issue in this case is the credibility of the complainant and of Dr. Lee. The Committee assessed their credibility based on all of the evidence that was placed before it.

In considering the standard of proof that the College must meet, the Committee paid careful attention to the recent decision of the Supreme Court of Canada in *F.H. v. McDougall*, which confirmed the applicability of the civil standard of proof in all civil cases. Further discussion of this decision and its application to these proceedings follows below.

(b) Interpreter for Patient A

At the outset of Patient A's testimony, the Committee entered into a *voir dire* for the purpose of determining whether Patient A required the assistance of a Spanish language interpreter in giving her testimony. She was examined by counsel for both parties and was questioned by the Committee members for the purpose of determining whether she needed an interpreter in the sense that she would otherwise be prejudiced by a lack of proficiency in English that would prevent her from fully and fairly putting her evidence

before the Committee. At the conclusion of the *voir dire*, the Committee determined that, in the main, Patient A understood the questions she was asked, her replies could be understood, and she was able to clearly convey her version of the events. Due to occasional issues of clarity, and to allow for assistance to Patient A or the Committee when that was needed, the Committee ordered that the interpreter be seated to her left and behind her, where he could hear the questions and answers and be available as needed. The witness, counsel and members of the Committee could seek the interpreter's assistance at any time. All present were in agreement that this was a sensible and pragmatic solution that would best assist the witness, counsel and the Committee. Patient A did use the interpreter on a few occasions, when it was necessary to find an appropriate English word.

(c) Summary of the Evidence

College's Witnesses

Dr. B and Patient A were the witnesses for the College.

Evidence of Dr. B:

Dr. B was Patient A's family physician at the time she was attending Dr. Lee. He brought her chart with him to the hearing and was allowed to refer to it in order to refresh his memory of how long Patient A had been his patient. However, he also had an independent recollection of the meeting at which Patient A told him of events that she alleged had transpired with Dr. Lee. She has been his patient since 2002. He has seen her approximately 23 times, and she is still his patient.

In late May, 2006, Patient A came to his office without an appointment, which was not unusual, as walk-ins to his office were not uncommon. The office staff would squeeze walk-ins into the appointment schedule based on their assessment of urgency. Dr. B saw her that day approximately at mid-day. Dr. B recalled that she was visibly distraught and teary-eyed. She was there to seek his advice, not for treatment of any physical condition. He had a good recollection of what she told him. He testified that he was confused, as he was not certain how to proceed. He told Patient A that he would seek advice himself. She

inquired what her options were under the circumstances, and he replied that he was uncertain how best to proceed but that he would investigate further what he should do, and he would meet with her again. Dr. B was a fully credible witness and his description of Patient A's emotional state was accepted by the Committee as her true emotional state at that time.

Evidence of Patient A:

Patient A is a married, woman in her mid-forties with two children. She trained as a health care professional in her country of origin and, since coming to Canada, she has worked in other areas. Her first language is Spanish. She did not recall the exact date in 2005 when she first saw Dr. Lee, but she recalled that it was in January or February. (Based on Dr. Lee's chart it appeared to be in February, 2005.) She came to see Dr. Lee following a referral that she requested from her family physician, Dr. B. She had found Dr. Lee through a friend, who had seen him. Her reason for seeing Dr. Lee at that time was that she had issues related to irregular bleeding. On that visit, Dr. Lee examined her, did a Pap smear and culture, and gave her some medication, which she described as one pill in a box, which he instructed her to take. She remembered being told that she would be called if there was any abnormality. During that visit, Dr. Lee took a history from her and she then undressed behind a curtain. She was certain that Dr. Lee's nurse was present during the examination. She had no memory of making further appointments or of seeing Dr. Lee again until May, 2006. She could not remember an appointment in March, 2005, which was documented in Dr. Lee's chart.

Patient A made an appointment with Dr. Lee for mid-May, 2006 to do another Pap test. She testified that, during that visit, she told Dr. Lee that, in January of that year, she had gone to the Caribbean, where she had plastic surgery and cosmetic breast surgery.
Dr. Lee performed a pelvic examination with a nurse in the room during the procedure. Following the examination that day, and after getting dressed, she mentioned to Dr. Lee that she was concerned about the breast surgery as she had tender breasts and was afraid that her husband might cause her pain while touching her breasts. He then said "OK, let me check your breasts". He asked her to lie down, which she did. She opened her blouse

and then her bra, which opened from the front. The nurse was not present at that time. She testified that Dr. Lee examined her breasts in a way that she had never been examined before, using a sweeping motion over both breasts. She testified that, while Dr. Lee was standing over her, with his hands open, he swept his hands over her breasts about three times, while saying that the job done on the breast surgery was “nice”, “amazing” and “beautiful”. He said, “Oh, beautiful. Amazing. Beautiful job. They did amazing job”. She testified that she did not complain about this at the time as she could not be sure, due to her breast swelling, if the examination was inappropriate. On cross-examination, she amplified that she had never been touched that way; Dr. Lee had touched her “more like a man” than like a doctor. While in retrospect she views what happened that day as salacious, at the time, while she was disconcerted by the type of examination and words used, she thought that the nature of the examination might have been due to the breast surgery and the resultant swelling.

Patient A saw Dr. Lee again in late May, 2006. She had returned for the results of the previous tests and further information on a tubal ligation referral she had requested on the previous visit. Three days before this appointment, she had been having sex with her husband (including oral sex), and he had pulled on her minor labia, causing severe pain that resulted in her not being able to move. She reported that, one hour later, she felt better, but she still felt that something was wrong with her genitals. Her idea was to ask Dr. Lee to check her.

