

MEDICAL BOARD OF CALIFORNIA
State of California

In the Matter of the Accusation)
Against:) OAH No. L-60597
) Case No. D-4797
)
STUART MARK BERLIN, M.D.)
31926 Watergate Court)
Westlake, California 91361)
) DECISION
Physician's and Surgeon's)
Certificate No. G-48756,)
)
Respondent.)
_____)

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the **Medical Board of California** as its Decision in the above-entitled matter.

This Decision shall become effective on September 14, 1995.

IT IS SO ORDERED this 15th day of August, 1995.

MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By 

rfm

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

In the Matter of the Accusation)	No. D-4797
Against:)	
)	OAH No. L-60597
STUART MARK BERLIN, M.D.)	
31926 Watergate Court)	
Westlake, California 91361)	
)	
Physician's and Surgeon's)	
Certificate No. G-48756,)	
)	
Respondent.)	

PROPOSED DECISION

This matter came on for hearing before Richard J. Lopez, Administrative Law Judge of the Office of Administrative Hearings, at Van Nuys, California, on the following days in 1995: May 22, June 5, 6 and 7.

Rosa Mosley, Deputy Attorney General, represented the complainant.

Respondent appeared in person and was represented by Theodore Cohen, Attorney at Law.

Oral and documentary evidence and evidence by way of stipulation and official notice was received. The record was held open to allow respondent to file additional documentary evidence. Same was received and filed on June 20, 1995 and the case then deemed submitted.

The Administrative Law Judge now finds, determines, and orders as follows:

PARTIES AND JURISDICTION

1

Kenneth J. Wagstaff, then Executive Director of the Medical Board of California (MBC or Board) brought subject accusation in said official capacity.

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Complainant, Dixon Arnett, the Executive Director of MBC brought the Second Amended and Supplemental Accusation solely in said official capacity.

(A) On or about August 30, 1982, Physician's and Surgeon's Certificate No. G-48756 was issued by the Board to Stuart Mark Berlin, M.D., respondent herein.

(B) Said Certificate No. G-48756 had been in full force and effect until it was suspended on June 16, 1992 pursuant to an order for petition for interim suspension. Said order, issued by an Administrative Law Judge of the Office of Administrative Hearings, states as follows:

Physician's and Surgeon's Certificate No. G48756 issued to Stuart Mark Berlin, M.D. is suspended pending completion of the hearing on this Order, including such time as is necessary to issue the written decision required by Government Code section 11529(g). During such time, Respondent Stuart Mark Berlin, M.D. shall engage in no act for which said certificate is required.

(C) Respondent's license number SA 14082 to supervise physician assistants was also suspended on June 16, 1992 pursuant to order.

(D) Thereafter, on July 2, 1992 the parties did stipulate in pertinent part as follows:

This stipulation to an interim suspension of respondent's license shall remain in effect until the matter is resolved by the Medical Board of California through the administrative process or by further stipulation of the parties.

(A) On complainant's motion the First Amended Accusation was dismissed and no Findings are made thereon.

(B) All prehearing requirements have been met. Jurisdiction for this proceeding does exist.

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FINDINGS OF FACT

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ACCUSATION

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FINDINGS RE: HEIDI B.

(A) On January 26, 1991 Heidi B. gave birth to a daughter;

(B) On January 27, 1991, respondent, Heidi B. daughter's pediatrician, visited Heidi B. at the hospital. She was breast-feeding her baby daughter when respondent came into the room. She told him she was having trouble breast feeding and he said he would help.

(C) Respondent began massaging Heidi B.'s breast, saying that usually gets the milk flowing. She thought, subjectively but reasonably, that all pediatricians massaged a mother's breast if the mother was having problems with breast feeding.

(D) On January 28, 1991, Heidi B. called respondent to ask him about a lactation specialist. He said he could help. He then came to Heidi B.'s home for a home visit.

