BEFORE THE
MEDICAL BOARD OF CALIFORNIA
STATE OF CALIFORNIA

In the Matter of the Accusation Against: STUART J. FISCHBEIN, M.D. 10309 Santa Monica Blvd., Suite 300 Los Angeles, California 90025 Physician's and Surgeon's Certificate No. G52027 Respondent.	Case No. 06-2006-172374 OAH No. L2006060527

DECISION AFTER NON-ADOPTION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on January 3, 4, and 5, 2007, in Los Angeles, California.

John E. Rittmayer, Deputy Attorney General, represented Complainant David T. Thornton.

Peter R. Osinoff, Attorney at Law, represented respondent.

Complainant seeks to discipline respondent's medical certificate for alleged sexual misconduct, repeated negligent acts, and conviction of a crime. The alleged causes for discipline all arise out of respondent having sexual relations with a patient. Respondent admitted having consensual sexual relations with his patient, and provided evidence in mitigation and rehabilitation in support of continued licensure.

Oral and documentary evidence, and evidence by written stipulation, was received, and the matter was submitted for decision.

On May 1, 2007, the Division of Medical Quality (Division) of the Medical Board of California issued an Order of Non-Adoption of Proposed Decision. The Division then issued a Notice of Hearing for Oral Argument on July 3, 2007, which set the date for oral argument on July 27, 2007. Having received oral and written argument from both parties, and having considered the entire record, including the transcripts of the hearing held from January 3-5, 2007, the Division hereby makes and enters the following decision:

FACTUAL FINDINGS

1. Complainant filed the First Amended Accusation in his official capacity as the Executive Director of the Medical Board of California, State of California (Board).

2. On March 12, 1984, the Board issued Physician's and Surgeon's Certificate number G 52027 to respondent. The certificate has been in effect since then and expires on July 31, 2007, unless renewed. It has not been previously disciplined.

3. Respondent is 50 years old. He received his medical degree in 1982, from the University of Minnesota. He completed an internship in 1983 and an obstetrics and gynecology (ob/gyn) residency in 1986, both at Cedars-Sinai Medical Center. He was the administrative chief resident during his last year. Respondent obtained a certification from the American Board of Ob/Gyn in 1989 and obtained re-certification in 1999. He has been engaged in the private practice of ob/gyn in the Century City area of Los Angeles since 1986. In 1995, he opened a second office in Camarillo, in which midwives play a significant role.

4. Respondent is divorced. He has one daughter, aged 10, and three step-sons, one aged 17 and twins aged 14. The couple separated after respondent's wife was unfaithful, but attempted reconciliation on multiple occasions. The last unsuccessful attempt occurred in July 2005.

5. In June 2005, respondent was diagnosed with shingles, an acute inflammation of the nerves caused by the chickenpox virus. He developed lesions and pain in his face. Although the lesions dissipated within weeks, the pain persisted for about one year. Respondent had difficulty sleeping and was prescribed sedatives, including Lunesta,[1] to treat the problem.

6. On August 17, 2005, S.K.[2], presented to respondent's Camarillo office, complaining of pelvic pain. She was 35 years old at the time and was completing post-doctoral training to become a clinical psychologist. S.K.'s boyfriend, S.C., accompanied her. In January 2005, a mass had been removed from S.K.'s ovary and endometriosis, an inflammatory process involving the ovaries and other organs, had been diagnosed. She had post-operative complications with urinary retention that required catheterization several times. The patient reported to respondent that her pain was similar to that experienced in January 2005. Respondent performed an ultrasound and diagnosed a complex right pelvic mass. He opined that the reported endometriosis could also be contributing to the pain. Respondent discussed the options with S.K. The patient preferred to avoid surgery and respondent agreed to monitor the situation. He planned to obtain the medical records of the January 2005 surgery and ordered laboratory blood tests. He told the patient that surgery would be required if the condition did not improve.

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[1] The parties stipulated that Lunesta is a trade name for eszopiclone, a prescription sedative indicated for insomnia, and that, as any sedative, it may have an inhibition-reducing effect similar to that of alcohol.

[2] Initials have been used to protect the privacy of the patient and her boyfriend, who is now her husband.

7. The pain persisted and the size of the mass did not decrease, and, during an office visit on September 8, 2005, respondent recommended surgery.

8. The patient returned on September 12, 2005 for a pre-operative visit. Respondent performed a physical examination, explained the procedure, and answered S.K.'s questions about the surgery. S.K. stated that she was sensitive to antibiotics and other medicine. Respondent nevertheless prescribed a prophylactic antibiotic and Lunesta to help her sleep. Respondent anticipated that the patient would experience pain and would be unable to sleep. She had taken another sedative, Ambien, but Lunesta, the newest drug used as a sleeping aid, was reported to have fewer side effects.

In an effort to establish rapport with the patient, respondent invited her to ask more general questions. In the conversation that ensued, they discussed various general matters, including family, friends, personal interests, and professions. Respondent touched the patient in the arm as she was checking out with the office staff, a gesture intended to reassure. He told her that everything would turn out fine.

9. On September 16, 2006, respondent performed surgery at St, John's Pleasant Valley Hospital in Camarillo, California. As the patient was prepared for surgery, respondent held S.K.'s hand and talked to her to reassure her.

10. The procedure, described in the operative report as an exploratory laparotomy, extensive lysis of adhesions, right ovarian cystectomy, left ovarian cystectomy of left endometrioma, and left salpingectomy, was performed by abdominal incision without reported complications. In brief, respondent removed two ovarian cysts, separated and cut tissue and organs that had stuck together (adhesions), and excised the left uterine tube. The patient had expressed a desire to have children and respondent was able to leave part of the right uterine tube, which in his view would facilitate in vitro fertilization.

11. Respondent was present when the patient woke up from the anesthesia. He stated that everything had gone well, and referred to S.K. as "sweet pea." Respondent explained that he has used the term for years as one of endearment, one he uses with patients and non-patients alike.

12. S.K. remained in the hospital three days. She made steady progress and suffered no complications. Although in pain, S.K. stopped taking morphine and relied on ibuprofen for relief.

13. Respondent visited S.K. on two occasions while she was in the hospital. They spoke about personal matters for long periods of time. Respondent provided more details about his marriage and divorce, about his children, and about past personal problems and challenges. S.K. spoke about her past marriage and her present relationship with S.C. She stated that S.C. was often out of town and respondent warned her about making a mistake with S.C. Respondent testified that it was during these conversations that he started viewing S.K. as a woman and not just as a patient.

14. On September 19, 2005, S.K. was discharged from the hospital. As set forth in the discharge instructions: physical activity was permitted as tolerated; climbing of stairs was permitted; walking at least three times per day was recommended; lifting was limited to 10 pounds; and driving was prohibited for two weeks. The patient was directed to seek medical attention if certain conditions developed, including heavy bleeding.

15. The discharge documents did not contain any restrictions on sexual intercourse. S.K. testified that respondent advised her not to have sexual intercourse for four to six weeks after surgery. Respondent did not recall if he had provided this recommendation. Pre-operatively, he typically provides such instructions to patients having abdominal surgery. Post-operatively, he evaluates each patient individually. In S.K.'s case, he did not discharge her and did not chart anything regarding avoiding sexual intercourse for any period of time. In the existing circumstances, S.K.'s testimony is credited, as she had better recollection and respondent typically provides such instruction.

16. S.K. stayed with her parents in Orange County for approximately one week following her discharge. She remained in pain and was bedridden most of the time. She took high dosages of ibuprofen for her abdominal pain. She also ingested the sedative Ambien in order to sleep. Respondent was in daily contact by telephone during this period. He checked on her progress and continued to discuss personal matters, including S.C.'s frequent absences and respondent's good personal attributes.

17. During one of the telephonic conversations while S.K was recuperating at her parents' home, the two briefly discussed the ethical considerations involved in dating a patient. Respondent's recollection of the discussion was poor, and he referred to the conversation as "not rational" and "colored by his love for S.K." S.K.'s recollection was more specific and included references to the fact that their respective professional regulatory bodies prohibited dating patients. She recalled that they agreed that therapists had greater restrictions. She also remembered respondent stating that the Board was not as strict as the psychology board and that he had dated "bushels" of patients. Respondent denied discussing the differences between the two boards or making any statement regarding dating bushels of patients. Respondent denied dating any other patient and there is no evidence that he has actually dated any other patient. It is unnecessary to resolve the conflict in testimony, as regardless of the content or length of the discussions, ethical considerations did not prevent respondent's continuing personal conversations with S.K. or his subsequent relationship with her.

18. S.K. terminated her relationship with S.C. while recuperating at her parents' home. She told S.C. that he was always out of town and not around her enough. She did not disclose her conversations with respondent or any desire to pursue a relationship with respondent. She thereafter told respondent about the break-up with S.C. Respondent welcomed the news and decided to pursue a relationship with S.K. Their subsequent telephone conversations took a decidedly sexual overtone.

19. On September 28, 2005, respondent visited S.K. in her home. As stipulated by the parties, the two had consensual sexual intercourse. Respondent described the intercourse as gentle, not involving pelvic thrusts. However, S.K. testified she was still in pain. After having intercourse, respondent took Lunesta and provided one to S.K. to facilitate falling asleep.