At that visit, she and Dr. Lee first talked at his desk in the usual manner and she was told that “everything is okay”, that her test results were perfect. She told him what happened with her husband. Dr. Lee said “let me check you”, and he told her to lie down. She stated that she lay down, lifted her skirt, and pulled her panties to the side. He told her to fully remove her panties, and to slide down to the end of the table. He moved her labia from one side to the other with his finger, as he examined them. He advised her that one labia was larger than the other, that that was normal, and that there was nothing to do about it, and that her clitoris was very healthy. He then said, “Tell your husband not to pull.” Patient A stated that Dr. Lee’s face came very close to her genitals–what she

estimated as four to five inches. He put his tongue out and made licking sounds at that time and told her, “Your husband has to lick like this…. Just lick, lick in here.… Tell your husband not to pull, just lick.” She remembered putting her hands over her genitals, as she felt him approach so close to her. She testified that Dr. Lee told her how he would perform oral sex on his wife prior to intercourse: “I lick her, and then when she’s ready, I put it inside, and she have two orgasms.” Patient A testified that Dr. Lee went to his desk, while she was still lying on the table, and he then said that he wanted to do another test. He took what looked like a long Q-tip and inserted it into her vagina. He then did a test using a long tube.

Patient A testified that she was certain that the nurse was not present during the examination of her labia. As to whether the nurse was present for the “Q-tip test”, she stated that she did not remember and could not “say 100 percent sure”, although she acknowledged it was possible. At one point in cross-examination, she stated that the nurse was there during the Q-tip test, but in answer to questions posed to her after that, she continued to express uncertainty as to whether the nurse was present during the Q-tip test. The Committee is satisfied that, taken in its entirety, Patient A’s evidence was that she was not certain whether or not the nurse was present during the Q-tip test.

Following this portion of the examination, when she was standing by the side of the examination table fully clothed, with her back against the table, Dr. Lee said “Okay, let me check your breasts again.” He told her to sit on the table, and he said, “Open your blouse and then open your bra.” She did this, and then he told her to “lie down and close your eyes.”

She did as he asked, and she stated that, before she was completely lying down, Dr. Lee then “grabbed my right breast with [his] mouth”. She said that his mouth was “very wet, he was very moist”. She asked him, “what kind of test is that, Doctor?” and he replied “I want to show you how your husband supposed to kiss your breasts.” She told him at that point that she knew what she liked and he did not have to show her. She indicated that she pushed him away by his forehead, and that it felt “very wet. It’s sweaty.” She stated

that this lasted only a few seconds, and then he returned to his seat at the desk. As she was coming off the table, the nurse came into the room. She indicated that the nurse "just open the door." Patient A then testified that Dr. Lee "said something, I don't know what he said, but there was–I don't know, there was no English. But he said two/three words, she went outside and he closed door again." He then told her to return two weeks after her tubal ligation surgery. As he was saying this, he was writing in a notebook, and his hand was shaking. As she was leaving, he told her that she should not get pregnant before the surgery. Patient A then proceeded to take the test material to the laboratory, went to her car where she sat for somewhere between five and ten minutes thinking about what to do, and then finally left the parking lot and went to see Dr. B, to tell him what had happened. She never returned to see Dr. Lee again.

Dr. Lee's Evidence

Dr. Lee testified in his own defence, and he also called Ms. C to give evidence.

Evidence of Dr. Lee:

Dr. Lee is a 61-year-old physician, married with two children, who received his M.D. in 1974. He received a specialty certification in Obstetrics and Gynecology in 1979. He started a private practice following a year of postgraduate training in amniocentesis. At present, twenty percent of his practice is office obstetrics, and the remainder is gynecology. He sees as many as 50 to 60 patients per day in his part-time practice. His staff consists of a receptionist, described as Caucasian and non-Chinese speaking, and a "nurse," Ms. C, who is bilingual (Chinese and English). She is certified as an RN in Hong Kong, but not in Canada. Dr. Lee is fluent in English and also speaks Chinese.

Dr. Lee described his standard office procedure, which, while not written down, is well-known to his staff and is followed rigorously. Ms. C brings patients to one of the two examining rooms, where the patients wait for Dr. Lee. He will enter and take a history as the patient sits in a chair next to the desk. If he determines that a physical examination is necessary, he will press a buzzer and Ms. C enters. He testified that the office policy is that a nurse be present for all physical examinations and that no physical examinations

take place unless a nurse is present. Ms. C instructs the patient to undress as required behind a drawn curtain and provides a cover. Dr. Lee stays at his desk writing while this is happening, and Ms. C stays with him. When the patient is finished undressing, he starts the examination. Ms. C stays with him during the examination and assists, including preparing any laboratory specimens that he collects. After the examination is finished, Dr. Lee will stay at his desk while the patient gets dressed behind the curtain. Ms. C does not leave the room until the patient is dressed. While in the past he used to leave during the robing and disrobing, he finds that he can do the charts during this time. As he no longer does surgery or deliveries, Ms. C will take his referral forms for the patients he refers to specialists and will proceed to arrange the referrals and the required fax forms. She will then return with a copy of the referral form for the patient. She also does all the autoclaving and laboratory requests.

Dr. Lee testified that Ms. C is always present during pelvic examinations, although the receptionist may attend during Ms. C's lunch breaks. He testified that, for at least 15 years, it had been his rigid policy that when he was conducting an intimate examination of a patient (whether of the vagina or the breasts) a nurse is always present, and that he did not vary from this. However, on cross-examination, he was taken to evidence that he gave at a previous hearing that, in 1995, he examined a patient's breasts without a nurse in the room. He acknowledged that, for obstetrical patients at that time, he did not have a nurse present during intimate examinations. He also acknowledged that, at a prior hearing in 1989, he had told another panel that he had changed his practice and now had staff present for such examinations. However, he testified that he was referring then to gynecological patients and, in fact, he did change his practice in respect of gynecological examinations after 1989.

