OAH 60-0903-36435

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF MEDICAL PRACTICE

In the Matter of the Medical License of Sanjeev K. Arora, M.B., B.S.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

This matter came before Administrative Law Judge James E. LaFave for a hearing on February 1-2, 2021. On March 5, 2021, the parties submitted written closing arguments, and the record closed.

Daniel S. Schueppert, Assistant Attorney General, represents the Minnesota Board of Medical Practice (Board) Complaint Review Committee (Committee). Henry M. Helgen, III, Kutak Rock, LLP, represents Sanjeev K. Arora, M.B., B.S. (Respondent).

STATEMENT OF THE ISSUES

1. Did Respondent engage in conduct with a patient that was sexual or reasonably interpreted as sexual, or in any verbal behavior that was seductive or sexually demeaning to a patient, in violation of Minn. Stat. § 147.091, subd. 1(t) (2020)?

2. Did Respondent in engage in unethical conduct in violation of Minn. Stat. § 147.091, subd. 1(g) (2020)?

3. Did Respondent engage in conduct that departed from, or failed to conform to, the minimal standards of acceptable and prevailing medical practice, in which case proof of actual injury need not be established, in violation of Minn. Stat. § 147.091, subd. 1(k) (2020)?

4. Did Respondent fail to cooperate with an investigation of the Board as required by Minn. Stat. § 147.131 (2020), in violation of Minn. Stat. § 147.091, subd. 1(u) (2020)?

5. Did Respondent fail to maintain adequate medical records in violation of Minn. Stat. § 147.091, subd. 1(o) (2020)?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that Respondent engaged in conduct with a patient that was sexual, unethical, and failed to conform to the minimal standards of acceptable and prevailing medical practice. In addition, Respondent failed to

cooperate with the Board's investigation. But the Committee has not met its burden to prove that Respondent failed to maintain adequate medical records. The Administrative Law Judge recommends that the Board impose discipline against Respondent's license.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent is a licensed physician who received his medical education in India, including a specialization in orthopedic surgery.[1] Although fluent in English, it is not Respondent's first language.[2]

2. The Board issued Respondent a license to practice medicine in Minnesota in 2004.[3]

3. Respondent is board certified in physical medicine and rehabilitation.[4] Respondent has built a successful medical practice, most recently as the owner of the Minnesota Institute for Pain Management (Clinic).[5]

4. Respondent's Clinic has two locations: Roseville and Burnsville.[6] Respondent's practice is focused on pain management.[7] Respondent primarily treats neck and back pain, but also addresses pain in the shoulders and hips.[8] The Clinic provides medication management, physical therapy, and some injections for pain care.[9]

5. Respondent is the sole physician working at the Clinic, although the Clinic also employs nurses, physician assistants, physical therapists, and receptionists.[10]

6. In April 2017, a 24-year-old woman, denoted here as Patient, presented to Respondent for acute neck and lower back pain following an automobile accident.[11] Patient was referred to Respondent by the attorney representing her in a lawsuit related to her car accident.[12]

7. Patient saw Respondent for nine appointments, the final appointment occurring on August 21, 2017.[13]

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[1] Transcript Volume 1 at 18 (Feb. 1, 2021) (Tr. Vol. 1).
[2] *Id.* at 138.
[3] *Id.* at 17-18.
[4] *Id.* at 18.
[5] *Id.* at 20.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 142-43; Ex. 27.
[11] Tr. Vol. 1 at 27; Ex. 6 at 1.
[12] Transcript Volume 2 at 340 (Feb. 2, 2021) (Tr. Vol. 2).
[13] Tr. Vol. 1 at 125-26.

8. In the beginning, Patient felt that Respondent acted professionally towards her, but over the course of several appointments, that changed.[14]

9. During one appointment, Patient was in pain and crying.[15] Respondent reached over and wiped a tear off her face.[16]

10. During another appointment, Respondent gave Patient medicinal injections to help with her back and neck pain.[17] These injections are painful.[18] Respondent hugged Patient three times during this appointment.[19]

11. These occurrences made Patient feel "uncomfortable."[20] Thereafter, Patient started recording her interactions with Respondent on her cell phone.[21] Respondent was not aware that he was being recorded.[22]

12. The recordings are not dated, and Patient is not able to place them in any chronological order.[23]

13. According to Patient, Respondent often reached underneath her clothes to listen to her heartbeat, sometimes without a stethoscope.[24] She further testified that, on at least one occasion, Respondent cupped her breast.[25]

14. In one recording, Patient tells Respondent: "I mean I think you can put your hand---, because your hand is like touching my chest area again. Yeah."[26] Later, during the same appointment, she tells him: "I think, if you could just stay, on the top of my shirt. Keep (inaudible) on top of my shirt."[27]

15. In that same appointment, the following exchange occurred:

> Respondent: So not now (inaudible) exam (inaudible) I want to talk to you about what happened, or what did not happen. (inaudible)
> Patient: Okay.
> Respondent: Then I'll maybe get (inaudible) some (inaudible).
> Patient: Okay.
> . . .
> Patient: Well I don't think hugs are need as much. I mean, yeah.