20. On September 29, 2005, S.K. saw respondent in his office for a post-operative visit. She reported lower abdominal tenderness, which respondent deemed normal for the type of surgery the patient had undergone. He noted that the wounds were healing slowly, but did not think it was unusual. Respondent also noted that there was some urine retention, and prescribed medication for the problem.

21. On October 1, 2005, S.K. drove to respondent's house. They again had consensual sexual intercourse. Respondent described the intercourse as a gentle act, similar to the first occasion.

22. Respondent and S.K. continued to speak by telephone. They met outside respondent's office on one additional occasion, but did not again engage in sexual intercourse.

23. S.K.'s last office visit with respondent took place on October 31, 2005. She complained of continued abdominal pain, but was getting better. She did not complain of any vaginal bleeding or of any pain attributable to sexual intercourse. Respondent did not note injury to any internal organ attributable to sexual intercourse. Ultrasound examination did reveal two small cysts and respondent provided instruction for treatment.

24. S.K. subsequently reconciled with S.C. and stopped talking to respondent. S.C. called respondent in early November 2005 and asked that he had no further contact with S.K. Respondent honored the request.

25. Complainant's expert, board-certified ob/gyn Michael L. Friedman, M.D., concurred with respondent's recommendation to S.K. regarding not having sexual intercourse for four to six weeks. This is the typical period in which the wounds heal and in which the organs return to their normal locations. In standard sexual intercourse, he stated, the abdominal muscles move and contract during pelvic thrusts. Intercourse could damage healing organs adjacent to the vagina. In his opinion, the standard of care would require a physician to advise his patients who undergo the type of surgery S.K. did to avoid sexual contact for four to six weeks, which testimony was not contradicted. He further opined that respondent deviated from the standard of care by having sexual intercourse with S.K. less than four weeks after surgery. On cross-examination, Dr. Friedman conceded that having sex with S.K. was not part of respondent's treatment plan for the patient.

26. Dr. Friedman testified that the medical treatment actually provided by respondent to S.K. had been within the standard of care. Dr. Friedman further testified that there was no evidence that the sexual intercourse had caused actual physical injury to S.K. This testimony is credible and corroborates respondent's own assertions.

27. Respondent did not engage in sexual intercourse with S.K. on the pretext that it was a necessary part of treatment.

28. On June 13, 2006, in the Superior Court of California, County of Los Angeles, State of California, in case number 6CA02400, respondent was convicted, following his plea of nolo contendere, of one count of violating Business and Professions Code section 729 (sexual exploitation of patient), a misdemeanor. The conviction resulted from respondent's sexual relations with S.K. The Court suspended imposition of sentence and placed respondent on probation for three years on terms and conditions that included service of 45 days in jail or 240 hours of community service, payment of $120 in fines and fees, completion of 52 weekly sessions of psychological counseling, and completion of the Professional Boundaries Program.

29. Respondent is complying with the terms and conditions of probation. He completed 80 hours of community beautification in Hollywood and 100 hours of community service at the Woodland Park Retirement Home.

30. Respondent did not deny or minimize his relationship with S.K. Respondent stated he fell in love with S.K. during a particularly vulnerable period in his life. In his mind, they were two people facing personal issues who became attracted to each other. He nevertheless expressed regret about his "terrible mistake in judgment." His efforts to understand what led to the relationship and to prevent its recurrence have led him to the conclusions that he has hurt many people, including S.K, and that he must never again engage in such hurtful behavior.

31. On January 20, 2005, respondent resumed psychotherapy with Jenny Williams Gruska (Gruska), M.A., M.F.T. She had facilitated marriage reconciliation efforts in the summer of 2005. In weekly sessions that continue to the present, respondent examined his relationship with S.K. and other aspects of his life. Gruska opines that respondent has made progress and does not believe he would ever enter into another dual relationship with a patient.

32. During the period of June 14 through 16, 2006, respondent completed the Professional Boundaries Program offered by the Physician Assessment and Clinical Education Program (PACE) at the University of California, San Diego, School of Medicine. He now clearly understands professional boundaries and continues to have contact with the course's facilitator, Elizabeth Becker, L.C.S.W. Respondent has learned techniques to maintain professional boundaries in the difficult situations faced by physicians in his specialty, such as demonstrating empathy to patients faced with emotional losses or painful choices.

33. Respondent now utilizes a female chaperone whenever he has to physically examine a patient.

34. Psychiatrist Lester M. Zackler, M.D., evaluated respondent in December 2006. Dr. Zackler administered the Minnesota Multiphasic Personality Inventory – 2 and the Personality Assessment Inventory. He also met with respondent for approximately five hours on December 12 and 18, 2006. Dr. Zackler is of the opinion that respondent's relationship with S.K. was the result of situational factors and that another similar relationship is unlikely. Respondent's own personal need for love, his recent marriage dissolution, and his bout with shingles, impacted his judgment. Dr. Zackler does not believe respondent to be a sexual predator because, unlike such deviants, respondent developed an emotional attachment to S.K. before engaging in sexual intercourse. In Dr. Zackler's opinion, respondent's greater awareness of professional

boundaries, increased insight about the relationship with S.K., and the consequences of his actions make recurrence of another sexual relationship with a patient unlikely.

35. (a) Four witnesses attested to respondent's good character and skill as a physician. Kathleen E. Bradley, M.D. has known respondent since 1992. Dr. Bradley specializes in the diagnosis of pre-natal conditions that create special risks for mother and fetus. She has provided numerous consultations to respondent, including some during regular visits to the office suite respondent shares with other ob/gyn physicians. Respondent has demonstrated his knowledge and diagnostic skill in the evaluation process before referrals. Respondent is often present during consultations involving his patients. In her observations, respondent has been compassionate and respectful of his patients; he has provided appropriate explanations of planned procedures.

(b) Irwin Frankel, M.D. has known respondent since the early 1980s, when he was one of respondent's supervising physicians at Cedars-Sinai Medical Center. Respondent was one of the best interns that Dr. Frankel had seen. Respondent became Dr. Frankel's associate after completing his training and has remained so ever since. Respondent has treated Dr. Frankel's patients and the two have performed surgery together over the years. Dr. Frankel described respondent as a very good doctor, one who is knowledgeable, warm, caring, and empathetic.

(c) David Kline, M.D., has known respondent since 1982. Since 1987, he and respondent have treated each other's patients when the other has been unavailable, and since 1994, they have shared office space. They also assist in each other's surgeries. Despite learning about respondent's relationship with S.K. and the conviction, Dr. Kline continues to trust his patients to respondent's care. Dr. Kline described respondent as having the "utmost competence." Respondent is also a warm and caring physician who goes "above and beyond" to ensure patient comfort. Respondent continues to improve his base of knowledge and shares it with Dr. Kline and others.

(d) Rebecca E. Sewards Ferrene has been respondent's patient for approximately sixteen years. Respondent was able to treat her medical condition, atypical cells in the cervix, to enable her to conceive children. He delivered her two children, a boy now five-years old and a girl now nine weeks old, properly handling complications in each instance. Respondent always kept her and her husband informed about the care and treatment provided. She is very satisfied with the care received and described respondent as an honorable person. She has referred friends and family and has not heard any complaints.

LEGAL CONCLUSIONS

1. Business and Professions Code[3] section 726 provides: "The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any [physician]. . . ." The statute was amended in 1993 to delete the words "which is substantially related to the qualifications, functions, or duties of the occupation for which the license was issued," which preceded the

[3] Unless otherwise stated, all further statutory references are to the Business and Professions Code.

words "constitutes unprofessional conduct." The amendment followed the decision in *Gromis v. Medical Board* (1992) 8 Cal.App.4th 589.

In *Gromis*, *supra*, the court concluded that there was insufficient evidence to establish that the respondent's sexual relationship with his patient violated section 726. In that case, the male physician met the female patient after she sought treatment; he asked and the patient agreed to go out on three separate dates; they had sexual intercourse on two occasions; and she continued to receive medical care during the relationship. The court held that the statute and the constitution compelled the conclusion that "[a] sexual relationship between physician and patient is not a sufficient basis for discipline without a finding that the sexual relationship was 'substantially related to the qualifications, functions, or duties' of a physician." (*Gromis*, *supra* at p. 599.) The court noted the absence of findings that the physician's medical judgment had been compromised or that he abused his status to induce the patient's consent to sexual intercourse, and remanded the case to the trial court for findings regarding whether the physician had abused his status as a physician.