Dr. Lee testified that the examination room is never locked and the door may be partially open or closed. The staff may knock and enter when they need to without waiting for him to invite them in. They are in and out of his examination rooms multiple times per day. As well, Dr. Lee testified (and Ms. C confirmed in her testimony) that the receptionist comes into the room more often than does Ms. C, as she gets calls from patients inquiring

about results of tests, and she needs to bring the patient's chart to Dr. Lee so that he can answer the inquiries. The office policy is that, whenever patients call, Ms. C or the receptionist will get the chart and will knock and enter to get the problem resolved as soon as possible. Dr. Lee stated that this office procedure was constant and the process did not vary.

With regard to his charts, Dr. Lee stated that the chart is a very important document and is a full record of what transpired. He knows the importance of documenting every visit, and that the chart should accurately record each patient encounter, including such items as adding the notation "np" to each visit where there was an examination to show that the nurse was present. He clearly expressed his concern that his charts accurately and fully reflected what transpired during a visit.

Dr. Lee testified that he had no independent memory of Patient A or his dealings with her. The chart was entered into evidence as a business record for the truth of its contents. Dr. Lee's evidence of what transpired during Patient A's visits was based solely on what was written in the chart.

According to the chart, Dr. Lee first saw Patient A in February, 2005, for post-coital spotting and vaginal itching. His chart stated that he did a Pap smear and culture and attempted an endometrial biopsy. He made a notation to use a tenaculum on a next visit. He prescribed an antifungal agent. There is a note "IUD or TL" which indicated that birth control was a topic for discussion. He testified that a "squiggle" on the left side of the chart meant "nurse present".

The next recorded visit was in March, 2005. This was the visit of which Patient A had no recollection. The chart stated that Patient A "used cream", when her last menstrual period was, "O/E abd.", meaning that he examined her abdomen, and it noted a "pelvic culture". There was no "squiggle" on the chart for that date that would signify that a nurse was present. Dr. Lee testified that the nurse was present; he had just forgotten to put it in.

In mid-May, 2006, there was a note in the chart that Patient A had had an "Abdominoplasty" and "lifting breast." At this visit, which was the visit during which Patient A stated that Dr. Lee felt her breasts inappropriately and inappropriately commented on them, he charted that he again did a Pap smear, culture, and "EB", which he said meant an endometrial biopsy. The chart contained the "squiggle" that he testified meant "nurse present". There is no note in the chart of a breast examination, and he stated that he therefore did not do one. He testified that he knew he had not done a breast examination because he always writes down a finding when he conducts an examination. He also denied making any comment to Patient A to the effect that the surgeon had done a beautiful job on her breasts, denied that he would have touched her breasts in the way in which she described, and denied touching her at any time during the examination for a sexual purpose. He testified that he rarely conducted breast examinations due to his personal preference and because, if he were to find a problem, he would have to refer the patient to a specialist anyway.

The chart for May, 2006 also showed that Patient A had requested a tubal ligation, and that Dr. Lee made a referral for Patient A to the surgeon to whom he referred patients for that type of surgery. Ms. C also wrote in the chart that she had confirmed the time and place with Patient A for her appointment with the surgeon in May, 2006.

The chart for the late May, 2006 visit contained the same "squiggle" that Dr. Lee said meant that a nurse was present. It also noted "sexual dysfunction, premature ejaculation" and a complaint of a "mass in" which Dr. Lee interpreted to mean in Patient A's vagina. The chart stated that "o/e" (on examination): "vulva L bigger than R pulled during oral sex felt bigger" and patient was "reassured and no treatment required". Dr. Lee testified that the presence of a lab report on a vaginal culture in the chart showed that he had done a Q-tip examination, although he forgot to chart it. As previously noted, Dr. Lee had no independent memory of this visit, which was the time that Patient A testified that he came close to her vagina, made licking sounds, and also licked her breast. He denied these allegations. He stated that he never examined her breasts, never put his mouth on them, and never touched her for other than medical purposes. He acknowledged that he would

have touched her labia and inspected it for tenderness or lesion, and that his face would have been about a foot away from her vagina. He further acknowledged that he might have given Patient A what he considered to be common sense advice about her husband being gentle with her during oral sex, but he denied that he would have made comments to her about his own sexual practices with his wife.

On direct examination regarding this last visit, Dr. Lee stated "I would have performed a visual inspection of the external genitalia. *She was complaining, bitterly complaining, of the left vulva bigger than the right, and that she had, you know, discomfort with oral sex,* and felt bigger, abnormal and that maybe a mass in her vagina" [emphasis added]. The Committee noted that there was no notation in the chart that Patient A had "bitterly" complained about these matters.

Evidence of Ms. C:

Ms. C confirmed the office procedures described by Dr. Lee, and confirmed the roles that she and the receptionist performed. She remembered Patient A and remembered making the appointment for her for the tubal ligation. She testified that Dr. Lee was notified by the police of the allegations by Patient A in August 2006, and that, the next morning, he told her and the receptionist about the allegations and they looked for and reviewed Patient A's chart at that time.

Drawings and Photographs

A drawing of the layout of Dr. Lee's office was tendered into evidence, as well as photographs from multiple perspectives. The witnesses generally agreed that these exhibits accurately represented the layout of the office at the time of Patient A's appointments with Dr. Lee.

