NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Botros, this is notice that the Discipline Committee ordered that there shall be a ban on publishing and broadcasting the names of patients, or any information that could disclose the names of patients who are 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. Botros, 2016 ONCPSD 5**

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 –

WAGDY ABDALLA BOTROS

PANEL MEMBERS: **DR. P. POLDRE (Chair)**
P. PIELSTICKER
DR. R. SHEPPARD
D. DOHERTY
DR. P. GARFINKEL

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

MR. PETER WARDLE

COUNSEL FOR DR. BOTROS:

MS. MARY THOMPSON
MR JOSH HANET

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. G. FORREST

Hearing Dates: September 28, 29, 30, and December 21, 2015
Decision Date: March 7, 2016
Release of Written Reasons: March 7, 2016

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 28, 29, 30, and December 21, 2015. At the conclusion of the hearing, the Committee reserved its decision with respect to the finding.

ALLEGATIONS

The Notice of Hearing alleged that Dr. Wagdy Abdalla Botros committed an act of professional misconduct:

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

2. under paragraph 1(1)33 of O. Reg. 856/93, in that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

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

RESPONSE TO THE ALLEGATIONS

Dr. Botros denied the allegations of professional misconduct in the Notice of Hearing. The College did not proceed with the allegation of incompetence.

OVERVIEW OF THE ISSUES

Dr. Botros is a psychiatrist who has been practising primarily in the area of sleep medicine since 1994. He is the medical director of a sleep clinic in an Ontario city.

The College alleged that Dr. Botros committed professional misconduct by failing to maintain the standard of practice with respect to his treatment of three patients at his sleep clinic c between 1998 and 2014. The College also alleged that Dr. Botros engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, in relation to a law firm's request for medical records pertaining to one of his former patients, in 2013.

Dr. Botros denied the allegations.

The College alleged that Dr. Botros committed professional misconduct in four separate sets of circumstances. Patient A, Patient C, and Patient B are the three patients in relation to whom Dr. Botros is alleged to have failed to maintain the standard of practice of the profession. Patient A and Patient C testified before the Committee. A Joint Book of Documents, which contains the medical records of the three patients in question, was entered into evidence.

The College also presented the evidence of Dr. Z, a respirologist and an expert in sleep medicine. The Committee reviewed Dr. Z's background and qualifications, and the parties agreed that he is qualified to give expert evidence in the area of sleep medicine. Dr. Z testified before the Committee. The College entered three of Dr. Z's reports with respect to Dr. Botros' treatment of Patient A, Patient C, and Patient B into evidence. Dr. Z referred to a number of documents pertaining to the use of hypnotic medications in patients suffering from obstructive sleep apnea, which the College also entered into evidence. These documents included the product monograph for Rivotril (Clonazepam), and excerpts from reference materials.

The Committee also heard the testimony of Ms. Y, a receptionist at the X Law Firm, regarding the allegation that Dr. Botros' conduct was disgraceful, dishonourable, or unprofessional in his communications with that firm.

In weighing the evidence of the witnesses, the Committee considered both the credibility and reliability of each witness in accordance with the well-recognized criteria enumerated in *F.H. v. McDougall*, [2008] 3 SCR 41.

EVIDENCE AND FINDINGS

PATIENT A

Patient A's family doctor referred him to Dr. Botros' sleep clinic in 1998 because Patient A had been waking up frequently during the night. Patient A had an initial diagnostic sleep study at the Dr. Botros' sleep clinic in November 1998. Dr. Botros first saw Patient A in November 1998.

The results of Patient A's initial diagnostic sleep study indicated that he suffered from Obstructive Sleep Apnea with a high frequency of periodic leg movements. Treatment with a continuous positive airway pressure ("CPAP") device was recommended.

Patient A returned to Dr. Botros' sleep clinic for a CPAP titration procedure in order to determine the optimal pressure for the device. Dr. Botros saw him again in December 1998. The records from that visit documented that Patient A's CPAP trial had been unsuccessful: Patient A had experienced difficulty adapting to the mask, which had caused an abrasion on the bridge of his nose.

Clonazepam Prescription

In December 1998, Dr. Botros' records indicate that he elected to treat Patient A's periodic leg movements with Clonazepam. Dr. Botros he believed Patient A's periodic leg movements were probably caused by the patient's antidepressant medication, Paxil.

Dr. Botros prescribed Clonazepam at a dose of 0.5 mg two tablets h.s. with the aim of reducing Patient A's periodic leg movements, thereby improving sleep and daytime performance. Further

treatment with CPAP was not recommended at that time, in light of Patient A's difficulty tolerating the mask. Patient A's progress was to be monitored.

Patient A had read a pamphlet in Dr. Botros' waiting room which cautioned against the use of "sleeping pills" in patients with Obstructive Sleep Apnea. Patient A accordingly did not fill his prescription for Clonazepam. He reported back to his family physician, Dr. W, who also expressed concerns with this approach to his treatment. She referred Patient A to a different sleep clinic, where he was eventually seen by Dr. V, a respirology and sleep medicine specialist.

Dr. V confirmed Patient A's diagnosis of Obstructive Sleep Apnea and recommended that Patient A obtain a customized mask in order to increase the tolerability of the CPAP device. This approach ultimately proved to be successful. Patient A testified that he has used a CPAP device with good effect ever since receiving the customized mask.

Dr. Z's evidence included reference to multiple exhibits pertaining to Clonazepam and other drugs of the benzodiazepine class. The Committee found that there are risks associated with the use of these medications in patients with Obstructive Sleep Apnea, and that these medications are considered to be relatively contraindicated for patients with Obstructive Sleep Apnea for this reason.