The court's holding that the substantial relationship requirement has a constitutional basis is in agreement with prior and subsequent cases. As the court in *Griffiths v. Medical Board of California* (2002) 96 Cal.App.4th 757, 769, recently noted: " '[A] statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her competence to practice that profession.' (*Hughes v. Board of Architectural Examiners, supra*, 17 Cal.4th at p.788.) Thus the state can impose discipline on a professional license only if the conduct upon which the discipline is based relates to the practice of the particular profession and thereby demonstrates an unfitness to practice such profession. 'There must be a logical connection of licensees' conduct to their fitness or competence to practice the profession or to the qualifications, functions, or duties of the profession in question.' (*Clare v. State Bd. of Accountancy* (1992) 10 Cal.App.4th 294, 302.) [¶] . . . Where a licensing statute does not require a nexus between the licensee's conduct and the licensee's fitness or competence to practice, the statute must be read to include this 'nexus' requirement to ensure its constitutionality. (*Marek v. Board of Podiatric Medicine, supra*, 16 Cal.App.4th at p. 1096.)"

The *Griffiths* court found the requisite nexus between the practice of medicine and a statute, section 2239, which defined the conviction of more than one misdemeanor or felony involving drugs or alcohol as unprofessional conduct, and thus grounds for disciplinary action. The court noted that convictions involving use of alcohol reflect a lack of sound professional and personal judgment that is relevant to a physician's fitness and competence to practice medicine. In the court's view, driving under the influence of alcohol shows disregard for the physician's personal safety and for that of the public, and for medical knowledge regarding the effects of alcohol on vision, reaction time, motor skills, judgment, coordination and memory, and the ability to judge speed, dimensions, and distance. The Legislature, therefore, properly determined that a nexus existed between driving after consumption of alcohol and a physician's fitness to practice medicine.

In enacting section 726, as amended, the Legislature has similarly determined that a nexus or logical connection exists between sexual relations with a patient and the practice of medicine. As the court in *Gromis* itself recognized in rejecting the physician's argument to restrict the reach of section 726, sexual relations with a patient involve potential abuse of a

patient under the guise of treatment, potential abuse of the physician's status, and potential compromise of the physician's medical judgment.

In this case, cause exists to discipline respondent's medical certificate pursuant to section 726 because he engaged in sexual relations with his patient S.K., as set forth in factual finding numbers 18, 19, and 21.

2. Cause for discipline exists pursuant to section 726 even if it is concluded that the amended statute is insufficient by itself to establish the requisite nexus or logical connection between sexual relations with a patient and the practice of medicine. In such case, the substantial relationship language must be specifically read into the statute. (*Clare v. State Board of Accountancy, supra*, 10 Cal.App.4th at pp. 301-03.) The evidence established that the sexual relationship adversely affected respondent's medical judgment. Thus, he engaged in sexual intercourse with S.K. before four weeks had passed from her surgery despite his earlier contrary sound medical advice, as set forth in factual finding numbers 15, 18, 19, 21, and 25. Respondent's sexual relations with S.K., in the existing circumstances, reflect poorly on his professional judgment and, therefore, are substantially related to the qualifications, functions, and duties of a physician.

3. Section 2234, provides, in pertinent part, as follows: "The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following: [¶ . . . ¶] "(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts."

The court in *Atienza v. Taub* (1987) 194 Cal.App.3d 388, a medical malpractice civil case, faced the issue of whether a physician engaged in negligence by entering into sexual relations with a patient. Adopting a definition of professional negligence by health care providers found in Business and Professions Code section 6146, subdivision (c)(3), the court concluded that "an action for professional negligence of a physician arises out of the breach of the duty of care owed to the patient by the physician *within* the scope of the patient-physician relationship." (*Id.* at p. 392; emphasis in original.) Since the issue of whether sexual relations with a patient could constitute a breach the duty owed the patient was one of first impression, the court looked to out-of-state decisions for guidance. After its review, the court stated that "allegations of a physician's sexual misconduct have provided a basis for a malpractice action only where the patient has alleged that the physician induced sexual relations as part of therapy. . . . Under these circumstances, the courts 'see no reason for distinguishing this type of malpractice and others, such as improper administration of a drug or a defective operation. In each situation, the essence of the claim is the doctor's departure from proper standards of medical practice.' . . . [¶] . . . The relevant authorities therefore agree that a physician who induces a patient to enter into sexual relations is liable for professional negligence only if the physician engaged in the sexual conduct on the pretext that it was a necessary part of the treatment for which the patient has sought out the physician." (*Id.* at p.393.)

With respect to the case before it, the court concluded: [A]ppellant seeks to combine the care given to her by respondent for her phlebitis and the emotionally destructive effect of her romantic and sexual involvement with him under the rubric of 'treatment' simply because the two things took place over the same period of time. Appellant does not allege that she was induced to have sexual relations with respondent in furtherance of her treatment. Essentially, appellant complains that she had an unhappy affair with a man who happened to be her doctor. This is plainly insufficient to make out a cause of action for professional negligence under any of the theories presented. . . ." (Id. at pp. 393 and 394.)

Complainant does not argue that sexual intercourse was part of S.K.'s treatment or that respondent engaged in sexual intercourse on the pretext that it was a necessary part of treatment. Nor was it established that respondent engaged in sexual intercourse under any medical treatment pretext.

Complainant nevertheless argues that respondent deviated from the standard of care, and thus engaged in negligent conduct, because he engaged in sexual intercourse with the patient despite having proscribed intercourse until at least four weeks after surgery. However, regardless of the lapse in judgment it represented, respondent's participation in sexual intercourse did not involve actual or purported treatment for S.K.'s ovarian mass, endometriosis, or any other medical condition. Put another way, the sexual act did not become part of treatment, or a pretext for treatment, simply because respondent failed to abide by his own proscription. As in *Atienza*, despite having met the patient in his office, the sexual relations that followed did not fall "within" the scope of the physician-patient relationship.

Accordingly, inasmuch respondent did not engage in sexual intercourse with S.K. on the pretext that it was a necessary part of treatment, respondent did not engage in negligence. Cause for discipline, therefore, has not been established pursuant to section 2234, subdivision (c).

4. Section 2236, subdivision (a), states: "The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter. . . ."

The Board defines a crime or act substantially related to the practice of medicine "if to a substantial degree it evidences present or potential unfitness of a person holding a license, certificate or permit to perform the functions authorized by the license, certificate or permit in a manner consistent with the public health, safety, or welfare. Such crimes or acts shall include but not be limited to those involving the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision of the Medical Practice Act." (Cal. Code Regs., tit. 16, § 1360.)

Respondent has suffered a conviction, as set forth in factual finding number 28. The underlying crime and circumstances evidence present or potential unfitness to practice medicine because respondent's medical judgment was adversely affected by the sexual relationship with the patient, as set forth in factual finding numbers 15, 18, 19, 21, and 25 and legal conclusion number 2. Accordingly, the conviction involves a crime substantially related to the qualifications, functions, and duties of a physician and surgeon.

5. All evidence presented in mitigation and rehabilitation has been considered. In brief, respondent developed an emotional attachment to S.K. and engaged in a sexual relationship with her at a time of stress and personal difficulties. The sexual relationship included two episodes of intercourse within three weeks of S.K.'s surgery; respondent had previously advised S.K. to avoid intercourse for a period of four to six weeks after surgery.

He has gained insight into the factors that led to the relationship and has benefited from additional training and understanding in the area of professional boundaries. He realizes the harm his actions have caused, regrets his actions, and vows not to repeat them. He is a good physician with no other blemish on his record. On the other hand, the sexual relationship and ensuing conviction are recent and respondent is still on criminal probation. Protection of the public warrants monitoring of the respondent by the Board.

6. The purpose of licensing statutes and administrative proceedings enforcing licensing requirements is not penal but public protection. (*Hughes, supra,* 17 Cal.4th at 784-786; *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476). Public protection is the paramount priority of the Board and the Division of Medical Quality. (§§ 2001.1, 2229.)

The Board's guidelines, entitled "Manual of Disciplinary Orders and Disciplinary Guidelines" (9th Edition, 2003), which are referred to in California Code of Regulations, title 16, section 1361, recommend the same discipline for violations of sections 726 and 2236: a maximum penalty of license revocation and a minimum penalty of stayed revocation and seven years of probation on various terms and conditions. The guidelines acknowledge that they are not binding standards and that mitigating or other appropriate circumstances may establish a basis to vary from them.

In this case, after consideration of the evidence of mitigation and rehabilitation presented by respondent, which is significant, revocation of respondent's physician and surgeon's certificate is not warranted. Certain optional terms and conditions of probation are unnecessary, as are an actual suspension, further psychiatric evaluation, medical evaluation or treatment, victim restitution, practice monitoring or restriction, or additional completion of the boundaries course.. What is necessary to protect the public, however, is the imposition of the probationary term (with attendant terms and conditions) recommended by the Board's guidelines – a term of seven years. No additional departures from the Board's disciplinary guidelines are warranted. Continued psychotherapy with the present therapist is appropriate to avoid unwarranted disruption of on-going rehabilitation. The order that follows is, therefore, necessary and sufficient for the protection of the public.

ORDER

Physician's and Surgeon's Certificate No. G 52027 issued to respondent Stuart J. Fischbein, M.D. is hereby revoked. However, the revocation is stayed and respondent's certificate is placed on probation for seven (7) years upon the following terms and conditions.