FINDINGS

The Committee is aware that the burden is on the College to prove the allegations against Dr. Lee. The standard of proof that the College must meet was set out in the recent case

of *F.H. v. McDougall*, as noted in the introduction. In *McDougall*, the Supreme Court of Canada stated that there is only *one* standard of proof in civil matters, and that is the balance of probabilities. In all civil cases the trial judge (the Committee in this case) must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred. Evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

Credibility of Patient A:

The Committee found that the testimony of Patient A was, on the whole, internally and externally consistent on the main points in contention. She was unwavering on these key points. When she was not sure of certain facts, such as the sequence of dressing and undressing, she admitted to her uncertainty. She was forthright about her reasons for not reporting Dr. Lee when she felt that there was something different about the first breast examination. She gave Dr. Lee the benefit of the doubt. The Committee finds this approach to be congruent with the perceptions she had at the time of the experience and the re-consideration in light of the events in late May, 2006. She was emotional in her descriptions, but did not exaggerate or exhibit anger or vindictiveness. Her testimony of being upset after the last examination was confirmed by Dr. B, and would be an expected reaction under the circumstances that she described. She was able to express herself well, and did not hide issues that might be embarrassing, although she presented those issues with a sense of embarrassment that was congruent with the material she was discussing. She was cooperative on both direct and cross-examination.

Her testimony was not shaken during the cross-examination in its essential components. The only point on which there was definite contradiction to her testimony was with respect to the office visit of March, 2005, a month after her first visit. She had no recall of this visit, but the chart showed that it had occurred. Of interest is that, on this visit, the chart showed that there was a “pelvic culture” done. The Committee concluded that, as there was no issue for her with this follow-up appointment, the fact that she had no memory of it does not detract from her credibility. The Committee accepted her

testimony as credible but, as will be noted in the analysis of the evidence, it looked at other possible explanations for what she experienced.

Credibility of Dr. Lee:

The Committee did not find Dr. Lee to be credible. He began his testimony confidently, concisely and totally knowledgeable about a myriad of details of the office, his staff, and both the necessity for, and the reasons why, his charts must be accurate. However, in relation to Patient A, he professed a total memory lapse. While he does see many patients a week in his part-time practice, he admitted that he sees few if any patients who have had plastic surgery, and even fewer who have undergone both breast and abdominal procedures. One would therefore have expected Patient A to stand out in his memory. In addition, her coming to him with the complaint of having her labia traumatized during oral intercourse and discussing her husband's sexual problems might also well cause her to stand out in a practice. Furthermore, the fact that Dr. Lee was informed of this patient's complaints about him by the police less than three months after her last visit in May, 2006, again suggests that a total memory lapse with regard to this patient is highly unlikely. The Committee is of the view that Dr. Lee's claim of a total lack of memory regarding this recent patient is not credible.

The Committee was particularly struck by the "slip-of-the-tongue" described above in Dr. Lee's testimony. In response to the question of what sort of examination he would have performed in these circumstances, Dr. Lee replied: "I would have performed a visual inspection of the external genitalia. *She was complaining, bitterly complaining, of the left vulva bigger than the right, and that she had, you know, discomfort with oral sex*, and felt bigger, abnormal and that maybe a mass in her vagina" [emphasis added]. There was no reference in the chart to Patient A "bitterly complaining". This indicates to the Committee that Dr. Lee had a greater memory of Patient A than he testified to, and, taken with the improbability that he would fail to remember her at all considering the issues mentioned above, this brings discredit to the entirety of Dr. Lee's testimony. The Committee was of the opinion that Dr. Lee must have known who Patient A was and, at the least, would have been reminded of their interaction when the police told him of the

allegations. Ms. C had no difficulty remembering Patient A, which adds to the lack of credibility of Dr. Lee's evidence that he had no memory of her whatsoever. Taken together with the testimony quoted above, the complete memory lapse is beyond belief and does not allow the Committee to give any weight to his evidence on the critical issues.

There were also other areas that detracted from Dr. Lee's credibility. He described the chart as an accurate reflection of his practice. He testified that he made a notation "np" ("nurse present") on his chart to signify that his nurse was present during an examination. When he was confronted with the fact that, at one of Patient A's appointments, he had failed to make the notation even though he testified that the nurse was present, he testified that he "forgot" to put it in. When it was put to him that his chart was therefore not accurate, he testified that accuracy was about history, physical findings and diagnosis, and that failure to note on the chart whether a nurse was present did not reflect the accuracy of the chart. This splitting of hairs, rather than being straightforward about a charting error, further led the Committee to question how straightforward he had been in his evidence.

<u>The Incident of mid-May, 2006:</u>

After considering all the evidence, the Committee finds that Dr. Lee did conduct a breast examination on Patient A in mid-May, 2006, and that he did make the comments to Patient A during this examination about her breasts to which she testified. As noted above, the Committee considered Patient A to be a credible witness and it believed her testimony regarding what had occurred. The Committee did not believe Dr. Lee's denial of what Patient A alleged, nor his evidence that he had a total lack of any memory of the patient-doctor interaction.

Patient A's evidence was that the breast examination that day occurred after she had already gotten dressed following a pelvic examination during which the nurse was present. She testified that the nurse had left the room at the time of the breast examination. Although both Dr. Lee and Ms. C testified that Ms. C was always present

during breast examinations, they also both testified that the office practice was that she would leave the room once the patient was dressed. The Committee found Ms. C to be a credible witness. However she could not testify to what occurred when she was not in the examining room. The Committee accepts Patient A's testimony that the nurse had left the room by the time Dr. Lee conducted the breast examination on her.