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[14] Tr. Vol. 2 at 304-05.
[15] Tr. Vol. 1 at 35-36; Ex. 2 at 2.
[16] Tr. Vol. 1 at 36, 38; Ex. 2 at 2.
[17] Ex. 2 at 2.
[18] Tr. Vol. 1 at 76, 97.
[19] Ex. 2 at 2; *see also* Ex. 3 at 7.
[20] Tr. Vol. 2 at 288.
[21] *Id.* at 286-88.
[22] Tr. Vol. 1 at 190.
[23] *See* Exs. 3-5, 7, 8; Tr. Vol. 2 at 207-07.
[24] Tr. Vol. 2 at 335.
[25] *Id.* at 336-37.
[26] Ex. 5 at 6.
[27] *Id.* at 8.

Respondent: (inaudible)
Patient: I think yeah, I think, everything between us, we'll just keep more doctor and patient, you know, like, yeah.
Respondent: (inaudible).
Patient: Okay because I don't think---
Respondent: (inaudible).
Patient: Okay.
Respondent: (inaudible).
Patient: Hmm-mm (affirmative), yeah. And then with the examine, I can just, you know, if you want me to, okay well if you do then you can just, I can just, you can just examine me from afar, like you don't have to---
Respondent: I just like to touch you. I just need to be a (inaudible).
Patient: Okay.
Respondent: (inaudible).
. . .
Patient: What do you mean, if you like me?
Respondent: Well, I like you as a person.
Patient: I don't know, I mean I don't know what you're---
Respondent: As a person you have something very unique.
Patient: That you like me, like me?
Respondent: No, the kind where the doctor (inaudible) likes the patient (inaudible).
Patient: Yeah.
Respondent: All right, so (inaudible). It's confusing to me.
Patient: Okay.
Respondent: (inaudible).
Patient: Yeah, but I think it's best that we keep it like doctor/patient (inaudible). But I need the doctor's note.[28]

16. During a different appointment, the following exchange took place:

Respondent: Okay, so there's the one thing I wanted to talk to you. The second one I wanted to talk to you about is what you said, getting too close.
Patient: Mm-hmmm (affirmative).
Respondent: I'm a little too sensitive of person.
Patient: Oh, sorry, yeah.
Respondent: I think, you know, when you were a little emotional like that—
Patient: Yeah.
Respondent: To kind of—
Patient: Oh.
Respondent: Help you with that, if you like.
Patient: Oh.
Respondent: I hope, I don't want to get, you know.
Patient: Okay, no, I understand.

[28] Ex. 5.

Respondent: I mean, I like you—
Patient: Mm-hmm (affirmative).
Respondent: As a person---
Patient: Mm-hmmm (affirmative)
Respondent: As a patient, but I would like to be friends with you after your case is done.
Patient: Oh, okay.
Respondent: I think. Am I wrong?
Patient: Yeah, okay.
Respondent: I mean I like hugging, because, you know? I feel like it's okay, as long as you're okay.
Patient: Okay.
…
Respondent: And I know you are a young girl and I don't want to have any problem with you or other things.
Patient: Yeah, yeah, okay.
Respondent: All right?
Patient: Okay.
Respondent: So, but at the same time, I mean I want to have, I want to kind of be able to touch you—
Patient: Mm-hmm (affirmative)
Respondent: And feel you a hug if I need to, if I need to, I don't want you to feel like I'm trying to approach you with a sexual intention.
Patient: Okay, yeah, okay. Okay.
Respondent: (inaudible) You're a nice person. I'm a nice person.
Patient: Yeah, thank you. All right, okay.
Respondent: Any questions for me?
Patient: Ah no. I think we—
Respondent: Like I say, like I'm sensitive and think about it too much.
Patient: Oh yeah. No, (inaudible).
Respondent: I care about you, all right?
Patient: Mm-hmm (affirmative).
Respondent: And I call you, the reason I call you is I somehow, I will say honestly, like I get a little more attached than what I should.
Patient: Mm-hmm (affirmative), yeah.
Respondent: I shouldn't.
Patient: Well I mean, it's okay if you call me, but then if you, if it's something that you could just have Lynette call me, that's fine too, yeah.
Respondent: Well I mean I have my personal relationship.
Patient: Oh, okay, yeah.
Respondent: And I mean, in a good way.
Patient: Mm-hmm (affirmative).
. . .
Respondent: What we do is we put needles---
Patient: Are they permanent or?