1. Education Course. Within 60 calendar days of the effective date of this Decision, and on an annual basis thereafter, respondent shall submit to the Division or its designee for its prior approval an educational program or course which shall not be less than 5 hours per year for each year of probation in professional boundaries issues. The educational program or course shall be Category I certified, limited to classroom, conference, or seminar settings. The educational program or course shall be at respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

2. Ethics Course. Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a course in ethics, at respondent's expense, approved in advance by the Division or its designee. Failure to successfully complete the course during the first year of probation is a violation of probation.

An ethics course taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Division or its designee, be accepted towards the fulfillment of this condition if the course would have been approved by the Division or its designee had the course been taken after the effective date of this Decision.

Respondent shall submit a certification of successful completion to the Division or its designee not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.

3. Psychotherapy. Respondent shall continue in psychotherapy with Gruska, or if she is no longer available, with another therapist approved by the Division. Respondent shall continue psychotherapy treatment, including any modifications to the frequency of psychotherapy, until the Division or its designee deems that no further therapy is necessary.

The psychotherapist shall consider any information provided by the Division or its designee and any other information the psychotherapist deems relevant. Respondent shall cooperate in providing the psychotherapist any information and documents that the psychotherapist may deem pertinent. Respondent shall have the treating psychotherapist submit quarterly status reports to the Division or its designee.

4. Third Party Chaperone. During probation, respondent shall have a third party chaperone present while consulting, examining or treating female patients. Respondent shall, within 30 calendar days of the effective date of the Decision, submit to the Division or its designee for prior approval name(s) of persons who will act as the third party chaperone. Each third party chaperone shall initial and date each patient medical record at the time the chaperone's services are provided. Each third party chaperone shall read the Decision(s) and the Accusation(s), and fully understand the role of the third party chaperone.

Respondent shall maintain a log of all patients seen for whom a third party chaperone is required. The log shall contain the: 1) patient name, address and telephone number; 2) medical record number; and 3) date of service. Respondent shall keep this log in a separate file or ledger, in chronological order, shall make the log available for immediate inspection and copying on the premises at all times during business hours by the Division or its

designee, and shall retain the log for the entire term of probation. Failure to maintain a log of all patients requiring a third party chaperone, or to make the log available for immediate inspection and copying on the premises, is a violation of probation.

5. Notification. Within five calendar days of the effective date of this Decision, respondent shall provide a true copy of the Decision in this matter to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Division or its designee within 15 calendar days. This condition shall apply to any change(s) in hospitals, other facilities or insurance carriers.

6. Supervision of Physician Assistants. During probation, respondent is prohibited from supervising physician assistants.

7. Obey All Laws. Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

8. Quarterly Declarations. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation. Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

9. Probation Unit Compliance. Respondent shall comply with directives from the Division's probation unit. Respondent shall, at all times, keep the Division informed of respondent's business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021, subdivision (b).

Respondent shall not engage in the practice of medicine in respondent's place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

Respondent shall immediately inform the Division or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than 30 calendar days.

10. Interview with the Division or its Designee. Respondent shall be available in person for interviews either at respondent's place of business or at the probation unit office, with the Division or its designee upon reasonable request at various intervals.

11. Residence or Practice Outside of California. In the event respondent should leave the State of California to reside or to practice, respondent shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding 30 calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code. All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside California will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws and Probation Unit Compliance.

Respondent's license shall be automatically cancelled if respondent's periods of temporary or permanent residence or practice outside California totals two years. However, respondent's license shall not be cancelled as long as respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

12. Failure to Practice Medicine – California Resident. In the event respondent resides in the State of California and for any reason respondent stops practicing medicine in California, respondent shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non- practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding 30 calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if respondent resides in California and for a total of two years fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

13. Completion of Probation. Respondent shall comply with all financial obligations (e.g., probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, respondent's certificate shall be fully restored.

14. Violation of Probation. Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation

and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

15. License Surrender. Following the effective date of this Decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request the voluntary surrender of respondent's license. The Division reserves the right to evaluate respondent's request and to exercise its discretion whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, respondent shall, within 15 calendar days, deliver respondent's wallet and wall certificate to the Division or its designee, and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation, and the surrender of respondent's license shall be deemed disciplinary action. If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

16. Probation Monitoring Costs. Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

This Decision shall become effective on October 10, 2007.

IT IS SO ORDERED this 10th day of September, 2007.

Cesar A. Aristeiguieta, M.D., F.A.C.E.P.
Chair
Panel A
Division of Medical Quality

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **STUART J. FISCHBEIN, M.D.**	
Physician's & Surgeon's Certificate No.: G52027	Case No.: 06-2006-172374 OAH No.: L2006060527
Respondent	

ORDER OF NON-ADOPTION OF PROPOSED DECISION

The Proposed Decision of the Administrative Law Judge in the above-entitled matter has been **non-adopted.** The Medical Board of California, Division of Medical Quality, will decide the case upon the record, including the transcript and exhibits of the hearing, and upon such written argument as the parties may wish to submit, including in particular, argument directed to the question of whether the proposed penalty should be modified. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

To order a copy of the transcript, please contact Kennedy Court Reporters, Inc., 523 W. Sixth Street, Suite 1228, Los Angeles, CA 90014, telephone (800) 231-2682, fax (714) 835-0641.

To order a copy of the exhibits, please contact the Transcript Clerk at the Office of Administrative Hearings, 320 West Fourth Street, 6th Floor, Suite 630, Los Angeles, CA 90013, telephone (213) 576-7200, fax (213) 576-7244.

In addition to written argument, oral argument will be scheduled if any party files with the Division within 20 days from the date of this notice a written request for oral argument. If a timely request is filed, the Division will serve all parties with written notice of the time, date and place for oral argument. Please do not attach to your written argument any documents that are not part of the record as they cannot be considered by the Panel.

Please remember to serve the opposing party with a copy of your written argument and any other papers you might file with the Division. The mailing address of the Division is as follows:

Division of Medical Quality
MEDICAL BOARD OF CALIFORNIA
1426 Howe Avenue
Sacramento, CA 95825-3236
(916) 263-2639

Dated: May 1, 2007

Cesar A. Aristeiguieta, M.D., F.A.C.E.P.
Chair, Panel A

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
STATE OF CALIFORNIA

In the Matter of Accusation Against: STUART J. FISCHBEIN, M.D. 10309 Santa Monica Blvd., Suite 300 Los Angeles, CA 90025 Physician's and Surgeon's Certificate Number G52027 Respondent.	Case No. 06-2006172374 OAH No. L2006060527

ORDER CORRECTING PROPOSED DECISION

On February 2, 2007, the Administrative Law Judge issued a proposed decision in this matter. The Administrative Law Judge thereafter noticed a mistake or clerical error in the proposed decision. In Legal Conclusion 6, the word "not" was inadvertently omitted from the beginning of the sixth line of the third paragraph. Such error is subject to correction by the undersigned pursuant to California Code of Regulations, title 1, section 1048, subdivision (c).

GOOD CAUSE appearing therefor, the following order is issued:

1. The correction is authorized by law.

2. The proposed decision is corrected and the second sentence of the third paragraph of Legal Conclusion 6 is corrected to read as follows: "Actual suspension, further psychiatric evaluation, medical evaluation or treatment, victim restitution, practice monitoring or restriction, or additional completion of the boundaries course are not necessary for the protection of public."

3. This order is hereby made part of the record of this case.

4. The agency shall serve respondent with the original proposed decision and a copy of this order at the time it serves respondent with a copy of the proposed decision or the final decision in this case, whichever is earlier.

DATED: 2/13/07

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
STATE OF CALIFORNIA

In the Matter of the Accusation Against: STUART J. FISCHBEIN, M.D. 10309 Santa Monica Blvd., Suite 300 Los Angeles, California 90025 Physician's and Surgeon's Certificate No. G52027 Respondent.	Case No. 06-2006172374 OAH No. L2006060527

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on January 3, 4, and 5, 2007, in Los Angeles, California.

John E. Rittmayer, Deputy Attorney General, represented Complainant David T. Thornton.

Peter R. Osinoff, Attorney at Law, represented respondent.

Complainant seeks to discipline respondent's medical certificate for alleged sexual misconduct, repeated negligent acts, and conviction of a crime. The alleged causes for discipline all arise out of respondent having sexual relations with a patient. Respondent admitted having consensual sexual relations with his patient, and provided evidence in mitigation and rehabilitation in support of continued licensure.

Oral and documentary evidence, and evidence by written stipulation, was received, and the matter was submitted for decision.

FACTUAL FINDINGS

1. Complainant filed the First Amended Accusation in his official capacity as the Executive Director of the Medical Board of California, State of California (Board).

2. On March 12, 1984, the Board issued Physician's and Surgeon's Certificate number G 52027 to respondent. The certificate has been in effect since then and expires on July 31, 2007, unless renewed. It has not been previously disciplined.

3. Respondent is 50 years old. He received his medical degree in 1982, from the University of Minnesota. He completed an internship in 1983 and an obstetrics and gynecology (ob/gyn) residency in 1986, both at Cedars-Sinai Medical Center. He was the administrative chief resident during his last year. Respondent obtained a certification from the American Board of Ob/Gyn in 1989 and obtained re-certification in 1999. He has been engaged in the private practice of ob/gyn in the Century City area of Los Angeles since 1986. In 1995, he opened a second office in Camarillo, in which midwives play a significant role.