Having found that Dr. Lee conducted the breast examination and uttered the words to which Patient A testified, the Committee next considered whether Dr. Lee's words and conduct constituted sexual abuse or conduct that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. In particular, the Committee considered whether Patient A's perceptions and memories could fit, in any way, into a normal, professional interaction between a doctor and patient.

The Committee was not persuaded on the balance of probabilities that the breast examination was clinically inappropriate. Considering that Patient A indicated that she had tender, swollen breasts, a light touch over the entire breast may have been appropriate, and was later misinterpreted as inappropriate by Patient A.

The Committee finds, however, that the words used by Dr. Lee to describe Patient A's breasts ("beautiful job", *etc.*) were unacceptable, inappropriate and unprofessional. Taken in their full context, with Dr. Lee uttering the words as he swept his hands over Patient A's breasts at least three times, the Committee concluded that the words were demeaning and could not be construed as simply a clinical comment by Dr. Lee concerning the surgical result of Patient A's breast reconstruction. Dr. Lee stated that, if he had said such words, it would be unprofessional. The Committee agrees with him on that point. The Committee therefore concluded that in uttering these words, Dr. Lee engaged in disgraceful, dishonourable and unprofessional conduct. However, the Committee was not satisfied on the balance of probabilities that the utterances could be construed as remarks of a sexual nature that would meet the definition of sexual abuse.

The Incidents of late May, 2006:

On the issue of the vaginal examination in late May, 2006, Patient A described Dr. Lee's face as being (what the Committee interprets from her hand motions during testimony) about five inches away from her external genitalia. Dr. Lee stated that he would have been more like twelve inches away during the examination. With Patient A prone on the examination table and the angle she would have observed in lifting her head, it is entirely possible that she underestimated his distance from her. The Committee finds that it cannot conclude that Dr. Lee was as close to her as she stated he was. The Committee is also not satisfied, on the balance of probabilities, that there was any inappropriate vaginal touching during this examination.

Having considered all the evidence, the Committee accepts Patient A's evidence and finds that Dr. Lee made "licking" sounds during this examination, and that Dr. Lee made the statements that Patient A ascribed to him about how Patient A's husband ought to "lick" her, and concerning his own sexual practices with his wife. The Committee concluded that these sounds and statements were inappropriate and constituted disgraceful, dishonourable and unprofessional conduct.

Dr. Lee submitted that it was improbable that he engaged in the inappropriate licking sounds and comments during the vaginal examination in late May because the nurse, Ms. C, was in the room. Patient A was very clear in her testimony that Ms. C was not present during the first part of the vaginal examination (the examination of her labia), which was when Dr. Lee engaged in his inappropriate conduct although she was unsure about whether Ms. C was there during the second part (the Q-tip examination). Ms. C testified that she was present during all physical examinations during the 2006 time period and that she would not have left the room before the patient had dressed. (She would not have been present during lunch breaks–the receptionist would have–but there is no suggestion that Ms. C was on lunch break during Patient A's appointment in late May, 2006.) While Ms. C testified that the examination of Patient A's labia was the type of examination for which she would have been present, she did not testify that she was present when Dr. Lee

performed this examination in May – in fact, she gave no evidence at all about what happened during any of Patient A's appointments with Dr. Lee. While Dr. Lee's chart for that date contains the notation "np" for "nurse present", it was apparent from Dr. Lee's evidence that his chart was not always accurate. For example, he acknowledged that for one of Patient A's appointments, he "forgot" to write the important "nurse present" notation, and on another occasion he forgot to chart an examination that the presence of laboratory results shows he must have done. The Committee accepts Patient A's evidence on this point and finds that Ms. C was not present during Dr. Lee's examination of Patient A's labia.

As noted above, Patient A was clearly uncertain whether Ms. C was present for the Q-tip examination. Patient A testified that she did not get up from the table between the labia examination and the Q-tip examination. Ms. C testified that she never entered the examination room to find a patient already lying on the examination table. The Committee therefore considers it unlikely that Ms. C was present for the Q-tip examination. The Committee noted that Patient A had previously told a College investigator (and had testified at Dr. Lee's criminal trial) that the nurse was present during the Q-tip examination. Given her candour in testifying that she was unsure about whether Ms. C was present during the Q-tip examination and her overall credibility, the Committee did not consider that these previous statements detracted from the reliability of Patient A's evidence on this issue.

The Committee accepts Patient A's evidence and finds that after Dr. Lee performed the vaginal swab and Patient A dressed, he asked her to lie down and close her eyes, with her breasts exposed, and that Dr. Lee then placed his mouth on her breast. The Committee also accepts Patient A's evidence concerning what Dr. Lee said to her ("I want to show you how your husband supposed to kiss your breasts") and finds that he made those statements. Patient A testified that Ms. C entered the examination room uninvited immediately after this, as she was standing down from the examination table. Ms. C and Dr. Lee conversed in a language other than English and Ms. C then left the room. Although Patient A had previously told a police detective that the time at which the nurse

entered the examination room was as she was pulling up her panties after the vaginal examination, Patient A was very clear in her evidence at this hearing that she was closing her blouse when Ms. C came in, not pulling up her panties. The Committee believed Patient A and accepted her evidence. Ms. C gave no evidence about when she entered the room and no evidence at all about the late May, 2006 appointment.

The Committee finds Dr. Lee's behaviour in placing his mouth on Patient A's breast during the late May, 2006 examination to be sexual abuse as defined in the *Health Professions Procedural Code* and to be disgraceful, dishonourable and unprofessional conduct. The Committee also finds Dr. Lee's remarks to Patient A to be disgraceful, dishonourable and unprofessional conduct.

