



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

June 21, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Diane Abeloff, Esq.
NYS Department of Health
5 Penn Plaza – 6th Floor
New York, New York 10001

David Barad, M.D.
26 Kinkaid Avenue
Closter, New Jersey 07624

Ivan Dochter, PC
1615 Northern Boulevard
Manhasset, New York 11030

RE: In the Matter of David Barad, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-190) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

STATE OF NEW YORK: DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

-----X

COPY

IN THE MATTER

OF

DAVID M. BARAD, M.D.

-----X

BPMC

ORDER # 00-190

DETERMINATION AND ORDER OF THE HEARING COMMITTEE

The undersigned Hearing Committee consisting of GERALD WEINBERGER, M.D., chairperson, MILTON HAYNES, M.D., and SHAHLA JAVDAN, were duly designated and appointed by the State Board for Professional Medical Conduct. MARY NOE served as Administrative Officer.

The hearing was conducted pursuant to the provisions of Sections 230 (10) of the New York Public Health Law and Sections 301-307 of the New York State Administrative Procedure Act to receive evidence concerning alleged violations of provisions of Section 6530 of the New York Education Law by DAVID M. BARAD M.D. (hereinafter referred to as "Respondent"). Witnesses were sworn or affirmed and examined. A stenographic record of the hearing was made. Exhibits were received in evidence and made a part of the record.

The Committee has considered the entire record in the above captioned matter and hereby renders its decision with regard to the charges of medical misconduct.

SUMMARY OF PROCEEDINGS

Pre-Hearing Conferences: September 7, 1999

Hearing dates: January 19, 2000
February 28, 2000
February 29, 2000
March 8, 2000
March 13, 2000

Place of Hearing: NYS Department of Health
5 Penn Plaza
New York, New York

Date of Deliberation: May 5, 2000

Petitioner appeared by: Diane Abeloff, Esq.
Associate Counsel
NYS Department of Health

Respondent appeared: Ivan M. Dochter, P.C.
1615 Northern Blvd.
Suite 303
Manhasset, New York 11030

WITNESSES

For the Petitioner: Patient A
Patient B
Lisa Weinstock, M.D.

For the Respondent: Respondent
Mrs. Barad
Maria Huckerson
Piera Graven
Dr. Merkatz
DeCherney

SIGNIFICANT LEGAL RULINGS

The Administrative Law Judge issued instructions to the Committee when asked regarding to the definitions of medical misconduct as alleged in this proceeding.

With regard to the expert testimony herein, including Respondent's, the Committee was instructed that each witness should be evaluated for possible bias and assessed according to his or her training, experience, credentials, demeanor and credibility.

FINDINGS OF FACT

1. The Respondent is authorized to practice medicine in New York State.
2. Patient A went to see Respondent at the Hormone and Fertility Clinic of Montefiore Medical Center in February 1996. (Pet. Exh. 3)
3. Respondent testified that Patient A had a tubal ligation approximately 10 years earlier, therefore to become pregnant she needed in-vitro fertilization with an embryo transfer. (T. 687)
4. On or about April 30th, Patient A went for the first step in-vitro fertilization and embryo transfer requiring the administration of hormones to enable the production of more eggs and to facilitate the fertility process. (T. 695)
5. On or about April 30th, Patient A went for the first step of the in vitro process, the harvesting of her eggs. Patient B was with her. On or about May 2nd, Patient A went to the Clinic for the embryo transfer of 3 fresh embryos. The remaining 5 embryos that had been harvested were frozen. (Pet. Exh. 3, T. 40)
6. This procedure was unsuccessful; Patient A did not become pregnant. (T. 57)
7. Patient A returned to the clinic on August 8, 1996 for a transfer of the frozen embryos. (Pet. Exh. 3)
8. Patient A learned of the negative pregnancy test results on August 20, 1996. (Pet. Exh. 3; T. 120)

9. The next entry in Patient A's medical chart is written on December 2, 1996; Respondent wrote "...after long discussion, will not pursue further therapy at this time." (Pet. Exh. 3)