(E) When he was at Heidi B.'s home, he weighed her daughter, then closed the bedroom door, placed the scale behind it and closed the blinds. He began to massage Heidi B.'s breasts. He told her that she should get her husband to suck her breast. She told him that her husband probably would not do that.

(F) Respondent then said, "Could I.....Oh never mind." Then without any warning, he started sucking the breast he was massaging. He was making a moaning sound while he sucked Heidi B.'s breast.

(G) He stopped briefly to say, "Oh by the way, this is just between you and I." Then he started to suck her breast again. Heidi B. pushed him away. He was kneeling beside the bed, breathing heavily.

(H) Approximately one year later, during a telephone conversation that was tape recorded, respondent agreed with Heidi B. that massaging her breast was a sexual gratification for him.

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(A) Respondent's conduct set forth in Finding 5 served no medical purpose and was of no benefit to the nursing mother. Reasonable inferences from the whole of the record did establish that said conduct subjected Heidi B. to embarrassment, anxiety, anger and indignity.

(B) Said conduct set forth in Finding 5 is substantially related to the qualifications, functions and duties of a physician.

(C) Said conduct set forth in Finding 5 constitutes sexual abuse and sexual misconduct and, accordingly, said conduct constitutes unprofessional conduct.

FINDINGS RE: JANINE H.

(A) Respondent was the pediatrician for Janine H.'s daughter, N., born 5-11-87 and her son J., born 3-29-91.

(B) On June 21, 1991, Janine H. took her son to be examined by respondent for an ear infection. On the same day she had trouble walking because of back pain.

(C) During the visit, respondent appeared to notice Janine H.'s back pain. While she was standing, holding her baby J., respondent began to massage her back, then her buttocks. He touched and massaged her on her back and buttocks without her permission.

(D) The next day, June 22, 1991, respondent phoned Janine H. from his car phone and offered to come to her home to examine her son J. When he came to her home, he asked if she wanted him to massage her back and she told him that she did not. Respondent then sat down on the couch and began to move closer and closer to Janine H. until he was practically on top of her. Janine H. kept moving away until she ended up sitting on the floor. Respondent stayed at Janine H.'s home for over 1 and ½ hours. He did not examine her son during this visit. He did not charge for this visit.

(E) On July 1, 1991 Janine H. took her son to be examined by respondent for dry spots on his chest. After respondent put lotion on J's chest, he took Janine B.'s arms and rubbed lotion onto them. Then he took her shoulders, turned her around, lifted her shirt in back and proceeded to rub lotion onto her back, chest and breasts under her bra. This lasted for approximately 30 seconds. Respondent did not have permission to rub lotion on Janine H. or to massage her back, chest or breasts.

(F) On July 27, 1991 Janine H. took her daughter N. to be examined by respondent for an ear infection. She had ear pain also. Respondent said he would check Janine H. for ear pain as well. During his exam of Janine H. for ear pain, he suddenly dropped a stethoscope down inside her blouse. He reached inside of her blouse and grabbed her breasts, squeezing them quickly 2-3 times. Before she realized what he was doing, respondent peered down the back of Janine H.'s pants to see the incision from her back surgery. Respondent did all of this without her permission. He charged for this visit.

(G) Janine H. was frightened by respondent's behavior.

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(A) Respondent's conduct set forth in Finding 7 served no medical purpose and was of no benefit to the nursing mother. Reasonable inferences from the whole of the record did establish that said conduct subjected Janine H. to embarrassment, anxiety, fear and indignity.

(B) Said conduct set forth in Finding 7 is substantially related to the qualifications, functions and duties of a physician.

(C) Said conduct set forth in Finding 7 constitutes sexual abuse and sexual misconduct and, accordingly, said conduct constitutes unprofessional conduct.

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FINDINGS RE: BREN D.

(A) On June 9, 1991, respondent was the pediatrician for Bren D's sons, A., born 1-7-88 and D., born 5-17-91. He had been A's pediatrician since 1989.