In arriving at its findings, the Committee took into consideration the submissions of Dr. Lee's counsel that, on the evidence, there were objective factors that made it unlikely that Dr. Lee would or did behave as Patient A testified. In effect, he would not have had the opportunity to behave as described by Patient A because the risk would have been too great. In particular, he pointed to evidence of office policies and procedures that the door to the examining room was never locked and that both Ms. C and the receptionist could, and often did, enter the examining room at will (described as "knock and enter"). The Committee accepts that it may have been risky for Dr. Lee to have engaged in the behaviour to which Patient A testified, but it does not accept that the risk in this case means that he did not engage in it. Patient A testified that Dr. Lee's placing of his mouth on her breast happened very quickly and Dr. Lee may well have thought that it was unlikely that anyone would "knock and enter" during that short time.

Conclusion:

In summary, the Committee is satisfied on the balance of probabilities, based on clear, convincing and cogent evidence, that Dr. Lee committed the following acts of professional misconduct:

(a) Dr. Lee engaged in the sexual abuse of his patient Patient A by placing his mouth on her breast in late May, 2006, and in so doing he engaged in conduct or an act relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable and unprofessional; and

(b) In making inappropriate comments about Patient A's breasts in mid-May, 2006, in making "licking" sounds and inappropriate comments about how Patient A's husband ought to "lick" her, and concerning his own sexual practices with his wife, during his examination of Patient A's labia in late May, 2006, and in making inappropriate comments to Patient A after he placed his mouth on her breast, Dr. Lee engaged in conduct or acts relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable and unprofessional.

The Committee requests the Hearings Office to schedule a penalty hearing at the earliest opportunity.

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Joseph Siu-Kan Lee, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity and any information that would disclose the identity of two patients, who were witnesses in prior proceedings before the Committee, whose names were disclosed at the hearing, pursuant to 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.

The Committee also made an order to prohibit the publication of the identity of the complainant witnesses and any information that could disclose their identity pursuant to subsection 47(1) of the *Code*.

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 to a fine of not more than $10,000 for a first offence and not more than $20,000 for a subsequent offence.

Indexed as: Lee (Re)

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

IN THE MATTER OF a Hearing directed
by the Complaints Committee of
the College of Physicians and Surgeons of Ontario
pursuant to Section 26(2) 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. JOSEPH SIU-KAN LEE

PANEL MEMBERS: **DR. L. THURLING (CHAIR)**
D. EATON-KENT
DR. M. GABEL
DR. B. TAA (Ph.D.)
DR. S. YOUNG

Penalty Hearing Date: **January 27, 2010**
Penalty Decision Date: **June 8, 2010**
Release of Written Reasons on Penalty: **June 8, 2010**

PUBLICATION BAN

PENALTY AND REASONS FOR PENALTY

The Discipline Committee of the College of Physicians and Surgeons of Ontario heard this matter at Toronto on November 12 to 14, 2008. At the conclusion of the hearing, the Committee reserved its decision. On June 10, 2009, the Committee delivered its written decision and reasons and found that Dr. Lee had committed acts of professional misconduct, in that he engaged in the sexual abuse of a patient, and he engaged in conduct or acts relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable and unprofessional.

The Committee heard evidence and submissions on penalty on January 27, 2010, and reserved its decision.

In arriving at its penalty decision, the Committee took into account the submissions of counsel, as well as the *viva voce* evidence and exhibits.

DECISION AND REASONS ON PENALTY

General Penalty Principles

In the case of *Moore v. College of Physicians and Surgeons of Ontario*, [2003] O.J. No. 5200 at para. 7, the Divisional Court outlined considerations with respect to penalty:

> In our view, the sentencing process involves a balancing of various factors with the protection of the public being the guiding principle. These factors include general and specific deterrence, proportionality, as well as the need for the College of Physicians and Surgeons to maintain its credibility in the community and with its members as a self-governing body.

As noted in *Tse v. College of Physicians and Surgeons of Ontario* (1979), 23 O.R. (2d) 649 (Div. Ct.) at pp. 8-9, the proportionality of a penalty involves consideration of the seriousness of the conduct, which includes the impact of the conduct on its victims. In *R. v. Solowan*, [2008] 3 S.C.R. 309, the Court wrote (at para. 3): “Unwarranted resort to maximum sentences is adequately precluded by proper application of those principles, notably the fundamental principle of proportionality….” and noted that it was appropriate “to impose the least restrictive sanction appropriate in the circumstances.”

The sexual abuse committed by Dr. Lee is not the type of sexual abuse for which revocation is mandatory, but revocation is an option that is open to the Committee in considering the range of penalties appropriate under the circumstances.

Evidence

The Committee heard from Dr. X, who was called as a witness by Dr. Lee and was qualified as an expert in psychiatric risk assessment. He interviewed Dr. Lee, and a social worker under his delegation interviewed "collateral" sources consisting of Dr. Lee's present wife, one of the nurses who functioned as a chaperone for Dr. Lee between January 2008 (when Dr. Lee was required by order of the Committee to have a chaperone during all patient interactions) and October 2009, and one of Dr. Lee's office assistants. Dr. X also reviewed a psychological consultation report provided by Dr. Y. On the issue of whether Dr. Lee is accepting responsibility for the allegations, Dr. X opined that this would depend on "whether one considers the court of law or the discipline panel of the CPSO as having the final authority to adjudicate the facts of the case." The Committee viewed this as showing a lack of understanding of the different roles of, and the different standards of proof in, each of these institutions.

Dr. Lee was administered a variety of psychological tests, including the HCR-20, which is a checklist of risk factors for violent behaviour, and the Hare Psychopathy Check-List Screening Version (Hare PCL-SV) as well as others.