4. Respondent is divorced. He has one daughter, aged 10, and three step-sons, one aged 17 and twins aged 14. The couple separated after respondent's wife was unfaithful, but attempted reconciliation on multiple occasions. The last unsuccessful attempt occurred in July 2005.

5. In June 2005, respondent was diagnosed with shingles, an acute inflammation of the nerves caused by the chickenpox virus. He developed lesions and pain in his face. Although the lesions dissipated within weeks, the pain persisted for about one year. Respondent had difficulty sleeping and was prescribed sedatives, including Lunesta,[1] to treat the problem.

6. On August 17, 2005, S.K.[2], presented to respondent's Camarillo office, complaining of pelvic pain. She was 35 years old at the time and was completing post-doctoral training to become a clinical psychologist. S.K.'s boyfriend, S.C., accompanied her. In January 2005, a mass had been removed from S.K.'s ovary and endometriosis, an inflammatory process involving the ovaries and other organs, had been diagnosed. She had post-operative complications with urinary retention that required catheterization several times. The patient reported to respondent that her pain was similar to that experienced in January 2005. Respondent performed an ultrasound and diagnosed a complex right pelvic mass. He opined that the reported endometriosis could also be contributing to the pain. Respondent discussed the options with S.K. The patient preferred to avoid surgery and respondent agreed to monitor the situation. He planned to obtain the medical records of the January 2005 surgery and ordered laboratory blood tests. He told the patient that surgery would be required if the condition did not improve.

7. The pain persisted and the size of the mass did not decrease, and, during an office visit on September 8, 2005, respondent recommended surgery.

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[1] The parties stipulated that Lunesta is a trade name for eszopiclone, a prescription sedative indicated for insomnia, and that, as any sedative, it may have an inhibition-reducing effect similar to that of alcohol.

[2] Initials have been used to protect the privacy of the patient and her boyfriend, who is now her husband.

8. The patient returned on September 12, 2005 for a pre-operative visit. Respondent performed a physical examination, explained the procedure, and answered S.K.'s questions about the surgery. S.K. stated that she was sensitive to antibiotics and other medicine. Respondent nevertheless prescribed a prophylactic antibiotic and Lunesta to help her sleep. Respondent anticipated that the patient would experience pain and would be unable to sleep. She had taken another sedative, Ambien, but Lunesta, the newest drug used as a sleeping aid, was reported to have fewer side effects.

In an effort to establish rapport with the patient, respondent invited her to ask more general questions. In the conversation that ensued, they discussed various general matters, including family, friends, personal interests, and professions. Respondent touched the patient in the arm as she was checking out with the office staff, a gesture intended to reassure. He told her that everything would turn out fine.

9. On September 16, 2006, respondent performed surgery at St, John's Pleasant Valley Hospital in Camarillo, California. As the patient was prepared for surgery, respondent held S.K.'s hand and talked to her to reassure her.

10. The procedure, described in the operative report as an exploratory laparotomy, extensive lysis of adhesions, right ovarian cystectomy, left ovarian cystectomy of left endometrioma, and left salpingectomy, was performed by abdominal incision without reported complications. In brief, respondent removed two ovarian cysts, separated and cut tissue and organs that had stuck together (adhesions), and excised the left uterine tube. The patient had expressed a desire to have children and respondent was able to leave part of the right uterine tube, which in his view would facilitate in vitro fertilization.

11. Respondent was present when the patient woke up from the anesthesia. He stated that everything had gone well, and referred to S.K. as "sweet pea." Respondent explained that he has used the term for years as one of endearment, one he uses with patients and non-patients alike.

12. S.K. remained in the hospital three days. She made steady progress and suffered no complications. Although in pain, S.K. stopped taking morphine and relied on ibuprofen for relief.

13. Respondent visited S.K. on two occasions while she was in the hospital. They spoke about personal matters for long periods of time. Respondent provided more details about his marriage and divorce, about his children, and about past personal problems and challenges. S.K. spoke about her past marriage and her present relationship with S.C. She stated that S.C. was often out of town and respondent warned her about making a mistake with S.C. Respondent testified that it was during these conversations that he started viewing S.K. as a woman and not just as a patient.

14. On September 19, 2005, S.K. was discharged from the hospital. As set forth in the discharge instructions: physical activity was permitted as tolerated; climbing of stairs was permitted; walking at least three times per day was recommended; lifting was limited to 10 pounds; and driving was prohibited for two weeks. The patient was directed to seek medical attention if certain conditions developed, including heavy bleeding.

15. The discharge documents did not contain any restrictions on sexual intercourse. S.K. testified that respondent advised her not to have sexual intercourse for four to six weeks after surgery. Respondent did not recall if he had provided this recommendation. Pre-operatively, he typically provides such instructions to patients having abdominal surgery. Post-operatively, he evaluates each patient individually. In S.K.'s case, he did not discharge her and did not chart anything regarding avoiding sexual intercourse for any period of time. In the existing circumstances, S.K.'s testimony is credited, as she had better recollection and respondent typically provides such instruction.

16. S.K. stayed with her parents in Orange County for approximately one week following her discharge. She remained in pain and was bedridden most of the time. She took high dosages of ibuprofen for her abdominal pain. She also ingested the sedative Ambien in order to sleep. Respondent was in daily contact by telephone during this period. He checked on her progress and continued to discuss personal matters, including S.C.'s frequent absences and respondent's good personal attributes.

17. During one of the telephonic conversations while S.K was recuperating at her parents' home, the two briefly discussed the ethical considerations involved in dating a patient. Respondent's recollection of the discussion was poor, and he referred to the conversation as "not rational" and "colored by his love for S.K." S.K.'s recollection was more specific and included references to the fact that their respective professional regulatory bodies prohibited dating patients. She recalled that they agreed that therapists had greater restrictions. She also remembered respondent stating that the Board was not as strict as the psychology board and that he had dated "bushels" of patients. Respondent denied discussing the differences between the two boards or making any statement regarding dating bushels of patients. Respondent denied dating any other patient and there is no evidence that he has actually dated any other patient. It is unnecessary to resolve the conflict in testimony, as regardless of the content or length of the discussions, ethical considerations did not prevent respondent's continuing personal conversations with S.K. or his subsequent relationship with her.

18. S.K. terminated her relationship with S.C. while recuperating at her parents' home. She told S.C. that he was always out of town and not around her enough. She did not disclose her conversations with respondent or any desire to pursue a relationship with respondent. She thereafter told respondent about the break-up with S.C. Respondent welcomed the news and decided to pursue a relationship with S.K. Their subsequent telephone conversations took a decidedly sexual overtone.

19. On September 28, 2005, respondent visited S.K. in her home. As stipulated by the parties, the two had consensual sexual intercourse. Respondent described the intercourse as gentle, not involving pelvic thrusts. However, S.K. testified she was still in pain. After having intercourse, respondent took Lunesta and provided one to S.K. to facilitate falling asleep.

20. On September 29, 2005, S.K. saw respondent in his office for a post-operative visit. She reported lower abdominal tenderness, which respondent deemed normal for the type of surgery the patient had undergone. He noted that the wounds were healing slowly, but did not think it was unusual. Respondent also noted that there was some urine retention, and prescribed medication for the problem.

21. On October 1, 2005, S.K. drove to respondent's house. They again had consensual sexual intercourse. Respondent described the intercourse as a gentle act, similar to the first occasion.

22. Respondent and S.K. continued to speak by telephone. They met outside respondent's office on one additional occasion, but did not again engage in sexual intercourse.

23. S.K.'s last office visit with respondent took place on October 31, 2005. She complained of continued abdominal pain, but was getting better. She did not complain of any vaginal bleeding or of any pain attributable to sexual intercourse. Respondent did not note injury to any internal organ attributable to sexual intercourse. Ultrasound examination did reveal two small cysts and respondent provided instruction for treatment.

24. S.K. subsequently reconciled with S.C. and stopped talking to respondent. S.C. called respondent in early November 2005 and asked that he had no further contact with S.K. Respondent honored the request.

25. Complainant's expert, board-certified ob/gyn Michael L. Friedman, M.D., concurred with respondent's recommendation to S.K. regarding not having sexual intercourse for four to six weeks. This is the typical period in which the wounds heal and in which the organs return to their normal locations. In standard sexual intercourse, he stated, the abdominal muscles move and contract during pelvic thrusts. Intercourse could damage healing organs adjacent to the vagina. In his opinion, the standard of care would require a physician to advise his patients who undergo the type of surgery S.K. did to avoid sexual contact for four to six weeks, which testimony was not contradicted. He further opined that respondent deviated from the standard of care by having sexual intercourse with S.K. less than four weeks after surgery. On cross-examination, Dr. Friedman conceded that having sex with S.K. was not part of respondent's treatment plan for the patient.