Expert Opinion of Dr. Botros' Treatment of Patient A

It was Dr. Z's expert opinion that Dr. Botros' treatment of Patient A failed to meet the standard of practice of the profession. Dr. Z testified that Dr. Botros had shown a lack of knowledge and judgement in his treatment of Patient A, and that the patient had been exposed to potential harm.

Dr. Z was critical of two aspects of Dr. Botros' treatment of Patient A: Firstly, Dr. Z testified that Patient A's Obstructive Sleep Apnea should not have been left untreated because of an easily-correctable problem – fixing the fit of the mask. In Dr. Z's opinion, Dr. Botros should have attempted to assist Patient A in finding a better fitting mask, rather than leaving his Obstructive Sleep Apnea untreated.

Secondly, Dr. Z testified that treating Patient A's periodic leg movements with Clonazepam when he also suffered from Obstructive Sleep Apnea was below the standard of care. Dr. Z stated that drugs such as Clonazepam, which have sedative and muscle relaxant properties, have the potential to depress respiration and to reduce arousability, thus potentially worsening the symptoms of Obstructive Sleep Apnea. In Dr. Z's opinion, Clonazepam was relatively contraindicated for Patient A. As well, no evidence exists from the medical record that Dr. Botros explained the risks and benefits of treatment of Clonazepam to Patient A.

Dr. Z testified about the detailed polysomnographic findings in the record of Patient A's sleep study. The sleep study confirmed the presence of moderate Obstructive Sleep Apnea, and the CPAP titration study resulted in poor tolerance for the CPAP device because of Patient A's discomfort with the mask. There is no real dispute between the parties with respect to these issues.

The Degree of Patient A's Obstructive Sleep Apnea

There was some disagreement between the parties regarding the degree of Obstructive Sleep Apnea indicated by Patient A's sleep study. Dr. Z stated that the periodic spikes in oxygen desaturation visible on the recording were concerning, and suggested that Patient A's Obstructive Sleep Apnea was at least moderately severe.

Defence counsel suggested that these oxygen desaturation spikes could have been caused by artifact. Defence counsel also pointed to a statement in a later report by Dr. V which appears to raise the question as to whether Patient A's Obstructive Sleep Apnea was in fact clinically significant at baseline.

Nevertheless, based on the totality of the evidence, the diagnosis of Obstructive Sleep Apnea cannot seriously be questioned. Dr. Botros made the diagnosis of Obstructive Sleep Apnea and it is recorded in the medical record.

Dr. Botros' Response

Dr. Botros, in his testimony, did not dispute the evidence of Patient A, and did not take serious issue with Dr. Z's expert opinions, with the exception with Dr. Z's evidence pertaining to the use of Clonazepam. Dr. Botros stated that he had considerable experience with this drug as a psychiatrist; that the dose he had prescribed to Patient A was low; and that, in his judgement, the risk of harm was similarly low.

FINDING REGARDING DR. BOTROS' TREATMENT OF PATIENT A

Regarding Dr. Botros' decision to leave the Obstructive Sleep Apnea untreated

The Committee found that Dr. Botros' decision to leave Patient A's Obstructive Sleep Apnea untreated constituted a failure to maintain the standard of practice of the profession.

The Committee found the evidence on this issue to be clear and persuasive. Patient A was a straightforward and credible witness. The expert evidence of Dr. Z carried considerable weight.

The Committee accepted Dr. Z's evidence that Dr. Botros did not meet the expected standard of care because Dr. Botros failed to explore alternatives to of Patient A's Obstructive Sleep Apnea treatment after the initial CPAP trial was unsuccessful due to a poorly-fitting mask. Dr. Z's evidence, that this problem was easily correctable, was demonstrated by Patient A's subsequent successful use of a CPAP device with a custom fitting mask under Dr. V's direction. Untreated Obstructive Sleep Apnea exposes the patient to the risk of harm. Dr. Botros' poor judgement in this regard is apparent to the Committee.

Regarding Dr. Botros' treatment of the periodic leg movements with Clonazepam

The Committee did not find that Dr. Botros' treatment of Patient A's periodic leg movements with Clonazepam fells below the standard of care. Dr. Botros was experienced with this particular medication with his background in psychiatry.

Although the Committee accepted the evidence that benzodiazepines, including Clonazepam, are relatively contraindicated in patients with Obstructive Sleep Apnea, the Committee found that it is not uncommon in clinical practice for medications to be successfully used in circumstances of relative contraindication. It becomes a question of clinical judgement to be exercised in the weighing of potential benefits and possible risks.

The Committee found that it was reasonable for Dr. Botros to conclude that Patient A's periodic leg movements were a significant clinical issue which could have been disturbing his sleep, and to propose to treat this condition. The dose of Clonazepam Dr. Botros prescribed, at a maximum of 1 mg per day, was low. The risk of respiratory depression at this low dose would have been negligible.

The Committee found that Dr. Botros should have explained the risks to Patient A, and there is no evidence that he did so in the context of what appears overall to have been little effort on Dr. Botros' part to communicate effectively with his patient. The Committee did not find, however, that this constituted a failure to maintain the standard of practice.

PATIENT B

Patient B was a patient at Dr. Botros' sleep clinic between 2003 and 2011. The College alleged that Dr. Botros failed to maintain the standard of practice in his care of Patient B because his history-taking and record-keeping were inadequate. The allegations pertain to Patient B's initial involvement with the clinic in January through March 2003.