Dr. X's conclusion was that Dr. Lee represented a low risk of reoffending. He found no psychiatric diagnosis or personality disorder, and based on psychological tests as well as interviews, he could find no factors that would indicate that Dr. Lee would not follow any orders that the Committee might impose. He also found that Dr. Lee had a low propensity for violence and aggression. He indicated that Dr. Lee is "functioning well in all domains of life and does not require psychotherapeutic intervention." He also noted that while Dr. Lee is willing to have a chaperone present for all patient interactions, he denies the findings of inappropriate behaviour.

The Committee was concerned that Dr. X did not interview more significant “collateral sources”. Two of the three people who were interviewed for his report, Dr. Lee’s wife and his office assistant, have a definite interest in a positive outcome for Dr. Lee, and cannot be considered neutral. The Committee might have given the report more weight if some of Dr. Lee’s fellow physicians with whom he interacted professionally, had been interviewed. College counsel, in his submissions, noted that as Dr. Lee lacked credibility as determined by this Committee, and this raised the question of whether he had been truthful with Dr. X – the trust to be placed in his report would only be as good as the information provided by Dr. Lee. The Committee considered this, but also noted that the tests performed by Dr. X and his colleagues have built-in validity scales.

On the whole, Dr. X’s testimony and his conclusions were helpful to the Committee in concluding that Dr. Lee does not have a psychiatric illness or personality disorder and that he is functioning well. However, given the Committee’s findings and the absence of any interviews in the report with professional colleagues of Dr. Lee, Dr. X’s opinion did not provide the Committee with any degree of comfort that public safety would be protected if Dr. Lee were permitted to practise unsupervised.

The Committee was presented with the victim impact statement of Patient A. It provided a picture of a woman profoundly affected by the incidents. It contained a summary of the difficulties she has experienced: guilt, unwarranted blaming of her husband, distrust of physicians, physical symptoms, reduced educational accomplishments, and other areas of concern. The Committee takes this letter as a credible statement of the effects of Dr. Lee’s actions on the complainant and has given it meaningful weight in its decision.

Dr. Lee submitted a “Brief of Character References” containing 14 letters of positive comments. The Committee notes that there is only one letter from a physician who has had any association with him. The Committee would have expected to see letters from colleagues he has worked with when at hospitals, and from the physicians he at present refers to routinely, as they would be expected to have insight into Dr. Lee’s character.

The Committee does not doubt the sincerity of the writers of the letters, especially his satisfied patients, and the truth of their own experiences with Dr. Lee. However, the Committee notes that in *Rosen (Re)*, [1999] O.C.P.S.D. No. 19, the Discipline Committee wrote:

> In argument counsel for the College asked the Committee to give little if any weight to the evidence of good character. Justice Sopinka in the case of *Regina v. Profit* [[1993] 3 S.C.R. 637] wrote that as a matter of weight, the trial judge is entitled to find that the propensity value of character evidence as to morality is diminished in such cases.

Justice Sopinka also wrote in *Regina v. Profit*: "Sexual misconduct occurs in private and in most cases will not be reflected in the reputation in the community of the accused for morality." The Committee therefore gave little weight to these letters in its decision.

The Committee considered mitigating factors to be that Dr. Lee has no prior record with the College, the transgression involved a single patient four years ago, the Committee heard of no further reported incidents, nor of any violation of the terms under which he has been practising since providing an undertaking to the College, and the favourable opinion (albeit with the stated reservations of the Committee) of Dr. X.

Aggravating factors include the seriousness of the boundary violation and the long-term effect on the complainant.

The Committee reiterates that the penalty must meet the important principles which apply to a discipline proceeding. The foremost is protection of the public from wrongful actions of the member. Additional criteria are the specific deterrence of Dr. Lee, sending a message to the profession concerning unacceptable conduct and its consequences (general deterrence), maintenance of public confidence in the profession and its ability to self-regulate, and, where appropriate, rehabilitation.

The issue of proportionality was also of concern to the Committee. While the Committee disagrees that the penalty of revocation is a "professional death sentence," and is of the

opinion that that outmoded terminology should be dropped from use, it does not see this case as reaching the level required for revocation. The Committee reviewed six prior decisions provided by counsel for Dr. Lee in which a finding of sexual abuse did not result in revocation, and eleven in which it did. No two cases are exactly alike, and while these prior decisions provide guidance, the Committee is aware that it is not bound by them. The particular circumstances of this case guided the Committee's decision. The mitigating factors listed above, as well as a comparison between Dr. Lee's conduct and the conduct of the physicians in the previous cases in which revocation was ordered, which was more serious, caused the Committee to conclude that Dr. Lee's transgressions were not of a degree that warranted revocation of his certificate.

The Committee examined the length of suspension ordered in each of the prior decisions it reviewed in light of the circumstances of that case. The suspensions ordered ranged from three months to one year. The Committee gave the most weight to the more recent cases decided by discipline panels. *Noriega* (2003) involved inappropriate touching of the breasts and the clitoris and vaginal area of a 17-year-old. The penalty was a net suspension of nine months. In *Henderson* (2005), there was kissing and fondling of a patient's breasts, kissing and hugging outside the examination room and inappropriate remarks to a patient. The physician had a previous finding of professional misconduct. His certificate of registration was ordered suspended for nine months. In *Sharma* (2004), the physician conducted inappropriate breast examinations, failed to leave the room while patients undressed and, among other issues, inserted his fingers into a patient's vagina while touching his own genitals. A six-month suspension was ordered. *Gorman* (2007) was a psychiatrist who engaged in sexual touching and a simulated act of sexual intercourse with a patient. He was in a long-term psychoanalytical relationship with this patient. The Committee ordered a one-year net suspension if other conditions were met. Each of these decisions involved sexual transgressions of various degrees. Comparisons of behaviour are difficult as each situation is unique and difficult for the patient. Dr. Lee's actions were not with a psychiatric patient or a teenager, but were invasive and serious. The Committee reiterates that proportionality has to be one of the guiding principles. These considerations guided the Committee's decision as to the length of

suspension. The Committee finds that six months is a proper and proportional length of suspension in light of the circumstances of this case.