26. Dr. Friedman testified that the medical treatment actually provided by respondent to S.K. had been within the standard of care. Dr. Friedman further testified that there was no evidence that the sexual intercourse had caused actual physical injury to S.K. This testimony is credible and corroborates respondent's own assertions.

27. Respondent did not engage in sexual intercourse with S.K. on the pretext that it was a necessary part of treatment.

28. On June 13, 2006, in the Superior Court of California, County of Los Angeles, State of California, in case number 6CA02400, respondent was convicted, following his plea of nolo contendere, of one count of violating Business and Professions Code section 729 (sexual exploitation of patient), a misdemeanor. The conviction resulted from respondent's sexual relations with S.K. The Court suspended imposition of sentence and placed respondent on probation for three years on terms and conditions that included service of 45 days in jail or 240 hours of community service, payment of $120 in fines and fees, completion of 52 weekly sessions of psychological counseling, and completion of the Professional Boundaries Program.

29. Respondent is complying with the terms and conditions of probation. He completed 80 hours of community beautification in Hollywood and 100 hours of community service at the Woodland Park Retirement Home.

30. Respondent did not deny or minimize his relationship with S.K. Respondent stated he fell in love with S.K. during a particularly vulnerable period in his life. In his mind, they were two people facing personal issues who became attracted to each other. He nevertheless expressed regret about his "terrible mistake in judgment." His efforts to understand what led to the relationship and to prevent its recurrence have led him to the conclusions that he has hurt many people, including S.K, and that he must never again engage in such hurtful behavior.

31. On January 20, 2005, respondent resumed psychotherapy with Jenny Williams Gruska (Gruska), M.A., M.F.T. She had facilitated marriage reconciliation efforts in the summer of 2005. In weekly sessions that continue to the present, respondent examined his relationship with S.K. and other aspects of his life. Gruska opines that respondent has made progress and does not believe he would ever enter into another dual relationship with a patient.

32. During the period of June 14 through 16, 2006, respondent completed the Professional Boundaries Program offered by the Physician Assessment and Clinical Education Program (PACE) at the University of California, San Diego, School of Medicine. He now clearly understands professional boundaries and continues to have contact with the course's facilitator, Elizabeth Becker, L.C.S.W. Respondent has learned techniques to maintain professional boundaries in the difficult situations faced by physicians in his specialty, such as demonstrating empathy to patients faced with emotional losses or painful choices.

33. Respondent now utilizes a female chaperone whenever he has to physically examine a patient.

34. Psychiatrist Lester M. Zackler, M.D., evaluated respondent in December 2006. Dr. Zackler administered the Minnesota Multiphasic Personality Inventory – 2 and the Personality Assessment Inventory. He also met with respondent for approximately five hours on December 12 and 18, 2006. Dr. Zackler is of the opinion that respondent's relationship with S.K. was the result of situational factors and that another similar relationship is unlikely. Respondent's own personal need for love, his recent marriage dissolution, and his bout with shingles, impacted his judgment. Dr. Zackler does not believe respondent to be a sexual predator because, unlike such deviants, respondent developed an emotional attachment to S.K. before engaging in sexual intercourse. In Dr. Zackler's opinion, respondent's greater awareness of professional boundaries, increased insight about the relationship with S.K., and the consequences of his actions make recurrence of another sexual relationship with a patient unlikely.

35. a. Four witnesses attested to respondent's good character and skill as a physician. Kathleen E. Bradley, M.D. has known respondent since 1992. Dr. Bradley specializes in the diagnosis of pre-natal conditions that create special risks for mother and fetus. She has provided numerous consultations to respondent, including some during regular visits to the office suite respondent shares with other ob/gyn physicians. Respondent has demonstrated his knowledge and diagnostic skill in the evaluation process before referrals. Respondent is often present during consultations involving his patients. In her observations, respondent has been compassionate and respectful of his patients; he has provided appropriate explanations of planned procedures.

b. Erwin Frankel, M.D. has known respondent since the early 1980s, when he was one of respondent's supervising physicians at Cedars-Sinai Medical Center. Respondent was one of the best interns that Dr. Frankel had seen. Respondent became Dr. Frankel's associate after completing his training and has remained so ever since. Respondent has treated Dr. Frankel's patients and the two have performed surgery together over the years. Dr. Frankel described respondent as a very good doctor, one who is knowledgeable, warm, caring, and empathetic.

c. David Kline, M.D., has known respondent since 1982. Since 1987, he and respondent have treated each other's patients when the other has been unavailable, and since 1994, they have shared office space. They also assist in each other's surgeries. Despite learning about respondent's relationship with S.K. and the conviction, Dr. Kline continues to trust his patients to respondent's care. Dr. Kline described respondent as having the "utmost competence." Respondent is also a warm and caring physician who goes "above and beyond" to ensure patient comfort. Respondent continues to improve his base of knowledge and shares it with Dr. Kline and others.

d. Rebecca E. Sewaidisfreen has been respondent's patient for approximately sixteen years. Respondent was able to treat her medical condition, atypical cells in the cervix, to enable her to conceive children. He delivered her two children, a boy now five-years old and a girl now nine weeks old, properly handling complications in each instance. Respondent always kept her and her husband informed about the care and treatment provided. She is very satisfied with the care received and described respondent as an honorable person. She has referred friends and family and has not heard any complaints.

LEGAL CONCLUSIONS

1. Business and Professions Code[3] section 726 provides: "The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any [physician]. . . ." The statute was amended in 1993 to delete the words "which is substantially related to the qualifications, functions, or duties of the occupation for which the license was issued," which preceded the words "constitutes unprofessional conduct." The amendment followed the decision in *Gromis v. Medical Board* (1992) 8 Cal.App.4th 589.

In *Gromis*, *supra*, the court concluded that there was insufficient evidence to establish that the respondent's sexual relationship with his patient violated section 726. In that case, the male physician met the female patient after she sought treatment; he asked and the patient agreed to go out on three separate dates; they had sexual intercourse on two occasions; and she continued to receive medical care during the relationship. The court held that the statute and the constitution compelled the conclusion that "[a] sexual relationship between physician and patient is not a sufficient basis for discipline without a finding that the sexual relationship was 'substantially related to the qualifications, functions, or duties' of a physician." (*Gromis*, *supra* at p. 599.) The court noted the absence of findings that the physician's medical judgment had been compromised or that he abused his status to induce the patient's consent to sexual intercourse, and remanded the case to the trial court for findings regarding whether the physician had abused his status as a physician.

The court's holding that the substantial relationship requirement has a constitutional basis is in agreement with prior and subsequent cases. As the court in *Griffiths v. Medical Board of California* (2002) 96 Cal.App.4th 757, 769, recently noted: " '[A] statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her competence to practice that profession.' (*Hughes v. Board of Architectural Examiners, supra*, 17 Cal.4th at p.788.) Thus the state can impose discipline on a professional license only if the conduct upon which the discipline is based relates to the practice of the particular profession and thereby demonstrates an unfitness to practice such profession. 'There

[3] Unless otherwise stated, all further statutory references are to the Business and Professions Code.

must be a logical connection of licensees' conduct to their fitness or competence to practice the profession or to the qualifications, functions, or duties of the profession in question.' (*Clare v. State Bd. of Accountancy* (1992) 10 Cal.App.4th 294, 302.) [¶] . . . Where a licensing statute does not require a nexus between the licensee's conduct and the licensee's fitness or competence to practice, the statute must be read to include this 'nexus' requirement to ensure its constitutionality. (*Marek v. Board of Podiatric Medicine, supra*, 16 Cal.App.4th at p. 1096.)"

The *Griffiths* court found the requisite nexus between the practice of medicine and a statute, section 2239, which defined the conviction of more than one misdemeanor or felony involving drugs or alcohol as unprofessional conduct, and thus grounds for disciplinary action. The court noted that convictions involving use of alcohol reflect a lack of sound professional and personal judgment that is relevant to a physician's fitness and competence to practice medicine. In the court's view, driving under the influence of alcohol shows disregard for the physician's personal safety and for that of the public, and for medical knowledge regarding the effects of alcohol on vision, reaction time, motor skills, judgment, coordination and memory, and the ability to judge speed, dimensions, and distance. The Legislature, therefore, properly determined that a nexus existed between driving after consumption of alcohol and a physician's fitness to practice medicine.

In enacting section 726, as amended, the Legislature has similarly determined that a nexus or logical connection exists between sexual relations with a patient and the practice of medicine. As the court in *Gromis* itself recognized in rejecting the physician's argument to restrict the reach of section 726, sexual relations with a patient involve potential abuse of a patient under the guise of treatment, potential abuse of the physician's status, and potential compromise of the physician's medical judgment.

In this case, cause exists to discipline respondent's medical certificate pursuant to section 726 because he engaged in sexual relations with his patient S.K., as set forth in factual finding numbers 18, 19, and 21.