Patient B did not testify before the Committee. The Committee relied upon evidence which consisted of her medical records at Dr. Botros' sleep clinic; the expert evidence of Dr. Z presented through Dr. Z's oral testimony and his written report; and Dr. Botros' testimony.

The College alleged that Dr. Botros should have clarified the inconsistencies he saw in Patient B's medical record. As well, in one area, Dr. Botros should have further elaborated on a potentially significant clinical issue to the referring doctor.

Patient B's medical record was allegedly inconsistent regarding whether she had been experiencing excessive daytime sleepiness in January 2003. In his handwritten note of January 2003, Dr. Botros indicates that this was the case.

In his consultation note sent to the referring physician Dr. U in February 2003, Dr. Botros indicated the presence of excessive daytime sleepiness by checking off a box in his note. Patient B, however, had completed a self-report questionnaire known as the Epworth Sleepiness Scale in February 2003. Her results were within the normal range, thus suggesting that she may not have had excessive daytime sleepiness. Dr. Z testified that this apparent contradiction should have been clarified in the record and that, because Dr. Botros did not do so, he failed to maintain the standard of practice.

The College alleged that the lack of clinical information in Patient B's record regarding her cardiovascular status is also a failure by Dr. Botros to maintain the standard of practice. Dr. Botros' consultation note to the referring physician, Dr. U, indicates the presence of "heart problems" in Patient B. Dr. Botros provided no further information in his note.

Dr. Botros testified that he knew that Patient B had a heart murmur. He testified that her heart murmur was not clinically relevant to her Obstructive Sleep Apnea, and that this was the reason he did not further elaborate on her heart murmur in his consultation note.

Dr. Botros did agree that, ideally, he should have included an explanation of the benign nature of Patient B's heart problems in the record for greater clarity. Dr. Z's opinion was that, because some forms of "heart problems" can be very significant in patients with Obstructive Sleep Apnea, Dr. Botros had an obligation to clarify the issue in his report to Dr. U. The absence of clinically significant heart disease would have been an important negative finding.

FINDING REGARDING DR. BOTROS' TREATMENT OF PATIENT B

The Committee did not find that Dr. Botros failed to maintain the standard of practice in his treatment of Patient B.

The Committee accepted that Dr. Botros' record keeping with respect to Patient B could have been more complete. His clinical notes are very brief and do not suggest that he attempted to reconcile contradictory information Patient B reported in her questionnaire.

It would have been more useful to the referring physician to have had the presence of significant cardiovascular disease excluded in light of the broad indicator of "heart problems." Dr. Botros made no effort to clarify this issue.

Dr. Botros' practices suggest a certain lack of precision in his record keeping and style of communication. His testimony in this area contained rationalizations which did not persuade the Committee and suggest that Dr. Botros has difficulty taking responsibility for the areas in which he is deficient.

Nevertheless, the standard of practice of the profession is not perfection; rather, the standard is what would be reasonably expected of a competent practitioner in the member's area of practice. While patient questionnaires can contain useful information, these are only one of a myriad of sources a physician uses in forming his or her opinions. The application of clinical judgement remains crucial.

The Committee accepted Dr. Botros' evidence that, in his clinical opinion, Patient B was experiencing excessive daytime sleepiness, despite the results of the questionnaire which she completed. While he could have explained this contradiction in the clinical record, it was not unreasonable for Dr. Botros to conclude that it was unnecessary to do so. There were no implications for the patient's treatment, and she was not exposed to the risk of harm.

Similarly, Dr. Botros ideally should have elaborated on the nature of Patient B's heart problems in his consultation note to her referring physician. Dr. Botros acknowledged this himself in his testimony. The Committee, however, accepted his explanation that he did not find it necessary to do so because he knew that her heart murmur was of no clinical significance with respect to her Obstructive Sleep Apnea. As a result, the Committee did not find that Dr. Botros failed to meet the standard of care with respect of his treatment of Patient B.

PATIENT C

Patient C had first been diagnosed with Obstructive Sleep Apnea in 2003. She had subsequently visited sleep clinics in various Ontario cities before moving to an area northwest of the city where Dr. Botros had his sleep clinic in 2008. Following her move, Patient C was unable to maintain contact with her previous sleep specialist. She had continued to use her CPAP device as previously prescribed.

Patient C, then 48, was referred to Dr. Botros' sleep clinic in 2003 in order to have her CPAP treatment reassessed. She was first seen at the clinic in May 2013 when she had at a CPAP titration study.

Patient C's May 2013 CPAP titration study confirmed that she has Obstructive Sleep Apnea and indicated that the optimal pressure for her CPAP machine would have been 14 to 15 cm H_2O. This study forms part of Patient C's clinical record at Dr. Botros' sleep clinic.

At the time of her study, the pressure on her machine was set at 11 cm H_2O, in accordance with her previous prescription. The Committee heard evidence that it is not unusual for the optimal machine pressure to change over time in response to a patient's changing condition, including a patient's weight gain. Patient C had gained weight and she therefore likely required a higher pressure for her treatment to be optimized.

Dr. Botros never personally saw Patient C. Patient C was scheduled to see Dr. Botros to discuss the results of her study and to have her clinical status evaluated after her May 2013 CPAP

titration study. Because the clinic had a long waiting list, Patient C's appointment to see Dr. Botros was scheduled for February 2014 – over eight months after her CPAP titration study.

Patient C's status changed suddenly on the Friday before the weekend when her CPAP machine broke and was no longer useable.

