

**IN THE MATTER OF**  
**EFRAIM KESSOUS, M.D.,**

**Respondent.**

**License Number: D70798**

**\* BEFORE THE**  
**\* MARYLAND STATE**  
**\* BOARD OF PHYSICIANS**  
**\* Case Numbers: 2221-0075**

\* \* \* \* \*

**FINAL DECISION AND ORDER**

**PROCEDURAL HISTORY**

Efraim Kessous, M.D., is a board-certified family medicine physician, originally licensed to practice medicine in Maryland in 2010, who practices at a medical office in Montgomery County, Maryland. On January 21, 2022, Disciplinary Panel B of the Maryland State Board of Physicians (the “Board”) charged Dr. Kessous with unprofessional conduct in the practice of medicine and with violating a provision of the Maryland Medical Practice Act, a rule or regulation adopted by the Board, or any State or federal law pertaining to the practice of medicine. *See* Md. Code Ann., Health Occ. § 14-404(a)(3)(ii) and (43). The charges alleged that Dr. Kessous was unprofessional while talking with a patient (the “Patient”) at her annual physical examination, on November 30, 2020, and acted unprofessionally and violated a State law pertaining to the practice of medicine by failing to wear a mask during the COVID-19 pandemic, as required by the Governor’s Executive Order.

On August 28, 2022, an Administrative Law Judge (“ALJ”) held an evidentiary hearing at the Office of Administrative Hearings. At the hearing, the State introduced eleven exhibits that were accepted into evidence and presented a witness, the Patient. Dr. Kessous introduced six exhibits, testified on his own behalf, and presented an additional witness, a scribe who was present at the Patient’s appointment. On November 17, 2022, the ALJ issued a proposed decision,

concluding that, as a matter of law, Dr. Kessous committed unprofessional conduct in the practice of medicine, Health Occ. § 14-404(a)(3)(ii); and violated provisions of the Maryland Medical Practice Act, a rule or regulation adopted by the Board or any State or federal law pertaining to the practice of medicine, Health Occ. § 14-404(a)(43). As a sanction, the ALJ recommended a reprimand, completion of courses in infection control and physician-patient relations, a one-year probationary period, and a \$10,000 fine.

Dr. Kessous filed exceptions to the proposed findings of fact, conclusions of law, and sanction recommended in the ALJ's proposed decision. On February 8, 2023, both parties appeared before Disciplinary Panel A of the Board ("Panel A" or the "Panel") for an exceptions hearing.

#### **FINDINGS OF FACT**

The Panel adopts the Joint Stipulations ¶¶ 1-16, the ALJ's undisputed Statement of the Case, issue, and summary of the evidence, and the ALJ's Proposed Findings of Fact ¶¶ 1-27 and incorporates them by reference into the body of this document as if set forth in full. *See* attached ALJ Proposed Decision, Exhibit 1. The Panel also adopts the ALJ's discussion section's legal framework description of witness testimony and the analysis as it pertains to the inappropriate comments (Ex. 1 at 10-27). Ex. 1. The findings of fact were proven by the preponderance of the evidence. The Panel does not adopt the ALJ's Proposed Decision analysis regarding the violations related to Dr. Kessous's failure to wear a mask.

For background, in brief, Dr. Kessous has been licensed to practice medicine in Maryland, since 2010, and is board-certified in family medicine. The Patient first saw Dr. Kessous on April 28, 2019, to obtain birth control medication as a treatment for acne. The Patient saw a dermatologist at Dr. Kessous's practice in May 2019, saw Dr. Kessous in a telehealth visit in July

2020, and had an in-person visit with Dr. Kessous on November 30, 2020. At the time of the November 30, 2020 appointment, the Patient was nineteen years old. Dr. Kessous, the Patient, and a male scribe were in a fairly small examination room, approximately ten feet by ten feet. Ultimately, much of the analysis regarding whether Dr. Kessous committed unprofessional conduct in the practice of medicine depends upon the disputed facts discussed below.

## **ANALYSIS**

### **I. UNPROFESSIONAL CONDUCT**

#### **A. Inappropriate Comments to Patient**

The ALJ found that Dr. Kessous used “language that was condescending, embarrassing, accusatory and insensitive to the Patient” and concluded that such language was “conduct unbecoming to the profession, and therefore is unprofessional conduct.” P.D. 27. Before the Panel, in exceptions, Dr. Kessous cites extensively to his own description of the events and argues that the Judge’s findings were incorrect and did not rise to the level of “unprofessional.” The State responded that the ALJ properly found that Dr. Kessous was not credible, that the Patient was credible, and that the comments that Dr. Kessous made were inappropriate, unbecoming a professional, and insensitive.

Concerning Dr. Kessous’s comment to the Patient, there are two main issues. The first is purely factual: what did Dr. Kessous say to the Patient. The second issue is whether Dr. Kessous’s comments to the patient constitute unprofessional conduct in the practice of medicine.

The Patient testified that Dr. Kessous brought up the topic of her sexual activity. Dr. Kessous asked the patient if she used a condom during sex and, when she answered in the affirmative, Dr. Kessous said that he did not believe her. He then asked the male scribe if he believed her and said that he would “make a bet” with the scribe that she doesn’t wear condoms

during sex. Dr. Kessous then asked the Patient if she used a condom during oral sex and, when the Patient said that she did not, he laughed and said, "I won the bet." The Patient testified that she felt ashamed based on the joke to the scribe that Dr. Kessous made at her expense.

Dr. Kessous also discussed the Patient's antidepressant medications in a flip manner. When he asked the Patient why she was taking antidepressants, the Patient told him that her parents were getting a divorce at the time. Dr. Kessous replied, "So, mommy and daddy aren't happy." The Patient said that Dr. Kessous's comment made her feel "small."

Finally, Dr. Kessous asked her about her microtia<sup>1</sup> and said, "Why didn't your parents fix it?" The patient was again shocked and overwhelmed by his question because it made her "feel like something was wrong with it and that I should've gone get it fixed and that my parents should've done something. That my parents were wrong for not doing something early on." The combination of these three interactions made the Patient feel embarrassed and uncomfortable.

According to Dr. Kessous, he did not make a bet regarding whether she used a condom, but merely told the Patient "I bet that you don't regard oral sex as sexual activity, and, therefore, you are not using condoms during oral sex" to prevent sexually transmitted diseases. Dr. Kessous denied that he commented on the Patient's parents' divorce. Dr. Kessous claimed to ask her whether she was born with the underdeveloped ear, whether it had been addressed, and offered a referral to a plastic surgeon. Dr. Kessous stated that he did not intend to make the Patient feel uncomfortable. In fact, Dr. Kessous said that he tried to make her feel comfortable.

The ALJ found the Patient credible and Dr. Kessous less credible based on several reasons. The ALJ relied upon the fact that the Patient wrote her complaint relatively soon after the event,

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<sup>1</sup> Microtia is a condition where the external ear is small and underdeveloped.

within one month of the encounter, and that she filed her complaint within two months of the incident. The Patient had a clear recollection of certain phrases and was unhesitating in her answers while also acknowledging which parts of the appointment that she could not recall. The Patient's complaint and testimony were consistent. The ALJ noted that the Patient had no motive to fabricate or exaggerate and did not appear to hold any animosity towards Dr. Kessous but instead was concerned about how Dr. Kessous would treat other patients.

In contrast, the ALJ found Dr. Kessous less credible based on the following: Dr. Kessous did not remember certain portions of the appointment in his interview with the Board on June 7, 2021, often saying during the interview what he "probably" said or what "might" have happened. At that interview he did not remember exact phrases. During the hearing, on August 29, 2022, however, Dr. Kessous changed his testimony and now claimed that he had a verbatim recollection of the appointment. When asked about the differences in the quality of his recollection, he claimed that he had a better recollection when testifying before the ALJ because he had thought about the appointment more since that time. The ALJ was not convinced. The ALJ also questioned whether Dr. Kessous would have such a verbatim memory, considering he sees thirty to fifty patients a day and, from his testimony, the patient encounter with the Patient was an uneventful annual appointment. The ALJ noted that, when confronted with the contradictions between his interview and the testimony before the ALJ, Dr. Kessous was evasive.

The Panel adopts the ALJ's credibility determinations for the reasons explained by the ALJ and concludes that the Patient's recollection was accurate and Dr. Kessous's was inaccurate. The Patient's statements were specific and consistent while Dr. Kessous's testimony contained contradictions and became more specific as it aged.

With the factual underpinning resolved, the next question is whether such statements made to the Patient constitute unprofessional conduct. Dr. Kessous claims that, even if the Patient felt embarrassed or ashamed, his comments were still professional. He claims the Patient did not understand him and he had no intention to denigrate or embarrass the Patient.

Unprofessional conduct is “conduct which breaches the rules or ethical code of a profession or conduct which is unbecoming a member in good standing of a profession.” *Finucan v. Board of Physicians*, 380 Md. 577, 593 (2004). Additionally, unprofessional conduct includes acts that are commonly understood by the profession to be prohibited. *See Salerian v. Maryland State Board of Physicians* 176 Md. App. 231, 248 (2007).