(B) On Sunday, June 9, 1991 Bren D. called respondent to see if he could examine her left breast to determine whether or not it had become abscessed. She had been in great pain for several days due to mastitis (inflammation in the mammary gland). She called respondent because her regular OB/GYN physician was not available. Respondent told her to meet him at his office. Bren D. was 37 years old at the time.

(C) When she went to respondent's office he told her to undress, put on a hospital gown and lie on her back.

(D) During the examination, respondent began to vigorously massage both her breasts. He stroked her nipples with a circular motion, using the palms of his hand. He said that her left breast was not abscessed. He said she appeared to be tense.

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(E) Respondent took a blood sample and while they were waiting for the results, he instructed her to lie on her stomach so he could give her a back rub.

(F) Respondent then vigorously massaged Bren D.'s shoulders and back and partially pulled down her panties to purportedly remove a bandage. He then massaged her buttocks and inner thighs. He did not have permission to do this.

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(A) Respondent's conduct set forth in Finding 9 served no medical purpose and was of no benefit to the nursing mother. Reasonable inferences from the whole of the record did establish that said conduct subjected Bren D. to embarrassment, anxiety, and indignity.

(B) Said conduct set forth in Finding 9 is substantially related to the qualifications, functions and duties of a physician.

(C) Said conduct set forth in Finding 9 constitutes sexual abuse and sexual misconduct and, accordingly, said conduct constitutes unprofessional conduct.

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FINDINGS RE: ANDREA N.

(A) Respondent was the pediatrician for Andrea N.'s daughter, A, born June 20, 1991.

(B) Andrea N. first encountered respondent during a birth preparation class she attended with her husband approximately two months prior to the birth of her daughter. During the birthing class, respondent mentioned that he made house calls for the first month of the infant's life so that the child would not be exposed to germs found in his office. Since he sounded like a concerned and very caring doctor, Andrea N. and her husband decided to use him as their child's pediatrician.

(C) The day after A's birth, respondent came to the hospital for a visit. When he came to Andrea N.'s hospital room, he kissed her on the lips and asked if she wanted to go see the baby. Andrea N. was dressed in a "teddy" and mesh underwear. She asked him to hand her robe to her. She felt uncomfortable when she stood up to put it on because it seemed respondent was staring at her breasts.

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(D) About a month later, respondent made a scheduled home visit for A's one month check up. When he arrived, Andrea N. was in the process of nursing her baby A. She was wearing a regular bra so she had to pull the strap off her shoulder and the cup off her breast; her breast was exposed. She felt uncomfortable and told respondent that she was going upstairs to put on a shirt. Respondent told her to continue feeding and he would ask her a few questions.

(E) They discussed the problems she had with breast-feeding and that she thought A was not getting enough milk. Respondent asked if she was massaging her breasts every day to help get the milk down. She told him that she was not doing that. He asked her if she knew how to massage her breasts to get the milk to "let down". When she told him that she did not, he said that he would show her how to do it. She was very uncomfortable with his suggestion. She went upstairs and put on a shirt.

(F) When she came back downstairs, respondent sat down next to her. He asked her to take off her shirt and she did. He then began massaging her right breast; he put his right hand underneath her breast and his left hand on the top of the breast. She kept looking at his face to gauge his reaction. After a few seconds, she started to squirm because it hurt and she felt uncomfortable. She told him to stop as she could do it herself. He remained sitting right next to her.

(G) She then picked up her baby and held her in front of her to shield her nakedness. Respondent reached around her baby, then under her left arm and started massaging her left breast. She began to squirm and told him that it hurt and to stop. He said that it would be a lot easier if she would lie down. He took his hands off her breast and moved over as if to let her lie down. She tried to remain clam, telling him that it was "OK" and that she knew how to do it. Respondent's face was very red and he began to talk fast. He said he needed to write a prescription, but could not find a prescription pad. He said, "I'll just send you a prescription in the mail." He went to his car and came back into her house unannounced and without knocking. He said, "I found the prescription pad." He wrote a prescription for vitamins for A and for a breast pump for Andrea N. He then left.

