IN THE MATTER OF	*	BEFORE THE
DONALD C. ROANE, M.D.	*	MARYLAND STATE BOARD
Respondent	*	OF PHYSICIANS
License Number: D10698	*	Case Nos. 2003-0488 & 2004-0718

*　　*　　*　　*　　*　　*　　*　　*　　*　　*　　*　　*　　*

FINAL DECISION AND ORDER FOR SUMMARY SUSPENSION OF MEDICAL LICENSE

On April 12, 2010, the Maryland State Board of Physicians (the "Board") notified Donald C. Roane, M.D., that the Board intended to summarily suspend his license to practice medicine in Maryland. On April 28, 2010, a show cause hearing was held before the Board allowing Dr. Roane the opportunity to present reasons and argument on why the summary suspension should not be issued. On May 21, 2010, based upon the presentations at the show cause hearing, the Board issued an order summarily suspending Dr. Roane's license. Dr. Roane requested an evidentiary hearing. On June 7, 2010, a full evidentiary hearing was held before the Office of Administrative Hearings, and, on August 6, 2010, Administrative Law Judge James T. Murray issued a proposed decision recommending that the Board affirm the summary suspension. Dr. Roane filed exceptions, and the State replied. The parties agreed that the Board would rule on the exceptions without oral argument before the Board. The Board reviewed the evidentiary record in the case, the ALJ's proposed decision, Dr. Roane's exceptions, and the State's reply to Dr. Roane's exceptions.

FINDINGS OF FACT

The Board adopts and incorporates by reference the Administrative Law Judge's findings of fact (attached as Exhibit 1) and, in addition, finds that the following facts were proven by a preponderance of evidence:

1. Dr. Roane has been licensed to practice in Maryland since 1965. He continuously renewed his license. He has practiced medicine in Anne Arundel County. Dr. Roane last applied for the renewal of his license in September 2009. The Board approved his application and renewed his license. His license remained active until May 21, 2010, when the Board issued the order of summary suspension. If Dr. Roane's license were not suspended, his license would be active and he would be authorized to practice medicine.

Patient A

2. Patient A was born on February 29, 1960. In 1974, Dr. Roane began treating Patient A for diabetes. She is insulin dependent.

3. In 1974, when Patient A was 14 years old, Dr. Roane initiated inappropriate sexual contact with her, which occurred several times during office visits.

4. When Patient A was 16 years old, Patient A continued to see Dr. Roane at his medical office. Dr. Roane provided her with free samples of insulin. In exchange for the insulin, Dr. Roane received oral sex. Dr. Roane did not maintain medical records on Patient A.

5. When Patient A was 17 years old, she and Dr. Roane began having sexual intercourse. During this period Dr. Roane prescribed for her insulin and an antidepressant, Zoloft.

6. Intermittently, until at least 2002, Patient A and Dr. Roane maintained a sexual relationship. In exchange for sex, Dr. Roane would give Patient A insulin and antidepressants.

Dr. Roane admitted in his testimony that he had a sexual relationship with Patient A until 2002. Dr. Roane also acknowledged procuring insulin and psychotropic medication for Patient A.

7. On January 20, 2000, Dr. Roane wrote a letter to the Pfizer Prescription Assistance Program on Patient A's behalf, asking them to provide her with free Zoloft. Dr. Roane wrote to Pfizer that he had followed her in his practice for over 20 years and that she did not have medical insurance. Dr. Roane sent a copy of the letter to Patient A.

8. Dr. Roane also wrote a letter to the pharmaceutical company Eli Lilly asking them to provide free insulin for Patient A. Eli Lily twice sent insulin in response to Dr. Roane's request.

9. On January 8, 2003, Dr. Roane visited Patient A at her house. Dr. Roane was upset that Patient A had disclosed their sexual relationship to others. Dr. Roane grabbed her hair and punched her on the sternum. On January 16, 2003, Patient A obtained an ex parte restraining order against Dr. Roane from the District Court of Maryland for Anne Arundel County. On January 23, 2003, a Final Peace Order was issued prohibiting Dr. Roane from contacting Patient for six months.