In finding Dr. Kessous guilty of unprofessional conduct in the practice of medicine, the ALJ found that the language used by Dr. Kessous was condescending, embarrassing, accusatory and insensitive and unbecoming of a member of the profession. The Panel agrees. It is unacceptable to make a “bet” that a patient is lying about her sexual behavior as a pedagogical tool to explain why condoms are necessary for oral sex. His use of this framing caused the Patient to feel ashamed and embarrassed, and it was unnecessary from a medical perspective. Similarly, his statement that the Patient’s “mommy and daddy aren’t happy” was condescending and belittling. Finally, his statements about “fixing” her microtia were insensitive. In total, the comments demonstrated a continued lack of judgment and are unbecoming a member of the medical profession. For the comments at issue, the Panel adopts the ALJ’s conclusion that Dr. Kessous was guilty of unprofessional conduct in the practice of medicine, in violation of § 14-404(a)(3)(ii) of the Health Occupations Article.

## **B. Failure to Wear a Mask During Treatment**

Like with the discussion above, the first issue in determining whether Dr. Kessous's behavior with respect to not wearing a mask was unprofessional is purely factual, assessing whether Dr. Kessous wore a mask during the appointment. The second is a question of mixed law and fact, determining whether a failure to wear a mask constitutes unprofessional conduct in the practice of medicine.

The examination took place on November 30, 2020, in the first year of the COVID-19 pandemic and before vaccinations were available (outside of clinical trials). Dr. Kessous was unvaccinated. The Patient was unvaccinated. The Patient's family, including the Patient's immunocompromised mother, were unvaccinated. The Patient explained that she wore a mask to keep herself and her family safe.

The Patient claimed that Dr. Kessous entered the room without a mask, and that he did not wear a mask, during their entire visit, which was approximately 30-45 minutes. For a majority of this visit, the Patient sat three feet away from Dr. Kessous. The Patient testified that, at one point during the examination, she needed to pull down her mask for Dr. Kessous to examine her mouth and throat and that she felt very exposed and anxious because he was not wearing a mask and was standing 3 to 6 inches away.

The Patient explained that they had a discussion about masking where she explained that her school had a strict masking policy. She explained to him that she was strict about wearing a mask. The Patient felt that Dr. Kessous did not share her feelings about the importance of masking and, after their discussion, Dr. Kessous did not put on a mask despite her concerns. She explained that she did not ask Dr. Kessous to wear a mask because she was scared to do so and thought that a physician would do what is right.

Dr. Kessous testified that he would sometimes enter a room without a mask if he forgot to put it on but would use that as an opportunity to discuss that he had immunity because he already had COVID-19 and would then put his mask on. He claims that, in this instance, he entered the room without a mask but then put on a mask at the beginning of the visit.

The Panel adopts the Patient's version of events that Dr. Kessous did not wear a mask throughout the entire appointment. For the reasons discussed above, including her direct and consistent testimony and Dr. Kessous's inconsistent testimony that became more specific over time, the Panel finds the Patient more credible than Dr. Kessous. Additionally, Dr. Kessous presented several reasons why he did not think masking was important. In his interview statements, he explained that he had "difficulties to stand with a mask for 14 hours a day working and it's not easy and makes me very claustrophobic." Similarly, he claimed in the interview that it was impossible for him to get COVID again because he had already been infected. These statements suggest to the Panel that Dr. Kessous was justifying and downplaying in the interview his failure to wear a mask.

The next question is whether it was unprofessional conduct in the practice of medicine for Dr. Kessous not to wear a mask in this instance. Dr. Kessous argues in his exceptions that "[f]ailure to wear a mask when entering a room . . . does not constitute unprofessional conduct" because, based on his COVID-19 knowledge in late 2020, he thought that he was unable to be infected with COVID-19 or infect others because he had already been infected with COVID-19 and was therefore "immunized." The State responds that his deliberate and intentional refusal to wear a protective mask in a closed examination room was contrary to all prevailing medical standards that were in effect at the time with respect to COVID-19 infection control. The State further argues that it was unprofessional to disobey the State's Executive Order regarding masking.



Office policy and the Governor's Executive Order provided requirements regarding masking. Under Dr. Kessous's medical office's policy, medical professionals were required to wear masks. The policy was based on the CDC guidelines recommendation.

The Governor issued many Executive Orders over the course of 2020 as circumstances and knowledge about the virus changed. In an April 15, 2020 Executive Order, the Governor required face coverings on public transportation and in retail and foodservice establishments. A July 29, 2020 Executive Order added to the required masking locations to include "indoors at any location where members of the public are generally permitted" and "Obtaining healthcare services, including without limitation, in offices of physicians and dentists, hospitals, pharmacies, and laboratories; and . . . [e]ngaged in work in any area where . . . interaction with others is likely, including without limitations in shared areas of commercial offices..." The Governor issued an updated Executive Order on November 17, 2020. The November Executive Order maintained the identical language regarding the requirement of wearing face coverings in physicians' offices and in work areas where interactions with others is likely. The Executive Order had no exceptions for those who had already been infected with COVID.

The Panel agrees with the State's analysis. Dr. Kessous failed to wear a mask for 30-45 minutes in a small, enclosed room measuring ten by ten feet. He examined the patient, at one point looking in her mouth a mere 3 to 6 inches from her face. This occurred during a worldwide pandemic at a time before vaccinations were readily available and when the COVID-19 virus was fairly new and not well understood.

Quite simply, during the public health crisis, it was "unbecoming a member in good standing" as a physician to fail to wear a mask, especially when it violated his own office policy

and the Governor's Executive Order, which were all intended to prevent the spread of an extremely contagious virus during a pandemic.

Dr. Kessous's personal theories about the spread of COVID do not change this analysis. We now know that individuals can be infected with COVID multiple times, contrary to Dr. Kessous's claim that he was immune to the virus after being infected once. But, regardless, the Executive Order and office policy did not contain an exception for individuals who had already tested positive for COVID. The Panel finds that these failures were unbecoming of a physician and constitute unprofessional conduct in the practice of medicine, in violation of § 14-404(a)(3)(ii) of the Health Occupations Article.

## **II. VIOLATION OF A RULE OR REGULATION ADOPTED BY THE BOARD OR ANY STATE OR FEDERAL LAW PERTAINING TO THE PRACTICE OF MARYLAND**

Pursuant to Health Occ. § 14-404(a)(43), a physician may not "violate[] . . . any rule or regulation adopted by the Board or any State or federal law pertaining to the practice of medicine."

The ALJ found that Dr. Kessous's violation of the Governor's Executive Order was a violation of State Law under the Public Safety Article. Specifically, the ALJ found that, if the Governor determines that a catastrophic health emergency exists, the Governor is allowed to issue a Proclamation under subtitle 3A, pursuant to Md. Code Ann., Pub. Safety § 14-3A-02(a). Under Pub. Safety § 14-3A-08(a)(1), "a person may not knowingly and willfully fail to comply with an order, requirement, or directive issued under this subtitle." By failing to comply with the Governor's Executive Order that directly pertained to wearing a face covering in a health care setting, the ALJ found that Dr. Kessous violated a State rule or regulation pertaining to the practice of medicine.

Dr. Kessous argued that the Governor's proclamation itself did not specifically reference health care providers or the practice of medicine. Specifically, the Executive Order does not directly reference treatment or individuals providing health care, rather references individuals obtaining health care services. Dr. Kessous claims that it is, therefore, not a "State or federal law pertaining to the practice of medicine." The State responded that the Governor was authorized under Article Two of the State Constitution to issue the Executive Order.

The Panel has already found that it was unprofessional and inappropriate for Dr. Kessous to ignore the Governor's Executive Order meant to protect public health, just as it was unprofessional for him to violate his own office's masking policy. This question is narrower; whether failing to wear a mask was a violation of a State law pertaining to the practice of medicine.

The Public Safety Article § 14-3A-08(a) requires everyone to follow the Governor's Executive Orders, while Pub. Safety § 14-3A-08(b) applies specifically to health care practitioners. The Executive Order was authorized by Pub. Safety § 14-3A-08(a) and concerned public health generally. The masking requirements were directed towards all offices and indoor locations to prevent the spread of the virus, not only medical offices. Even the provisions specifically concerning medical offices were directed towards all individuals present and required patients and physicians alike to wear masks. The Governor's Executive Order was not issued through Pub. Safety §§ 14-3A-08(b) and 14-3A-03(c), which allow the Governor to order health care providers to "participate in disease surveillance, treatment, and suppression efforts." Such an order would have concerned the practice of medicine. Instead, the Panel finds that the broad Executive Order does not specifically pertain to the practice of medicine, and therefore, the Panel does not find a violation under Health Occ. § 14-404(a)(43).

## CONCLUSIONS OF LAW

Based on the foregoing conduct, Panel A concludes, as a matter of law, that Dr. Kessous is guilty of unprofessional conduct in the practice of medicine, in violation of Health Occ. § 14-404(a)(3)(ii), with respect to his comments to the Patient during the examination on November 30, 2020, and for his failure to wear a mask during his medical treatment of the Patient during that same visit. The Panel dismisses the charge of violating a provision of this title, rule or regulation adopted by the Board, or State or federal laws pertaining to the practice of medicine, in violation of Health Occ. § 14-404(a)(43).