Without the CPAP machine, Patient C testified that she immediately started having problems: She was unable to sleep at night; she could only nap for short periods of time while sitting up; she felt exhausted during the day; she felt like she was drunk; and she had to stop driving, which caused her difficulty because she was caring for three children at home and was responsible for carpooling other children.

In August 2013, Patient C called Dr. Botros' sleep clinic to ask for assistance. Patient C testified that she called several times, and spoke to two different people at the clinic. She attempted to convey to them the urgency of her situation. She asked if she could be put on an urgent cancellation list to be seen quickly, or if the doctor could communicate with a CPAP provider to prescribe a new machine for her.

Patient C testified that the responses she received from Dr. Botros' sleep clinic were extraordinarily unhelpful. She felt that her concerns were not being heard, and that she was not being treated with respect. She stated that, several times, she was told "there's nothing we can do."

In August 2013, Patient C wrote an email to the Ministry of Health and Long Term Care explaining her situation and complaining about the lack of assistance she was receiving from Dr. Botros' sleep clinic.

Patient C stated that she contacted other sources asking for assistance. She was soon able to obtain a replacement CPAP machine from a supplier in another Ontario city, with assistance from a nurse in a second Ontario city who her former sleep physician had recommended. Patient

C was only without CPAP treatment for five or six days. She never returned to Dr. Botros' sleep clinic. She was able to quickly obtain a referral to another sleep clinic.

Expert Opinion of Dr. Botros' Treatment of Patient C

Dr. Z testified that Dr. Botros' non-response to Patient C's emergency in August 2013 did not meet the standard of care. Patient C had severe Obstructive Sleep Apnea and, following the breakdown of her machine, she was left completely untreated. As a result, it was inevitable that her symptoms would likely re-emerge severely.

Patient C's recent study, which had been generated at Dr. Botros' sleep lab, was available to Dr. Botros. It would have provided him with the information necessary to quickly respond to Patient C's request for a new prescription. Dr. Botros would have also known that she had a very high body mass index and, accordingly, that she would have been at high risk for complications of untreated Obstructive Sleep Apnea, including cardiovascular and metabolic complications. In Dr. Z's opinion, Dr. Botros had an obligation to assist this patient. His conduct in not doing so showed a lack of judgement to an extent that the patient was at risk of harm, which falls below the expected standard of care.

Dr. Z expressed some concern about requiring Patient C to wait over eight months after her initial sleep study to meet with Dr. Botros, especially since her study indicated that her current treatment was suboptimal because of the pressure setting on her CPAP machine. Dr. Z, however, did not testify that the standard of practice had not been met in this regard. The realities of high demand for service makes theoretical targets for wait times likely unrealistic.

Dr. Botros' Response

Dr. Botros confirmed in his testimony that he had had no direct contact with Patient C. He testified that he had interpreted her May 2013 sleep study and was aware that her consultation appointment had been scheduled for a later date. He described the eight month wait time as "upsetting," but said that because of limited resources and high demand, waiting lists are

inevitable. He stated that Patient C would not have been considered a priority because she was already receiving treatment for her Obstructive Sleep Apnea.

Dr. Botros stated that he did not know much about Patient C's particular circumstances when her machine broke in August 2013 and she started calling for assistance. He testified, however, that he instructed his staff to give her an appointment as quickly as possible.

Dr. Botros testified that he had intended for Patient C to be seen within the week. Dr. Botros stated that his clinic received a request for Patient C's information from another sleep clinic in August 2013. Dr. Botros testified that he assumed at that time that she had obtained assistance elsewhere. Dr. Botros stated that he did not think that his clinic could have responded any differently to Patient C's requests for urgent assistance.

Dr. Botros went to great lengths to attempt to make a distinction between patients of the sleep clinic and patients of the sleep lab, which is associated with the clinic. He stated that, when Patient C's CPAP machine broke in August 2013, she was a patient of the sleep lab but not of the sleep clinic. Dr. Botros testified that Patient C would only have become a patient of the sleep clinic after he had personally seen her.

However, Dr. Botros agreed that Patient C had been assigned a file number at the clinic as of June 2013. He also agreed that he had personally billed OHIP under his billing number for a CPAP study interpretation which had been done for her.

FINDING REGARDING DR. BOTROS' TREATMENT OF PATIENT C

The Committee found that Dr. Botros failed to maintain the standard of practice when he failed to attempt to assist Patient C when her CPAP machine broke, which was an emergency situation.

The Committee accepted Patient C's clear and consistent evidence on this issue. She testified that she was repeatedly told that there was nothing the clinic could do to help her. Her testimony

before the Committee was consistent with what she had described in her August 2013 communication to the Ministry of Health and Long Term Care.

Dr. Botros' evidence on this issue, in contrast, is not credible. The Committee characterized his testimony as evasive, self-serving, and seemingly tailored in order to attempt to avoid responsibility.

It was clear to the Committee that Dr. Botros' emphasis on Patient C's supposed status as a patient of the sleep lab but not of the sleep clinic was a mere attempt to avoid responsibility for failing to respond to her emergency in August 2013.

There can be no reasonable confusion about Patient C's status as Dr. Botros' patient at the material time. Although she had not yet been seen by Dr. Botros, Patient C had undergone an assessment at his sleep lab. The CPAP study interpretation of June 2013 is on sleep clinic letterhead with Dr. Botros identified as the attending physician. Her sleep study contains the clinical information relevant to Patient C's presenting problem of Obstructive Sleep Apnea. Dr. Botros had reviewed and commented upon these findings and had made recommendations.