(H) Andrea N.'s next office visit occurred during the first week in July, 1991 when A was six weeks old. After respondent examined A, he walked up behind Andrea N. and began to massage her bare shoulders. She was wearing a long-sleeved T-shirt with a boat neck which is open around the collarbone and upper shoulders. He had his hands on her neck and shoulders. When she stiffened, he stopped the massage and began to babble about giving her some first aid kits for the baby.

(I) On the first month's visit, the hospital visit, and on the visits to her home, respondent squeezed A.'s breasts to see if they were producing milk. He depressed the skin around the nipple, then pinched forward like he was popping a whitehead. He said, "Let's see if she still has milk."

(J) In February, 1992, Andrea N. attended a "Mommy and Me" class at an Elementary School. Respondent was at the meeting with his eleven month-old son. Andrea N thought it was unusual for him to bring his son to a meeting where the babies were much younger. There was a class available for older babies.

(K) During the class when Andrea N. was asked to introduce herself, she told the class that her baby's pediatrician had molested her and that he was present in the room. Respondent did not deny her accusations at that time.

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(A) Respondent's conduct set forth in Finding 11 served no medical purpose and was of no benefit to the nursing mother. Reasonable inferences from the whole of the record did establish that said conduct subjected Andrea N. to embarrassment, anxiety, anger, distress and indignity.

(B) Said conduct set forth in Finding 11 is substantially related to the qualifications, functions and duties of a physician.

(C) Said conduct set forth in Finding 11 constitutes sexual abuse and sexual misconduct and, accordingly, said conduct constitutes unprofessional conduct.

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The conduct set forth in Findings 5, 7, 9, 11, and each of same, does constitute an extreme departure from the standard of medical care and the standard of medical practice, and is, therefore, gross negligence and, accordingly, said conduct constitutes unprofessional conduct.

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The negligent (gross) conduct set forth in Findings 11, 9, and 7 are each of them, and in combination, are a repeat of the negligent (gross) conduct set forth in Finding 5 and, therefore, does constitute repeated negligent acts and, accordingly, does constitute unprofessional conduct.

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(A) By his conduct set forth in Findings 5, 7, 9 and 11 respondent directly and indirectly misrepresented to Heidi B., Andrea N., Bren D., and Janine H., mothers of his pediatric patients that his conduct as set forth respectively, in said Findings, was necessary and was part of their treatment and/or treatment for their infants.

(B) Respondent falsely represented to Heidi B. and Andrea N., mothers of his pediatric patients, that he (respondent) needed to make home visits to avoid contaminating the infants with germs from his office where he regularly examined and treated his pediatric patients.

(C) Respondent's conduct set forth in paragraphs (A) and (B) does constitute the commission of acts involving dishonesty and corruption during the course of respondent's practice.

FINDINGS OF FACT

RE

SECOND AMENDED ACCUSATION

VENTURA CONVICTION

(A) On or about July 23, 1992 a complaint was filed in the matter of *People v. Stuart Mark Berlin*, Case No. 92C006952, in the Ventura County Municipal Court, charging respondent with committing sexual battery in violation of Penal Code section 243.4, subdivision (d).

(B) On October 30, 1992, respondent was convicted after trial by jury, of three counts, sexual battery upon said Bren D., and two others: Marie C and Elsfrieda M., of violating Penal Code section 243.4, subdivision (d), and was ordered to serve 180 days in the county jail, was fined \$2000 and was placed on three years probation.

LOS ANGELES CONVICTION

(A) On or about March 25, 1992, a complaint was filed in the matter of *People v. Stuart Mark Berlin*, Case No. 92C00264, in the Municipal Court of Malibu Judicial District, County of Los Angeles, charging respondent with committing sexual battery in violation of Penal Code section 243.4, subdivision (d).