Respondent: So the blocks is like, this is the spine. You put in here, three spots.
Patient: Oh, mm-hmm, okay.
Respondent: If you cry I will hug you.
Patient: Maybe I'll cry I don't know, I'm very sensitive.[29]

17. During another appointment, the following exchange occurred:

Respondent: So do you, I think I was telling you last time, is that we should do some of those injections.
Patient: Along the nerves?
Respondent: The (inaudible) injections.
Patient: Mm-hmm (inaudible).
Respondent: Do you want to do those?
Patient: Yeah, sure and then those are the ones that you say that if it's the nerves and you guys can burn away . . . Yeah, we can try those, yeah (inaudible).
Respondent: So what's the issue here?
Patient: What do you mean, what issue?
Respondent: Why don't you call me?
Patient: I do call.
Respondent: Okay, so why don't you come see me in Burnsville?
Patient: Why don't I come see you---?
Respondent: In Burnsville.
Patient: Well, I mean I like it in Inver Grove, on no Inver Grove, Rosedale more and this is closer to me.
Respondent: No, it's the same distance almost.
Patient: Well yeah, well it's like a little bit closer to me, like five minutes (inaudible).
Respondent: Because I think I can see you more closely there.
Patient: Oh, yeah, I mean, I don't know since I've been coming here I'm just, I'll be find coming here.
Respondent: Just (inaudible).
Patient: To the Burnsville one?
Respondent: Mm-hmmm (inaudible).
Patient: Yeah, a little bit. Yeah, I mean I don't know, I like this area and it's a little bit closer and I'm more familiar with this area, so—I just prefer—
Respondent: Otherwise, you're okay with me examining you and whatever I do, that's fine with you? I don't you to be, you know upset about it.
Patient: Yeah, that's fine, just—
Respondent: If you have any concerns, let me know.
Patient: Yeah.
Respondent: Are you okay?
Patient: Yeah, it's just sometimes you're a little bit too close, I don't know. It's just kind of—

[29] Ex. 3.

Respondent: You can tell me that I'm too close to you.
Patient: Okay, yeah, just a little, yeah.
. . .
Respondent: No, we'll do the block in the low back too.
Patient: Oh, I see. Yeah, we can try both, definitely. Because I do just want to get better, you know? And then I want to have whatever will make me get better, so yeah.
Respondent: So if I like you, it's not a good idea.
Patient: What do you mean you like me?
Respondent: We're just friends in general, as a person.
Patient: Yeah, like doctor and patient.
Respondent: Yeah, yeah, yeah, yeah. So the problem is this that, you know, I think what happened is you get, you got, you know, this painful injection and you get emotional, and then get all this, and I have to now sometimes get real close to you, and I just don't want you to feel like—
Patient: Oh yeah, yeah.

18. Patient testified that Respondent often asked her to see him at the Burnsville Clinic, which made her feel like "he wanted [them] to be in a private room together [because] [h]e wanted to take things further."[30] She thought he wanted to touch her more and kiss her, and possibly have sex with her.[31]

19. Respondent's wife was an administrative assistant at the Roseville Clinic.[32]

20. Respondent asked Patient several times if she was interested in working for Respondent at the Clinic.[33] According to Respondent, the Clinic needed a receptionist and Patient was a good candidate because she was fluent in Hmong.[34]

21. During the recordings, Respondent often lowers his voice and speaks to Patient with a seductive tone.[35]

22. Patient reported Respondent's conduct to the Board.[36]

23. On February 6, 2018, an investigator from the attorney general's office interviewed Respondent.[37] Respondent told the investigator that he does not put his hands under a patient's shirt and that he listens to the "stethoscope over the shirt."[38]

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[30] Tr. Vol. 2 at 356.
[31] *Id.*
[32] Ex. 29 at 33; Tr. Vol. 1 at 80.
[33] Exs. 3-4
[34] Tr. Vol. 1 at 26, 81-82, 171.
[35] *See* Ex. BB.
[36] *See* Ex. 2.
[37] Ex. 27.
[38] *Id.* at 19-20.

24. During the interview, the following exchange occurred:

Q: Do you hug any of your patients?"
A: I don't hug my patients. Sometimes patients will say that they want a hug sometimes, then they'll feel like okay can I hug you?
Q: Okay. Do you offer to hug them?
A: No.
Q: Okay. Did you offer to give [Patient] hugs during her appointment?
A: No.

25. Later in the interview, the investigator asked Respondent if he "truthfully answer[ed] the questions," and he responded "Yes."[39]

26. On October 4, 2019, the Committee filed a Notice and Order for Prehearing Conference and Hearing with the Office of Administrative Hearings.[40] The Committee alleged that Patient violated five statutory provisions, including engaging in sexual conduct with a patient, and therefore discipline against his license was warranted.[41]

27. On September 4, 2020, the Committee moved for partial summary disposition.[42] The Administrative Law Judge denied the Committee's motion, and the matter proceeded to evidentiary hearing on February 1-2, 2021.[43] Thereafter, the parties filed written closing arguments, and the record closed on March 5, 2021.