The Committee accordingly found that Patient C was in fact Dr. Botros' patient at the material time, and that he did have a responsibility to respond to her requests for urgent assistance when her emergency occurred. Dr. Botros' stubborn attempts to obfuscate this issue during his testimony by claiming that Patient C was not yet a patient of his sleep clinic seriously detracted from the credibility of his evidence.

The Committee carefully considered the issue of when and to what extent a specialist assumes responsibility for a patient referred to him. There is no categorical response to this question. The issue will be determined, rather, on the circumstances of each case.

Dr. Botros testified that he was not responsible for attempting to assist Patient C because he hadn't yet seen her himself. In the circumstances of this case, the Committee does not accept this position. The Committee therefore found that Dr. Botros had a duty to assist Patient C.

The Committee heard no evidence to corroborate Dr. Botros' claim that he instructed clinic staff to bring Patient C in as quickly as possible. There were no such notations on the medical record, and the Committee heard no testimony on this matter from office staff. While the onus is on the College to prove the allegations, and while Dr. Botros is not obligated to produce corroborating evidence, the lack of such corroboration will inevitably mean that Dr. Botros' personal credibility is of crucial importance. For the reasons stated above, the Committee finds that Dr. Botros is not credible on this issue.

The Committee accepts Dr. Z's expert evidence on this issue. Patient C's severe Obstructive Sleep Apnea was left completely untreated after her machine had broken. She was at high risk for severe symptoms and a variety of complications on account of her severe disorder, her untreated state, and her co-morbid issues including obesity. Dr. Botros should have recognized this and responded quickly. The Committee found that his failure to do so means he failed to meet the requisite standard of practice.

X LAW FIRM

Ms. Y, a receptionist at the X Law Firm, testified before the Committee. The firm, which specializes in personal injury litigation, had requested the complete clinical notes and records of Patient T, a former patient of Dr. Botros' sleep clinic.

The firm mailed and faxed this request to Dr. Botros and Dr. S on June 10, 2013. Copies of the correspondence between the law firm and Dr. Botros' sleep clinic, between June 10 and August 13, 2013, were entered as exhibits.

Dr. Botros testified in his own defence with respect to this allegation.

Ms. Y testified about the difficulties she had encountered in obtaining the requested medical records from Dr. Botros' sleep clinic. A dispute arose when Dr. Botros requested $200 in pre-

payment before he would produce the records. Some back and forth correspondence ensued between the firm and Dr. Botros regarding his demands.

The firm felt that a $200 fee for the requested medical records was unreasonable. The firm offered $75 for photocopying, and requested a breakdown of the hourly rate and time spent by the physicians in reviewing the clinical notes.

Ms. Y testified that Dr. Botros telephoned her at her office at this point. Ms. Y described Dr. Botros' manner on the phone to be very rude, unprofessional, and unreasonable. Ms. Y found Dr. Botros to be so intolerable that she wished no further communication with him. She informed her employer, Mr. X, of this, in an email dated August 2013, a copy of which was filed as an exhibit.

The medical records the firm had requested from Dr. Botros on June 10, 2013 were finally produced in December 2013.

The Committee found Ms. Y to be a credible witness. Her testimony was straightforward, clear, and consistent with the written record. The Committee accepts her evidence.

Dr. Botros, in his testimony, attempted to portray his conduct in this matter as reasonable. While admitting that he could have handled the matter differently, he accepted no responsibility for his conduct in relation to Ms. Y, including in his telephone call to her, which she had found rude, unprofessional, and highly objectionable.

Dr. Botros' testimony focused instead on the amount of money he had requested from the firm. Dr. Botros attempted to claim that, because the original request was addressed to both himself and Dr. S, both physicians would have had to review the records in question, thus doubling the fee.

The Committee found Dr. Botros' testimony in this regard to be self-serving and disingenuous. Moreover, in focusing on the amount of money in dispute rather than the nature of his conduct, Dr. Botros appeared oblivious to the more important issue of a physician's responsibility to

respond in a professional manner to what was a perfectly reasonable and legitimate request for the records of a former patient. There is no apparent recognition on Dr. Botros' part of the fact that his former patients' interests could be compromised because of his own delay in producing the requested material.

FINDING REGARDING DR. BOTROS' CONDUCT IN RELATION TO THE X LAW FIRM

The Committee found that Dr. Botros committed professional misconduct by engaging in conduct that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional in his dealings with the X Law Firm regarding the requested medical records of his former patient.

The Committee found that Dr. Botros' conduct in relation to this issue was, at the very least, unprofessional. His delay in producing the requested records showed a disregard for the interests of his former patient. His repeated haggling over small amounts of money, and his evident irritation at having his position questioned by the law firm, suggest an attitude of unfettered entitlement which brings dishonour to the profession. Dr. Botros' manner of communication with the law firm, consisting of barely legible scrawls returned by fax and one abusive telephone call, are unacceptable.

SUMMARY OF FINDINGS

The Committee found that Dr. Botros failed to maintain the standard in relation to:

- leaving Patient A's Obstructive Sleep Apnea untreated; and,
- failing to attempt to assist Patient C when an emergency arose when her CPAP machine broke.

The Committee found that Dr. Botros engaged in disgraceful, dishonourable, or unprofessional conduct in relation to his delay in providing records to and in his manner of communication with the X Law Firm.

CONCLUSION

The Committee requests that the Hearings Office schedule a penalty hearing pertaining to the findings of professional misconduct.

Indexed as: **Ontario (College of Physicians and Surgeons of Ontario) v. Botros, 2017 ONCPSD 7**

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

IN THE MATTER OF a Hearing directedby the Inquiries, Complaints and Reports Committee of the College of Physicians and Surgeons of Ontariopursuant 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. WAGDY ABDALLA BOTROS

PANEL MEMBERS:

DR. P. POLDRE (CHAIR)
MS D. DOHERTY
DR. R. SHEPPARD
MR. P. PIELSTICKER
DR. P. GARFINKEL

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

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MS. M. THOMSON
MR. J. HANET

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. G. FORREST

Penalty Hearing Date:	**September 23, 2016**
Penalty Decision Date:	**September 23, 2016**
Penalty Reasons Date:	**February 15, 2017**

PENALTY AND REASONS FOR PENALTY

The Discipline Committee (the "Committee") of the College of Physicians and Surgeons of Ontario delivered its written decision and reasons on finding in this matter on March 7, 2016. The Committee found that Dr. Botros committed an act of professional misconduct in that he failed to maintain the standard of practice of the profession and that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

The Committee heard evidence and submissions on penalty and costs on September 23, 2016, and delivered its order on penalty and costs with reasons to follow.

EVIDENCE AND SUBMISSIONS ON PENALTY AND COSTS

In arriving at its decision on penalty and costs, the Committee considered the documentary evidence filed in evidence by counsel for the College and by counsel for Dr. Botros. This included multiple documents pertaining to Dr. Botros' history with the College; previous decisions of the Discipline Committee, each of which bore some similarity to the facts in the current proceedings; and a report by Dawn Martin, Communications Specialist and Educational Consultant, pertaining to her work with Dr. Botros.

The Committee also took into account its findings in its Decision and Reasons for Decision in this matter dated March 7, 2016.

The College proposed a composite penalty consisting of a public reprimand, a four month suspension of Dr. Botros' certificate of registration (to run concurrent with the unexpired portion of the suspension imposed by a different panel of this Committee on February 22, 2016), an order requiring Dr. Botros to complete a Medical Ethics course, a fine in the amount of $35,000.00, and costs for five hearing days at the usual tariff rate, amounting to $22,300.00. The Committee was advised that Dr. Botros' existing suspension expires on October 16, 2016, such

that the four month suspension sought by the College would result in a further suspension of three months plus one week.

Counsel for Dr. Botros agreed that an appropriate penalty would include a public reprimand, a suspension of Dr. Botros' certificate of registration, and partial costs. Counsel for Dr. Botros submitted, however, that the suspension should be for two months (but this would be in addition to, and not concurrent with, the existing suspension), and that hearing costs should be limited to the cost of three days at the tariff rate. Counsel for Dr. Botros did not agree to an order requiring Dr. Botros to complete a Medical Ethics course, or to pay a fine of any amount.

DECISION ON PENALTY

For the reasons that follow, the Committee ordered that Dr. Botros appear before the Committee to be reprimanded, that his certificate of registration be suspended for a period of four months commencing immediately (concurrent with the unexpired portion of the suspension imposed by a different panel of this Committee on February 22, 2016), that Dr. Botros complete individualized instruction in Medical Ethics satisfactory to the College, that Dr. Botros pay a fine to the Ministry of Finance in the amount of $20,000.00 within 90 days of the date of this order, and that Dr. Botros pay costs to the College in the amount of $17,840.00 within 60 days of the date of this order.

REASON FOR DECISION ON PENALTY

The principles which guide the imposition of penalty in disciplinary proceedings are well established. The protection of the public is the paramount consideration. Other principles include maintenance of public confidence in the integrity of the profession and in the College's ability to govern the profession in the public interest, specific deterrence as it applies to the member, general deterrence as it applies to the membership as a whole, and, where appropriate, rehabilitation of the member.

It is for the Committee to weigh these principles in light of the specific facts and circumstances of the case, including both aggravating and mitigating factors, in order to arrive at a penalty which is just and appropriate. The penalty should be proportionate to the findings of misconduct committed, and should be reasonably consistent with previous disciplinary decisions in similar cases.

The Committee reviewed its findings with respect to Dr. Botros, which are documented in detail in its decision of March 7, 2016. The Committee found that Dr. Botros failed to maintain the standard of the profession with respect to sleep medicine in his care of two patients. He failed to properly treat Patient A's condition of obstructive sleep apnea in 1998, and he failed to respond adequately to a developing emergency when Patient C's CPAP machine broke in August 2013, thus leaving her severe obstructive sleep apnea untreated and exposing her to the risk of harm. The Committee also found that Dr. Botros' responses to a personal injury law firm's request for information regarding one of his patients was disgraceful, dishonourable, or unprofessional.

Not all of the allegations against Dr. Botros were proven. The Committee did not find that Dr. Botros had failed to maintain the standard of practice with respect to Patient B.

Dr. Botros' failure to maintain the standard of practice with respect to Patient A was due to having left the patient's obstructive sleep apnea untreated when treatment was available, and did not extend to the prescription of sedative/anxiolytic medication.

The Committee considered Dr. Botros' success on these matters when determining costs, as discussed below.

The Committee carefully reviewed Dr. Botros' history with the College, and found that some aspects of his disciplinary history are relevant to the current penalty proceeding.