## SANCTION

As a sanction, the ALJ recommended that the Panel impose a reprimand, one year of probation, courses on infection control and appropriate physician-patient relations, and a \$10,000 fine. The ALJ cited the sanctioning guidelines, which provide for a sanction between a reprimand and revocation and a fine between \$5,000 and \$50,000 for unprofessional conduct. COMAR 10.32.02.10B. The ALJ recognized that the case involved a single appointment with the Patient, Dr. Kessous had no prior disciplinary record, and the violation was not particularly egregious. On the other hand, the ALJ noted that failing to wear a mask had the potential for patient harm and that the Patient was also harmed by the comments Dr. Kessous made to her. Moreover, Dr. Kessous did not have any regret or remorse regarding his conduct during the appointment and did not appreciate that his language, tone, and manner could be offensive. Regarding the fine, the ALJ noted that \$10,000 is toward the lower end of the range of fines listed in the sanctioning guidelines.

Dr. Kessous takes exception to the ALJ's proposed sanction and argues that the Board should eliminate the recommended \$10,000 fine. Dr. Kessous focused on his lack of prior discipline and claims that he was trying his best to educate the Patient. He described his

communication as well-intentioned but poorly executed and that not wearing a mask also did not warrant a fine.

The State argues that Dr. Kessous's demeaning remarks were inappropriate and constitute grounds to impose a fine. The State argues that Dr. Kessous's refusal to protect his patients through wearing a mask was irresponsible and inconsistent with his duties as a physician and requires the imposition of a fine. The State notes that the minimum fine for unprofessionalism is \$5,000 and argues that based on the two distinct violations (the statements and masking), two separate fines of \$5,000, totaling \$10,000, is appropriate.

The Panel has considered the mitigating factors that apply, including Dr. Kessous's lack of disciplinary history, the single appointment, and lack of the egregiousness of the conduct to the sanction. COMAR § 10.32.02.09(B)(5). The Panel has also considered the aggravating factors, including the potential for patient harm related to his failure to wear a mask and the emotional distress and harm caused by his remarks to the Patient. COMAR § 10.32.02.09(B)(6). In short, the Panel believes that the ALJ's proposed sanction is appropriate and adopts it.

### **ORDER**

It is, on an affirmative vote of a majority of the quorum Panel A, hereby

**ORDERED** that **EFRAIM KESSOUS, M.D.**, is **REPRIMANDED**; and it is further

**ORDERED** that Dr. Kessous is placed on **PROBATION** for a minimum period of **ONE (1) YEAR**.<sup>2</sup> During the probationary period, Dr. Kessous shall comply with the following probationary terms and conditions:

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<sup>2</sup> If Dr. Kessous's license expires while he is on probation, the probationary period and any probationary conditions will be tolled. COMAR 10.32.02.05C(3).

(1) Within **SIX (6) MONTHS**, Dr. Kessous is required to take and successfully complete the following two courses: (1) physician-patient relations and (2) infection control. The following terms apply:

- (a) It is Dr. Kessous's responsibility to locate, enroll in and obtain the disciplinary panel's approval of the courses before the course is begun;
- (b) Dr. Kessous must provide documentation to the disciplinary panel that Dr. Kessous has successfully completed the courses;
- (c) The courses may not be used to fulfill the continuing medical education credits required for license renewal; and
- (d) Dr. Kessous is responsible for the cost of the courses; and

(2) Within **ONE (1) YEAR**, Dr. Kessous shall pay a civil fine of **TEN THOUSAND (\$10,000) DOLLARS**. The fine shall be paid by money order or bank certified check made payable to the Maryland Board of Physicians and mailed to P.O. Box 37217, Baltimore, Maryland 21297. The Board will not renew or reinstate Dr. Kessous's license if Dr. Kessous fails to timely pay the fine to the Board; it is further

**ORDERED** that, after Dr. Kessous has complied with all terms and conditions of probation and the minimum period of probation imposed by the Order has passed, Dr. Kessous may submit to the Board a written petition for termination of probation. After consideration of the petition, the probation may be administratively terminated through an order of the disciplinary panel, but Dr. Kessous may be required to appear before the disciplinary panel to discuss his petition for termination. The disciplinary panel may grant the petition to terminate the probation, through an order of the disciplinary panel, if Dr. Kessous has complied with all probationary terms and conditions and there are no pending complaints relating to the charges; and it is further

**ORDERED** that a violation of probation constitutes a violation of this Order; and it is further

**ORDERED** that, if Dr. Kessous allegedly fails to comply with any term or condition imposed by this Order, Dr. Kessous shall be given notice and an opportunity for a hearing. If the

disciplinary panel determines there is a genuine dispute as to a material fact, the hearing shall be before an Administrative Law Judge of the Office of Administrative Hearings followed by an exceptions process before a disciplinary panel; and if the disciplinary panel determines there is no genuine dispute as to a material fact, Dr. Kessous shall be given a show cause hearing before a disciplinary panel; and it is further

**ORDERED** that, after the appropriate hearing, if the disciplinary panel determines that Dr. Kessous has failed to comply with any term or condition imposed by this Order, the disciplinary panel may reprimand Dr. Kessous, place him on probation with appropriate terms and conditions, or suspend his medical license with appropriate terms and conditions, or revoke his license to practice medicine in Maryland. The disciplinary panel may, in addition to one or more of the sanctions set forth above, impose a civil monetary fine on Dr. Kessous; and it is further

**ORDERED** that Dr. Kessous is responsible for all costs incurred in fulfilling the terms and conditions of this Order; and it is further

**ORDERED** that the effective date of the Order is the date the Order is signed by the Executive Director of the Board or her designee. The Executive Director or her designee signs the Order on behalf of the disciplinary panel which has imposed the terms and conditions of this Order; and it is further

**ORDERED** that this Order is a public document. *See* Health Occ. §§ 1-607, 14-411.1(b)(2) and Gen. Prov. § 4-333(b)(6).

05/01/2023  
Date

***Signature On File***

Christine A. Farrelly, Executive Director  
Maryland State Board of Physicians

**NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW**

Pursuant to Md. Code Ann., Health Occ. § 14-408(a), Dr. Kessous has the right to seek judicial review of this Final Decision and Order. Any petition for judicial review shall be filed within 30 days from the date of mailing of this Final Decision and Order. The cover letter accompanying this final decision and order indicates the date the decision is mailed. Any petition for judicial review shall be made as provided for in the Administrative Procedure Act, Md. Code Ann., State Gov't § 10-222 and Title 7, Chapter 200 of the Maryland Rules of Procedure.

If Dr. Kessous files a petition for judicial review, the Board is a party and should be served with the court's process at the following address:

**Maryland State Board of Physicians  
Christine A. Farrelly, Executive Director  
4201 Patterson Avenue  
Baltimore, Maryland 21215**

Notice of any petition should also be sent to the Board's counsel at the following address:

**David S. Finkler  
Assistant Attorney General  
Department of Health and Mental Hygiene  
300 West Preston Street, Suite 302  
Baltimore, Maryland 21201**



# Exhibit 1

MARYLAND STATE BOARD OF  
PHYSICIANS

v.

EFRAIM KESSOUS, M.D.,

RESPONDENT

LICENSE No.: D70798

\* BEFORE ERIN H. CANCIENNE,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\*  
\* OAH No.: MDH-MBP1-71-22-10890

\* \* \* \* \*

**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On January 21, 2022, a disciplinary panel of the Maryland State Board of Physicians (Board) issued charges against Efrain Kessous, M.D. (Respondent) alleging violations of the State law governing the practice of medicine. Md. Code Ann., Health Occ. §§ 14-101 through 14-508, and 14-601 through 14-607 (2021).<sup>1</sup> Specifically, the Respondent is charged with violating sections 14-404(a)(3)(ii) and (43) of the Maryland Medical Practice Act. Md. Code Ann., Health Occ. §14-404(a); Code of Maryland Regulations (COMAR) 10.32.02.03E(3)(d).

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<sup>1</sup> All references hereinafter to the Health Occupations Article cite the 2021 Replacement Volume of the Maryland Annotated Code.

The disciplinary panel to which the complaint was assigned forwarded the charges to the Office of the Attorney General for prosecution, and another disciplinary panel delegated the matter to the Office of Administrative Hearings (OAH) for issuance of proposed findings of fact, proposed conclusions of law and proposed disposition. COMAR 10.32.02.03E(5); COMAR 10.32.02.04B(1).

I held a hearing on August 29, 2022, at the OAH office, located at 11101 Gilroy Avenue, Hunt Valley, Maryland. Health Occ. § 14-405(a); COMAR 10.32.02.04. Robert J. Gilbert and Veronica A. Colson, Assistant Attorneys General and Administrative Prosecutors, represented the State of Maryland (State). Robert C. Maynard, Esquire, represented the Respondent, who was present.

Procedure is governed by the contested case provisions of the Administrative Procedure Act, the Rules for Hearings Before the Board of Physicians, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 10.32.02; COMAR 28.02.01.

### ISSUES

1. Whether the Respondent's conduct constitutes unprofessional conduct in the practice of medicine under Md. Code Ann., Health Occ. § 14-404 (a)(3)(ii).
2. Whether the Respondent's conduct violates any provision of Title 14 of the Health Occupation Article, any rule or regulation adopted by the Board, or any State or federal law pertaining to the practice of medicine, under Md. Code Ann., Health Occ. § 14-404(a)(43).
3. If so, what sanction(s) are appropriate?