28. Respondent and Patient were the only witnesses at the hearing.

29. At the hearing, Patient testified:

Q: There is a lot of information we've talked about. Can you kind of summarize what specific, like, things did Dr. Arora do that made you feel uncomfortable?
A: Him putting his—him touching my lips and just the way he looks at me. And also, when I was walking away, he watches me walk away, he just stares me down. And his—also when he would ask to listen to my heartbeat like three times in a row. He'll listen and then he will stop and then he'll listen again. He would obviously—he would cup my breast. He will go under my shirts. There has been times where I wore a second layer of clothing so he would stop going under. So if he would lift the first layer of clothing there would be another one for protection.[44]

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[39] *Id.* at 32.
[40] Notice and Order for Prehearing Conference and Hearing (Oct. 4, 2019).
[41] *Id.*
[42] Complainant Review Committee's Notice of Motion and Motion in Support of Motion for Partial Summary Disposition (Sept. 4, 2020).
[43] Order Denying Motion for Summary Disposition (Dec. 16, 2020).
[44] Tr. Vol. 2 at 343.

30. Patient testified that while bending her during an examination, Respondent's "privates would come in contact with [her] back side."[45]

31. Patient also testified as to why she started recording her interactions with Respondent:

> Q: You told Mr. Helgen . . . one of the reasons you made the recordings was because you wanted to make sure. What were you making sure of?
> A: I wanted to make sure I wasn't thinking something wrong because, again, he's a doctor and obviously he's supposed to help us. And I just wanted to make sure that I wasn't just thinking too much, that what he did was normal and I thought it was something else.
> Q: Okay. Is it fair to say you realized that if you had concerns about what a doctor was doing with you, it would be a very serious thing to make an issue about, and you wanted to be sure and make a record of what happened in a way you knew how?
> A: Yes.[46]

32. Respondent admitted that he wiped a tear off Patient's face and that he had hugged her several times.[47]

33. Respondent testified that because English is not his first language, he sometimes misstakes things.[48] He testified that he never meant to make Patient uncomfortable, and was only trying to treat her pain, which required him to examine her.[49]

34. Respondent denies engaging in inappropriate conduct with Patient.[50]

35. Respondent's testimony in this regard is not credible.

36. Any finding of fact contained in the following Memorandum is hereby adopted as such.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Board and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. §§ 147.091, 14.50 (2020).

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[45] Tr. Vol. 2 at 314.
[46] *Id.* at 347.
[47] Tr. Vol. 1 at 37-40, 46.
[48] *Id.* at 50-51, 138-39.
[49] *Id.* at 42, 70, 158-59
[50] *Id.* at 134.

2. The Committee gave proper and timely notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law and rule.

3. The Committee has the burden of proof in this proceeding and must establish the facts at issue by a preponderance of the evidence.[51]

4. "Preponderance of the evidence" means that the ultimate facts must be established by a greater weight of the evidence.[52] "It must be of a greater or more convincing effect and . . . lead you to believe that it is more likely that the claim . . . is true than . . . not true."[53]

5. The Board may discipline licensees who engage in conduct prohibited by Minn. Stat. § 147.091 (2020). Among the listed prohibitions, a physician may not engage "in conduct with a patient which is sexual or may reasonably be interpreted by the patient as sexual, or in any verbal behavior which is seductive or sexually demeaning to a patient."[54]

6. The statute does not distinguish between sexual conduct that is welcome or unwelcome, and it does not permit consensual sexual activities between a doctor and patient. Seductive sexual communications, such as emails and texts, are also prohibited.[55]

7. The Committee has met its burden of proving that Respondent engaged in inappropriate sexual behavior with a Patient.

8. The Board may discipline physicians for engaging in "any unethical or improper conduct." The relevant statute contains a non-exclusive list enumerating certain types of unethical or improper conduct that are specifically prohibited, such as conduct likely to deceive or defraud the public, likely to harm the public, or demonstrating a willful or careless disregard for the health, welfare or safety of a patient.[56]

[51] Minn. R. 1400.7300, subp. 5; *In re Medical License of Friedenson*, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998); *In re Wang*, 441 N.W.2d 488, 492 (Minn. 1989).
[52] 4 *Minnesota Practice*, CIVJIG 14.15 (2006).
[53] *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).
[54] Minn. Stat. § 147.091, subd 1(t).
[55] *See In re Woggon*, No. A19-1280, 2020 WL 2119244 at *5 (Minn. Ct. App. May 4, 2020).
[56] *See* Minn. Stat. § 147.091, subd. 1(g)(1)-(3).