2. Cause for discipline exists pursuant to section 726 even if it is concluded that the amended statute is insufficient by itself to establish the requisite nexus or logical connection between sexual relations with a patient and the practice of medicine. In such case, the substantial relationship language must be specifically read into the statute. (*Clare v. State Board of Accountancy, supra*, 10 Cal.App.4th at pp. 301-03.) The evidence established that the sexual relationship adversely affected respondent's medical judgment. Thus, he engaged in sexual intercourse with S.K. before four weeks had passed from her surgery despite his earlier contrary sound medical advice, as set forth in factual finding numbers 15, 18, 19, 21, and 25. Respondent's sexual relations with S.K., in the existing circumstances, reflect poorly on his professional judgment and, therefore, are substantially related to the qualifications, functions, and duties of a physician.

3. Section 2234, provides, in pertinent part, as follows: "The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following: [¶ . . . ¶] "(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts."

The court in *Atienza v. Taub* (1987) 194 Cal.App.3d 388, a medical malpractice civil case, faced the issue of whether a physician engaged in negligence by entering into sexual relations with a patient. Adopting a definition of professional negligence by health care providers found in Business and Professions Code section 6146, subdivision (c)(3), the court concluded that "an action for professional negligence of a physician arises out of the breach of the duty of care owed to the patient by the physician *within* the scope of the patient-physician relationship." (*Id.* at p. 392; emphasis in original.) Since the issue of whether sexual relations with a patient could constitute a breach the duty owed the patient was one of first impression, the court looked to out-of-state decisions for guidance. After its review, the court stated that "allegations of a physician's sexual misconduct have provided a basis for a malpractice action only where the patient has alleged that the physician induced sexual relations as part of therapy. . . . Under these circumstances, the courts 'see no reason for distinguishing this type of malpractice and others, such as improper administration of a drug or a defective operation. In each situation, the essence of the claim is the doctor's departure from proper standards of medical practice.' . . . [¶] . . . The relevant authorities therefore agree that a physician who induces a patient to enter into sexual relations is liable for professional negligence only if the physician engaged in the sexual conduct on the pretext that it was a necessary part of the treatment for which the patient has sought out the physician." (*Id.* at p.393.)

With respect to the case before it, the court concluded: [A]ppellant seeks to combine the care given to her by respondent for her phlebitis and the emotionally destructive effect of her romantic and sexual involvement with him under the rubric of 'treatment' simply because the two things took place over the same period of time. Appellant does not allege that she was induced to have sexual relations with respondent in furtherance of her treatment. Essentially, appellant complains that she had an unhappy affair with a man who happened to be her doctor. This is plainly insufficient to make out a cause of action for professional negligence under any of the theories presented. . . ." (Id. at pp. 393 and 394.)

Complainant does not argue that sexual intercourse was part of S.K.'s treatment or that respondent engaged in sexual intercourse on the pretext that it was a necessary part of treatment. Nor was it established that respondent engaged in sexual intercourse under any medical treatment pretext.

Complainant nevertheless argues that respondent deviated from the standard of care, and thus engaged in negligent conduct, because he engaged in sexual intercourse with the patient despite having proscribed intercourse until at least four weeks after surgery. However, regardless of the lapse in judgment it represented, respondent's participation in sexual intercourse did not involve actual or purported treatment for S.K.'s ovarian mass, endometriosis, or any other medical condition. Put another way, the sexual act did not become part of treatment, or a pretext for treatment, simply because respondent failed to abide by his own proscription. As in *Atienza*, despite having met the patient in his office, the sexual relations that followed did not fall "within" the scope of the physician-patient relationship.

Accordingly, inasmuch respondent did not engage in sexual intercourse with S.K. on the pretext that it was a necessary part of treatment, respondent did not engage in negligence. Cause for discipline, therefore, has not been established pursuant to section 2234, subdivision (c).

4. Section 2236, subdivision (a), states: "The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter. . . ."

The Board defines a crime or act substantially related to the practice of medicine "if to a substantial degree it evidences present or potential unfitness of a person holding a license, certificate or permit to perform the functions authorized by the license, certificate or permit in a manner consistent with the public health, safety, or welfare. Such crimes or acts shall include but not be limited to those involving the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision of the Medical Practice Act." (Cal. Code Regs., tit. 16, § 1360.)

Respondent has suffered a conviction, as set forth in factual finding number 28. The underlying crime and circumstances evidence present or potential unfitness to practice medicine because respondent's medical judgment was adversely affected by the sexual relationship with the patient, as set forth in factual finding numbers 15, 18, 19, 21, and 25 and legal conclusion number 2. Accordingly, the conviction involves a crime substantially related to the qualifications, functions, and duties of a physician and surgeon.

5. All evidence presented in mitigation and rehabilitation has been considered. In brief, respondent developed an emotional attachment to S.K. and engaged in a sexual relationship with her at a time of stress and personal difficulties. His actions were situational and not predatory. He has gained insight into the factors that led to the relationship and has benefited from additional training and understanding in the area of professional boundaries. He realizes the harm his actions have caused, regrets his actions, and vows not to repeat them. He is a good physician with no other blemish on his record. On the other hand, the sexual relationship and ensuing conviction are recent and respondent is still on criminal probation. Protection of the public warrants monitoring by the Board.

6. The purpose of licensing statutes and administrative proceedings enforcing licensing requirements is not penal but public protection. (*Hughes, supra,* 17 Cal.4th at 784-786; *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476).

The Board's guidelines, entitled "Manual of Disciplinary Orders and Disciplinary Guidelines" (9th Edition, 2003), which are referred to in California Code of Regulations, title 16, section 1361, recommend the same discipline for violations of sections 726 and 2236: a maximum penalty of license revocation and a minimum penalty of stayed revocation and seven years of probation on various terms and conditions. The guidelines acknowledge that they are not binding standards and that mitigating of other appropriate circumstances may establish a basis to vary from them.

In this case, the evidence of mitigation and rehabilitation presented by respondent, which is significant, warrant discipline in the low end of the spectrum, including a shorter probationary term, and make certain optional terms and conditions unnecessary. Actual suspension, further psychiatric evaluation, medical evaluation or treatment, victim restitution, practice monitoring or restriction, or additional completion of the boundaries course are necessary for the protection of public. Continued psychotherapy with the present therapist is appropriate to avoid unwarranted disruption of on-going rehabilitation. The order that follows is, therefore, necessary and sufficient for the protection of the public.

ORDER

Physician's and Surgeon's Certificate No. G 52027 issued to respondent Stuart J. Fischbein, M.D. is hereby revoked. However, the revocation is stayed and respondent's certificate is placed on probation for five years upon the following terms and conditions.

1. Education Course. Within 60 calendar days of the effective date of this Decision, and on an annual basis thereafter, respondent shall submit to the Division or its designee for its prior approval an educational program or course which shall not be less than 5 hours per year for each year of probation in professional boundaries issues. The educational program or course shall be Category I certified, limited to classroom, conference, or seminar settings. The educational program or course shall be at respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

2. Ethics Course. Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a course in ethics, at respondent's expense, approved in advance by the Division or its designee. Failure to successfully complete the course during the first year of probation is a violation of probation.

An ethics course taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Division or its designee, be accepted towards the fulfillment of this condition if the course would have been approved by the Division or its designee had the course been taken after the effective date of this Decision.

Respondent shall submit a certification of successful completion to the Division or its designee not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.

3. Psychotherapy. Respondent shall continue in psychotherapy with Gruska, or if she is no longer available, with another therapist approved by the Division. Respondent shall continue psychotherapy treatment, including any modifications to the frequency of psychotherapy, until the Division or its designee deems that no further therapy is necessary.

The psychotherapist shall consider any information provided by the Division or its designee and any other information the psychotherapist deems relevant. Respondent shall cooperate in providing the psychotherapist any information and documents that the psychotherapist may deem pertinent. Respondent shall have the treating psychotherapist submit quarterly status reports to the Division or its designee.

4. Third Party Chaperone. During probation, respondent shall have a third party chaperone present while consulting, examining or treating female patients. Respondent shall, within 30 calendar days of the effective date of the Decision, submit to the Division or its designee for prior approval name(s) of persons who will act as the third party chaperone. Each third party chaperone shall initial and date each patient medical record at the time the chaperone's services are provided. Each third party chaperone shall read the Decision(s) and the Accusation(s), and fully understand the role of the third party chaperone.

Respondent shall maintain a log of all patients seen for whom a third party chaperone is required. The log shall contain the: 1) patient name, address and telephone number; 2) medical record number; and 3) date of service. Respondent shall keep this log in a separate file or ledger, in chronological order, shall make the log available for immediate inspection and copying on the premises at all times during business hours by the Division or its designee, and shall retain the log for the entire term of probation. Failure to maintain a log of all patients requiring a third party chaperone, or to make the log available for immediate inspection and copying on the premises, is a violation of probation.

5. Notification. Within five calendar days of the effective date of this Decision, respondent shall provide a true copy of the Decision in this matter to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine,

including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Division or its designee within 15 calendar days. This condition shall apply to any change(s) in hospitals, other facilities or insurance carriers.

6. Supervision of Physician Assistants. During probation, respondent is prohibited from supervising physician assistants.

7. Obey All Laws. Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

8. Quarterly Declarations. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation. Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

9. Probation Unit Compliance. Respondent shall comply with directives from the Division's probation unit. Respondent shall, at all times, keep the Division informed of respondent's business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021, subdivision (b).

Respondent shall not engage in the practice of medicine in respondent's place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

Respondent shall immediately inform the Division or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than 30 calendar days.

10. Interview with the Division or its Designee. Respondent shall be available in person for interviews either at respondent's place of business or at the probation unit office, with the Division or its designee upon reasonable request at various intervals.

11. Residence or Practice Outside of California. In the event respondent should leave the State of California to reside or to practice, respondent shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding 30 calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside California will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws and Probation Unit Compliance.

Respondent's license shall be automatically cancelled if respondent's periods of temporary or permanent residence or practice outside California totals two years. However, respondent's license shall not be cancelled as long as respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

12. Failure to Practice Medicine – California Resident. In the event respondent resides in the State of California and for any reason respondent stops practicing medicine in California, respondent shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non- practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding 30 calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if respondent resides in California and for a total of two years fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

13. Completion of Probation. Respondent shall comply with all financial obligations (e.g., probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, respondent's certificate shall be fully restored.

14. Violation of Probation. Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

15. License Surrender. Following the effective date of this Decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request the voluntary surrender of respondent's license. The Division reserves the right to evaluate respondent's request and to exercise its discretion whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, respondent shall, within 15 calendar days, deliver respondent's wallet and wall certificate to the Division or its designee, and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation, and the surrender of respondent's license shall be deemed disciplinary action. If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

16. Probation Monitoring Costs. Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

DATED: 2/2/07

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

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Attorneys for Complainant

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Case No. 06-2006172374
STUART J. FISCHBEIN, M.D.	OAH No.
10309 Santa Monica Blvd. Ste. 300 Los Angeles, California 90025	**FIRST AMENDED** **A C C U S A T I O N**
Physician's and Surgeon's Certificate No. G52027	
Respondent.	

Complainant alleges:

PARTIES

1. David T. Thornton (Complainant) brings this Accusation solely in his official capacity as the Executive Director of the Medical Board of California.

2. On or about March 12, 1984, the Medical Board of California issued Physician's and Surgeon's Certificate Number G52027 to Stuart J. Fischbein, M.D. (Respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on July 31, 2007, unless renewed.

JURISDICTION

3. This Accusation is brought before the Division of Medical Quality, Medical Board of California (Division), under the authority of the following laws. All section

references are to the Business and Professions Code unless otherwise indicated.

4. Section 2004 of the Code states:

"The Division of Medical Quality shall have the responsibility for the following:

"(a) The enforcement of the disciplinary and criminal provisions of the Medical Practice Act.

"(b) The administration and hearing of disciplinary actions.

"(c) Carrying out disciplinary actions appropriate to findings made by a medical quality review committee, the division, or an administrative law judge.

"(d) Suspending, revoking, or otherwise limiting certificates after the conclusion of disciplinary actions.

"(e) Reviewing the quality of medical practice carried out by physician and surgeon certificate holders under the jurisdiction of the board."

5. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Division deems proper.

6. Section 2234 of the Code states:

"The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5, the Medical Practice Act].

". . .

"(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated

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negligent acts.

". . ."

7. Section 726 of the Code states:

"The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division, under any initiative act referred to in this division and under Chapter 17 (commencing with Section 9000) of Division 3.

"This section shall not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship."

8. Section 729 of the Code states, in part:

"(a) Any physician and surgeon, psychotherapist, alcohol and drug abuse counselor or any person holding himself or herself out to be a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor, who engages in an act of sexual intercourse, sodomy, oral copulation, or sexual contact with a patient or client, or with a former patient or client when the relationship was terminated primarily for the purpose of engaging in those acts, unless the physician and surgeon, psychotherapist, or alcohol and drug abuse counselor has referred the patient or client to an independent and objective physician and surgeon, psychotherapist, or alcohol and drug abuse counselor recommended by a third-party physician and surgeon, psychotherapist, or alcohol and drug abuse counselor for treatment, is guilty of sexual exploitation by a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor."

"(b) (5) . . . .

"For purposes of subdivision (a), in no instance shall consent of the patient or client be a defense. However, physicians and surgeons shall not be guilty of sexual exploitation for touching any intimate part of a patient or client unless the touching is outside the scope of medical examination and treatment, or the touching is done for sexual gratification."

9. Section 2236 of the Code states in part:

"(a) The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter [Chapter 5, the Medical Practice Act]. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred.

. . .

"(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section and Section 2236.1. The record of conviction shall be conclusive evidence of the fact that the conviction occurred."

10. Section 490 of the Code states:

"A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code."

11. Section 493 of the Code states:

"Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in

order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

"As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and 'registration.'"

FIRST CAUSE FOR DISCIPLINE

(Sexual Misconduct)

12. Respondent is subject to disciplinary action under Section 726 of the Code in that he has committed acts of sexual misconduct, which also constitute acts of sexual exploitation of a patient within the meaning of Section 729 of the Code. The circumstances are as follows:

13. On or about August 17, 2005, S.K.[1/] consulted Respondent about her persistent abdominal pain. S.K.'s boyfriend of five years accompanied her to the consultation and they discussed with Respondent their difficulty in conceiving a child after two years of attempts.

14. Respondent recommended surgery for the cause of the pain, S.K. agreed, and the two met in Respondent's office on or about September 8, 2005. At that meeting Respondent scheduled surgery for September 16, 2005, but also discussed facts about his personal life with S.K. He touched her intimately on the arm and hand.

15. On September 16, 2005, Respondent performed surgery on S.K. He caressed her arm and hand as she was rolled into the operating room, and addressed her "Sweet Pea" after she woke up from the anesthetic. In the next two days Respondent came to the hospital and had two long visits with her in which he discussed S.K.'s life, her past marriage, his past marriage, his children and family and other highly personal matters. He recommended that she not marry her boyfriend. He told her she had more chance of getting pregnant with him than with her boyfriend. He also advised her not to have sexual intercourse for four to six weeks.

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1. To protect privacy, the patient shall be designated by her initials in these proceedings. Respondent will be provided with identifying information if discovery is requested.

16. In and about the week following her September 19, 2005 discharge from the hospital, Respondent telephoned S.K. each day. She told Respondent that she and her boyfriend wished to have children. He stated that the boyfriend's career demands were not conducive to starting a family. Respondent implied that he was a better candidate to be a father for S.K.'s children. On or about September 24, 2005, S.K. telephoned her boyfriend (who was out of town on business) and terminated their relationship. She conveyed this news to Respondent (who was out of town for a conference) by telephone. Respondent congratulated her and made overt sexual advances.

17. On or about September 28, 2005, as he returned to Los Angeles from the conference, Respondent came to S.K.'s residence and had sexual relations with her. At this time not only was still S.K. feeling the effects of anesthesia and pain medication she took related to her September 16 surgery, but Respondent also supplied her with a tablet of Lunesta[2/].

18. On or about October 1, 2005, S.K. went to Respondent's house, where they again engaged in consensual sex. Respondent again supplied Lunesta. The following day, Respondent saw her for a follow-up visit at his office and continued to treat her at least until October 31, 2005.

SECOND CAUSE FOR DISCIPLINE

(Repeated Negligent Acts)

19. Respondent is subject to disciplinary action under section 2234, subdivision (c), in that, on two occasions, he had sexual intercourse with S.K. against his own medical advice to avoid intercourse for at least four weeks. The circumstances are as follows:

20. The facts alleged in paragraphs 13 through 18 are incorporated here.

21. Respondent departed from the standard of practice in that in the September 16, 2005 surgery he had operated on severe adhesions to the pelvic organs and had obliterated the

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2. Lunesta™ is a trade name for eszopiclone, a prescription Schedule IV hypnotic that the manufacturer describes as having an inhibition-reducing effect similar to that of alcohol.

cul-de-sac with an argon coagulator to stop bleeding. Sexual relations could have redamaged and traumatized those organs. Further, sexual relations could have compromised the incision Respondent made in S.K.'s abdominal wall in the course of the surgery. Finally, since Respondent did not use a condom on either occasion, he placed S.K. at risk for sexually transmitted diseases and/or pregnancy.

THIRD CAUSE FOR DISCIPLINE

(Conviction of Substantially-Related Crime)

22. Respondent is subject to disciplinary action under section 2236, subdivision (a), in he was convicted of a crime substantially related to the qualifications, functions, or duties of a physician and surgeon. The circumstances are as follows:

23. On or about June 13, 2006, respondent was convicted by plea of nolo contendere of a violation of Business and Professions Code section 729, a public offense, as charged in Count 1 of the complaint in *People of the State of California v. Stuart James Fischbein*, Superior Court, County of Los Angeles case number 6CA02400.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Division issue a decision:

1. Revoking or suspending Physician's and Surgeon's Certificate Number G52027, issued to Stuart J. Fischbein, M.D..

2. Ordering Stuart J. Fischbein, M.D. to pay the costs of probation monitoring if placed on probation.

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3. Taking such other and further action as deemed necessary and proper.

DATED: June 29, 2006

DAVID T. THORNTON
Executive Director
Medical Board of California
State of California
Complainant

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