10. On February 1, 2003, Patient A filed a complaint with the Board against Dr. Roane.

Patient B

11. Dr. Roane began to treat Patient B in 1984.

12. In 1988, while Patient B was in his office, lying on an examination table after an internal exam, Dr. Roane had sex with her without her consent.

13. Patient B saw Dr. Roane about four more times. During most of these visits, Dr. Roane pressured Patient B for oral sex. In exchange for these encounters, Dr. Roane provided Patient B with free medication from his sample supply.

14. On May 21, 2004, Patient B filed a complaint with the Board. In her complaint, Patient B alleged that the Respondent subjected her to unwanted sexual activity while he was providing medical services and treatment for her.

Exceptions

Dr. Roane filed exceptions to the administrative law judge's proposed decision, essentially arguing (1) that a summary suspension was not imperatively required because Dr. Roane, although licensed, retired from the practice of medicine; and (2) that the Board's investigative period, more than six years from when the Complaints were filed, was too long and, therefore, nullified the order of summary suspension.

a. Finding of Imperatively Required.

The Board may summarily suspend a license under section 10-226(c) of the State Government Article, which provides:

> (1) Except as provided in paragraph (2) of this subsection, a unit may not revoke or suspend a license unless the unit first gives the licensee:
> (i) written notice of the facts that warrant suspension or revocation; and
> (ii) an opportunity to be heard.
> (2) A unit may order summarily the suspension of a license if the unit:
> (i) finds that the public health, safety, or welfare imperatively requires emergency action; and
> (ii) promptly gives the licensee:
> 1. written notice of the suspension, the finding, and the reasons that support the finding; and
> 2. an opportunity to be heard.

Under the Board's regulations, the Board may issue a notice of intent to summarily suspend a license if "there is substantial likelihood of a risk of serious harm to the public health, safety, or

welfare." COMAR 10.32.02.05B(1). The Board's definition of the term "[i]mperatively requires" also refers to "a substantial likelihood of risk of serious harm to the public health, safety, and welfare." COMAR 10.32.02.02B(14).

In his exceptions, Dr. Roane argues that the summary suspension was not imperatively required because he is retired from the practice of medicine. He testified that he retired on December 31, 2008. But he also testified, and it is undisputed, that he applied for the renewal of his license in September 2009. His renewal application was granted, and, thus, if the summary suspension were not in effect, Dr. Roane would be authorized to practice medicine. The public would not be adequately protected if Dr. Roane maintained a license and could, at any time, end his retirement and return to the practice of medicine.

There is also a substantial likelihood that Dr. Roane would seriously harm others using his privilege to practice medicine, notwithstanding his purported retirement. Dr. Roane has demonstrated an unsettling willingness to rationalize his improper sexual behavior with patients by simply asserting that this activity was outside the purview of his medical practice. He has adamantly maintained that (other than her initial visits to him when she was 14 years old) he did not have a physician-patient relationship with Patient A; yet, in 2000, when he prescribed Zoloft for Patient A, he represented to the Pfizer Prescription Assistant Program that Patient A had been "followed in this practice for more than 20 years." (State's Exhibit 5.) Over the course of decades, Dr. Roane routinely provided Patient A with insulin and medication as well as wrote prescriptions for her. The only reason why Dr. Roane could provide Patient A with insulin and medication and with prescriptions was because he had a medical license. Dr. Roane continuously used his medical license to exploit Patient A, yet argues that his relationship with Patient A was independent of his medical license. Based upon his pattern of conduct and his

current rationalizations, the Board finds that there is a substantial likelihood that Dr. Roane will use his medical license, and the powers concomitant with it, such as the authority to write prescriptions and dispense medication, to prey on others whom he will then not consider patients. The protection of the public health, safety, and welfare imperatively requires the summary suspension of Dr. Roane's medical license

b. Length of Investigation.

Dr. Roane also argues, based upon the length of the Board's investigation, that the summary suspension should be reversed. The Board received the patients' complaints in 2003 and 2004 and issued its notice of intent to summarily suspend Dr. Roane on April 12, 2010. Dr. Roane argues that he did not delay the investigation and that he was interviewed by the Board in 2004 and 2007.