## SUMMARY OF THE EVIDENCE

### Exhibits

I admitted the following exhibits into evidence on behalf of the Board:

- Bd. Ex. 1 - Licensing Information for Respondent, undated
- Bd. Ex. 2 - Proclamations/Executive Orders, issued on April 15, 2020, July 29, 2020, and November 17, 2020
- Bd. Ex. 3 - Complaint, dated January 3, 2021
- Bd. Ex. 4 - Communications from Board to Respondent, dated March through May 2021
- Bd. Ex. 5 - Email from Respondent to Board, dated May 28, 2021 (containing Respondent's written response to the Board dated March 8, 2021)
- Bd. Ex. 6 - *Subpoena duces tecum* for the Patient's<sup>2</sup> medical records, January 15, 2021, and response, March 15, 2021
- Bd. Ex. 7 - *Subpoena duces tecum* for chaperone policy, March 25, 2021, and response, undated
- Bd. Ex. 8 - *Subpoena ad testificandum*, May 20, 2021, and transcribed interview of the Respondent, June 7, 2021
- Bd. Ex. 9 - *Subpoena ad testificandum*, August 2, 2021, and transcribed interview of [REDACTED], August 27, 2021
- Bd. Ex. 10 - Report of Investigation, dated October 22, 2021
- Bd. Ex. 11 - Charges Under the Maryland Medical Malpractice Act, dated January 21, 2022

I admitted the following exhibits into evidence on behalf of the Respondent:

- Resp. Ex. 1 - Curriculum Vitae of Respondent, undated
- Resp. Ex. 2 - Demographics, History and Problem List for Patient, printed March 15, 2021
- Resp. Ex. 3 - Medical records of Patient for April 28, 2019
- Resp. Ex. 4 - Medical records of Patient for May 2, 2019

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<sup>2</sup> In order to protect her privacy, throughout this decision, the Patient will not be referenced by name. However, the Patient's name is contained in various exhibits from both the Board and the Respondent.

Resp. Ex. 5 - Medical records of Patient for July 27, 2020

Resp. Ex. 6 - Medical records of Patient for November 30, 2020

Testimony

The following witness testified on behalf of the Board: the Patient

The Respondent testified in his own behalf, and presented the following witness:

[REDACTED]

JOINT STIPULATIONS<sup>3</sup>

1. At all relevant times, the Respondent was and is a physician licensed to practice medicine in the State of Maryland. The Respondent was initially licensed to practice medicine in Maryland on May 10, 2010, under License Number D70798. The Respondent has maintained continuous licensure in Maryland since that time. The Respondent's Maryland medical license expires on September 30, 2022, subject to renewal.

2. The Respondent is board-certified in family medicine and at all relevant times, practiced at the [REDACTED], a medical office in Montgomery County, Maryland.

3. The Maryland State Board of Physicians (the "Board") initiated an investigation of Dr. Kessous after receiving a complaint dated January 3, 2021, from a patient (referred to in the charges as the "Patient") about Dr. Kessous's actions when she presented to his office for an annual examination on November 30, 2020.

4. On January 15, 2021, the Board issued a subpoena duces tecum to the [REDACTED] requesting that it provide a complete copy of any and all medical

<sup>3</sup> The wording of these Joint Stipulations comes directly from the stipulations submitted by the parties at the outset of hearing. See COMAR 28.02.01.21H.

records and billing records with respect to the Patient. The [REDACTED] subsequently submitted those records to the Board.

5. On March 25, 2021, the Board issued a subpoena duces tecum to Dr. Kessous, requesting that he provide a complete copy of any chaperone policy for [REDACTED] and/or Efrain Kessous, M.D. Dr. Kessous subsequently submitted that information to the Board.

6. By letter dated March 25, 2021, the Board notified Dr. Kessous that it had opened a full investigation of him as a result of the Patient's complaint. The Board requested that Dr. Kessous address the complaint in a written response within 10 business days. Dr. Kessous did not provide the responsive information within that time frame.

7. Through an email dated May 10, 2021, the Board notified Dr. Kessous that it had requested that he provide a written response, which it had not received. The Board requested that he provide the requested information by close of business on May 12, 2021. Dr. Kessous did not provide the responsive information within that time frame.

8. By letter dated May 20, 2021, the Board again notified Dr. Kessous that it had opened an investigation of him and requested a written response to the Patient's complaint.

9. Through an email to the Board dated May 28, 2021, Dr. Kessous addressed the matter in an attached written response, which was dated March 8, 2021.

10. On May 20, 2021, the Board issued a subpoena ad testificandum to Dr. Kessous, directing him to appear for an interview by video-conference with Molly Dicken, Board Compliance Analyst, on June 7, 2021.

11. On June 7, 2021, Board staff conducted an under-oath interview of Dr. Kessous.

12. On August 2, 2021, the Board issued a subpoena ad testificandum to [REDACTED] [REDACTED]<sup>4</sup> Dr. Kessous's scribe, directing him to appear for an interview by video-conference with Molly Dicken, Board Compliance Analyst, on August 27, 2021.

13. On August 27, 2021, Board staff conducted an under-oath interview of Mr. [REDACTED].

14. On October 22, 2021, Board Compliance Analyst Molly Dicken issued a Report of Investigation in this matter.

15. On January 21, 2022, the Board issued a document titled, Charges Under the Maryland Medical Practice Act, against Dr. Kessous under MBP Case Number 2221-0075B; alleging that he violated the following provisions of the Maryland Medical Practice Act, Md. Code Ann., Health Occ. §§ 14-404 (a): (3) Is guilty of: (ii) Unprofessional conduct in the practice of medicine; and (43) Except for the licensure process described under Subtitle 3A of this title, violates any provision of this title, any rule or regulation adopted by the Board, or any State or federal law pertaining to the practice of medicine.

16. Dr. Kessous was duly served with the above disciplinary charges.

#### PROPOSED FINDINGS OF FACT

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

##### Executive Orders and State of Emergency

1. On March 5, 2020, Lawrence J. Hogan, Jr., the Governor of Maryland (Governor) proclaimed a state of emergency and catastrophic health emergency within the State of Maryland (State) due to the COVID-19 pandemic. The state of emergency was renewed multiple times and remained in effect at all relevant times. Bd. Ex. 2.

<sup>4</sup> While the Joint Stipulations spell the last name [REDACTED] at the hearing, the witness spelled his last name [REDACTED].

2. On July 29, 2020, the Governor issued an Order, which among other things required the use of face coverings in the following circumstances:

4. obtaining healthcare services, including without limitation, in offices of physicians and dentists, hospitals pharmacies, and laboratories; and

5. engaged in work in any area where:

a. interaction with others is likely, including without limitations, in shared areas of commercial offices...

Bd. Ex. 2.

3. On November 17, 2020, the Governor extended the required use of face coverings when obtaining healthcare services and while engaged in work in any area where interaction with others is likely. Bd. Ex. 2.

4. The November 17, 2020 Order by the Governor remained in full force and effect as of November 30, 2020.

Patient History with the Respondent's Practice

5. The Respondent is an owner and physician for the [REDACTED]

6. The Patient's first appointment with the Respondent occurred on April 28, 2019. At the April 2019 appointment, the Patient sought birth control medication as a treatment for her acne. The Patient's mother was present during this appointment. At the end of this appointment, the Respondent prescribed the Patient with birth control medication.

7. On May 2, 2019, the Patient had an in-person appointment with [REDACTED] M.D., a dermatologist in the Respondent's practice, regarding her acne. The Patient did not have any other appointments with Dr. [REDACTED]

8. On July 27, 2020, the Patient had a telemedicine appointment with the Respondent. During this appointment, the Patient sought to renew her prescription for birth control medication.



9. On July 27, 2020, the Respondent prescribed the Patient birth control medication for ninety days, but requested an in-person annual exam with the Patient before prescribing any additional refills.

10. The Patient did not have any complaints regarding the April 28, 2019, May 2, 2019, and July 27, 2020 appointments.

The November 30, 2020 appointment

11. On November 30, 2020, the Patient had an in-person appointment (Appointment) with the Respondent. The Patient was nineteen years old at the time of the Appointment.

12. On November 30, 2020, [REDACTED], acted as a scribe for the Appointment between the Patient and the Respondent and was present in the examination room.

13. When the Respondent entered the examination room for the Appointment, he was not wearing a mask.

14. The Respondent had COVID-19 in April 2020 and had recovered from COVID-19 before the date of the Appointment.

15. The Respondent would sometimes enter an examination room without a mask, and then have a discussion with a patient about his prior exposure, recovery, immunity, and the purpose of a mask. After that discussion, the Respondent would put his mask on if a patient requested it.

16. During the Appointment, the Patient did not request or demand that the Respondent put on his mask.

17. During the Appointment, the Respondent never wore a mask.

18. During the Appointment, the Respondent and the Patient discussed whether the Patient engaged in sexual activities and whether the Patient used condoms or other preventative measures to prevent transmission of sexually transmitted diseases (STDs).

19. During this discussion of prevention of STDs, the Respondent used accusatory statements about whether the Patient always used a condom during sexual activities.<sup>5</sup>

20. This statement led to a discussion of using condoms during oral sex to prevent transmission of STDs.

21. The Patient was on anti-depressants during the Appointment.

22. During the Appointment, the Respondent asked questions about the Patient's use of anti-depressants.

23. The Patient discussed her parent's divorce as one of the reasons for her taking anti-depressants.

24. In response to this reason, the Respondent responded with a phrase similar to "Mommy and daddy are not getting along."

