

**State of New Hampshire
Board of Medicine
Concord, New Hampshire**

In the Matter of:

James Kowles, M.D.

License No.: 5825

(Adjudicatory/Disciplinary Proceeding)

Docket No. 05-02

DECISION AND ORDER

Before the New Hampshire Board of Medicine (“the Board”) is the disciplinary proceeding against James Kowles, M.D. (“Respondent” or “Dr. Kowles”) alleging violations of RSA 329:17, VI. The allegations specifically include violation of RSA 329:17, VI(d) (professional misconduct); and RSA 329:17, VI(d) and (i) (sexual misconduct).

Background Information

On or about May 7, 2004, the Board received a written complaint from Dr. Ernst M. Oidtmann, M.D. and Dr. Carrie M. Webber, M.D. In letters dated August 19, 2003, August 23, 2003 and April 26, 2004, Dr.'s Oidtmann and Webber complained about the respondent's narcotic prescribing habits and behavior. An investigation was initiated. As a result of the investigation, a Notice of Hearing was issued by the Board on July 12, 2005. In the Notice of Hearing, the Board ordered a hearing on the allegations described in paragraph #5, Notice of Hearing July 12, 2005. A hearing began on November 2, 2005. The purpose of the hearing was to determine the answers to the following questions as stated in the Notice of Hearing, paragraph #6:

A. Whether Respondent has committed professional misconduct by providing medical care to family members and significant others in violation of RSA 329:17, VI(d); Med 501.01(a); 501.02(h); 501.02(j); and American Medical Association Code of Medical Ethics - Current Opinions with Annotations (2004-2005), Opinion 8.19.

B. Whether Respondent committed sexual misconduct by engaging in sexual contact current with the physician-patient relationship with his former girlfriend and current girlfriend in violation of RSA 329:17, VI(d) and (i); Med 501.01(a); Med 501.02(h) and (j); and American Medical Association Code of Medical Ethics - Current Opinions with Annotations (2004-2005), Opinion 8.14.

C. Whether Respondent inappropriately prescribed narcotic drugs to three patients with chronic pain syndrome in violation of RSA 329:17, VI(c) and (i); and Med 501.01(a); and 501.02(i) and (j).

D. Whether Respondent engaged in unprofessional conduct by behaving in an agitated, angry manner towards patients on more than one occasion in violation of RSA 329:17, VI(d); Med 406.01; 501.01(a); 501.02(h); and American Medical Association Code of Medical Ethics - Current Opinions with Annotations (2004-2005), Opinion 10.01.

E. If any of the above allegations are proven, whether and to what extent Respondent should be subject to one or more of the disciplinary sanctions authorized by RSA 329:17, VIII.

On November 2, 2005, the Board heard testimony from Dr. Ernst Oidtmann and reviewed medical records and exhibits. On January 25, 2006, a mid-hearing conference was held with Presiding Officer, Judith E. Dickinson and Counsel for both parties. Subsequently, Presiding Officer Dickinson resigned from the Board on March 17, 2006. On July 26, 2006, the parties attended another mid-hearing conference with a new Presiding Officer, Paul J. Scibetta, Jr., D.O. On August 29, 2006, the Board issued a Decision and Order and Amended Notice of Hearing in this case. The Board, in light of the evidence proffered by the parties and analysis, dismissed allegations stated in paragraph 5(C) and (D) of the Notice of Hearing. The Board still had before it the allegations stated in paragraph 5(A) and (B) of the Notice of Hearing. It was, therefore, ordered that an adjudicatory/disciplinary proceeding would be commenced for the purpose of resolving the remaining issues articulated in the Notice of Hearing dated July 12, 2005, pursuant to RSA 329:18-a, Med 206 and Med 502. Due to a depleted panel, the parties agreed that the hearing would revert back to the full Board.