9. "Minnesota courts have previously affirmed medical-license revocations for 'unethical conduct' under subdivision 1(g) where a physician engaged in sexual conduct with a patient."[57]

10. The Committee has met its burden of proving that Respondent engaged in unethical behavior.

11. Physicians may be disciplined for "[c]onduct that departs from or fails to conform to the minimal standards of acceptable and prevailing medical practice in which case proof of actual injury need not be established."[58]

12. The Committee has met its burden to prove that Respondent engaged in conduct that failed to conform to the minimal standards of acceptable and prevailing medical practice.

13. "A physician who is the subject of an investigation by or on behalf of the board shall cooperate fully with the investigation. Cooperation includes responding fully and promptly to any question raised by or on behalf of the board relating to the subject of the investigation and providing copies of patient medical records, as reasonably requested by the board, to assist the board in its investigation."[59]

14. Pursuant to Minn. Stat. § 147.091, subd. 1(u), failure to cooperate with an investigation of the board as required by Minn. Stat. § 147.131 is grounds for discipline.

15. The Committee established, by a preponderance of the evidence, that Respondent failed to cooperate with an investigation of the Board.

16. "Improper management of medical records, including failure to maintain adequate medical records" is grounds for discipline under Minn. Stat. § 147.091, subd. 1(o).

17. The Committee has failed to meet its burden of proving that Respondent mismanaged medical records.

18. When the Board finds that a licensed physician has violated a provision or provisions of Minn. Stat. §§ 147.01-.22 (2020), it may impose discipline, by revoking, suspending or imposing conditions upon a license, assessing a civil penalty of not more than $10,000 per violation, or censuring or reprimanding the licensee.[60]

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[57] *In re Woolley*, No. A05-33, 2005 WL 2077475, at *8 (Minn. Ct. App. Aug. 30, 2005) (citing *In re Freidenson,* 574 N.W.2d 463, 466-67 (Minn. Ct. App. 1998) (upholding revocation where physician performed a pelvic exam without wearing gloves), *review denied* (Minn. Apr. 30, 1998)); *Padilla v. Minn. State Bd. of Med. Exam'rs*, 382 N.W.2d 876, 886 (Minn. Ct. App. 1986) (upholding revocation where physician "made unwarranted sexual advances, touchings and solicitations" of a patient), *review denied* (Minn. Apr. 24, 1986)), *review denied* (Minn. Nov. 22, 2005).

[58] Minn. Stat. § 147.091, subd. 1(k).

[59] Minn. Stat. § 147.131.

[60] Minn. Stat. § 147.141 (2020).

19. Sanctions against Respondent's license are appropriate.

20. The imposition of disciplinary action by the Board against the Respondent is in the public interest.

Based on these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge concludes that Respondent engaged in conduct with a patient that was sexual, unethical, and failed to conform to the minimal standards of acceptable medical practice. In addition, Respondent failed to cooperate with the Board's investigation. But the Committee has not met its burden to prove that Respondent failed to maintain adequate medical records. The Administrative Law Judge respectfully recommends that the Board impose sanctions commensurate with the established violations.

Dated: June 11, 2021

JAMES E. LAFAVE
Administrative Law Judge

Reported: Digitally Recorded
Transcript Prepared

NOTICE

This Report is a recommendation, not a final decision. The Board will make the final decision after a review of the record. The Board may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61 (2020), the Board shall not make a final decision until this Report has been made available to the parties to the proceeding for at least ten calendar days. The parties may file exceptions to this Report and the Board must consider the exceptions in making a final decision. Parties should contact Ruth Martinez, Executive Director of the Minnesota Board of Medical Practice, Suite 400, 2829 University Avenue SE, Minneapolis, Minnesota 55414, (612) 548-2149, to ascertain the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and the Administrative Law Judge of the date the record closes. If the Board fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2020). In order to comply with this statute, the Board must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2020), the Board is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

I. Introduction

The Committee alleges that Respondent (1) engaged in inappropriate sexual conduct; (2) engaged in unethical conduct; (3) failed to conform to the minimal standards of acceptable and prevailing medical practice; (4) failed to cooperate "fully and promptly" with the Board's investigation; and (5) mismanaged medical records in violation of Minn. Stat. § 147.091, subd. 6. These allegations will be considered in turn.

II. Sexual Conduct

A physician may not engage "in conduct with a patient which is sexual or may reasonably be interpreted by the patient as sexual, or in any verbal behavior which is seductive or sexually demeaning to a patient."[61] The statute does not distinguish between sexual conduct that is welcome or unwelcome, and it does not permit consensual sexual activities between a doctor and patient. Seductive sexual communications, such as emails and texts, are also prohibited.[62] The Committee argues that "[t]he overwhelming credible evidence in this case shows Respondent

[61] Minn. Stat. § 147.091, subd 1(t).
[62] *See In re Woggon*, No. A19-1280, 2020 WL 2119244 at *5 (Minn. Ct. App. May 4, 2020).

engaged in verbal and physical sexual misconduct" with Patient. The Administrative Law Judge agrees.