A primary concern for the State's health occupations boards is protecting patients from sexual misconduct. In 2010, the General Assembly enacted section 1-603 of the Health Occupations Article, establishing a time limitation for submitting complaints. Under section 1-603, a board may not charge a licensee if a complaint was received more than six years from the facts that led to the complaint. The General Assembly, however, provided exceptions to this time limitation. One exception includes "sexual misconduct or other similar boundary violations," Health Occ. § 1-603(b)(1), and another exception concerns "[a]cts that occur while a patient is a minor," Health Occ. § 1-603(b)(5). By providing these exceptions, the General Assembly indicated that protecting patients from licensees who commit sexual misconduct was a matter of special import, especially in cases where licensees acted against minors. Like the General Assembly, the Board takes into account the nature of the licensee's harmful conduct when considering objections based upon the passage of time.

Dr. Roane relies upon *Board of Physician Quality Assurance v. Mullan,* 381 Md. 157 (2004). In *Mullan,* the court considered the length of the investigation as a relevant factor in determining whether the Board acted arbitrarily or capriciously. *Id.* at 168. But the court held that the Board's summary suspension of the physician who practiced while intoxicated on a particular day should be affirmed despite the length of the Board's investigation. *Id.* at 173.

Under *Mullan,* the Board retains flexibility in all facets of the case, which includes discretion on whether to issue an order of summary suspension and *when* to issue the order. *Id.* at 168. *Mullan* also stressed that the thoroughness of the Board's investigation should not be compromised by the threat of reversal because the investigation took "'too long.'" *Id.* at 169. While the Board retains significant discretion in its handling its cases, it is not limitless. The Board, of course, cannot act arbitrarily or capriciously, *id.* at 168, and the investigative period is a relevant factor in determining whether the agency acted arbitrarily or capriciously, *id.* at 170-71. But the arbitrary or capricious standard is not established solely by the length of the investigation. There is no mandatory time limitation in which the Board must issue a summary suspension order. *See Mullan,* 381 Md. 157 at 170, *citing John P. v. Axelrod,* 468 N.Y.S.2d 951, 952-53 (N.Y.App.Div. 1983) (the agency could find an imminent danger to the public and summarily suspend a physician's license, even after a six-year delay). There must be a showing, under the circumstances in the particular case, that the Board's actions were arbitrary or capricious. *See Mullan,* 381 Md. at 169, *quoting State v. Chavis,* 200 S.E.2d 390, 392 (S.C. 1973) ("when there is nothing other than an unexplained delay on the part of the reporting officials, unaccompanied by any showing of real prejudice to the driver, the driver is not entitled to any relief because of delay in imposing the suspension").[1] "When an individual alleges that

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[1] Dr. Roane has neither shown nor alleged that he was prejudiced by the length of the

an agency's decision is 'arbitrary or capricious' based on a factual issue, the burden lies on the individual to provide factual evidence to the court." *Harvey v. Marshall,* 389 Md. 243, 315 (2005).

The evidentiary record in this case does not establish the facts explaining the length of the investigation. The four witnesses who testified were the two patients who filed complaints, a therapist for a patient, and Dr. Roane; thus, none of the witnesses conducted the investigation or was part of the investigation team. In *Mullan,* the cause of the delay was clear from the evidentiary record, but in this case no cause was established. The length of the investigation by itself does not dictate a finding that the Board acted arbitrarily or capriciously or that it abused its discretion when it issued its order to summarily suspend. Without any indication that the length of the investigative period stemmed from arbitrary or capricious motives or reasons, Dr. Roane has not met his evidentiary burden. It also must be noted that *Mullan* did not involve instances of sexual misconduct or predatory behavior. The *Mullan* decision does not support a finding that the Board acted arbitrarily or capriciously.

Dr. Roane's exceptions are denied.

The Board summarily suspended Dr. Roane because Dr. Roane used his medical practice to extract sexual favors from vulnerable patients. The evidence also shows that Dr. Roane had sex with a patient without her consent. He also physically assaulted a patient in an attempt to keep her from disclosing their sexual relationship to others. The method Dr. Roane has most relied upon, though, has been to exchange samples of medications for sexual acts from patients who could not afford the medication. His deviant conduct has occurred over such a long period and his explanations are so illogical that it is apparent that his behavior is ingrained. Despite his

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investigative period.

professed retirement, a summary suspension is a necessary measure in this case to protect the public from serious harm.