The Respondent, along with his counsel, K. William Clauson, Esq., and Hearing Counsel, Katherine Cooper, Esq., appeared before a new panel of the Board to participate in the adjudicatory/disciplinary proceeding. All previous testimony and exhibits were stricken from the record and the new panel started over and heard testimony and received exhibits to determine whether the respondent committed and violations and, if deemed appropriate, be subject to sanctions pursuant to RSA 329:17, VII. The hearing commenced on November 1, 2006, which was then continued December 6, 2006, January 3, 2007 and concluded on February 7, 2007. All exhibits admitted at hearing are incorporated herein. The Board has also reviewed the following documents all received on February 20, 2007: Hearing Counsel's *James Kowles, M.D. Proposed Findings of Fact and Rulings of Law*, Respondent's Counsel's *James Kowles, MD's Memorandum as to the Merits*, and Respondent's Counsel's *James Kowles, MD's Memorandum as to Procedural Objections*.

Procedural History

1. Dr. Kowles is a physician who was licensed to practice medicine in New Hampshire on September 19, 1977. Respondent holds license number 5825.
2. Dr. Kowles was employed as a physician by the Family Health Center (FHC), Lebanon, New Hampshire until December 31, 2002. His physician partners at FHC at the time included Ernst M. Oidtmann, M.D. and Carrie M. Webber, M.D.
3. On or about May 7, 2004, the Board received written complaints from the Respondent's former partners, Dr.'s Oidtmann and Webber. These letters accused the Respondent of inappropriate narcotic prescribing habits and irrational behavior.
4. An investigation performed by the Board of Medicine's Medical Review Subcommittee ("MRSC"), generated several ROIs. The ROIs included: ROI 5/31/05 by investigator Dori Tohill; ROI 1/18/05 by investigator Dori Tohill; and addendum to ROI dated 10/15/05 performed by Dori Tohill written by Dr. Merrithew on 1/13/05; and an ROI dated 10/15/05 performed by Diane Arsenault, M.D.
5. A *Notice of Hearing* was issued by the Board in the matter of James Kowles, M.D. on July 12, 2005.

6. An adjudicatory/disciplinary proceeding was held November 2, 2005.
7. A *Decision and Order and Amended Notice of Hearing* was issued August 29, 2006.

In light of the evidence and analysis, the allegations stated in paragraph 5(C) and 5(D) of the *Notice of Hearing* dated July 12, 2005 were dismissed. Allegations stated in paragraph 5(A) and 5(B) of the *Notice of Hearing* dated July 12, 2005 remained.

8. A new adjudicatory/disciplinary proceeding commenced on November 1, 2006. This hearing was continued on December 6, 2006, January 3, 2007 and concluded February 7, 2007.

Analysis

The Amended *Notice of Hearing* alleged the following facts:

A. Respondent has established a pattern of medically treating family members and his significant others. First, Respondent has admitted to treating his ex-wife during their marriage. Second, medical records and the statement of Respondent's former live-in girlfriend indicated that she was a patient of his and that he treated her medically on several occasions during the course of their relationship. Third, medical records and correspondence from the Respondent's current girlfriend indicated that he has acted, and may still be acting, as her primary care physician while in an intimate relationship.

B. In the past several years, Respondent has had sexual contact with two of his patients (the above mentioned girlfriends) during the course of the patient-physician relationship, which constitutes sexual misconduct.

Issues Presented in the Notice of Hearing

The specific issues to be determined at the adjudicatory/disciplinary proceeding include, but are not limited to the following:

1. Whether Respondent has committed professional misconduct by providing medical care to family members and significant others in violation of RSA 329:17, VI(d); Med 501.01(a); 501.02(h); 501.02(j); and American Medical Association Code of Medical Ethics – Current Opinions with Annotations (2004-2005), Opinion 8.19.

2. Whether Respondent committed sexual misconduct by engaging in sexual contact concurrent with the physician-patient relationship with his former girlfriend and current girlfriend in violation of RSA 329:17, VI(d) and (i); Med 501.01(a); Med 501.02(h) and (j); and American Medical Association Code of Medical Ethics – Current Opinions with Annotations (2004-2005), Opinion 8.14.
3. If any of the above allegations are proven, whether and to what extent Respondent should be subjected to one or more of the disciplinary sanctions authorized by RSA 329:17, VII.