The record supports a conclusion, by a preponderance of the evidence, that Respondent engaged in sexual conduct with Patient, both physically and verbally. First, Patient testified credibly that Respondent inappropriately touched her breast.[63] Patient's recordings support her testimony. In one recording, Patient tells Respondent: "I mean I think you can put your hand---, because your hand is like touching my chest area again. Yeah."[64] Later, during the same appointment, she tells him: "I think, if you could just stay, on the top of my shirt. Keep (inaudible) on top of my shirt."[65] Respondent also wiped a tear off Patient's face, and, on at least one occasion, Respondent's "privates" touched Patient's "back side."[66]

In addition, the record is replete with sexually charged comments that Respondent made to Patient:

- As a patient, but I would like to be friends with you after your case is done.
- I mean I like hugging, because you know? I feel like it's okay, as long as you're okay.
- And I know you are a young girl and I don't want to have any problem with you or other things.
- And feel you a hug if I need to, if I need to, I don't want you to feel like I'm trying to approach you with a sexual intention.
- And I call you, the reason I call you is I somehow, I will say honestly, like I get a little more attached than what I should.
- If you cry I will hug you.
- Like if I hug for three times, you say three is enough.
- I mean I have some personal needs that I need from you, you'll help me, right?
- I just like to touch you. I just need to be a (inaudible).
- As a person you have something very unique.
- Looks like you have a shirt on. Can you take this off?
- Why don't you call me?

These are not appropriate things for a doctor to say to a patient. And even more troubling is the way that Respondent said them. In the recordings, when discussing treatment, Respondent speaks in a loud, clear voice. However, during the statements noted above, Respondent frequently lowers his voice to a quiet, seductive tone.

At first glance, it might be possible to minimize some of these statements, as Respondent attempts to do. But a patient should not need to request that a doctor stop hugging her. She should never have to ask him to keep his hands off her chest. And

[63] Tr. Vol. 2 at 320-21, 343.
[64] Ex. 5 at 6.
[65] *Id.* at 8.
[66] Tr. Vol. 2 at 314.

she should not be expected to clarify that she wants to keep their relationship one of a doctor and patient. When Respondent's conduct is considered together with his tone of voice, it is clear his conduct towards Patient was sexually motivated and that Patient could reasonably interpret Respondent's actions as sexual.

Respondent counters that he acted appropriately throughout the approximately five months at issue here. First, Respondent argues that he did not touch Patient's breast. According to Respondent, on July 25, 2017, the day Patient alleges he touched her inappropriately, she was getting an injection.[67] And during injections, Respondent is never alone with the Patient, because there is always an x-ray technician in the room.[68] But in her complaint, Patient acknowledges that this incident occurred in the injection room.[69] Her description of that encounter, and other statements allegedly made, correspond directly with the recording in which Patient tells Respondent, "your hand is like touching my chest area again."[70] It seems unlikely, given the nature of that recording, that anyone else was in the room with Patient and Respondent, contrary to Respondent's assertion. Moreover, it is possible that Patient used the wrong date in her complaint, and the recordings are not dated. Regardless, the recording indicates that Respondent touched Patient's chest area in a way that made her feel uncomfortable. In fact, Patient used the word "again," indicating that this had happened before. And Respondent's response, "Oh, like this?" certainly does not leave an impression that he was concerned with her discomfort. The Administrative Law Judge concludes that it is more likely than not that Respondent touched Patient's breast in a sexual manner.

Respondent also argues that English is not his first language and that "there is a lack of depth and breadth of [his] vocabulary or appropriateness of the use of words at times."[71] Even if this were true, the inappropriateness of his conduct does not turn on his alleged subjective intent. Patient only heard the words that he said, and those words were inappropriate from an objectively reasonable standpoint. In addition, as noted above, the problem here is more than just the words themselves; it is also Respondent's tone. And although Respondent testified: "You see in the transcript, I tell her that there is not even a single thinking about, you know, any sexual content. And so no, there was no sexual content,"[72] his saying it does not make it true. In fact, the need to say it implies the opposite. Even assuming for a moment that Respondent had no sexual intent, Patient was more than reasonable in her belief to the contrary. And that is all the statute requires.

Respondent claims that when Patient stated that she wanted to keep things "more doctor and patient" she was referring to his job offer. But the record does not

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[67] *See* Ex. 6.
[68] Tr. Vol. 2 at 243-44.
[69] Ex. 2 at 2 ("July 25, 2017 I had a neck injection and I needed a driver afterwards. My son and husband were in the waiting area. The injection room was too small for my husband to be present during an examination. In that examination Dr. Aurora decided to examine my chest. He did so going under my shirt where he partially cupped the bottom of my breast.").
[70] Ex. 5 at 6.
[71] Tr. Vol. 1 at 139.
[72] Tr. Vol. 1 at 181.

support this assertion. Patient stated that she wanted to keep "everything between us . . . more doctor and patient." At the time of her statement, Respondent and Patient were discussing hugs and Respondent's examinations; they were not discussing the job offer. Moreover, Patient's reference to "everything between us" implies a personal relationship, not a professional one.