25. The Patient had another medical provider to manage her depression and did not want to discuss the topic with the Respondent.

26. The Patient has a condition called microtia, which caused her left ear to be deformed.

27. During the Appointment, the Respondent asked the Patient, why her parents never had her ear fixed.

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<sup>5</sup> The exact words used are unclear as the Appointment was not recorded. However, the Patient described the statement as a bet between the Respondent and the scribe regarding whether the Patient used a condom for all sexual activities. The Respondent described the statement as proving that that Patient did not always use a condom for sexual activities.

## DISCUSSION

### Legal Framework

When not otherwise provided by statute or regulation, the standard of proof in a contested case hearing before the OAH is a preponderance of the evidence, and the burden of proof rests on the party making an assertion or a claim. State Gov't § 10-217 (2021); COMAR 28.02.01.21K. To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). The State bears the burden to show that the Respondent violated Maryland Code Annotated, Health Occupations Article, 14-404(a)(3)(ii), and (43) by a preponderance of the evidence. COMAR 28.02.01.21K(1)-(2)(a).

The grounds for reprimand or probation of a licensee, or suspension or revocation of a license under the Act include the following:

(a) *In general.* – Subject to the hearing provisions of § 14-405 of this subtitle, a disciplinary panel, on the affirmative vote of a majority of the quorum of the disciplinary panel, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:

...

(3) Is guilty of:

...

(ii) Unprofessional conduct in the practice of medicine;

...

(43) Except for the licensure process described under Subtitle 3A of this title, violates any provision of this title, any rule or regulation adopted by the Board, or any State or federal law pertaining to the practice of medicine.

Health Occ. § 14-404(a)(3)(ii), (43).

## Witnesses<sup>6</sup>

### Patient

The Patient is currently a senior in college. She is a life-long resident of Montgomery County, Maryland. The Patient testified that she only had four appointments with the Respondent's practice and only three with the Respondent. The appointments with the Respondent were in the summer of 2019, the summer of 2020, and November 30, 2020.

On the first appointment, the Patient went to the Respondent to get birth control to help control her acne, prior to trying Acutane, which the Patient did not want to use. Her mother attended the appointment with the Patient. The Patient does not allege anything unprofessional occurred during this appointment.

The second appointment was a remote visit through Zoom. The Patient wanted to get a refill of her birth control before returning to college for the semester. The Patient testified that the Respondent provided a refill but told her that the next time she returned home, she needed to schedule a physical exam before he would prescribe any more refills. The Patient does not allege anything unprofessional occurred during this appointment.

The third appointment (Appointment) was in-person on November 30, 2020. The Patient's mother did not attend the Appointment. At the time of the Appointment, the Patient was nineteen years old. The Patient's goal with this appointment was to get a refill of her birth control. The Patient testified that she was wearing a mask that day because her mother is immunocompromised. She said it was her routine at that time to wear a mask for her and her

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<sup>6</sup> Both [REDACTED] and the Respondent had completed a recorded interview, as well as testified at the hearing. The Patient wrote the complaint as well as testified at the hearing. This section will contain statements from the recorded interviews; complaint, and testimony from the hearing.

family's safety. The Patient noticed that the Respondent's practice offered COVID-19 testing, and that the staff appeared to be masked.

The Patient testified that while she was waiting in the examination room for the Respondent the door was open. She further testified that she saw the Respondent leave a room without a mask, and then saw another individual (that she testified was another patient) in the room. The Patient testified that immediately after leaving that room, the Respondent came into her room without a mask. The Patient testified that the Respondent did not wash his hands when he entered the room and did not have gloves on when he entered. Once the Respondent and the scribe entered the examination room, the door was closed. The Patient testified that she was sitting on the chair by the table, in what she described as an average examining room.

The Patient testified that the Respondent did not put on his mask during the entire visit. She repeated this point multiple times throughout her testimony and never wavered regarding whether the Respondent wore a mask for any portion of her appointment. Further, the Patient remembers a discussion with the Respondent regarding her school's strict masking and testing policies. She testified that the Respondent did not seem enthusiastic about these policies, and that caused her to determine that he and she did not share the same beliefs about the importance of masking. The Patient testified that at one point in the exam, she needed to pull down her mask for the Respondent to examine her and that she felt very exposed as the Respondent was not wearing a mask at that time. The Patient did not specifically ask the Respondent to put on a mask or to challenge him because she was scared, and felt it was hard to challenge a physician because she generally believes physicians do what is right, and she thought maybe she was wrong.

During the appointment, there was a discussion of the Patient's sexual activities and use of condoms during various sexual activities. According to the Patient, the following discussion occurred:

A. So, he first began by saying are you sexually active? I said yes. He then goes, "Do you use a condom when you have sex?" I said yes. He then goes, "I don't believe you." Then he looks at the male scribe that's in the room and goes, "Do you believe her?" And then he says no, the male scribe says no. The doctor then looks up at the male scribe and goes, "Let's make a bet that she doesn't wear condoms." He then asked me the question, "Do you have oral sex?" I said yes. Then he goes, "So, I know when you do that, you don't wear a condom, right?" And I said, no. He then goes -- he then laughs and goes, "I won the bet."

Hearing Transcript, p. 39, L 11-22. The Patient testified that the Respondent made her feel ashamed and disgusted. She further explained: "I've never had any Doctor make these assumptions, make jokes about me while I'm in the room and have there be no female scribe or chaperone in there. It made me feel very alone and like it made me feel unsafe, really." *Id.* p. 40, L 8-12.

During the Appointment, the Respondent noticed that the Patient's medications include antidepressants. The Respondent asked the Patient why she was depressed, and she explained that her parents were getting divorced. The Patient testified that the Respondent replied "So, mommy and daddy aren't happy." *Id.*, p. 41, L. 6 -7. The Patient testified that this comment made her feel small, less than she was, and that she was shocked by it.

During the physical examination, the Respondent noticed that the Patient's left ear is underdeveloped due to a condition call microtia. According to the Patient, the Respondent asked, "Why didn't your parents fix it?" *Id.*, p. 41, L. 19. The Patient testified that she responded that it did not need to be fixed. According to the Patient, the Respondent did not suggest that he could provide her any names of providers who could address her microtia. After the Patient responded that it did not need to be fixed, there was no further discussion on this

issue. The Patient testified that this comment was shocking, and it made her feel sad, like something was wrong with her, and that her parents had done something wrong by not taking actions earlier.

The Patient was clear that the topics discussed during the Appointment (safe sexual practices, the cause of her depression, and her microtia) were appropriate topics. Her complaint was about the manner, the language, and the way the Respondent talked to her during the Appointment. The Patient testified that when she left the Respondent's office she was in tears, embarrassed and ashamed.

The Patient did not report any of her concerns regarding the Appointment to the Respondent's practice. The Patient did not file the complaint with the Board initially. Instead, she talked to people close to her because she did not think there was anything she could do. Approximately three weeks after the Appointment, a trusted adult told the Patient that there were things she could do. The Patient began writing her complaint prior to Christmas and then had her sister review it before submitting it to the Board. The Patient did not undergo a recorded interview during the Board's investigation of the Complaint. The Patient testified that she did not receive the letter requesting an interview timely because she was away at school.<sup>7</sup>

Board Exhibit 3 is the Patient's Complaint form, and it was received by the Board on January 8, 2021.<sup>8</sup> The Patient's Complaint only references the November 30, 2020 appointment. At the time the Complaint was made, the Patient disclosed that she had also made a formal complaint to [REDACTED]. No party provided any evidence regarding the content of the complaint to

<sup>7</sup> The record is unclear when a letter requesting an interview may have been sent, or the exact language of the request. Neither side introduced the letter into evidence. Board Exhibit 11, the Report of Investigation stated "Board staff made multiple attempts to interview [the Patient]. She never responded to the Board's attempts."

<sup>8</sup> The date stamp on the first page indicated it was received on January 8, 2020. However, the Appointment in question did not occur until November 30, 2020, and the Patient signed the Complaint on January 3, 2021. Therefore, it is presumed that this date stamp has the incorrect year.

Medstar, the date when that complaint was filed, or whether anything was done in response to that complaint. In the Complaint, the Patient reported that she saw the Respondent for the yearly exam to refill her birth control. She indicated that the Respondent was not her primary family doctor and was only her doctor regarding that refill. The Patient reported that she had waited over an hour after her set appointment time.

She further reported that the Respondent entered the room without a mask immediately after leaving another patient's room. The Complaint indicated that the Respondent did not wear a mask during the entire appointment and that the Patient felt unsafe because the Respondent's office conducts COVID-19 testing and he was not following necessary safety protocols. The Patient described having to remove her mask for the Respondent to look inside of her mouth and feeling exposed.

In the Complaint, the Patient stated that she had told the Respondent that she always uses a condom. She stated that the Respondent did not believe her and continued to insist that I did not use condoms. Bd. Ex. 3. She stated that the Respondent made a bet with the male assistant in the room to say that she was lying. *Id.* The Patient stated that the Respondent and the male assistant both laughed at the jokes that the Respondent made while she was uncomfortable and shocked. The Patient found the questions invasive and stated that the Respondent "crossed too many lines..." *Id.* The Patient stated that a female assistant or physician should have been in the room during the Appointment because the Patient felt judged and vulnerable.