CONCLUSIONS OF LAW

Based upon the findings of fact, the Board concludes, under section 10-226(c) of the State Government Article and COMAR 10.32.02.05, that Dr. Roane presents a substantial likelihood of risk of serious harm to the public health, safety, or welfare, imperatively requiring the summary suspension of his license to practice medicine in Maryland.

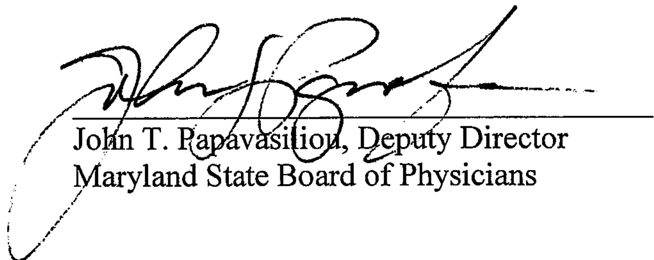
ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby

ORDERED that the summary suspension of Dr. Roane's license to practice medicine in Maryland is **AFFIRMED,** thus, his license to practice medicine in Maryland remains **SUMMARILY SUSPENDED**; and it is further

ORDERED that this is a public document.

12/13/10
Date



John T. Papavasiliou, Deputy Director
Maryland State Board of Physicians

NOTICE OF APPEAL RIGHTS

Pursuant to section 14-408(a) of the Health Occupations Article, Donald C. Roane, M.D., has the right to appeal this decision to the Board of Review of the Maryland Department of Health and Mental Hygiene. Any appeal to the Board of Review shall be filed within 30 days from the date this order is mailed. This order was mailed on the date it was executed. If Dr. Roane decides to appeal this decision, a notice of appeal shall be filed with Carlean Rhames-

Jowers, Board of Review, Department of Health and Mental Hygiene, 201 W. Preston Street, Room 511B, Baltimore, Maryland 21201. A copy of the notice of appeal must also be sent to David Wagner, Assistant Attorney General, 300 W. Preston Street, Suite 302, Baltimore, Maryland 21201. The administrative prosecutor is not involved with appeals and should not be sent of copy of any notice of appeal.

STATE BOARD OF PHYSICIANS	* BEFORE JAMES T. MURRAY.
v.	* AN ADMINISTRATIVE LAW JUDGE
DONALD C. ROANE, M.D.	* OF THE MARYLAND OFFICE
RESPONDENT	* OF ADMINISTRATIVE HEARINGS
	* CASE NO: DHMH-SBP-72-10-18384

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
STIPULATIONS OF FACT
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED DISPOSITION

STATEMENT OF THE CASE

On May 21, 2010, the State Board of Physicians (the Board) issued an Order of Summary Suspension against Donald C. Roane, M.D. (Respondent), which suspended the Respondent's license to practice medicine in the State of Maryland. The Board alleges that the Respondent had inappropriate sexual relationships with two patients. The Board alleges further that the Respondent's conduct is immoral and unprofessional conduct in the practice of medicine and that this behavior raises a substantial likelihood of risk of serious harm to the public health, safety, or welfare. Md. Code Ann., Health Occ. § 14-404(a)(3)(i) & (ii)(2009).

I held a hearing on June 7, 2010 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann. Pursuant to section 14-405(a) of the Health Occupations Article, Annotated Code of Maryland (2009). The Respondent was present and was

EXHIBIT 1

represented by Alan Legum, Esquire. Debra Smith, Assistant Attorney General, was the Administrative Prosecutor.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Board, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); Code of Maryland Regulations (COMAR) 10.32.02; and COMAR 28.02.01.[1]

ISSUES

Does a preponderance of the evidence support the Board's determination that the Respondent engaged in immoral or unprofessional conduct in the practice of medicine; and if so

Is summary suspension of the Respondent's licensed necessary because public health, safety, or welfare imperatively requires emergency action?