10. Respondent's Exhibit H has an e mail dated Monday, August 19, 1996 from Patient A to Respondent stating "Hi David, Trying to reach you once again..."(Respondent's Exh. h)

11. Patient A's next communication with the Respondent is dated Monday, August 26, 1996 stating "Hi David, ... You can write me as much as you like and we can talk about whatever you want..."(Respondent's Exh. H)

12. On August 28, 1996 Patient A sends the Respondent an sexual explicit e mail which states *inter alia* "...See I never had a chance to really enjoy love making in that way.I know it's possible and that I can make it happen right within my own walls of my marriage.But if he has no desire to be as passionate what do I do..."(Respondent's Exh. H)

13. In the same e mail from Patient A to Respondent she states, "I want to be your friend right now and I want you to be my friend.Just for the moment try not to be my doctor..."(Respondent's Exh. H)

14. On August 30, 1996, Respondent sent sexually explicit e mail to Patient A (Pet. Exh. 4)

15. Respondent testified that he and Patient A had sexual contact by September 18, 1996. (T. 908)

DISCUSSION

This case before the Panel was narrowed to one single issue, since the Respondent testified that he had sexual contact with Patient A, the question remained as to whether there was a physician - patient relationship during the time the Respondent had sex with Patient A. The dates listed in the Patient's chart were as follows: treatment began on or about February 1996, 2nd embryo transfer on August 8, 1996, pregnancy test on August 20, 1996, Patient A's e-mails to

Respondent started on August 19, 1996, Respondent's e-mails to Patient A begin on August 30th, 1996, a final note in Patient A's chart dated December 2, 1996.

This Panel finds, based on the testimony and the evidence before them, that the physician - patient relationship existed till December 2, 1996. The Panel relied on the following to make this determination: first, the patient's medical chart which indicated a note on August 8, 1996 of embryo transfer, August 20, 1996, of no pregnancy and then December 2, 1996 indicating the Patient did not wish to continue. (Pet. Exh. 3) Second, Petitioner's Exhibit 7 ACOG and Petitioner's Exhibit 8 guideline are clear as to the necessity for the patient to recognize that there is no physician - patient relationship. The Respondent took no affirmative action such as writing a letter, discussing with the patient or noting in the chart that the physician - patient relationship had ended despite his sexual contact with Patient A. In Patient A's e mail dated August 28, 1996 the Patient states "Just for the moment try not to be my doctor...." indicating the patient's understanding of the relationship with the Respondent. (Respondent's Exh. H) Third, this Panel finds the Respondent's argument that the treatment is episodic and therefore the physician - patient relationship ended to be without merit. In general, a patient goes to a physician because of a specific medical reason i.e. pregnancy. However, Patient A never became pregnant during the embryo transfers. There would be nothing prohibiting Patient A from trying to become pregnant again through embryo transfers at the clinic the Respondent worked.

The Panel was not persuaded by the testimony of Drs. Merkatz and DeCherney who attempted to diminish the significance of the entry of December 2, 1996 in Patient A's chart.

The Panel found no physician - patient relationship to exist between the Respondent and Patient B, who was Patient A's husband.

It is unclear from the testimony and exhibits submitted who initiated the relationship however, the Respondent chose to enter into an intimate relationship with Patient A.. The Respondent, as a fertility expert, is aware of the mental state of patients who have recently had a failed pregnancy transfer. Patient A's e mail details an unhappy sex life with her husband and

refers to the possibility of having a happy sex life within her marriage; yet Respondent answers Patient A's e mail with explicit sexual detail of what his fantasy with her would be.

The Panel is not persuaded by Respondent's testimony as to when the intimate part of this relationship started. The Respondent testified the relationship started on September 18, 1996 (T. 908) However, Patient A in her e mail dated August 19, 1996 is referring to the Respondent by his first name, "David." (Respondent's Exh H) It is unclear why Patient A is referring to the Respondent by his first name when Respondent's witness Maria Huckerson testified that the patients call the Respondent Doctor (T. 495). Furthermore, the transfer was done on August 8th, pregnancy test on August 20th, and there is Respondent's explicit sex e-mail by August 30th.