In 2002, the Complaints Committee ordered that Dr. Botros be cautioned with regard to his failure to provide sleep study data from his records to a subsequent treating physician, despite repeated requests that he do so. Dr. Botros had asked for $500.00 in advance before he would

provide this information. The Complaints Committee found that Dr. Botros' behavior demonstrated a lack of concern for the welfare of his patient. This is similar to Dr. Botros' conduct in the present case in demanding $200.00 before sending his patient's records to her personal injury legal counsel. This Committee noted that Dr. Botros' behaviour in this regard showed no apparent recognition of the fact that his former patients' interests could be compromised because of his delay in producing the requested material. Dr. Botros appealed the 2002 decision of the Complaints Committee to the Health Professions Appeal and Review Board, which upheld the decision, and his subsequent application to Divisional Court for judicial review was dismissed.

In November 2011, the Inquiries, Complaints and Reports Committee, in two separate decisions, ordered that Dr. Botros be cautioned on account of his failure to respond to College investigators in a professional and responsible fashion with respect to two patients who had complained about him. Both these decisions were confirmed by the Health Professions Appeal and Review Board following Dr. Botros' appeals.

Dr. Botros' conduct in relation to these three patients, resulting in cautions by the Complaints Committee and the Inquiries, Complaints, and Reports Committee, predates his conduct with the personal injury law firm in 2013, which is the basis for the current finding of disgraceful, dishonourable, or unprofessional contact. Such conduct is, therefore, relevant to the penalty to be imposed in respect of his actions regarding the personal injury firm.

Although one case dates to 2002, and the Committee is mindful of the passage of time since that case, there are clear similarities with respect to the nature of Dr. Botros' misconduct in these earlier decisions, including his obstructionist and dismissive attitude, his request for monetary compensation in one case and, importantly, his disregard for the interests of the patients involved. He appears to have been unaware or unconcerned that, in failing to produce patient-related clinical information in a timely fashion to other parties who have a legitimate need for this information, he is jeopardizing the interests of his patients. The Committee agreed with the parties in the current proceeding that this history is an aggravating factor with respect to the

imposition of penalty (although not in relation to Dr. Botros' conduct with respect to Patient A, which pre-dated these cautions).

Dr. Botros has had further and more recent involvement with the College. On April 21, 2015, a different panel of the Discipline Committee found that he engaged in disgraceful, dishonourable, or unprofessional conduct on account of his failure to take a Communication Skills course as ordered by the Inquiries, Complaints and Reports Committee. Dr. Botros was found to have demonstrated a blatant disregard for College processes, and contempt for his governing body. The Committee in that case ordered a six month suspension of his certificate of registration, in addition to a public reprimand and costs.

On July 31, 2015, another panel of the Discipline Committee found that Dr. Botros had failed to meet the standard of care in his treatment of 22 patients at his sleep clinic, that he was incompetent, and that his conduct towards College investigators was disgraceful, dishonourable, or unprofessional. The Committee in that case ordered a six month suspension of Dr. Botros' certificate of registration and restricted him from practising sleep medicine, in addition to a reprimand and costs. This suspension has now been served. While Dr. Botros remains restricted from practising sleep medicine, there is no evidence to suggest that he cannot resume the practice of psychiatry.

The two most recent findings of the Discipline Committee provide this Committee with context. Dr. Botros is a physician who has been found to be incompetent in the practice of sleep medicine and who has demonstrated patterns of unprofessional behaviour for many years, including a cavalier disregard for the interests of his patients and an obstructionist and defiant attitude toward the College. He has failed to develop insight into his behaviour or respond constructively to previous sanctions imposed by the College despite repeated opportunities to do so. However, these two cases postdate the misconduct found by this Committee and, as such, they are not aggravating factors with respect to the imposition of penalty in these proceedings.

Counsel for Dr. Botros submitted that Dr. Botros has now completed a Communications Skills course, and referred to the report from Dawn Martin, Communications Specialist and

Educational Consultant, which describes his progress in favourable terms. Counsel for Dr. Botros submitted that it is now unnecessary for Dr. Botros to take any further courses, including the Ethics course proposed by the College, because remediation has already occurred.

The Committee does not accept this submission. Although Dr. Botros has now finally taken the Communication Skills course which was ordered by the Inquiries, Complaints and Reports Committee in 2011, and although the Committee acknowledges that he did well in the course, this Committee's concerns, outlined above, extend far beyond Dr. Botros' communication deficiencies.

Communication and ethics are entirely different concepts. Dr. Botros' misconduct with respect to Patient C, which in the view of the Committee was of a serious nature and exposed the patient to the risk of harm, was primarily an ethical failure. The Committee is aware that one of the principles regarding penalty is to address the rehabilitation of the member, if possible. Accordingly, the Committee has no hesitation in ordering Dr. Botros to successfully complete individualized instruction in Medical Ethics with an instructor provided by the College, while recognizing that the success of such an endeavour will depend largely on Dr. Botros' ability and willingness to constructively engage with the process.

Counsel for Dr. Botros cautioned that this Committee should avoid "piling on" Dr. Botros, noting that he had recently been sanctioned by the Discipline Committee following other findings of professional misconduct, and that the protection of the public had already been addressed on account of his restriction from practising sleep medicine. Counsel for Dr. Botros submitted that this should be considered a mitigating factor with respect to the current proceedings.

This Committee is concerned, however, with imposing a penalty which is fair and appropriate in the circumstances of this case, and which gives expression to the stated principles of penalty. To impose a more lenient penalty because similar misconduct has already been sanctioned would not fulfill the goal of maintaining public confidence in the College's ability to regulate the profession in the public interest, nor would it address specific or general deterrence.