SUMMARY OF THE EVIDENCE

Exhibits:

The Board identified the following exhibits that were admitted into evidence:

Bd. Ex. #1-	Summary Suspension Order, May 21, 2010
Bd. Ex. #2	Complaint from Patient A, February 1, 2003
Bd. Ex. #3	Complaint from Patient B, May 21, 2004
Bd. Ex. #4	Petition for Peace Order, January 16, 2003, with attachments
Bd. Ex. #5	Letter from Respondent to Pfizer, January 18, 2000, with attachments
Bd. Ex. #6	Giant Pharmacy prescription label, December 17, 1999, with attachments

[1] The current regulations were proposed at 37:1 Md. Reg. 34-41 (Jan. 4, 2010), Notice of Final Action is at 37:6 Md. Reg. 480 (March 12, 2010) (to be codified at Code of Maryland Regulations (COMAR) 28.02.01).

Bd. Ex. #7	Cover letter, August 23, 2004, and Memorandum of Board interview with Patient A
Bd. Ex. #8	Memorandum of telephone conversation with Patient A, March 15, 2007
Bd. Ex. #9	Elizabeth Finkle interview notes
Bd. Ex. #10	Medical records for Patient B
Bd. Ex. #11	Board interview with Respondent, March 15, 2007
Bd. Ex. #12	Summary suspension hearing transcript for the Respondent, April 28, 2010
Bd. Ex. #13	Medical records from BC Medical Center, January 10, 2003, with attachments
Bd. Ex. #14	Board Subpoena to Elizabeth Finkle, July 1, 2004
Bd. Ex. #15	Board Subpoena to Dr. John Christie, July 20, 2004
Bd. Ex. #16	Federation of State Medical Boards Sexual Boundary Guidelines
Bd. Ex. #17	American Medical Association Sexual Misconduct Opinion and Report

The Respondent submitted the following documents that were admitted into evidence:

Resp. Ex. #1	Investigative Report, January 15, 2003
Resp. Ex. #2	Medical records for Patient A
Resp. Ex. #3	Confidential Settlement Agreement, Release and Covenant Not to Sue, February 23, 2004
Resp. Ex. #4	Letter regarding Patient B, October 13, 1997
Resp. Ex. #5	Letter from Respondent to Richard Hill, March 12, 2003, with attachments
Resp. Ex. #6	Letter from Pamela J. Cromer to the Respondent, July 27, 2004
Resp. Ex. #7	Pamela J. Cromer interview with the Respondent, February 15, 2006

Resp. Ex. #8 Board interview with Cassandra Smith, February 15, 2006

Resp. Ex. #9 Letter from John T. Papavasiliou to the Respondent, April 12, 2010

I also considered the Respondent's Hearing Memorandum in deciding this matter.

Testimony

Elizabeth Finkle, Patient A, and Patient B testified on behalf of the Board. The Respondent testified on his own behalf.

FINDINGS OF FACT

Having considered the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Respondent has been licensed to practice medicine in Maryland since 1965. He is currently 75 years of age and has been semi-retired since he sold his medical practice in 2001.

2. The Respondent was licensed to practice medicine in Maryland until May 21, 2010.

3. Patient A was born February 29, 1960. In 1974, the Respondent began treating Patient A for Juvenile Diabetes. He treated her and provided her with medications intermittently thereafter until 2003.

4. On February 1, 2003, Patient A filed a complaint with the Board. In her complaint, Patient A alleged that she was sexually assaulted by the Respondent in 1974 and then became involved in a long-term sexual relationship with him while he was providing medical services and treatment for her.

5. The Respondent had a sexual relationship with Patient A beginning in the 1970's while he was treating her. Eventually, Patient A stopped seeing the Respondent.

6. When Patient A became an adult, she began seeing the Respondent again. During this period, the Respondent provided Patient A with medications in return for sex.

7. On or about May 21, 2004, Patient B filed a complaint with the Board. In her complaint, Patient B alleged that the Respondent subjected her to unwanted sexual activity while he was providing medical services and treatment for her.