As a result of a self-described "sexual addition" (not established to be other than a colloquial term and a term not used by properly trained licensed professionals) respondent has been engaged in therapy since approximately 1987. The therapy has been "eclectic" and geared, for the most part, to those who have abused substances (alcohol or drugs or both). Recently, part of said therapy included the following:

(A) On August 22, 1991 he entered and completed a 4 week-treatment program for "sexual dependency" in Minnesota at Golden Valley Hospital.

(B) Immediately thereafter he entered and completed the 8 week Talbot Program in Georgia and a 4 week course of therapy at River Oaks, Louisiana.

(C) He was evaluated for the MBC's diversion program for impaired physicians and admitted thereto in December 1991. He continued therein until, three years hence, he was phased out. Respondent was cooperative with the Board.

It was not established that any of the therapy, including said recent therapy, has diminished the risks presented by respondent to lactating (nursing) mothers. Further, given the recent criminal convictions set forth in Findings 16 and 17, it was not established that said therapy has been rehabilitative.

(A) As a result of said Ventura conviction respondent did serve 115 days of jail time and was placed on 3 year formal probation on certain terms and conditions. As a result of said Los Angeles conviction respondent did serve 6 days of jail time. One condition of the Ventura probation requires respondent to "participate as directed in any treatment program designated by the probation officer."

(B) Respondent has been and presently is under therapy and counseling at a clinical psychology facility (clinic) as result of said court ordered condition. The therapy commenced approximately two years ago and is on-going (one session of one and one-half hours per week) at the Pacific Professional Associates Clinic. A number of psychometric tests were administered by the clinic but no specific diagnosis was made and it was not established that other than non-specific counseling has occurred. The court (or probation officer thereof) has provided no oversight of the "therapy". Accordingly, it was not established any of that said "therapy" has diminished respondent's risk to lactating mothers or was rehabilitative given the criminal conduct set forth in Findings 16 and 17.

(C) At present respondent is undergoing treatment by a licensed physician (psychiatrist) consisting, primarily, of dialogue (talking back and forth). The treatment involves no medication, now, or at any time during the course of treatment dating back to December, 1991. During that time period respondent has seen the psychiatrist, for therapy, on a average of once or twice per week. It was not established that that therapy, general in nature, has diminished respondent's risk to nursing mothers.

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The passage of time from the recent conduct and recent convictions to the present has not allowed a record of clear and convincing rehabilitation. In particular:

(A) Respondent, in aggravation, engaged in conduct which was - from time to time - sociopathic, compulsive, deceitful, manipulative and predatory. Further, he frequented prostitutes during the time spanning his abuse of nursing mothers. His mouth which sucked at a prostitute's genitalia also sucked the same breast to be suckled by a pediatric patient. That conduct is depraved.

(B) Respondent, in aggravation, abused victims (nursing mothers) who were particularly vulnerable in that they had entrusted themselves and their babies into respondent's care while the victims were alone with respondent. Further, in aggravation, respondent took advantage of a position of trust and confidence to commit the offenses.

(C) Respondent has some awareness of the harm he has caused to his victims. That awareness was the result of the criminal justice system and not the result of any therapy received, to date, or of any intervention by BMQA. Respondent's awareness is not yet significant awareness. He does not, presently, fully comprehend the harm that he has caused to the four mothers set forth in these Findings and is, not yet, contrite.

24

Having served jail time and reentered society respondent is now engaged in the normal civil conduct of day to day life and responsibilities (caring for his children, reading, engaging in domestic duties). Presently he is under care of a competent, concerned and caring physician. Further respondent has been ably counselled by his attorney of record, a competent, concerned and caring lawyer.