The Committee does not accept that recent misconduct already penalized ought in any way to be considered a mitigating factor. The Committee is cognizant, however, of the total period of suspension that Dr. Botros will be facing and recognizes that the total period should not place a disproportionate burden on Dr. Botros. The Committee determined that the penalty imposed, with a portion of the suspension being served concurrently, would not impose a disproportionate burden on Dr. Botros.

Dr. Botros, through counsel, acknowledged that findings of professional misconduct were made and that the allegations which resulted in the findings were serious. His testimony during the earlier phase of the hearing, however, compels the conclusion that, at that time, Dr. Botros had little understanding of the way in which his misconduct demonstrated a failure of his professional responsibility to his patients. His attitude was perhaps better characterized not so much as a lack of insight but as active resistance, manifest by stubborn attempts at obfuscation and rationalization, to the acceptance of responsibility. The Committee found his testimony to be evasive, self-serving, and to demonstrate a disregard for the interests and, in one case, the safety of his patients. Insight, acceptance of responsibility, and commitment to positive change can be mitigating factors. These were not present here.

In all of the circumstances, the Committee finds that a significant penalty is required in order to address specific and general deterrence, maintain public confidence in the College's ability to regulate the profession in the public interest, and adequately express the profession's condemnation of misconduct of this nature.

The Committee has considered the prior decisions of the Discipline Committee which were produced by both counsel. Although every case is different, similar misconduct should in general attract similar sanctions. The Committee is satisfied that its penalty falls within the range of those imposed in most of the prior cases reviewed.

The fine imposed by this Committee, while not a usual component of a composite penalty in other cases, is within the discretion of the Committee to order. The Committee has decided to

order a fine in this case primarily in order to address specific and general deterrence. The Committee wishes to emphasize to the membership that misconduct of the sort committed by Dr. Botros will not be tolerated. The Committee's decision to impose a fine was also influenced by Dr. Botros' discipline history with the College in 2002 and 2011, referred to above.

Counsel for Dr. Botros submitted that circumstances where fines have been imposed are more commonly cases involving sexual impropriety or where a member's misconduct relates to financial gain, citing *Kwamie* (1992) and *Otto* (2015). There is nothing in either of these decisions which indicates that a fine is limited to such situations. In any event, although the Committee does not accept misconduct related to financial gain is required for a fine, Dr. Botros' actions with respect to the personal injury firm did involve Dr. Botros potentially compromising his patient's interests because he delayed providing patient records due to a dispute over money.

Further, while the Committee does consider prior cases as a starting point, it must have the ability to order penalties authorized by the statute where it considers them part of a fair and just penalty, even if such penalties have not been imposed have not been imposed as frequently in the past.

In reviewing the case of *Kwamie* (1992), in which the member had tried to establish a romantic relationship with a former patient, the Committee noted that there was a joint submission on penalty that included a three month suspension and a $5,000 fine. Dr. Kwamie had no prior discipline history. The *Kwamie* case was an example of a suspension and fine being imposed together a penalty. In *Otto* (2015), in which the general practitioner over-billed for Special Diet Allowance, there was another joint submission on penalty, this time with a two month suspension and a fine of $10,000.

The Committee in this case finds the following quote from *Otto* to be equally applicable to the current case: the fine and suspension are "an appropriate response to the seriousness of the misconduct and acts as both specific deterrence for Dr. X and general deterrence for the profession".

Counsel for Dr. Botros also referred the Committee to *Derenda* (2007) for the proposition that a fine is not appropriate where there is no reason to impose a fine in addition to other penalties and the principles governing penalty are being properly served by other forms of penalties already being sanctioned. The Committee notes that *Derenda* is a case in which the Committee revoked the member's certificate of revocation, a fact which was central to the decision not to impose a fine:

> With respect to a fine of $5000, the Committee finds insufficient reason to impose it. Given the penalty of revocation, the Committee sees this quantum amount as arbitrary and the principles applicable to penalty determination are properly served by revocation without fine. [emphasis added]

In this case, the Committee has not revoked Dr. Botros' certificate of registration. The Committee finds that the fine imposed is appropriate in this case.

Finally, the Committee rejected Dr. Botros' submission that a fine would be overly punitive considering that Dr. Botros has not been permitted to practise medicine since December 2015 and is restricted from practising sleep medicine indefinitely. Given that Dr. Botros will have the capacity to earn income as a psychiatrist, the Committee did not feel that the financial burden would be overwhelming.

With respect to costs, the Committee acknowledges that the College was only partially successful in proving the allegations against Dr. Botros. Costs will therefore be limited to the cost of four hearing days at the usual tariff rate.

ORDER

Accordingly, on the matter of penalty and costs, the Committee ordered and directed in its order dated September 23, 2016:

1) that Dr. Botros appear before the panel to be reprimanded;

2) that the Registrar suspend Dr. Botros' certificate of registration for a period of four months commencing immediately, to run concurrently with respect to any unexpired portion of the suspension imposed by the Discipline Committee in its decision of February 22, 2016;

3) that as a term or condition of his certificate of registration, Dr. Botros shall, at his own expense, participate and successfully complete, within six months at the date of this order, individualized instruction in medical ethics satisfactory to the College, with an instructor provided by the College. The instructor shall provide a summative report to the College including his or her conclusion about whether the instruction was completed successfully by Dr. Botros;

4) that Dr. Botros shall within 90 days pay a fine to the Minister of Finance in the amount of $20,000.00, and that Dr. Botros shall provide proof of this payment to the Registrar of the College; and,

5) that Dr. Botros pay costs to the College in the amount of $17,840.00 within 60 day of the date of this order.