8. The Respondent had a sexual relationship with Patient B while he was treating her. The Respondent provided Patient B medication in exchange for sex.

9. On May 21, 2010, the Board summarily suspended the Respondent's license to practice medicine.

10. Summary suspension of the Respondent's license to practice medicine is an appropriate use of the Board's discretion because public health, safety, or welfare imperatively requires the emergency action.

DISCUSSION

I. GOVERNING STATUTES AND REGULATIONS

In accordance with COMAR 10.32.02.05, the Board may summarily suspend the license of a health care provider if "there is a substantial likelihood of a risk of serious harm to the public health, safety, or welfare." Summary suspensions are governed by the Administrative Procedure Act which permits suspension if "the public health, safety, or welfare imperatively requires emergency action and the licensee is given notice of the suspension and the opportunity to be heard. Md. Code Ann., State Govt § 10-226(c)(2)(2009); COMAR 10.32.02.05. In turn, COMAR 10.32.02.02B(14) defines "imperatively requires" as an action required "as the result of factual contentions which raise a substantial likelihood of risk of serious harm to the public health, safety,

or welfare before an evidentiary hearing governed by the Administrative Procedure Act." However, at a contested case hearing, in accordance with section 10-217 of the State Government Article, the Board must establish by a preponderance of the evidence that the summary suspension of the health care provider's license to practice medicine should be sustained.

II. SUMMARY OF THE ARGUMENTS

The Board contends that the Respondent had sex with two of his patients. The Board argues that having sex with Patients A and B was improper because they were his patients and having sex with patients is immoral and unprofessional conduct in the practice of medicine. It maintains that summary suspension is necessary because the Respondent does not recognize appropriate boundaries and, as long as he remains licensed, there remains the likelihood that he will continue to engage in similar behavior. Thus, the Respondent's conduct raises a substantial risk of serious harm to the public health, safety, or welfare.

The Respondent notes that the first complaint was filed against him in 2003 and alleged conduct that had occurred nearly thirty years earlier. He points out that it was not until March of 2010 that the Board decided that a summary suspension was in necessary. The Respondent contends that due to this long period of inaction by the Board and because the Respondent is now semi-retired, there is no evidence upon which the Board can find that the public health, safety or welfare imperatively requires emergency action and that there is a substantial likelihood of serious harm to the public health, safety or welfare while a full evidentiary hearing is pending.

III. LEGAL STANDARD FOR A SUMMARY SUSPENSION BY THE BOARD

It is well settled that the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate

procedures." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Id.* Thus, Maryland's pre-deprivation procedures must satisfy Constitutional due process requirements embodied in the Fourteenth Amendment. By requiring a contested case hearing based on a preponderance of the evidence, Maryland's procedures more than meet the minimum Constitutional standards.[2] Md. Code Ann. State Gov't §§ 10-217 and 226(c)(2) (2009).

The Respondent's specific argument, that due to the delay in imposing the emergency suspension the Board cannot establish that the suspension was "imperatively" required to protect the public health, safety or welfare is without merit. The same argument was made before the Court of Appeals in *Board of Physician Quality Assur. v. Mullan*, 381 Md. 157 (2004). The Court explained:

> The discretion to issue a summary suspension order if the agency so chooses necessarily includes the discretion to issue the order *when* the agency chooses. Just as the agency may decide not to issue a summary suspension order under § 10-226(c)(2), even when it finds exigent circumstances under § 10-226(c)(2)(i), the agency also may delay issuing that order under the same statutory provisions...
>
> Giving dispositive weight to the speed with which an agency culminates a complaint into a suspension order unreasonably restricts the ability and discretion of the agency to conduct its investigation and issue a summary suspension based upon credible, substantiated allegations... Nor does it comport with the discretion expressly committed to the agency under § 10-226(c)(2). When investigating

[2] They also satisfy Article 24 of the Maryland Declaration of Rights, which is in accord with the Fourteenth Amendment. *Md. Dep't of Transp., Motor vehicle Admin. v. Armacost*, 299 Md. 392 (1984)