This Order addresses the allegations 6(A) and 6(B) of the Notice of Hearing of July 12, 2005.

Findings of Fact and Rulings of Law

1. In applying the facts presented during the hearing to the law at issue, the Board may use its collective professional judgment as to whether or not the Respondent's conduct was unprofessional. As stated in the Preface to the AMA Code of Ethics, "No one Principle of Medical Ethics can stand alone or be individually applied to a situation. In all instances, it is the overall intent and influence of the Principles of Medical Ethics which shall measure ethical behavior for the physician." (AMA Code of Medical Ethics, Current Opinions with Annotations, 2004-05 ed., at viii ("hereinafter AMA Code")).
2. It is not necessary for the Board to apply the language of the Opinions in a form as strict as that of a criminal statute. "It is not necessary that the Information be cast with that degree of technical nicety as required in a criminal prosecution. If a charge of improper conduct as contemplated by the act is stated, that is sufficient." Ahern v. Florida Real Estate Commission, ex rel O'Kelley, 149 Fla. 706 (1942); *see also* Clock v. Ambach, 537 N.E.2d 181 (N.Y. 1989). Ethical principles are meant as guidelines to behavior and it is within the power of the profession's governing board to determine whether or not the certain facts presented violate the general principle at issue.

3. The Board recognizes that factual intricacies within a case would make a strict interpretation of opinions impossible based on the facts in that case. The Board recognizes that Opinion 8.19 addresses treatment of family members. In this case, S.C. and R.H. were not family members; nor does the Board feel that the State has provided evidence to support that S.C. and R.H. acted as family members. If Opinion 8.19 was expanded to include "significant others," based upon the amount of health care delivered, the Board would consider a violation to have occurred. The Board finds that due to the fact that S.C. and R.H. were not family members, Opinion 8.19 does not apply. The Respondent provided the Board with evidence of his treatment of family members, including his ex-wife and his son. The Board finds that the evidence provided regarding his ex-wife and son does not rise to the level of violation of Opinion 8.19; RSA 329:17, VI(d); Med 501.01(a); 501.02(h); 501.02(j).
4. The second charge against Respondent is a violation of sexual misconduct as outlined by Opinion 8.14. The medical records show that Respondent treated S.C. as a patient for several years prior to asking her to meet him at the Dirt Cowboy Cafe in November of 1998. Respondent treated the patient for several medical conditions over the years, including depression, for which he prescribed medication. Respondent and the patient had sexual intercourse in November or December of 1998 and continued to have a sexual relationship, which included cohabitation, until sometime during the year 2000. There was no record in the file to indicate that Respondent ever notified S.C. that he terminated his role as the patient's physician.
5. The Respondent claimed that he ended the physician/patient relationship at the Dirt Cowboy Cafe, ostensibly the couple's first date. S.C. denies this fact. Regardless, the Board finds Respondent's ongoing and continuous treatment of S.C. negated any alleged attempt made by Respondent to terminate as the patient's physician. He treated her, according to his testimony, the morning after they first had sexual intercourse for a case of bursitis. He continued to treat her for minor medical issues and to provide regular care, including a pap test, rabies shots, rectal bleeding, etc. Respondent continued to treat S.C. over the duration

of their sexual relationship and he kept the records to prove it. S.C. never saw any other physicians during that time period and testified that Respondent never encouraged her to go elsewhere for care. S.C. testified that Respondent enjoyed providing medical care to her. In addition, Respondent, who has proven to be a meticulous record keeper, never made a note in the patient file concerning termination. Respondent submitted test results using fake names in order to hide S.C.'s identity. He also facilitated the removal of S.C.'s original medical record from the offices of Family Health Center. Respondent testified on page 107-108, lines 20-24 and on page 108, lines 1-5, his use of an anal scope during exam on S.C. These findings demonstrate a romantic relationship concurrent with physician/patient relationship in the above referenced patients. The Board finds that these facts provide evidence that Respondent was aware that his conduct was wrong.