Dr. Lee's counsel proposed that he take the College Ethics course and Boundaries course. The Committee agrees that he should do so, and is therefore imposing successful completion of those courses as a term, condition and limitation of his certificate of registration. The Committee does not accept the submission on behalf of Dr. Lee that part of the suspension should be suspended upon Dr. Lee's completion of these courses. The Committee is of the opinion that each aspect of a penalty order should stand on its own. The length of a suspension should not depend on the fulfilling of other terms of the penalty order. All aspects of the penalty order should fit together into a coherent whole.

The Committee believes that an appropriate amount of time should be made available for the orderly closure of Dr. Lee's practice, prior to the commencement of his suspension, for the benefit of his patients.

The Committee agrees as well with the submission on behalf of Dr. Lee that chaperoning of all his patient encounters (not just the physical examination portion) should be mandatory and in effect for an indefinite period of time. This will afford maximum protection to the public and ensure that all of Dr. Lee's patients are given the respect they are entitled to.

Furthermore, the prominent display of signs in English and other appropriate languages in Dr. Lee's office stating that Dr. Lee is required to have a chaperone would complement the order and add to public protection.

Dr. Lee has caused harm to his patient who may well, if she chooses, require extended counselling. She may claim funding for such counselling from the College, to a maximum amount, under the program established under section 85.7 of the Health Professions Procedural Code. Counsel for the College informed the Committee that the maximum amount was $13,130. Dr. Lee must bear the burden of any such funding by the

College of this counselling. He must therefore reimburse the College for any funding that it provides to this patient, and he must post security acceptable to the College to guarantee such payment.

A reprimand is an appropriate way to express the profession's condemnation of Dr. Lee's professional misconduct. It will also help inform the public of the Committee's concerns, and will hopefully aid Dr. Lee in understanding his transgressions and assist in framing his self-rehabilitation.

Costs

In an appropriate case, the Committee may, in its discretion, order a member whom it has found committed an act of professional misconduct to pay all or part of, among other things, the College's costs and expenses incurred in conducting the hearing. The Committee considered this to be an appropriate case considering the severity and egregious nature of the professional misconduct and the effects on the patient. On the other hand, the hearing proceeded expeditiously, with no issues raised by Dr. Lee to impede the speedy resolution of this matter. The College asked for costs for four hearing days, at the daily tariff of $3,650, totaling $14,600. The Committee decided, in light of the two considerations noted above, that half of this sum would be appropriate.

ORDER

The Discipline Committee therefore orders and directs that:

1. The Registrar suspend Dr. Lee's Certificate of Registration for a period of six months, this suspension to take effect 60 days after the date of this order.

2. The Registrar impose a term, condition and limitation on Dr. Lee's certificate of registration, that Dr. Lee shall register for and complete, on the next available date, and in any event within six months of the date of this Order, the College courses on Understanding Boundary Issues and Managing the Risks Inherent in the Doctor-Patient Relationship, and Medical Ethics and Informed Consent, and

provide proof thereof to the College. Upon providing proof of completion of these courses to the Registrar, this term, condition and limitation shall be removed from Dr. Lee's certificate.

3. The Registrar impose a term, condition and limitation on Dr. Lee's certificate of registration, for an indefinite period of time, that

   (a) Dr. Lee shall have a monitor (chaperone) present for all in-person professional encounters with female patients, who shall be a member of a health profession pursuant to the terms of the *Regulated Health Professions Act, 1991*, who is acceptable to the College;

   (b) The monitor shall initial each chart entry contemporaneously with any in-person professional encounter with Dr. Lee, and shall keep a log of each of Dr. Lee's professional encounters that occur in her presence and shall provide the College with a true copy of this log on a monthly basis; and

   (c) A sign shall be prominently displayed in Dr. Lee's office, in English and other appropriate languages, stating that Dr. Lee is required to have a monitor present for all in-person professional encounters with female patients.

4. The Registrar impose a term, condition and limitation on Dr. Lee's certificate of registration that Dr. Lee shall immediately provide a signed consent allowing the College to have access to his OHIP billings. Upon providing the signed consent, this term, condition and limitation shall be removed from Dr. Lee's certificate.

5. The Registrar impose a term, condition and limitation on Dr. Lee's certificate of registration, for an indefinite period of time that Dr. Lee shall submit to, and not interfere with, unannounced or announced inspections of his office and practice and patient charts by a College representative for the purpose of monitoring compliance with the terms of this penalty order.

6. Dr. Lee shall reimburse the College for any funding provided to Patient A under the program required under section 85.7 of the Code, and shall post an irrevocable letter of credit or other security acceptable to the College to guarantee payment of such amounts, within 30 days of the date of this Order, in the amount of $13,130.

7. Dr. Lee shall pay to the College, within 60 days of the date of this Order, costs of the hearing in the amount of $7,300.

8. Dr. Lee shall appear before the Discipline Committee to be reprimanded, on a date to be fixed by the Hearings Office, which shall be no later than three months from the date this Order becomes final.

The Hearings Office is requested to set a date as soon as available to administer the reprimand.

N.B.: Dr. Lee has appealed the decision of the Discipline Committee to the Superior Court of Justice (Divisional Court).