> potential summary suspensions, an agency should not compromise the thoroughness of its investigation because of the threat of judicial reversal should the investigation take "too long."
>
> Consideration of the time period preceding the summary suspension as "evidence" vitiating the Board's factual finding would also create the perverse additional incentive for licensees to delay and not cooperate with the Board's attempts to substantiate complaints. Unquestionably, a licensee under investigation has the right to avail himself or herself of legal counsel and all the protections afforded him or her under law. Nevertheless, a licensee's legal defense, obviously an acceptable and lawful response to the threat of summary suspension, should not be rewarded with the unexpected and unwarranted windfall of precluding summary suspension altogether.
>
> Ultimately, consideration of the delay as vitiating evidence illogically shifts the discretion to order summary suspensions away from the agency and into the hands of the licensee under investigation. Clearly, this result could not have been intended by the Legislature. (Internal citations omitted.)

Id. at 169-170.

IV. EVIDENCE

The Board presented the testimony of Patients A and B. Each elated their story, which was consistent with their earlier statements. In order to buttress the testimony of Patient A, the Board presented the testimony of Elizabeth Finkle, a social worker and Patient A's former counselor. Ms. Finkle related that Patient A had confided in her about her sexual encounters with the Respondent before she reported them to the Board.

The Respondent conceded that he had a sexual relationship with Patient A, but stated that at the time she was no longer his patient. He admitted to obtaining free medication for her and giving it to her for her diabetes, but maintained that he obtained the medication on her behalf from drug companies. He opined that this did not constitute the practice of medicine. The Respondent acknowledged that Patient B had once been his patient, but denied that he had sex with her or provided her with medication for free.

V. ANALYSIS

I conclude that the Board has proven by a preponderance of the evidence that the Respondent's continued practice of medicine raises a substantial likelihood of risk of serious harm to the public health, safety, or welfare. The Respondent has been a physician treating patients for 45 years. During that period, starting as early as 1974, he has had sexual relationships with at least two patients, one of whom was a minor when the sexual relationship began.

For the reasons set forth below, I find a preponderance of the evidence supports the charges that the Respondent had sexual relationships with patients and that this is immoral and unprofessional conduct in the practice of medicine.

The Respondent admitted to having sex with Patient A, while at the same time he was providing her with medication. However, he denied that he was "treating" her and does not believe that this constitutes the practice of medicine. In his view, his providing her with medication that he obtained from a pharmaceutical company was not the practice of medicine. Md. Code Ann., Health Occ. § 14-101(l) defines "practice medicine" in pertinent part as follows:

> (l) *Practice medicine.* – (1) "Practice medicine" means to engage, with or without compensation, in medical:
>
> (i) Diagnosis;
> (ii) Healing;
> (iii) Treatment; or
> (iv) Surgery.
>
> (2) "Practice medicine" includes doing, undertaking, professing to do, and attempting any of the following:
> (i) Diagnosing, healing, treating, preventing, prescribing for, or removing any physical, mental, or emotional ailment or supposed ailment of an individual:
> 1. By physical, mental, emotional, or other process that is exercised or invoked by the practitioner, the patient, or both; or
> 2. By appliance, test, drug, operation, or treatment;...

In *McDonnell v. Commission on Medical Discipline*, 301 Md. 426 (1984), the Maryland Court of Appeals determined that the phrase "practice as a physician" was limited to "matters pertaining essentially to the diagnosis, care or treatment of patients." *Id.* at 436. The Court found that conduct is not within the practice of medicine where there is only a "general or associative relationship to the physician in his capacity as a member of the medical profession." *Id.* The Court of Appeals, however, took a broader view of the practice of medicine in *Board of Physician Quality Assurance v. Banks,* 354 Md. 59 (1999). In that case, the Court held that Dr. Banks committed immoral or unprofessional conduct when he sexually harassed three women on the clerical staff in a hospital. Dr. Banks committed the proscribed conduct while on duty, but not actually diagnosing, healing, treating or performing surgery. The Court nonetheless found that his conduct was "in the practice of medicine." Thus, the Court of Appeals did not strictly limit the practice of medicine to the actual performance of diagnosis, healing, treatment or surgery. It held that such an "approach so narrowly construes § 14-404 (a)(3) that it would lead to unreasonable results and render the statute inadequate to deal with many situations which may arise. *Id.* at 73.