6. The goal of Opinion 8.14 is to prevent exploitation of the patient. The Board finds that Respondent violated Med 501 because such exploitation occurred in this case. S.C. described that she held Respondent in high esteem as a man and as a doctor when she first started to see him. In paragraph two of Exhibit 15, S.C. clearly articulates the problem with the dynamic of such a relationship. S.C.'s testimony before the Board demonstrated the emotional damage that was caused by her relationship with Respondent. She was harmed by Respondent's betrayal of her as a boyfriend and as a physician. The Board finds that in light of the ongoing physician-patient relationship, this dissolution was on a different level than that of a typical boyfriend/girlfriend break up.
7. Respondent has failed to admit any responsibility for any of these ethical lapses. He has argued that it is not unprofessional conduct to have sex with a patient if you don't recall the woman as your patient of several years; it's not unprofessional conduct to have sex with a patient if you terminate care on the first date; it's not unprofessional conduct to have sex with a patient unless the patient complains that the sex interfered with the quality of medical treatment that was given.

8. In light of the above findings of fact, the Board finds that the Respondent's conduct violated RSA 329:17, VI(d) and (j), Med 501.01(a), Med 501.02(h) and (j) and AMA Code of Ethics, Opinion 8.14. Respondent's conduct in this matter is deemed unprofessional. He has demonstrated a lack of respect for the ethical principles that guide this profession with regard to sexual misconduct in the practice of medicine.

Order

In consideration of the foregoing rules of laws, the Board imposes the following sanctions pursuant to its authority under RSA 329:17, VI and VII:

1. The license of James Kowles, M.D., number 5825, is suspended for a period of five years from the date of this Decision and Order ("Order"). Respondent may petition the Board for reinstatement of license after two years.
2. The Respondent is required to meaningfully participate in a program of continuing medical education, specifically in boundary violations. The program shall be approved by the Board prior to its completion. These hours shall be in addition to the hours required by the Board for renewal of licensure and shall be completed within one year from the effective date of this Order. Within fifteen days of completing these hours, Respondent shall notify the Board and provide written proof of completion.
3. Respondent is assessed an administrative fine in the amount of \$1,000.
Respondent shall pay this fine in full within 30 days of the effective date of this Order as defined further below by delivering a money order or bank check, made payable to Treasurer, State of New Hampshire, through the Board's office at 2 Industrial Park Drive, Suite 8, Concord, New Hampshire. Respondent shall bear all costs of the treatment evaluation, continuing education and reporting required by this Order, but he shall be permitted to share such costs with third parties.
4. The Board may consider Respondent's compliance with the terms and conditions herein and any subsequent proceeding before the Board regarding Respondent's license.

5. Within twenty days of the effective date of this Order, as defined further below, Respondent shall furnish a copy of the Order to any current employer for whom Respondent performs services as a physician or work which requires a medical degree and/or medical license or directly or indirectly involves patient care, and to any agency or authority which licenses, certifies or credentials physicians, with which Respondent is presently affiliated.
6. For a continued period of three years from the effective date of this Order, Respondent shall furnish a copy of this Order to any employer to which Respondent may apply for work as a physician or for work in any capacity which requires a medical degree and/or medical license or directly or indirectly involves patient care, and to any agency or authority that licenses, certifies or credentials physicians, to which Respondent may apply for any such professional privileges or recognition.
7. Respondent's breach of any terms or conditions of this Order shall constitute unprofessional conduct pursuant to RSA 329:17, VI(d) and a separate sufficient basis for further disciplinary action by the Board.
8. This Order shall become a permanent document in Respondent's file which is maintained by the Board as a public document.
9. This Order shall take effect on the date it is signed by an authorized representative of the Board.

By Order of the Board/*

Dated: April 9, 2007


Penny Taylor, Administrator
Authorized Representative of the
New Hampshire Board of Medicine

/*Board members Bruce Friedman, M.D. and Kevin Costin, P.A. recused.