Respondent next argues that Patient had "unusual heightened sensitivity" and that without this heightened sensitivity, his treatment protocol would have been "unobjectionable." Respondent testified at length about Patient being "hypersensitive" to touch and that he had to continuously check in, and reassure her, during examinations. But the Administrative Law Judge has listened to the recordings and the testimony and parsed the documentary evidence. The problem here was not with Patient's perception, but rather Respondent's actions. As noted above, Respondent's sexual advances were not merely "touching" based, but rather encompassed his entire approach to Patient, including his verbiage and tone. Moreover, Respondent conceded that a doctor is in a position of power over a patient. That is even more true when the patient is a young girl in pain, and the doctor is significantly older. And yet, Respondent gave Patient hugs without any thought to her comfort level. The Administrative Law Judge does not find Respondent's assertions that Patient was just "too sensitive" meritorious.

Similarly, Respondent attempts to use Patient's choice not to seek another doctor as proof that Respondent's conduct was not inappropriate. But Patient testified that she "knew it didn't feel right to [her], but [she] didn't really know if [she] was just thinking too much."[73] In addition, Patient's attorney referred her to Respondent, so she was not sure how to switch doctors. Finally, Patient ultimately did stop seeing Respondent because she was too uncomfortable.

Respondent also implies that Patient's failure to have someone accompany her to appointments indicates that Respondent's conduct was above board. The Administrative Law Judge is not willing to infer the appropriateness of Respondent's behavior from Patient's conduct, especially when the evidence indicates otherwise. The law, and common sense, dictate that patients are not required to bring witnesses to doctor's appointments to avoid being sexually harassed. Patient's alleged hypersensitivity to touch, her decision not to seek another doctor, and her choice to enter the examination room alone were not the concern here. It is Respondent's conduct that is the issue. Moreover, Respondent's contention begs the question: if he knew that Patient was uncomfortable with his examinations, why didn't *he* ask someone else to be in the room?

In sum, despite Respondent's insinuations to the contrary, Patient is not to blame for what happened here. She did not cause Respondent to act inappropriately. In fact, Patient repeatedly complained to Respondent about getting too close to her. Nonetheless, Respondent continued to speak to, and touch, Patient in a sexual manner. Moreover, part of the problem was not what Respondent said to Patient, but rather the

[73] Tr. Vol. 2 at 295.

way that he said it. Respondent's careful wording provided him with plausible deniability. It was ultimately Patient's decision to record these conversations that proved decisive.

III. Unethical Conduct

The Committee argues that Respondent's conduct with Patient was unethical. Physicians may be disciplined for engaging in "any unethical or improper conduct." The relevant statute contains a non-exclusive list enumerating certain types of unethical or improper conduct that are specifically prohibited, such as conduct likely to deceive or defraud the public, likely to harm the public, or demonstrating a willful or careless disregard for the health, welfare or safety of a patient.[74] "Minnesota courts have previously affirmed medical-license revocations for 'unethical conduct' under subdivision 1(g) where a physician engaged in sexual conduct with a patient."[75]

Respondent engaged in sexually inappropriate conduct with Patient. This conduct was both verbal and physical and demonstrated a willful disregard for Patient's welfare. Patient was in her 20s. Respondent was significantly older. She believed that her doctor would alleviate pain following a car accident. Instead, Respondent sexually harassed and abused her. In addition to Patient's distress, this conduct has the potential to harm the public. There is no reason to believe that Respondent will refrain from engaging in similar conduct in the future, and he therefore remains a threat to other patients.[76] The Committee has met its burden of proving that Respondent's conduct was unethical.

IV. Minimal Standards of Acceptable and Prevailing Medical Practice

The Committee argues that Respondent deviated from the minimal standards of acceptable medical practice. Physicians may be disciplined for "[c]onduct that departs from or fails to conform to the minimal standards of acceptable and prevailing medical practice in which case proof of actual injury need not be established."[77]

The Administrative Law Judge notes that the Committee failed to submit any evidence indicating what constitute the minimal standards of acceptable practice for a physician. But the Minnesota Court of Appeals has upheld license discipline based on a conclusion that sexual conduct failed to comport with the minimal standards of practice.[78] The Administrative Law Judge is not willing to conclude that sexual conduct with a patient could ever be acceptable practice, despite the Committee's failure to specifically support their contention. Therefore, given the facts of this case, the Administrative Law Judge concludes that Respondent's conduct fell below the minimal standards of acceptable and prevailing medical practice.