In the Complaint the Patient described the Respondent asking questions about why she was taking anti-depressants and why she was depressed. The Patient stated that the Respondent then asked about her family and why her parents are so unhappy that they are getting a divorce.



*Id.* The Patient felt that this was a topic for her psychiatrist and herself and not an area for the Respondent to delve into.

In the Complaint, the Patient indicated that the Respondent looked at both of her ears and noticed her microtia of her left ear. The Patient reported that the Respondent asked her why her parents never fixed it. The Patient described the question as incredibly rude and unnecessary.

*Id.*

██████████  
██████████ worked as a scribe for the Respondent's medical practice at the time of the Appointment. Mr. ██████████ documented the encounter during the Appointment. Mr. ██████████ remembers that in November 2020, COVID-19 testing was occurring at the office, masks were being used and social distancing was required. Mr. ██████████ recalled times when the Respondent would enter an examination room without a mask, but Mr. ██████████ attributed that to switching from telemedicine visits to in-person appointments and that the Respondent would just forget to put the mask back on. Mr. ██████████ testified that when asked to put on a mask, the Respondent did so.

Mr. ██████████ testified that the Respondent would try to talk to his patients on a personal level and not use words that the patient may not understand. Mr. ██████████ testified that he never was in the room as a scribe where he felt the Respondent acted unprofessionally.

Mr. ██████████ could not recall the Appointment at all. He did not know if the Respondent did or did not wear a mask for any part of the Appointment. He could not provide any testimony regarding the specific conversations that the Respondent had with the Patient.

Mr. [REDACTED] had previously given a recorded interview on August 27, 2021. *See* Bd. Ex. 9. During that interview he explained general discussions the Respondent had with patients when the Respondent entered the examination room without a mask.<sup>9</sup> Mr. [REDACTED] explained that the Respondent would discuss with his patients that he already had “corona” and then would talk about immunity, and the purpose of a mask in terms of spreading the virus. Bd. Ex. 9, p. 17, L 1-23. Mr. [REDACTED] in the interview stated that the Respondent would discuss his antibodies from already having COVID-19. Typically, after this discussion the Respondent would put the mask on. *Id.* P. 18, L7-10.

#### Respondent

The Respondent is the owner and a practitioner at [REDACTED]. He has owned this practice since January 2015.<sup>10</sup> He is board certified in Family Medicine. The Respondent’s patients include all ages.

The Respondent testified extensively on what he does to make his patients feel comfortable. This included the design of the examination room, using a scribe instead of typing his own notes of the visit, where he and patients would be during the appointment, and the terms he would use to discuss various issues with patients. According to the testimony, the examination rooms are designed to have the doors open into the wall to block someone in the hallway from seeing a patient if a patient is on the exam table. Based on this design, the Respondent testified that it would be impossible for a patient on the table to see into another

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<sup>9</sup> Even during the interview, Mr. [REDACTED] did not remember the Appointment or the Patient. Therefore, this was a more general description of a typical conversation and not a specific recollection of the Patient’s Appointment.

<sup>10</sup> The practice includes general practitioner, dermatology, and orthopedic services. The charges in this matter are against only the Respondent for his actions and words on November 30, 2020, and not against any other providers from the practice.

examination room. However, the Respondent testified that he encourages his patients to sit on a chair during the examination so that he and the patient can be at eye level.

The Respondent's first appointment with the Patient was on April 28, 2019. At that time, the Patient came with her mother regarding starting birth control to treat her acne. This appointment focused on acne and its treatment. During the discussion of birth control, the Respondent asked if the Patient was sexually active and at the time, the Patient said no. The Respondent informed the Patient that birth control would not protect against STDs, and that the Patient should use other protection if she became sexually active. The Respondent did not examine the Patient's ear during this examination.

The Respondent's second appointment with the Patient was on July 27, 2020. This visit was conducted via telemedicine due to the COVID-19 pandemic. The Respondent testified that he would need to see the Patient in about three months for an annual examination in order to continue refilling the birth control prescription. The Respondent explained that as a physician he is responsible for the patient's health, and that an annual exam allows him to screen for specific problems, before refilling a prescription indefinitely. The Respondent did not know that the Patient had a primary care physician. He believed he was the Patient's primary care physician, since he is a primary care physician.

In his testimony, the Respondent stated that his practice had policies in place in November 2020 that everyone would wear protective equipment (mask, gloves and gown) when they triaged a patient. Hearing Transcript, p. 73, L. 21 - p. 74 L. 2. This would be required for testing and touching the patients. Generally, in the office, everyone had to wear a mask. In late April into early May 2020, the Respondent had COVID-19 and recovered.

At the time of the Appointment, vaccinations were not available to either the Respondent or the Patient. However, the Respondent testified that he had developed immunity because he had already gotten sick with COVID-19.

The Respondent testified that on the day of the Appointment, he probably worked fourteen hours and saw anywhere from thirty to fifty patients. The Respondent testified that the appointment that he conducted prior to the Appointment was a telemedicine visit, which he would conduct in his office. He testified that he would not wear a mask in his office while conducting a telemedicine visit. The Respondent testified that he walked into the Patient's exam room without a mask on. He testified that after he walked into the room, he and the Patient "discussed it" and then he put the mask on. Hearing Transcript, p. 8, L. 4-10. The discussion included the appropriate use and effectiveness of a mask. In general, the conversation about masks could take anywhere from one minute to five minutes. However, the Respondent was not asked specifically how long the discussion was during the Appointment. The Respondent admitted sitting about three feet away from the Patient during the Appointment with no mask.

During his testimony, the Respondent stated that if a patient says he does not have to wear a mask, he will not wear one. It was unclear from the testimony and the questioning whether this testimony was in reference to the present or to November 2020 at the time of the Appointment.

The Respondent discussed the role of a primary care physician. Specifically, he stated that primary care physicians specialize in preventative care. Often primary care physicians are seeing healthy patients and patients that want to stay healthy. The Respondent testified that an annual appointment for the age group of 16 to 24 years old is to elicit information regarding risky behavior, including sports and sexually transmitted diseases.

During the visit, the Respondent would ask screening questions, and then the visit would develop based on the responses. In the Appointment, the Respondent noted that the Patient had answered yes for sexual activity, which opened the door for further questions. He discussed that birth control does not protect from STDs. This led to a discussions about sexual activity, which included oral sex. The Respondent testified that a lot of people do not regard oral sex as sexual activity and therefore, they do not use condoms during that activity. During his testimony, the Respondent described his statements to the Patient as follows:

I said to the patient, not to the scribe, I said I bet you that you don't regard oral sex as sexual activity, and therefore, you are not using condoms during oral sex. I didn't ask her if she's having oral sex. I just stated that in practicing oral sex, or BJ,<sup>11</sup> as most people call it, they basically disregard that portion of sexual activity as sexual activity, and they don't practice it with condoms.

*Id.*, p. 96, L 11-18. The Respondent testified that he probably used the term "BJ" with the Patient at the Appointment. On cross examination the Respondent testified that he stated, "I can prove to you that -- it's not you don't use condoms, that you don't use condoms with the act of oral sex." *Id.*, p. 133, L. 21-23. The Respondent testified that this statement helped the Patient because she was not using condoms during oral sex. The Respondent denied making a bet with the scribe or laughing at the Patient. The Respondent testified that it was appropriate to ask the Patient about these topics and that he does not view them as inappropriate. However, he acknowledged that the Patient may have "perceived it" differently. *Id.*, p. 137, L. 13-18.

Regarding the Patient's depression, the Respondent noted in her chart that the Patient was taking a medication known to treat mental health symptoms. Part of his screening required him to ask why the patient takes the medication, and also due to the Patient's age to ask questions regarding mental health and depression.

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<sup>11</sup> BJ means blow job, which is another term for oral sex.

According to the Respondent, he remembered that the Patient stated she was suffering from anxiety and depression, was being treated by a psychologist and did not want to discuss it anymore. The Respondent testified that he moved on from that topic. He denied any intent to make the Patient feel small regarding her mental health. He denied making any comment like "mommy and daddy are not happy."

With regards to the Patient's microtia, the Respondent stated that he looked at the Patient's ear as part of the physical examination. He testified that he asked if she was born with it or if it was due to a trauma. The Patient had been born with it. According to the Respondent,

I asked if it was addressed. She said that it was never addressed, and I said, you know, there is plastic surgeons today that would love to help in this case, and today with the advancement of technology, they can fix it. She doesn't have to, you know, live like that -- try, basically, to inform her about options that she may have if she would like to.

*Id.* P. 99, L. 22 – p. 100, L. 3. The respondent testified that he "sensed" that the Patient did not want to talk about it too much. *Id.* P. 100, L. 14. The Respondent later described his statement as "Did you or your parents try to fix it or do something about it?" *Id.* P. 143, L. 6-7. The Respondent does not see what was inappropriate about asking that question. The Respondent multiple time referenced that he believes the Patient has low self-esteem regarding her appearance and tried to link this with the microtia. The Respondent testified that he sensed the Patient was uncomfortable during both the discussion regarding the microtia and the discussion regarding the psychologist.

After the Appointment, the Respondent never heard from the Patient again. The Respondent did not believe any of the topics discussed during the Appointment, nor the manner that those topics were discussed, were inappropriate.

During cross examination, the Respondent was asked about the time between when he saw the Patient and when he signed off on the records, which was at least several months. He was also asked how well he remembered the office visits of the Patient. The Respondent testified that he recalled the appointments well because after the Complaint was filed, he thought about the case and he started to recall more and more of the visit. He testified that his memory at the time of the hearing was better than his memory at the time he gave his recorded statement because he had more time to review and consider the case over and over again.

During his recorded interview, the Respondent discussed the Appointment with the Patient. He stated that the Appointment was towards the end of November during a break in the semester or at the end of the semester. He could not remember who was the scribe in the room for the Appointment.

In the recorded interview, the Respondent answered questions regarding discussions regarding sexual behavior and prevention of STDs. During his recorded interview, the Respondent stated that he said you can get STDs from oral sex, or a blow job, and that if you do not use a condom with oral sex, you are exposing yourself to STDs. The Respondent could not fully recall the conversation with the Patient during the interview. He later stated "I probably said something to, I can probably prove you that you don't always use condoms and then I said how about with oral sex, with a B.J." Bd. Ex. 8, p. 61, L. 1-5. He continued to state, "...I say well do you have oral sex with a condom, because I can tell you that I haven't seen until today in my career anybody that is having oral sex with a condom." *Id.*, p. 61, L. 16-18.

During the recorded interview, the Respondent did not remember specifics about the discussion with the Patient regarding her microtia or her depression. The Respondent said what the conversation may have been generally, but did not remember the exact language used, or the specific discussion during the Appointment.

During the recorded interview, the Respondent spent a lot of time discussing having COVID-19, masks, and the risk to get COVID-19 a second time. Specifically, the Respondent stated that he had COVID-19 in April and May of 2020. *Id.*, p. 74-L. 5-7. He stated that people that had COVID-19 or are vaccinated, cannot get the disease again. *Id.*, p. 76, L. 10-13, p. 78, L. 24-25. He stated that he had difficulties wearing a mask for fourteen hours a day while working. He stated that it makes him claustrophobic. He further explained the discussion he had with patients and stated specifically:

And every time I walk into the room, we kind of, it's kind of the topic for discussion, I call it, it's kind of are you immunized? I'm not wearing a mask. Do your want me to wear the mask? Do you, you know, I say, I mean if they are not immunized and I sense that they feel uncomfortable, I will put a mask on. There's always this, you know, knowing about what mask is.

*Id.*, p. 76, L. 23 - p.77, L. 5. He admitted to walking into the Appointment without a mask on.

He stated in the recorded interview that after he walked into the room, they had a discussion and then he put on a mask to respect the Patient's request. In the recorded interview, the Respondent stated the following:

... [I]f I see someone with a physical that is normal that walks into the office feeling comfortable in the middle of COVID, then I also feel as that if they are comfortable with coming to an office that they know that there are COVID patients there, I can say in the same way, you know, hey, if you are so, so, so anxious, why are you leaving the house?

*Id.*, p. 83, L. 5-12.



## Analysis

### *Unprofessional Conduct*

The Board charged the Respondent with being guilty of unprofessional conduct in the practice of medicine. Judge Harrell, writing for the Court of Appeals in *Finucan v. Maryland Board of Physician Quality Assurance*, 380 Md. 577 (2004), and addressing a constitutional challenge to the Act's prohibition of "unprofessional conduct", stated:

The meaning of terms such as "immoral conduct" and "dishonorable conduct" is determined by the "common judgment" of the profession as found by the professional licensing board. . . . A statute prohibiting "unprofessional conduct" or "immoral conduct," therefore, is not per se unconstitutionally vague; the term refers to "conduct which breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession."

*Id.* at 593 (citations omitted).

The Maryland legislature, through its enactment of the Act, including the prohibition on "unprofessional conduct," has empowered the Board to render a "common judgment" as to the propriety of a physician's behavior. The Board has not attempted to delineate the exact contours of "unprofessional conduct", which is not defined in the statute.<sup>12</sup>

There is no dispute that the conduct addressed in this case occurred when the Respondent, acting as a physician, was examining and conducting an appointment with the Patient. Therefore, the conduct occurred in the practice of medicine. However, the parties disputed whether the conduct was unprofessional.

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<sup>12</sup> The Board has given notice, through its regulations governing disciplinary hearings, that it "may consider the Principles of Ethics of the American Medical Association" in disciplinary and licensing matters before the Board. COMAR 10.32.02.16. However, neither party relied on those principles during the hearing or pointed to any other specific authority to assert the alleged conduct was or was not professional.

Throughout the Appointment, the Respondent repeatedly used language that was condescending, embarrassing, accusatory and insensitive to the Patient. I found the Patient credible. She had a total of three appointments with the Respondent. She limited her complaints to a single Appointment. In her testimony, she was clear that nothing inappropriate happened at the other visits with either the Respondent or his practice. She started to write her Complaint within a month of the Appointment and had submitted that Complaint in less than two months from the Appointment. When the Patient testified, she had a clear recollection of certain phrases and was unhesitating in her answers regarding specific issues. However, she was honest regarding other parts of the Appointment that she did not recall, such as whether a nurse took triage information or vitals from her. The Patient has no apparent motive to fabricate or exaggerate what occurred during the Appointment. The Patient did not appear to hold any animosity towards the Respondent but was concerned that other patients could be subjected to similar insensitive comments. Concerning the discussions on her microtia and the use of condoms during oral sex, the Patient's Complaint and the testimony tracked each other and were consistent. In the Complaint, the Patient did not fully discuss what was said regarding the discussion of her mental health issues. She did not mention any phrase regarding whether her parents were happy. In her testimony, the Patient more fully discussed the Appointment and the conversation regarding her reason for her depression. The Patient's testimony regarding this conversation did not contradict the Complaint but expounded upon the interactions during the Appointment.

The Respondent's testimony was much less credible. First, during the recorded interview, there were several portions of the Appointment that the Respondent could not remember. He had an idea of what he probably said, or what may have happened, but he did not

remember the exact phrases used. This interview occurred on June 7, 2021 (approximately one year prior to the hearing). Second, during the hearing, he testified that he had a verbatim recollection of the Appointment and that his memory at the time of the hearing was actually better than his memory was on the day of the recorded interview (a year prior) because he had thought about the Appointment more since that time. This is not how memory generally works. Third, the Respondent testified that he sees thirty to fifty patients a day. Yet, he contended that he had a verbatim recollection of what he thought was an uneventful annual appointment. Fourth, when confronted with direct contradictions between his recorded statement and his current testimony, the Respondent often was evasive in his answers, and did not directly answer the question. Further, the Respondent did not deny using some of the more offensive words alleged with this Patient, such as "fixed", or "I can prove" or blowjob and B.J. Instead, the Respondent was defensive about the phrases he used and even when challenged about the appropriateness of using phrases like "I can probably prove...", blowjob or B.J., or "fix", the Respondent tended to shift the blame to the Patient for being too sensitive. The Respondent also justified the language as no one had complained about this language before. Instead, of acknowledging that maybe he should be more careful about the language he uses, he insisted that he was right.

Mr. [REDACTED] had no recollection of the Appointment, and therefore, his testimony and recorded interview regarding any specific discussions in this Appointment were not persuasive in my decision.

While it would have been preferable for both parties to provide better authority for what is unprofessional conduct and further to distinguish or liken the Respondent's behavior to that authority, neither party chose to do so during the hearing. Therefore, I am left to apply common

judgment regarding the propriety of the Respondent's behavior. I find that the Respondent's use of language that was condescending, embarrassing, accusatory and insensitive to the Patient is conduct unbecoming to the profession, and therefore is unprofessional conduct. Regarding the issue of whether there should have been a female chaperone in the room, I do not find it was unprofessional conduct to have an annual examination where the female patient remains clothed without a female chaperone, especially when the female patient did not request a female provider or a chaperone at the time of the examination.

*Violation of any rule, regulation, or law pertaining to the practice of medicine*

The Board charged the Respondent with being guilty of conduct that violates any provision of Title 14 of the Health Occupation Article, any rule or regulation adopted by the Board, or any State or federal law pertaining to the practice of medicine, under Md. Code Ann., Health Occ. § 14-404(a)(43). The Board did not allege that the Respondent violated any provision of Title 14 of the Health Occupation Article, or any rule or regulation adopted by the Board. Instead, the violation alleged was a violation of a Proclamation issued by the Governor during a catastrophic health emergency.

Public Safety Article Title 14 discusses Emergency Management, and subtitle 3A specifically addresses the Governor's Health Emergency Powers. If the Governor determines that a catastrophic health emergency exists, he is allowed to issue a Proclamation under subtitle 3A. Md. Code, Ann., Pub. Safety § 14-3A-02(a) (2018).<sup>13</sup> A person may not knowingly and willfully fail to comply with an order, requirement or directive issued under this subtitle. Pub. Safety § 14-3A-08(a)(1).

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<sup>13</sup> All references to the Public Safety Article are to the 2018 volume, and hereinafter the short cite Pub. Safety will be used.