Still later, in *Finucan v. Board of Physicians*, 380 Md. 577 (2004), *cert. denied*, 125 S. Ct. 227 (2004), the Court of Appeals considered whether a physician's sexual relationships with three patients were accomplished "in the practice of medicine" for the purpose of disciplinary action under § 14-404(a)(3). The Court held that this conduct constituted unprofessional conduct in the practice of medicine. The Court held: "A parallel sexual relationship between a physician and a patient compromises the physician-patient relationship, violates the ethics of the medical profession, and reflects on the fitness of the physician to practice medicine." *Id.* at 595. The Court further held:

> Unethical conduct may indicate unfitness to practice medicine if it raises reasonable concerns that an individual abused, or may abuse, the status of being a physician in such a way as to harm patients or diminish the standing of the medical profession in the eyes of a reasonable member of the general public. We are satisfied that the Board's concerns with Finucan's sexual liaisons with his various patients are reasonable concerns about him using his position as a physician to prey on his emotionally vulnerable female patients, and his predatory behavior diminishes the standing of the medical profession as caregivers.

Id at 602.

A physician's providing of medication to someone is much more than merely a "general or associative relationship" to the physician's capacity as a member of the medical profession. *See Banks*, 354 Md. at 72. It is clearly the practice of medicine. Furthermore, having such a relationship is not necessarily helpful to the person receiving the medication and does not take into account the view of the person receiving the medication. It also raises the distinct possibility that the physician's judgment will be impaired by the relationship and that the person's medical care will suffer. In this case, it obviously disturbed Patient A, who eventually reported the Respondent's conduct.

Although the Respondent denied any similar relationship with Patient B, who was also his patient at some point, I find it more probable than not that he had such a relationship with her as well. Like with Patient A, there were potential credibility issues with Patient B because of her history and lifestyle. However, I think it is these very traits that actually bolstered her testimony because, in many ways she was like Patient A.

Both Patient A and Patient B were vulnerable individuals. They both were subject to rather easy manipulation. Neither had substantial means for medical care and both needed medication on a regular basis. I also find it important that neither patient was

known to the other, yet their stories regarding the Respondent's actions toward them were strikingly similar.

"Imperatively requires" describes the circumstances that will satisfy section 10-226(c)(2)(i)'s requirement of an emergency and signals the degree of exigency contemplated for summary suspension orders. *Mullan* at 166. That degree of exigency has been demonstrated in this case. Although the Respondent claims that any sex he had with the complaining patients was voluntary, his own testimony demonstrates that the Respondent does not know, or chooses not to follow, the boundaries of the practice of medicine. The Respondent's conduct reflects on the Respondent's fitness to practice medicine. It raises reasonable concerns that he may continue to abuse the status of being a physician in such a way as to harm patients or diminish the standing of the medical profession in the eyes of a reasonable member of the general public. *See Finucan* 380 at 602. Thus, the Respondent's conduct imperatively requires the degree of exigency needed for a summary suspension. A more detailed examination of the Respondent's alleged transgressions awaits a hearing on the full merits of the complaints against him.

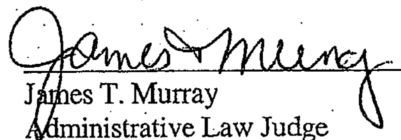
CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the State Board of Physicians proved by a preponderance of the evidence that summary suspension of the Respondent's license to practice medicine on May 21, 2010 is imperatively required to protect the public health, safety and welfare. Md. Code Ann., State Gov't § 10-226(c)(2)(2009).

PROPOSED DISPOSITION

I **PROPOSE** that the Summary Suspension of the Respondent's license to practice medicine of May 21, 2010 be **AFFIRMED**.

August 6, 2010
Date Decision Mailed



James T. Murray
Administrative Law Judge

JTM/gar
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NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party may file exceptions, in writing, to this Proposed Decision with the Board of Physicians within fifteen days of receipt of the decision. Md. Code Ann., State Gov't § 10-216 (2009) and COMAR 10.32.02.03F. The Office of Administrative Hearings is not a party to any review process.

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