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[74] *See* Minn. Stat. § 147.091, subd. 1(g)(1)-(3).
[75] *Woolley*, 2005 WL 2077475, at *8.
[76] *See id.* at *4 (citing *Padilla,* 382 N.W.2d at 887 (stating that one of the very functions of the board is to consider "the harm to the public if such acts remain unpunished").
[77] Minn. Stat. § 147.091, subd. 1(k).
[78] *Padilla*, 382 N.W.2d at 886.

V. Investigation

"A physician who is the subject of an investigation by or on behalf of the board shall cooperate fully with the investigation. Cooperation includes responding fully and promptly to any question raised by or on behalf of the board relating to the subject of the investigation and providing copies of patient medical records, as reasonably requested by the board, to assist the board in its investigation."[79] Failure to cooperate with an investigation of the board as required by Minn. Stat. § 147.131 is grounds for discipline.[80] The Committee argues that Respondent failed to cooperate with the Board because "he lied during the investigation" by stating that he did not hug patients, including Patient.[81] At the hearing, Respondent admitted to hugging Patient several times.[82]

Nonetheless, Respondent places the blame on the investigator, arguing that the Committee "asked if he hugged patients without defining the type of hug, i.e., a sexually passionate hug or a simple comforting gesture."[83] Therefore, Respondent stated that he took the "inquiry to mean that it was inappropriate hugs that were of concern and not brief hugs given to a distraught patient."[84] At the hearing, Respondent testified: "And I thought since this is an investigation, it's probably an allegation, you know, of a romantic kind of hugs. And obviously that's where my answer came from."[85] First, the record belies this assertion. The following exchange occurred during the interview:

> Q: Do you hug any of your patients?"
> A: I don't hug my patients. Sometimes patients will say that they want a hug sometimes, then they'll feel like okay can I hug you?
> Q: Okay. Do you offer to hug them?
> A: No.
> Q: Okay. Did you offer to give [Patient] hugs during her appointment?
> A: No.

Respondent indicated that, although his patients sometimes asked for hugs, he did not hug them. It is incredibly unlikely that Respondent's patients were asking for romantic hugs, yet he argues that is what he assumed the investigator was asking about. Respondent's assertion is not credible. Moreover, the idea of a hug is not a difficult concept. *Meriam-Webster* defines hug as "press[ing] (someone) tightly in one's arms especially as a sign of affection."[86] A hug is a hug, whether comforting, sexual, or otherwise. Respondent did not attempt to clarify the "type" of hug; he knew that the general term included all permutations.

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[79] Minn. Stat. § 147.131.
[80] Minn. Stat. § 147.091, subd. 1(u).
[81] Committee's Closing Argument at 8.
[82] Tr. Vol. 1 at 37-40.
[83] Respondent's Closing Argument at 10.
[84] *Id.* at 11.
[85] Tr. Vol. 1 at 180.
[86] *Hug*, *Merriam-Webster* Online Dictionary, www.merriam-webster.com (last visited Mar. 24, 2021).

The statute requires a licensee to respond "fully and promptly" during an investigation. Respondent told the investigator that although his patients occasionally asked for comforting hugs, he did not provide them, and he had not, on any occasion hugged Patient. Respondent later admitted to hugging Patient. Respondent was knowingly untruthful; therefore, he did not respond "fully" to the Board's investigation.

VI. Medical Records

"Improper management of medical records, including failure to maintain adequate medical records" is grounds for discipline under Minn. Stat. § 147.091, subd. 1(o). The Committee alleges that Respondent "did not adequately or accurately maintain medical records reflecting the patient's concerns or response to his care."[87] Respondent argues that "the Committee did not even provide the appropriate standard or factors that are considered in determining whether progress notes are compliant" with the relevant statute.[88] The Administrative Law Judge agrees.

The Committee implicitly contends that Petitioner violated the statute by failing to document every interaction with Patient or convey her actual emotional status. But without any standard, it is impossible for the Administrative Law Judge to determine what is an "adequate medical record" under the statute. In fact, Respondent testified that progress notes are intended to document a patient's medical condition and treatment, and would not necessarily include every time a patient gets upset.[89] Similarly, according to Respondent, routine telephone calls would not generally require a progress note.[90] Because the only evidence in the record contradicts the Committee's allegation, the Committee has failed to meet its burden of proving that Respondent's medical records were inadequate.

VII. Conclusion

In sum, the Committee has met its burden of proving that Respondent engaged in inappropriate sexual conduct that was both unethical and fell below the minimal standards of acceptable and prevailing medical practice. In addition, the Committee has met it burden to prove that Respondent failed to cooperate with the Board's investigation. But the Committee has failed to meet its burden of proving that Respondent's medical records were inadequate. The Administrative Law Judge respectfully recommends that the Board impose discipline against Respondent's license.

J. E. L.

[87] Committee's Closing Argument at 10.
[88] Respondent's Closing Argument at 11.
[89] Tr. Vol. 2 at 198-201.
[90] *Id.*