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DETERMINATION OF ISSUES

I

(A) Business and Professions Code (BPC) section 2234 provides that the Division of Medical Quality of the Medical Board of California shall take action against a holder of a physician and surgeon certificate who is guilty of unprofessional conduct. Unprofessional conduct includes, in pertinent part, the following:

BPC section 2234(b): gross negligence.

BPC section 2234(c): repeated negligent acts.

(B) BPC section 726 provides that the commission of any act of sexual abuse, misconduct or relations with a patient, client or customer which is substantially related to the qualifications, functions or duties of the occupation for which a license was issued constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under Division 2 of said Code.

(C) Division 2 of the BPC includes the licensing of physicians and surgeons by the Medical Board of California.

II

Cause does exist for discipline of respondent's license pursuant to BPC for violations of the following sections of said Code:

(A) Section 726 by reason of Findings:

- (1) 5 and 6, collectively
- (2) 7 and 8, collectively
- (3) 9 and 10, collectively
- (4) 11 and 12, collectively

(B) Section 2234(b) by reason of Findings:

- (1) 5 and 13, collectively
- (2) 7 and 13, collectively
- (3) 9 and 13, collectively
- (4) 11 and 13, collectively

(C) Section 2234(c) by reason of Finding 14.

(G) Sections 2234(a), 2234(e) and 480(a)(2) by reason of Finding 15.

(H) Section 2236 and 490 by reason of Findings 16 and 18.

(I) Section 2236 and 490 by reason of Findings 17 and 18.

III

No cause exists for any award of costs pursuant to BPC section 125.3 by reason of Finding 19.

IV

All motions and arguments not affirmed or denied herein, or on the record, are found not to be established by the facts or the law and are, accordingly denied.

V

(A) The objective of an administrative proceeding relating to discipline, if any, is to protect the public; to determine whether a license holder has exercised his privilege in derogation of the public interest. Such proceedings are not for the primary purpose of punishment Camacho v. Youde (1979) 95 Cal.App.3d 161, 165; Ex Parte Brounell (1778) 2 Cowp. 829, 98 Eng. Rep. 1385.

(B) The Medical Board of California, in large measure, is a regulatory agency mandated by pertinent legislation to regulate the profession of physicians and surgeons consistent with, and in furtherance of said public interest.

(1) The evidentiary record of this matter revealed that BMQA had notice of respondent's abuse of patients or clients prior to his abuse of the persons set forth in this decision but failed to do that which was necessary to protect the public interest.

(2) The legislature has, by statute, recently restructured the MBC, as successor of BMQA, and mandated MBC fulfill its regulatory function to the end that it operate with sound public policy to met the public need and sustain the public good. Of significance, in light of paragraph (B)(1) above, is the legislative note to BPC section 2220:

NOTE: The 1989-90 Regular Session of the Legislature declares that the physician discipline system administered by the board's Division of Medical Quality is inadequate to protect the health, safety, and welfare of the people of California against incompetent or impaired physicians....

VI

During the course of any physician-patient or physician-client relationship the physician is in a position of special trust toward the client or patient. The patient or client is in a situation of vulnerability. The patient, presumptively, has special confidence that the physician will not abuse that trust. By his conduct set forth in Findings 5, 7, 9 and 11 respondent breached the special trust of four vulnerable nursing mothers. By such conduct respondent undermined the overall integrity of his practice and, aside from the violations of law set forth in Determination II, respondent dishonored his profession and breached the ethics of his profession.

VII

In light of the foregoing, and by reason of the nature of the violations set forth in Determination II combined with the absence of rehabilitation, the order which follows is consistent with the public interest and is consistent with the legislature mandate governing the operation of the MBC.

ORDER

1. Certificate Number G-48756, previously issued to Stuart Mark Berlin, M.D., is hereby revoked.

2. License Number SA 14082 to supervise physician assistants, previously issued to Stuart Mark Berlin, M.D., is hereby revoked.

Dated:

28 June 1995



RICHARD J. LOPEZ
Administrative Law Judge
Office of Administrative Hearings

RJL:rfm