It is undisputed that the Governor's November 17, 2020 Proclamation/Executive Order was in effect at the time of the Appointment.<sup>14</sup> This document required the use of face coverings in the following circumstances:

4. obtaining healthcare services, including without limitation, in offices of physicians and dentists, hospitals pharmacies, and laboratories; and
5. engaged in work in any area where:
  - a. interaction with others is likely, including without limitations, in shared areas of commercial offices...

Bd. Ex. 2. During the hearing, the parties focused on the first of these two provisions. The Board's position was that the Respondent violated this provision when he entered the Patient's examination room without a mask, and that the Respondent continued to violate this provision by failing to wear a mask throughout the entire visit. The Respondent's position is that the Proclamation only addresses individuals obtaining healthcare services and not those providing those services. Further, if any violation of that provision occurred, it was an accidental and minimal violation, rather than an intentional and prolonged violation. Neither party addressed the second of these provisions and whether any other part of the Proclamation/Executive Order pertained to the practice of medicine.<sup>15</sup>

The Proclamation began with several paragraphs explaining why it was issued. These paragraphs explain that there was a "catastrophic health emergency" involving controlling and preventing the spread of COVID-19. Bd. Ex. 2. The Proclamation explains how COVID-19 spreads, and several different ways to reduce the spread. *Id.*

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<sup>14</sup> Neither party raised any argument that the Proclamation was invalid or unenforceable, nor any argument regarding the constitutionality of the document.

<sup>15</sup> Interestingly, neither side presented any document from the Maryland Department of Health or the Board discussing what was being recommended or required by those entities in practice settings at the time of the Appointment. It is unknown whether any rules, policies, guidelines or other documents were issued from either of those entities regarding providing treatment to patients during the pandemic.

The Proclamation addresses that the State is monitoring hospital capacity and working with hospitals to ensure surge capacity can accommodate residents of the State who become ill. The Proclamation also states "the Coronavirus Recovery Team has advised that widespread use of Face Coverings is likely to help control the spread of COVID-19." *Id.* I find that the Proclamation pertains to the practice of medicine. While the Proclamation does not have a particular section labeled for the practice of medicine, the entire document is written due to a catastrophic health emergency, with a goal to manage the spread of a disease, which at the time of the Proclamation and the Appointment, did not have a vaccination available to the public. Further, when the Proclamation discusses face coverings, it discusses specifically what needs to occur when obtaining health care treatment, but also what needs to occur while engaged in work in any area where interaction with others is likely. The Respondent's argument that the Proclamation did not apply to him (or as his testimony repeatedly stated, that the Proclamation was only guidance), is illogical. I find that the Respondent violated a provision of the Proclamation by not wearing a mask when he entered the Patient's examination room.

I further find that the Respondent continued that violation by not putting on his mask after he entered the room and throughout the examination. Based on both the Respondent's recorded interview and the Patient's testimony, it is clear that the Respondent disagreed with the requirements to wear face coverings as he had already had COVID-19, and he felt that he could not get the disease again, and therefore, masks were unnecessary. I find that he discussed his views regarding masks with the Patient and she was intimidated, therefore, she did not request or demand that the Respondent wear a mask. I find it disingenuous that both the Respondent and his counsel argued that because the Patient came into the office for the Appointment, the Respondent could assume the Patient was comfortable with going to his location during the

pandemic. The Respondent refused to refill her medication without doing an in-person exam, which was stated by the Respondent in his recorded interview, and confirmed by the Patient in her testimony. The Patient wanted to continue her medication and therefore, had limited options with how to proceed without requiring her to find a new doctor during the pandemic. Further, I do not find it credible that the Respondent put on his mask at any point during the Appointment based on the credible testimony of the Patient, and the conflicting testimony of the Respondent regarding whether he would a) put on a mask if requested, or b) as soon as he noticed it was missing, he would put a mask on, or c) he would put on a mask after discussing his views on masks regardless of a request. As I find the Respondent intentionally did not put on his mask during the Appointment, it is irrelevant whether the Respondent had come from another examination room with an in-person patient, or whether the Respondent had come from a tele-medicine visit.

I further find that the Proclamation was a State Order in effect at the time of the Appointment which could be enforced by law enforcement officers and could subject a violator to prosecution for a misdemeanor. This Proclamation was pertaining to the provision of health care, specifically as the entire Proclamation was in response to a catastrophic health emergency.

#### Sanctions

In this case, the Board has stated that it seeks to impose the disciplinary sanctions of a reprimand, probation for a period of one year, and to require the Respondent take two continuing education courses (one on infection control and one on appropriate physician-patient relations). Health Occ. § 14-404(a); COMAR 10.32.02.09A; COMAR 10.32.02.10. The range of sanctions for a physician who is guilty of unprofessional conduct in the practice of medicine (not sexual in nature) is a Reprimand to a Revocation. COMAR 10.32.02.10. The matrix of sanctions does not

include any range of sanctions for a violation of a law, rule, or regulation pertaining to the practice of medicine. Neither side presented any evidence regarding aggravating or mitigating factors. Further, during the closing arguments, neither side raised any arguments specifically regarding aggravating or mitigating factors. A reprimand is the minimum sanction expressed in the range of sanctions. The violations in this case involve a single Appointment with the Patient. There was no evidence presented that the Respondent had a prior disciplinary record. The Appointment, while unprofessional, was not particularly egregious. However, failing to wear a mask had the potential for harm to the Patient. Despite the Respondent's belief that he could not get COVID-19 again after having it in April 2020, such knowledge was uncertain at the time, and at this point it is well known that many people have gotten COVID-19 more than once. Therefore, his failure to wear a mask during the Appointment had the potential for harm to the Patient (and her mother who was immunocompromised). Further, based on his testimony at the hearing, the Respondent did not seem to have any regret or remorse regarding the Appointment. While he did not intend to upset the Patient, he did not seem to appreciate why his language, tone and manner could be offensive, and instead stated that he has not received prior complaints and this was a typical annual appointment. Considering all of the above, I agree with the Board's recommendation of a reprimand, and attending the two courses suggested. Further, I agree with the Board's recommendation of a probation for one year, which would allow the Respondent the time to attend the recommended courses.

Under the applicable law, the Board also may impose a fine instead of, or in addition to, disciplinary sanctions against a licensee who is found to have violated Md. Code Ann., Health Occ. § 14-404. COMAR 10.32.02.10B. In this case, the Board is seeking a fine of \$10,000.00.



The range of fines for a physician who is guilty of unprofessional conduct in the practice of medicine (not sexual in nature) is \$5,000.00 to \$50,000.00. COMAR 10.32.02.10. The matrix of sanctions does not include any range of fines for a violation of a law, rule, or regulation pertaining to the practice of medicine. In this matter, neither side addressed why a fine of \$10,000.00 would be appropriate, or inappropriate. The Board made the recommendation for the fine, and the Respondent denied that there were any violations and therefore, did not address any proposed fine. \$10,000.00 is on the lower end of the range of fines listed in the matrix of sanctions. COMAR 10.32.02.10. It reflects conduct that is a violation, but also reflects a lack of extensive aggravating circumstances. The recommended fine is not unreasonable. Considering the mitigating and aggravating factors discussed above for the sanction, I agree with the recommended fine of \$10,000.00.

#### **PROPOSED CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated the alleged provisions of the law. Md. Code Ann., Health Occ. § 14-404(a)(3)(ii) and (43). As a result, I conclude that the Respondent is subject to disciplinary sanctions of a reprimand, and probation for one year pending the completion of required courses for the cited violations. *Id.*; COMAR 10.32.02.09A.

I further conclude that the Respondent is subject to a fine of \$10,000.00 for the cited violations. COMAR 10.32.02.10.

#### **PROPOSED DISPOSITION**

I **PROPOSE** that charges filed by the Maryland State Board of Physicians against the Respondent on January 21, 2022 be **UPHELD**; and

I **PROPOSE** that the Respondent be sanctioned by a reprimand; and further

I PROPOSE that the Respondent be sanctioned by being placed on probation for one year, during which time he is to complete a course on infection control, and to complete a course on appropriate physician-patient relations.

I PROPOSE that the Respondent be ordered to pay a fine of \$10,000.00.

November 17, 2022  
Date Decision Issued



Erin H. Cancienne  
Administrative Law Judge

EHC/sh  
#200707

**NOTICE OF RIGHT TO FILE EXCEPTIONS**

Any party adversely affected by this proposed decision may file written exceptions with the disciplinary panel of the Maryland State Board of Physicians that delegated the captioned case to the Office of Administrative Hearings (OAH), and request a hearing on the exceptions. Md. Code Ann., State Gov't § 10-216(a) (2021); COMAR 10.32.02.05. Exceptions must be filed within fifteen (15) days of the date of issuance of this proposed order. COMAR 10.32.02.05B(1). The exceptions and request for hearing must be addressed to the Disciplinary Panel of the Board of Physicians, 4201 Patterson Avenue, Baltimore, MD, 21215-2299, Attn: Christine A. Farrelly, Executive Director.

A copy of the exceptions should be mailed to the opposing attorney, and the other party will have fifteen (15) days from the filing of exceptions to file a written response addressed as above. *Id.* The disciplinary panel will issue a final order following the exceptions hearing or other formal panel proceedings. Md. Code Ann., State Gov't §§ 10-216, 10-221 (2021); COMAR 10.32.02.05C. The OAH is not a party to any review process.

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