There is no doubt that the Respondent is a highly skilled physician however, it was through his position only that this sexual relationship arose.

The Panel in considering all the penalties, have based their penalty on the egregious actions that occurred between a physician and a patient. They have considered the Respondent admitting that there was sex between himself and Patient A; that Respondent was previously and continues to be in therapy; (T. 950) and Respondent's commitment that such actions will never occur again.(T. 964)

DETERMINATIONS ON FACTUAL ALLEGATIONS

A1 - sustained as to Patient A, not sustained as to Patient B

A2 - not sustained

DETERMINATION ON SPECIFICATION OF CHARGES

Physically Abusing a Patient - partially sustained as to Patient A, Paragraph A1

Negligence on more than one occasion - not sustained

Moral Unfitness - partially sustained as to Patient A, Paragraph A1

DETERMINATION OF THE HEARING COMMITTEE AS TO PENALTY

The Hearing Committee, in a unanimous vote, after giving due consideration to all the penalties available have determined that the Respondent's license to practice medicine in the state of New York should be SUSPENDED FOR FIVE YEARS. THE SUSPENSION IS STAYED FOR THE LAST THREE YEARS OF SUSPENSION if the Respondent completes CME course or medical school classes on abuse of patients approved by the Office of Professional Medical Conduct.

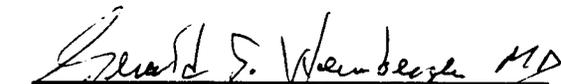
ORDER

Based upon the foregoing, **IT IS ORDERED THAT:**

1. The Hearing Panel in a unanimous vote that the Respondent's license to practice medicine in the state of New York should be **SUSPENDED FOR FIVE YEARS. THE FIRST TWO YEARS THE RESPONDENT'S LICENSE IS SUSPENDED. THE SUSPENSION IS STAYED FOR THE LAST THREE YEARS OF SUSPENSION** if the Respondent completes CME courses or medical school classes on abuse of patients approved by the Office of Professional Medical Conduct.

2. This **ORDER** shall be effective on personal service on the Respondent or within seven (7) days after the date of mailing of a copy to Respondent by certified mail or as provided by Public Health Law Section 230 (10) (h).

DATED: Ardsley, New York
6/15 2000


GERALD S. WEINBERGER, M.D.

MILTON HAYNES, M.D.
SHAHLA JAVDAN

NEW YORK STATE DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
DAVID BARAD, M.D.

STATEMENT
OF
CHARGES

DAVID BARAD, M.D., the Respondent, was authorized to practice medicine in New York State on or about October 12, 1979, by the issuance of license number 140352 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. From on or about February 11, 1996, through on or about December 2, 1996, Patient A and her husband, Patient B (the patients are identified in the attached appendix) were treated by Respondent at his office located at 20 Beacon Hill Drive, Dobbs Ferry, N.Y. 10522. Respondent's care deviated from accepted medical standards, in that:
1. On numerous occasions from in or about August 1996 through in or about December 1996, Respondent had sexual contact with Patient A.

SPECIFICATION OF CHARGES**FIRST SPECIFICATION**
PHYSICALLY ABUSING A PATIENT

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(31)(McKinney Supp. 1999) by willfully harassing, abusing, or intimidating a patient physically, as alleged in the facts of:

1. Paragraph A, A.1.

SECOND SPECIFICATION
NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(3)(McKinney Supp. 1999) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of two or more of the following:

2. Paragraph A, A.1.

THIRD SPECIFICATION
MORAL UNFITNESS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(20)(McKinney Supp. 1999) by engaging in conduct in the practice of the profession of medicine that evidences moral unfitness to practice as alleged in the facts of the following:

- 3. Paragraph A, A.1.

DATED: December 13, 1999
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct