Board for Professional Medical Conduct

Corning Tower • Empire State Plaza • Albany, NY 12237 • (518) 474-8357

C. Maynard Guest, M.D.
Executive Secretary

February 6, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Howard Delozier, M.D.
Box 109
20 West Canal Street
Winooski, Vermont 05404

RE: License No. 121094
Effective Date: 02/13/95

Dear Dr. Delozier:

Enclosed please find Order #BPMC 95-32 of the New York State Board for Professional Medical Conduct. This Order and any penalty provided therein goes into effect upon receipt of this letter or seven (7) days after the date of this letter, whichever is earlier.

If the penalty imposed by the Order is a surrender, revocation or suspension of this license, you are required to deliver to the Board the license and registration within five (5) days of receipt of the Order.

Board for Professional Medical Conduct
New York State Department of Health
Empire State Plaza
Tower Building-Room 438
Albany, New York 12237-0756

Sincerely,

C. Maynard Guest, M.D.
Executive Secretary
Board for Professional Medical Conduct

Enclosure

cc: S. Crocker Bennett, II, Esq.
Paul, Frank & Collins, Inc.
1 Church Street
P.O. Box 1307
Burlington, Vermont 05402-1307

Marcia Kaplan, Esq.

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

IN THE MATTER :

OF : ORDER

HOWARD DELOZIER, M.D. : BPMC #95-32

Upon the Application of Howard DeLozier, M.D., Respondent, to Surrender his or her license as a physician in the State of New York, which application is made a part hereof, it is

ORDERED, that the application and the provisions thereof are hereby adopted; it is further

ORDERED, that the name of Respondent be stricken from the roster of physicians in the State of New York; it is further

ORDERED, that Respondent shall not apply for the restoration of Respondent's license until at least one year has elapsed from the effective date of this order; and it is further

ORDERED, that this order shall take effect as of the date of the personal service of this order upon Respondent, upon receipt by Respondent of this order via certified mail, or seven days after mailing of this order via certified mail, whichever is earliest.

SO ORDERED,

DATED: 1 February 1995

Charles J. Vacanti

CHARLES J. VACANTI, M.D.
Chairperson
State Board for Professional
Medical Conduct

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

IN THE MATTER OF HOWARD LUTHER DE LOZIER, M.D.	**APPLICATION TO SURRENDER LICENSE**

STATE OF VERMONT)
ss.:
COUNTY OF)

HOWARD LUTHER DE LOZIER, M.D., being duly sworn, deposes and says:

On or about August 8, 1974, I was licensed to practice as a physician in the State of New York having been issued License No. 121094 by the New York State Education Department.

I am not currently registered with the New York State Education Department to practice as a physician in the State of New York, and have not been registered to practice in New York since December 31, 1979.

My current address is Box 109, 20 West Canal Street, Winooski, Vermont 05404.

I understand that I have been charged with two specifications of professional misconduct as set forth in the Statement of Charges, annexed hereto, made a part hereof, and marked as Exhibit "A".

On or about December 8, 1994, the Vermont Board of Medical Practice issued a Revised Order, a copy of which is attached and made a part of this Application as Exhibit "B."

I am applying to the State Board for Professional Medical Conduct for permission to surrender my license as a physician in the State of New York on the grounds that I do not contest the two specifications of professional misconduct set forth in the Statement of Charges, except as follows: first, that where the December 8, 1994 Revised Order of the Vermont Board modifies the June 29, 1994 Order of the Vermont Board, as set forth in the Second Specification of the Statement of Charges, I do not contest the New York Charges as reflected in the Revised Order of the Vermont Board; and second, that I do not contest that the acts alleged, if committed within New York State, would constitute professional misconduct under N.Y. Educ. Law Sections 6530(3), 6530(4), 6530(9)(iii) and 6530(35), but that I take specific exception to so much of the Statement of Charges that sets forth that the acts alleged, if committed within New York State, would constitute professional misconduct under N.Y. Educ. Law Section 6530(20).

I also respectfully request that an error in the subtitle of the Second Specification be corrected and that the word "SUSPENDED" be substituted for the word "REVOKED" in that my license to practice medicine in Vermont has never been revoked.

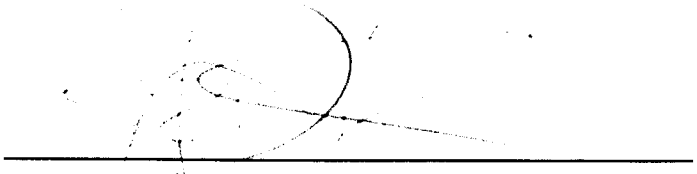
I hereby make this application to the State Board for Professional Medical Conduct and request that it be granted.

I understand that, in the event that the application is not granted by the State Board for Professional Medical Conduct, nothing contained herein shall be binding upon me or construed to be an admission of any act of misconduct alleged or charged against me, such application shall not be used against me in any way, and shall be kept in strict confidence during the pendency of the professional misconduct disciplinary proceeding; and such denial by the State Board for Professional Medical Conduct shall be made without prejudice to the continuance of any disciplinary proceeding and the final determination by a Committee on Professional Medical Conduct pursuant to the provisions of the Public Health Law.

I agree that in the event the State Board for Professional Medical Conduct grants my application, an order shall be issued

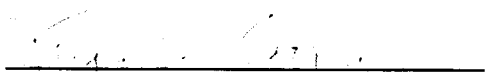
striking my name from the roster of physicians in the State of New York without further notice to me.

I am making this Application of my own free will and accord and not under duress, compulsion, or restraint of any kind or manner.



HOWARD LUTHER DE LOZIER, M.D.
Respondent

Sworn to before me this
day of , 199 .



NOTARY PUBLIC

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

IN THE MATTER	APPLICATION TO
OF	SURRENDER
HOWARD LUTHER DE LOZIER, M.D.	LICENSE

The undersigned agree to the attached application of the Respondent to surrender his license.

Date: _____, 199

HOWARD LUTHER DE LOZIER, M.D.
Respondent

Date: _____, 199

S. CROCKER BENNETT, II, ESQ.
Paul, Frank & Collins, Inc.
Attorney for Respondent

Date: _____, 199

MARCIA E. KAPLAN
Associate Counsel
Bureau of Professional
Medical Conduct

Date: Jan. 30, 1995

Kathleen M. Tanner

KATHLEEN M. TANNER
Director
Office of Professional
Medical Conduct

Date: 1 February 1995

Charles J. Vacanti

CHARLES J. VACANTI, M.D.
Chairperson
State Board for
Professional Medical Conduct

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

----------X

IN THE MATTER	:	STATEMENT
OF	:	OF
HOWARD LUTHER DE LOZIER, M.D.	:	CHARGES

----------X

HOWARD LUTHER DE LOZIER, M.D., the Respondent, was authorized to practice medicine in New York State on August 8, 1974 by the issuance of license number 121094 by the New York State Education Department. The Respondent is not currently registered with the New York State Education Department to practice medicine. His registration expired on December 31, 1979.

FIRST SPECIFICATION

HAVING BEEN CONVICTED OF

AN ACT CONSTITUTING A CRIME

UNDER THE LAW OF ANOTHER JURISDICTION

1. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law Sec. 6530(9)(a)(iii) (McKinney Supp. 1994) in that he has been found guilty of committing an act constituting a crime under the law of another

jurisdiction and which, if committed within this state, would have constituted a crime under New York State law, specifically:

On or about June 13, 1991, the Respondent was convicted after a plea of nolo contendere in the District Court of Vermont of Sexual Assault on a Minor, a felony, in violation of Title 13 V.S.A. Sec. 3252(3) in that on or about November 21, 1988, Respondent engaged in a sexual act, to wit, contact between his penis and the vulva of J.P., with a person who was under the age of 16 and not married to him:

On or about June 13, 1991, the Respondent was sentenced to three to ten years imprisonment, which term was suspended, and Respondent was placed on probation until further order of the Court.

These acts, if committed within New York State, would constitute a crime under N.Y. Penal Code Section 130.25(2) (McKinney 1987) (Rape in the Third Degree) or Section 130.55 (McKinney 1987) (Sexual Abuse in the Third Degree). See also Section 130.05 (McKinney 1987) (Sex Offenses; lack of consent).

SECOND SPECIFICATION

HAVING HIS LICENSE TO PRACTICE

MEDICINE REVOKED IN ANOTHER STATE

2. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law Sec. 6530(9)(b) (McKinney Supp. 1994) in that has been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state

where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, specifically:

> On or about June 29, 1994, the Respondent's license to practice medicine in Vermont was suspended by the Vermont Board of Medical Practice (Vermont Board) for six months, such suspension was stayed, and Respondent's license was conditioned and restricted as follows: that within one year Respondent shall successfully complete a specified mini-residency in the proper prescribing of controlled substances, and should he fail to do so, that Respondent's license shall be suspended until he complies; that he shall not write prescriptions outside of his medical practice of otolaryngology; that he shall continue to participate in at least weekly therapy with a therapist specifically trained to deal with sexually deviant behavior; that he shall not serve as a faculty member or teach medical staff; that he shall write a journal article of publishable quality on the impact of moral offenses by physicians upon public trust of the medical profession and upon the physician-patient relationship, which shall be filed with the Vermont Board within six months of the date of the Order, which the Vermont Board may distribute to those it deems may benefit from reading it; and that the conditions and restrictions shall remain in effect until removed by the Board, and violation of any conditions or restrictions imposed may result in a hearing, which may result in further discipline, including revocation of Respondent's license.
>
> The Vermont Board imposed disciplinary action upon Respondent upon finding him guilty of the following:
>
> Immoral conduct, under 26 V.S.A. Sec. 1398, by engaging in sexual acts including and not including sexual intercourse with J.P., a minor;

Dishonorable Conduct under 26 V.S.A. Sec. 1398, by engaging in sexual acts including and not including sexual intercourse with J.P., a minor; and by being convicted of the criminal offense of engaging in a sexual act with a minor;

Gross Failure to use and exercise on a particular occasion in the course of practice that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same of similar conditions, whether or not actual injury to a patient has occurred, and whether or not committed within or without the state, under 26 V.S.A. Sec. 1354(22), as follows: by interposing himself between L.L. and her psychiatrist; by prescribing a two-months' supply of Klonopin for L.L. on October 3, 1992; by prescribing Xanax for L.L. during the same time period in which he prescribed two other benzodiazepines for her; by prescribing an excessive amount of Xanax for L.L. in November 1992; by prescribing benzodiazepines for L.L. out of the context of a structured, therapeutic setting and as an adjunct of his personal and sexual relationship with her; by providing the types and quantities of benzodiazepines prescribed for L.L. in October and November 1992;

Prescribing drugs for other than legal and legitimate therapeutic purposes, under 26 V.S.A. Sec. 1354(6), by prescribing Klonopin, Halcion, and Xanax for L.L. in violation of 18 V.S.A. Sec. 4214(a) and in a way that was not medically valid;

Failure to use and exercise on repeated occasions, in the course of practice, that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, whether or not actual injury to a patient has occurred and whether or not committed within or without the state, under 26 V.S.A. Sec. 1354 (22), by failing to follow the statutory standard of care as charged in nine separate counts (Count XI);

Unprofessional Conduct under 26 V.S.A. Sec. 1354(22), i.e. displaying conduct which evidences unfitness to practice medicine, by grossly and repeatedly failing to uphold the statutory standard of care, by prescribing drugs for other than legal and legitimate therapeutic purposes, by impermissibly mixing clinical functions with an intense personal relationship with L.L., by prescribing excessive and dangerous quantities of drugs, by keeping no medical records for L.L., and by failing to contact her previous treating physician.

These acts, if committed within New York State, would constitute professional misconduct under N.Y. Educ. Law Sections 6530(3) (practicing the profession with negligence on more than one occasion), 6530(4) (practicing the profession with gross negligence on a particular occasion), 6530(9)(iii) being convicted of an act constituting a crime under the law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York state law, 6530(20) (conduct in the practice of medicine which evidences moral unfitness to practice medicine) and/or 6530(35) (ordering excessive treatment not warranted by the condition of the patient).

DATED: NEW YORK, NEW YORK
December 1, 1994

CHRIS STERN HYMAN
Counsel
Bureau of Professional
Medical Conduct

STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

Docket Nos. MPS103-0891
MPS79-0993

In re Howard L. DeLozier, M.D.	)	Hearings held at
	)	Montpelier, Vermont
	)	March 17, 1994
	)	March 18, 1994
	)	March 24, 1994
	)	March 25, 1994

PRESENT: Susan M. Spaulding, Hearing Panel Chair
Sally S. Hackett
Alexander S. MacDonald, Jr., M.D.
William B. Peck, M.D.
William D. Segel, M.D.
Carol A. Vassar, M.D.

APPEARANCES: Geoffrey A. Yudien, Assistant Attorney General
for petitioner

S. Crocker Bennett, II, Esq.
for respondent

Howard L. DeLozier, M.D., respondent

BOARD DISCUSSION AND REVISED ORDER

On June 29, 1994, the Board issued its findings of fact, conclusions of law, opinion, and order in this matter. Petitioner filed a motion for reconsideration dated July 11, 1994. Respondent filed a memorandum in opposition dated July 22, 1994. In addition, both parties filed notices of appeal.

After reviewing petitioner's motion for reconsideration and respondent's memorandum in opposition, the Board has decided to revise its June 29 order as explained below. A revised "findings of fact, conclusion of law, opinion, and order" containing the actual changes follows this discussion. Areas where revisions have been made are shown in bold print in the text.

(1) Petitioner correctly points out that the Board's order at page 14, paragraph N, contains a typographical error. The correct statutory cite is 26 V.S.A. § 1354(7), not § 1354(22).

(2) Petitioner argues that the Board should require respondent to take a medical ethics course. The Board declines to revise its order to reflect petitioner's argument, because medical ethics courses typically cover issues such as euthanasia and abortion. Such clinical subjects are not areas in which respondent needs to do rehabilitative work. For this reason, the

Board requires respondent to perform rehabilitative work precisely in the area where he needs it most: the impact of moral offenses by physicians upon public trust of the medical profession and upon the physician-patient relationship. The Board has tailored its disciplinary action in this area to fit respondent's offense.

Furthermore, by requiring respondent to file a copy of the journal article he writes (a) with the Board, so that the Board may in turn furnish copies to others, and (b) with the University of Vermont College of Medicine, the Board will have a mechanism by which respondent's misconduct may serve as instruction and warning to other physicians and to medical students. This specific, tailored disciplinary requirement serves the best interests of the public far more than would a requirement that respondent take and pass a course in medical ethics.

(3) Petitioner argues that the Board should require respondent to "provide the Board with proof that he has successfully completed" the mini-residency, "The Proper Prescribing of Controlled Dangerous Substances," directed by forensic and educational consultant William Vilensky, R.Ph., D.O. If a physician referred to the mini-residency provides him with authorization, Dr. Vilensky writes to the Board to inform it that the physician referred by the Board has registered for the mini-residency and to request a copy of the Board order entered in the physician's case.

At the conclusion of the mini-residency, Dr. Vilensky again writes to the Board to tell it whether or not the physician referred to the mini-residency by the Board successfully completed the mini-residency and how well the physician performed in the mini-residency. Dr. Vilensky's report to the Board includes grades and scores for attendance at both the didactic and clinical portions of the mini-residency, attention in class, classroom participation, test results, improvement in number of correct test responses (pre-test to post-test), and percentage improvement in score over pre-test.

Thus, the Board is not left to rely upon self-reporting by the physician referred to the mini-residency. A third party, Dr. Vilensky, assures the Board of successful course completion by a respondent referred to the mini-residency by the Board. For this reason, the Board declines to revise its order to require respondent to furnish proof to the Board that he has successfully completed Dr. Vilensky's mini-residency. Rather, the Board will revise its order to require respondent to provide Dr. Vilensky with any and all authorization necessary to permit Dr. Vilensky to communicate with the Board as outlined above.

(4) Petitioner argues that the Board should require Board approval of the therapist specifically trained to deal with

sexually deviant behavior. Based upon respondent's testimony in this case, it seems likely that the therapist whom respondent will continue to consult is Dr. Gary R. Martin. Dr. Martin's credentials as a therapist were not disproved, and he indicated his willingness to continue to provide therapy to respondent. The Board will, however, revise its order to incorporate petitioner's suggestion.

(5) Petitioner argues that the Board should require respondent to notify future employers and patients of the violations found by the Board. The Board declines to revise its order to incorporate petitioner's suggestion, because it does not want to encourage prospective employers or patients to rely upon physicians to provide this information when other reliable sources are available.

For example, the Federation of State Medical Boards and the National Practitioner Data Bank collect and store physician disciplinary information and provide it in response to inquiries from specified categories of individuals and entities. A hospital must request information from the National Practitioner Data Bank at the time a physician applies for a position on its medical staff, or for clinical privileges at the hospital, and at two-year intervals thereafter. Prospective employers should contact these data banks or the Board to ascertain whether a particular physician holds a license in good standing.

Patients should contact the Board to ascertain whether a particular physician holds a license in good standing. In the opinion of the Board, relying upon physicians to supply this information will result in confusion and possibly non-compliance.

(6) Petitioner argues that the discipline imposed by the Board is disproportionate to the gravity of respondent's offenses and fails to provide sufficient protection for the public. The Board declines to revise the sanctions it has imposed. Numerous credible witnesses testified to the effect that respondent's medical license should not be suspended or revoked. These witnesses included J.P., who declared on the witness stand in response to direct examination by petitioner, that the case was not about respondent in his capacity as a physician. On cross-examination, J.P. stated that she has never thought that respondent should lose his medical license because of what happened to her.

An audiologist, Linda Strojny, who is respondent's colleague, testified that she has never seen respondent compromise patient care. She also testified that when anyone in the office where she and respondent work has a problem, whether it be a computer-related problem or any other office issue, that person goes to respondent for help in working through any difficulty. She stressed that respondent has always "been there"

for all of the support staff and professional staff at the office.

Dr. Robert Sofferman, Chief of Otolaryngology at the Medical Center Hospital of Vermont, stated his opinion that respondent is an extraordinary physician and that depriving respondent of his medical license would harm many more people than respondent. Theodore Piececki, a chemical engineer who suffers from cancer of the larynx and who is respondent's patient, stated directly and simply that respondent saved his life by diagnosing his cancer in five minutes after other physicians had told him that he merely had an allergy.

Dr. Deborah Gonzalez, an otolaryngologist employed at the Medical Center Hospital of Vermont, testified that respondent treats his patients carefully and cautiously. Carolyn Barchi, an operating room nurse clinician specialist at the Medical Center Hospital of Vermont, testified that respondent is very professional, that he is never condescending to nurses, and that he is the most highly-skilled surgeon she has seen. Joanna Weinstock, a medical student at the University of Vermont and a librarian by training, testified that both her husband and her daughter are patients of respondent and that she and her family have found respondent to be a very patient caregiver.

All of these witnesses, most of whom have first-hand experience working with respondent or consulting him as patients, presented credible testimony to the Board. The main point of their testimony was to ask the Board not to remove respondent from the practice of medicine.

One of respondent's principal witnesses was Dr. Julius Cohen, who testified about respondent's quality of care. While the Board found Dr. Cohen to be a credible witness, his testimony did not weigh as heavily on the issue of disposition as that of the other witnesses enumerated above, because he did not directly address the disposition issue, as those other witnesses did.

Furthermore, equally credible evidence from Theoharis K. Seghorn, Ph.D., of New England Forensic Associates in Arlington, Massachusetts, showed that respondent is not a pedophile (attracted to children) nor a hebophile (attracted to adolescents) and is not at risk for any recurrence of behavior similar to that which occurred with the adolescent, J.P.

Therefore, the preponderance of credible evidence on the issue of disposition weighs heavily in favor of not revoking respondent's medical license and against petitioner's request to have his license revoked. The discipline imposed by the Board in this case will protect the public while not denying respondent's patients the medical care which they require from him.

(7) Both parties have noted in their legal memoranda that petitioner charged respondent with both gross and simple failure to uphold the standard of care in Count III, because, although the language used in Count III is "gross failure," Count XI aggregates the previous counts and charges repeated, simple failure to uphold the standard of care. Therefore, the Board will make a specific finding relating to simple failure in Count III. The additional finding in Count III shows that respondent's conduct as alleged in that count did not rise to the level of simple failure to uphold the standard of care, because the quantity of Halcion prescribed was so small.

(8) As with Count III, petitioner points out that respondent was charged in Count VI with both gross and simple failure to uphold the standard of care. The Board will, therefore, make a specific finding relating to simple failure in Count VI. The additional finding shows that respondent's conduct, in telling L.L. that he preferred that she not tell anyone that he had written prescriptions for her and that he would lose his medical license if it ever became known that he had issued prescriptions for her, did constitute simple failure to uphold the standard of care. However, this additional finding of a simple failure to uphold the standard of care in Count VI does not justify increasing the severity of the sanctions which the Board has imposed on respondent. (The Board has increased the number of conditions and restrictions applied in paragraph 4 of the order.)

(9) As with Counts III and VI, petitioner points out that respondent was charged in Count VII with both gross and simple failure to uphold the standard of care. The Board will, therefore, make a specific finding relating to simple failure in Count VII. The additional finding shows that respondent's conduct as alleged in that count did not rise to the level of simple failure to uphold the standard of care.

While something unusual or unorthodox may have occurred in the way that the hospital physicians caring for L.L. in the emergency room apparently attempted to distance themselves from the situation by directing a psychiatry resident to call respondent and ask him to issue a prescription for Xanax, petitioner did not present sufficient evidence to prove such a sequence of events, and it must, therefore, remain speculation.

Without a clear picture of the surrounding events and motivations of the principal individuals involved in caring for L.L. in the emergency room on December 14, 1992, the Board is not able to find that respondent's conduct in agreeing to the psychiatry resident's request to write a prescription for a two-day supply of Xanax consititutes either gross or simple failure to uphold the standard of care. However, the Board will remove the phrase "poor judgment" from paragraph 58, in light of the discussion in paragraph (10) below and the confusion which might

possibly result if the language remained in the findings.

(10) The Board's discussion in its opinion of the legal definition of "gross" failure to uphold the standard of care under Rivard v. Roy, 124 Vt. 32, 35, 196 A.2d 497 (1963), requires further explanation. The Vermont Supreme Court has declared, in the context of a medical malpractice action, that "[t]he concept of gross negligence left our law with the repeal of the guest-passenger statute." Deyo v. Kinley, 152 Vt. 196, 207-208, 565 A.2d 1286 (1989). The Court's rejection of the word "gross" in connection with a negligence charge to a jury was based upon its belief that language instructing a jury that recovery could be had only if the defendant was found to have committed "gross" negligence that was "more than an error of judgment" was misleading and confusing and suggested that a standard of care higher than ordinary care must be found in medical malpractice cases. Id. at 208.

The concept of "gross" negligence or "gross" failure to uphold the standard of care appears in the Medical Practice Act at 26 V.S.A. § 1354(22). Whether the word "gross" in § 1354(22) means "more than an error of judgment" or not, it clearly means that respondent has violated a standard even more stringent than that of ordinary care,--and that is the concept that the Board has applied here. See, e.g., In re Peter L. Braun, D.M.D., No. DE16-0193 at 5-6 (Office of the Secretary of State, Appellate Officer, Sept. 29, 1994); Vivian v. Examining Board of Architects, 61 Wis. 2d 627, ___, 213 N.W.2d 359, 364, (1974) (term "gross negligence" in professional licensing statute distinguishes between gross or grave acts of negligence as compared to less serious or more ordinary acts of negligence).

(11) Although both parties have filed appeals in this case, neither party has requested a stay pending appeal. To forestall possible confusion, June 29, 1994, the effective date of the original order, should continue to be regarded as the date from which to calculate the running of the various time-related sanctions imposed in the Board's order, unless the order specifically states otherwise, as in paragraphs 4(g), 4(h), and 4(i).

(12) A dissenting opinion, filed by a public member of the Board, appears at the end of the order.

REVISED

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION, AND ORDER

This cause came before the Board of Medical Practice (Board) on a specification of charges against Howard L. DeLozier, M.D. (respondent). Evidence having been adduced thereon, the Board has determined that the following findings of fact and conclusions of law are supported by the preponderant weight of

the evidence.

Motions

1. Petitioner's motion to consolidate Docket Nos. MPS103-0891 and MPS79-0993 was GRANTED.

2. Petitioner's motion to maintain confidentiality of victims' identities was GRANTED.

3. Petitioner's motion to amend paragraph 3 of the specification of charges in Docket No. MPS103-0891 to read "November 10, 1988" instead of "November 17, 1988" was GRANTED.

4. Petitioner's motion to amend paragraph 31 of the specification of charges in Docket No. MPS79-0993 to read "legal and legitimate therapeutic purposes" instead of "legal and therapeutic purposes" was GRANTED.

5. Respondent's motion in limine to exclude complainant L.L.'s prior testimony was DENIED.

Findings of Fact

General Findings

1. Respondent is licensed by the Board to practice medicine in the State of Vermont. He holds license number 42-6193.

2. Respondent is an otolaryngologist specializing in head and neck surgery. He also holds the position of Associate Professor, Department of Surgery, University of Vermont College of Medicine. His psychiatric training is limited to the standard six-week rotation completed during his residency and an even shorter period of training completed during his internship.

Docket No. MPS103-0891

3. In 1988, J.P. was a 15-year-old girl who was a neighbor of respondent and his family. J.P. often babysat for respondent's young daughter. J.P. was not respondent's medical patient.

4. In the summer and fall of 1988, respondent, who was then 41 or 42 years old and who was experiencing marital difficulties, became infatuated with J.P. Clandestine meetings and correspondence between respondent and J.P. ensued, as part of the process by which respondent "groomed" J.P. (that is, established a trust-building relationship with her to gain sexual access to her later).

5. On the evening of November 10, 1988, respondent drove

J.P. to his medical office. At the office, respondent and J.P. engaged in sexual acts not including sexual intercourse.

6. On the evening of November 21, 1988, respondent picked up J.P. at her school. He purchased beer at J.P.'s request. Respondent and J.P. parked in a parking lot and consumed beer. Respondent then drove J.P. to his office, where they engaged in sexual acts including sexual intercourse.

7. As a result of engaging in sexual intercourse with the 15-year-old J.P., respondent was convicted on June 13, 1991 of sexual assault under 13 V.S.A. § 3252(a)(3) (engaging in a sexual act with another person when that person is under the age of 16).

8. Based upon common understanding and practices, respondent's conduct with J.P. was immoral.

9. Respondent's conduct with J.P. was dishonorable, because it was disgraceful.

Docket No. MPS79-0993

Count I

10. In April 1992, L.L. was a 28-year-old woman addicted to alcohol and prescription drugs. She also had an eating disorder and was under psychiatric care.

11. L.L. was not available to testify in this proceeding, because, at the time of the March 1994 hearings, she was hospitalized in a private facility in another state, where she was being treated for her alcohol and substance abuse problems.

12. Testimony of L.L., given at a final hearing in Vermont Family Court, Chittenden County, on October 8, 1993, was admitted in this proceeding.

13. L.L. and respondent met in April 1992, after respondent and his wife had separated. Respondent and L.L. began dating and entered into a sexual relationship which continued intermittently until November 1992.

14. During the course of their relationship, respondent became aware of L.L.'s eating disorder, psychiatric treatment, alcoholism, and use of regulated prescription drugs.

15. During the course of their relationship, respondent told L.L. that all that psychiatrists want is the money from their patients and that psychiatrists do not really care about their patients. Respondent also told L.L. that he could provide her with a program of recovery from her eating disorder.

16. L.L.'s testimony on the subject of the allegations contained in Count I, admitted in the form of a transcript from a prior proceeding, is more credible than respondent's testimony. Respondent's motivation to deny making the statements alleged in Count I is strong, because of the possibility of imposition of discipline upon his license.

17. Respondent's comments to L.L. criticizing psychiatrists and their treatment motives contributed at least partially to L.L.'s stopping seeing her psychiatrist.

18. Respondent interposed himself between L.L. and her psychiatrist and interfered with her psychiatric treatment.

19. The standard of care is that a physician does not interpose himself or herself between a patient and the patient's psychiatrist and does not interfere with the psychiatric treatment being rendered to the patient. Respondent failed to uphold that standard.

20. Respondent's failure to uphold the standard of care, when he interposed himself between L.L. and her psychiatrist for a period of months, was a gross failure, because it showed more than a mere error of judgment, momentary inattention, or loss of presence of mind.

Count II

21. In the fall of 1992, respondent began to write prescriptions for medications for L.L.

22. The writing of prescriptions shows the existence of a physician-patient relationship. Respondent realized that he was establishing a physician-patient relationship with L.L. when he wrote prescriptions for her **for a two-months' supply of Klonopin.**

23. Although respondent thought of himself merely as L.L.'s "intermediate healthcare giver," he did, in fact, establish a physician-patient relationship with L.L.

24. Despite establishing a physician-patient relationship with L.L., respondent kept no medical records of his treatment of her.

25. Respondent did not consult or communicate with L.L.'s treating psychiatrist to determine what diagnoses or therapies had been made or undertaken.

26. On October 3, 1992, respondent wrote L.L. a prescription for a two-months' supply of Klonopin. Respondent wrote the prescription because L.L. told him that she had missed her scheduled appointment with her psychiatrist and needed the drug

as part of the therapy she was undergoing for chronic anxiety disorder.

27. Respondent had never prescribed Klonopin for anyone before.

28. Klonopin is a benzodiazepine and acts as a central nervous system depressant. Overdosage may result in somnolence, confusion, coma, and diminished reflexes.

29. The quantity of Klonopin which respondent prescribed for L.L. was excessive and dangerous.

30. The standard of care is that a physician does not (a) establish and maintain a physician-patient relationship with an individual by writing prescriptions when the physician has an intimate personal relationship with the patient, (b) fail to keep medical records for the patient, and (c) prescribe a powerful drug in excessive and dangerous quantities. Respondent failed to uphold that standard.

31. Respondent's failure to uphold the standard of care, when he prescribed a two-months' supply of Klonopin for L.L. on October 3, 1992, was a gross failure, because it showed more than a mere error of judgment, momentary inattention, or loss of presence of mind.

Count III

32. On October 11, 1992, respondent wrote a prescription for L.L. for six tablets of Halcion, because L.L. complained to him that she was having difficulty sleeping.

33. Halcion is a benzodiazepine hypnotic agent and is used as a "sleeping pill." Halcion is a Schedule IV controlled drug.

34. Respondent had often prescribed Halcion for his patients in his practice.

35. There is a risk associated with prescribing several different benzodiazepines to a patient at the same time, as respondent did for L.L. Use of the benzodiazepines (here, Klonopin and Halcion) together could produce a compounded physiological effect upon the patient.

36. Nevertheless, the amount of Halcion (six tablets) prescribed by respondent for L.L. was small enough not to rise to the level of **a simple failure or** a gross failure to uphold the statutory standard of care, as charged in this count.

Count IV

37. On October 24, 1992, respondent wrote a prescription for L.L. for 60 tablets of Xanax (a 20-day supply), because L.L. told him that her physician was prescribing Xanax for her as part of her treatment, that her physician was out of town, and that she needed some of the medication to tide her over until her physician returned.

38. Xanax is a benzodiazepine used to treat chronic anxiety disorder. Xanax is a Schedule IV controlled drug. Patients who become physically dependent upon Xanax may suffer withdrawal symptoms, including life-threatening seizures.

39. Together with Klonopin and Halcion, Xanax was the third benzodiazepine which respondent prescribed for L.L. during the month of October 1992.

40. Respondent had never prescribed Xanax before prescribing it for L.L.

41. There is a risk associated with prescribing several different benzodiazepines to a patient at the same time, as respondent did for L.L. Use of the benzodiazepines (here, Klonopin, Halcion, and Xanax) together could produce a compounded physiological effect upon the patient.

42. The standard of care is that a physician does not (a) establish and maintain a physician-patient relationship with an individual by writing prescriptions when the physician has an intimate personal relationship with the patient, (b) fail to keep medical records for the patient, and (c) prescribe several powerful drugs at the same time. Respondent failed to uphold that standard.

43. Respondent's failure to uphold the standard of care, when he prescribed Xanax for L.L. during the same time period in which he prescribed two other benzodiazepines for her, was a gross failure, because it showed more than a mere error of judgment, momentary inattention, or loss of presence of mind.

Count V

44. On November 11, 1992, respondent wrote a prescription for L.L. for a 110-day supply of Xanax (including refills), because L.L. told him that she was financially unable to continue seeing her psychiatrist and because respondent wanted to "buy time" for L.L. to regain her financial ability to resume psychiatric treatment.

45. The quantity of Xanax prescribed by respondent for L.L.

on November 11, 1992 was too large to represent a mere temporary expediency designed to "buy time" for L.L. to regain financial stability and was excessive.

46. The standard of care is that a physician does not (a) establish and maintain a physician-patient relationship with an individual by writing prescriptions when the physician has an intimate personal relationship with the patient, (b) fail to keep medical records for the patient, and (c) prescribe a powerful drug in an excessive amount. Respondent failed to uphold that standard.

47. Respondent's failure to uphold the standard of care, when he prescribed an excessive amount of Xanax for L.L. in November 1992, was a gross failure, because it showed more than a mere error of judgment, momentary inattention, or loss of presence of mind.

Count VI

48. Respondent indicated to L.L. that he preferred that she not tell anyone that he had written prescriptions for her.

49. Respondent told L.L. that he would lose his medical license if it ever became known that he had issued prescriptions for her.

50. By December 1992, respondent's and L.L.'s personal relationship had ended. Respondent told L.L. that he would not write any more prescriptions for her.

51. During the time that L.L. had been obtaining prescriptions from respondent, she had also been obtaining prescriptions for some of the same benzodiazepines from at least one other physician in the area.

52. L.L. attempted to discontinue use of the drugs prescribed for her, was unsuccessful in her attempts, and suffered withdrawal symptoms.

53. Although respondent mixed his personal and professional relationships with L.L. and told her **that he preferred that she not tell** anyone about his writing the prescriptions for her and that he would lose his medical license if she did so, his actions were not contributing factors in L.L.'s suffering withdrawal reactions. L.L. had prescriptions for some of the same drugs from at least one other physician. Her withdrawal reactions could have been attributable to the drugs she obtained by means of the other physician's prescriptions rather than respondent's prescriptions. **Nevertheless, respondent's attempt to pressure L.L. into keeping his prescribing for her a secret constitutes simple failure but not gross failure to uphold the statutory**

standard of care, as charged in this count. The standard of care is that a physician does not exploit a personal relationship in an attempt to keep improper medical acts secret.

Count VII

54. On December 14, 15, and 17, 1992, L.L. was taken to a hospital emergency room because of her benzodiazepine withdrawal reactions.

55. When she was taken to the emergency room on December 14, L.L. told the emergency room staff that she had received her prescriptions for benzodiazepines from respondent.

56. The hospital physicians involved in caring for L.L. were uncomfortable with prescribing benzodiazepines for her. Therefore, the attending physician directed a psychiatry resident on duty to call respondent, tell him that L.L. was having problems attempting to withdraw from Klonopin and Xanax, and ask him to issue a prescription for L.L. for Xanax.

57. Respondent acquiesced to the request from the hospital staff and prescribed a two-day supply of Xanax for L.L.

58. While respondent's acquiescence to the hospital staff's request indicates **compliancy**, it does not constitute **a simple failure or** a gross failure to uphold the statutory standard of care.

Count VIII

59. Respondent's providing of benzodiazepines to L.L. was not done in the context of a structured, therapeutic setting with defined boundaries between physician and patient. Rather, respondent's conduct occurred as an adjunct of his personal and sexual relationship with L.L.

60. Because of her alcohol and drug addictions and eating disorder, L.L. required highly specialized care. Respondent was not capable of providing the level of care needed by L.L.

61. A physician who undertakes to provide psychiatric treatment to a patient should not have any past or current personal or intimate relationship with the patient.

62. Because a physician who undertakes to provide psychiatric treatment is perceived by the patient to be a person of standing and power, any interpersonal relationship beyond or outside of the therapeutic relationship can be very damaging to the patient.

63. The standard of care is that a physician should provide

drugs such as benzodiazepines to a patient with a history of substance abuse, eating disorder, and psychiatric treatment only in the context of a structured, therapeutic setting with defined boundaries between physician and patient and not as an adjunct of the physician's personal and sexual relationship with the patient. Respondent failed to uphold that standard.

64. Respondent's failure to uphold the standard of care, when he prescribed benzodiazepines for L.L. out of the context of a structured, therapeutic setting and as an adjunct of his personal and sexual relationship with her, was a gross failure, because it showed more than a mere error of judgment, momentary inattention, or loss of presence of mind.

Count IX

65. Benzodiazepines such as Klonopin, Halcion, and Xanax are powerful drugs that act to depress the central nervous system or act as hypnotic agents. Benzodiazepines may produce psychological and physical dependence. Prescribing several benzodiazepines at the same time can have a compounded physiological effect upon the patient.

66. On October 3, 1992, respondent prescribed a two-months' supply of Klonopin for L.L. This quantity was excessive and dangerous.

67. On October 11, 1992, respondent prescribed six tablets of Halcion for L.L.

68. On October 24, 1992, respondent prescribed a 20-day supply of Xanax for L.L. This was the third benzodiazepine which respondent prescribed for L.L. during the month of October 1992.

69. On November 11, 1992, respondent prescribed a 110-day supply of Xanax (including refills) for L.L. This quantity was excessive and could not be justified as a mere temporary expediency to allow L.L. to "buy time" to improve her financial situation.

70. The standard of care is that a physician such as respondent, who possessed minimal psychiatric training and who was involved in an intimate personal relationship with his patient, does not provide the types and quantities of benzodiazepines which respondent provided to L.L., particularly when the patient has the type of complex medical history which L.L. had. Respondent failed to uphold that standard.

71. Respondent's failure to uphold the standard of care, when he provided the types and quantities of benzodiazepines prescribed for L.L. in October and November 1992, was a gross failure, because it showed more than a mere error of judgment,

momentary inattention, or loss of presence of mind.

Count X

72. Respondent wrote the prescriptions for L.L. at a time when he had established a physician-patient relationship with her, even though he did not specifically hold himself out to her as being her physician.

73. Under 18 V.S.A. § 4214(a), a physician may prescribe regulated drugs in good faith and in the course of the physician's professional practice only.

74. Klonopin (clonazepam), Halcion (triazolam), and Xanax (alprazolam) are regulated drugs under 18 V.S.A. § 4201(6)(C) and (29) and were so regulated at the time of the conduct alleged in these charges.

75. Respondent did not prescribe Klonopin, Halcion, and Xanax for L.L. in good faith and in the course of his professional practice. He prescribed the drugs for a person whom he knew to have substance abuse problems and an eating disorder and whom he knew to be under psychiatric treatment. Respondent had never seen L.L. in his office, she was not a surgical patient of his, and he was involved in an intimate personal relationship with her.

76. Respondent's prescribing for L.L. was not medically valid. In writing the prescriptions, respondent mixed clinical functions with an intense personal relationship. He kept no medical records for L.L., and he did not attempt to contact her previous treating physicians.

77. Because respondent prescribed Klonopin, Halcion, and Xanax for L.L. in violation of 18 V.S.A. § 4214(a), and because the prescriptions respondent wrote for L.L. were not medically valid, respondent prescribed drugs for other than legal and legitimate therapeutic purposes.

Count XI

78. Under the amended specification of charges in Docket No. MPS79-0993, the Board has found **statutory violations in the following counts preceding Count XI: Counts I, II, IV, V, VI, VIII, IX, and X.**

79. **As alleged in Count XI, these violations** found by the Board in Docket No. MPS79-0993 constitute a failure by respondent to uphold the standard of care on repeated occasions.

Count XII

80. The Board has found that respondent grossly failed to uphold the standard of care, that he prescribed drugs for other than legal and legitimate therapeutic purposes, and that he repeatedly failed to uphold the standard of care.

81. Respondent impermissibly mixed clinical functions with his intense personal relationship with L.L. He prescribed excessive and dangerous quantities of drugs, kept no medical records, and failed to contact previous treating physicians.

82. Respondent's conduct with L.L. was inappropriate. Essentially, respondent attempted to practice medicine in an area (psychiatry) in which he was not qualified. Respondent's conduct **in regard to his misuse of psychotropic drugs** therefore demonstrates unfitness to practice medicine.

Disposition Findings

83. Respondent is a surgeon with demonstrated ability to perform complex surgical operations skillfully and successfully.

84. For the type of complex surgery respondent performs, a hiatus of more than six months of regular performance of the surgery can lead to significant deterioration of the surgeon's skills.

85. Respondent is a "regressed offender" but not a "fixated pedophile." A regressed offender is a person for whom a constellation of factors and stresses converge to create an offense. A fixated pedophile is a person who usually has had sexual contacts with children at a very young age and has developed a primary sexual orientation toward children, which persists throughout adult life.

86. Fixated pedophiles are generally difficult to treat and have a poor prognosis for successful treatment. Regressed offenders are more amenable to treatment and generally have a good prognosis for successful treatment.

87. The prognosis for respondent is that he probably will not re-offend by engaging in sexual misconduct with a minor, as long as protections such as continued counseling and monitoring are in place.

88. Respondent is willing to continue with counseling on a long-term basis, similar to the group and individual sex-offender counseling he is receiving under the terms of his court-ordered probation.

89. With both J.P. and L.L., respondent overstepped the boundaries a physician is expected to observe. With J.P., respondent turned a personal family helper into a fulfillment object. With L.L., respondent used inappropriate clinical methods to turn an individual into a fulfillment object.

90. Respondent's letters to J.P. display extreme immaturity. They also demonstrate clearly that respondent manipulated and "groomed" the 15-year-old girl and took advantage of his status as a physician to gain sexual access to her.

91. In his conduct with L.L., respondent displayed extremely poor judgment. While still on probation for his criminal conviction, respondent entered into a personal relationship in which he **lost his perspective on his true clinical capability in relation to a woman who was also fulfilling a void in his life for love, affection, and sexual engagement. In so doing, respondent again took advantage of his status as a physician and used inappropriate clinical methods to turn L.L. into a fulfillment object.**

92. In his current position as an associate professor, respondent teaches medical students and others and, by virtue of his faculty position, serves as a role model for them.

93. After his criminal conviction, respondent's university-based employer and the hospital where he had privileges suspended him for six months. During this six-month suspension, respondent continued to teach in the medical school.

94. In 1991, after he had been convicted, the university promoted respondent from assistant to associate professor, essentially ignoring the nature and gravity of his criminal offense.

95. Based upon his unprofessional conduct with J.P. and L.L., respondent cannot be allowed to continue to teach medical students and others as part of his practice of medicine or to serve as a role model for them by virtue of holding a faculty position.

96. Numerous credible witnesses testified to the effect that respondent's medical license should not be suspended or revoked. These witnesses included J.P., who declared on the witness stand in response to direct examination by petitioner, that the case was not about respondent in his capacity as a physician. On cross-examination, J.P. stated that she has never thought that respondent should lose his medical license because of what happened to her.

97. An audiologist, Linda Strojny, who is respondent's colleague, testified that she has never seen respondent

compromise patient care. She also testified that when anyone in the office where she and respondent work has a problem, whether it be a computer-related problem or any other office issue, that person goes to respondent for help in working through any difficulty. She stressed that respondent has always "been there" for all of the support staff and professional staff at the office.

98. Dr. Robert Sofferman, Chief of Otolaryngology at the Medical Center Hospital of Vermont, stated his opinion that respondent is an extraordinary physician and that depriving respondent of his medical license would harm many more people than respondent.

99. Theodore Piececki, a chemical engineer who suffers from cancer of the larynx and who is respondent's patient, stated directly and simply that respondent saved his life by diagnosing his cancer in five minutes after other physicians had told him that he merely had an allergy.

100. Dr. Deborah Gonzalez, an otolaryngologist employed at the Medical Center Hospital of Vermont, testified that respondent treats his patients carefully and cautiously.

101. Carolyn Barchi, an operating room nurse clinician specialist at the Medical Center Hospital of Vermont, testified that respondent is very professional, that he is never condescending to nurses, and that he is the most highly-skilled surgeon she has seen.

102. Joanna Weinstock, a medical student at the University of Vermont and a librarian by training, testified that both her husband and her daughter are patients of respondent and that she and her family have found respondent to be a very patient caregiver.

103. All of these witnesses, most of whom have first-hand experience working with respondent or consulting him as patients, presented credible testimony to the Board. The main point of their testimony was to ask the Board not to remove respondent from the practice of medicine.

104. One of respondent's principal witnesses was Dr. Julius Cohen, who testified about respondent's quality of care. While the Board found Dr. Cohen to be a credible witness, his testimony did not weigh as heavily on the issue of disposition as that of the other witnesses enumerated above, because he did not directly address the disposition issue, as those other witnesses did.

105. Furthermore, equally credible evidence from Theoharis K. Seghorn, Ph.D., of New England Forensic Associates in Arlington, Massachusetts, showed that respondent is not a

pedophile (attracted to children) nor a hebophile (attracted to adolescents) and is not at risk for any recurrence of behavior similar to that which occurred with the adolescent, J.P.

106. Therefore, the Board specifically finds that the preponderance of credible evidence on the issue of disposition weighs heavily in favor of not revoking respondent's medical license and against petitioner's request to have his license revoked. The discipline imposed by the Board in this case will protect the public while not denying respondent's patients the medical care which they require from him.

Conclusions of Law

Docket No. MPS103-0891

A. (Count I) By engaging in sexual acts not including sexual intercourse with J.P., a minor, respondent displayed immoral conduct, for which respondent may be disciplined under 26 V.S.A. § 1398.

B. (Count II) By engaging in sexual acts not including sexual intercourse with J.P., a minor, respondent displayed dishonorable conduct, for which respondent may be disciplined under 26 V.S.A. § 1398.

C. (Count III) By engaging in sexual acts including sexual intercourse with J.P., a minor, respondent displayed immoral conduct, for which respondent may be disciplined under 26 V.S.A. § 1398.

D. (Count IV) By engaging in sexual acts including sexual intercourse with J.P., a minor, respondent displayed dishonorable conduct, for which respondent may be disciplined under 26 V.S.A. § 1398.

E. (Count V) By being convicted of the criminal offense of engaging in a sexual act with a minor, respondent displayed dishonorable conduct, for which respondent may be disciplined under 26 V.S.A. § 1398.

Docket No. MPS79-0993

F. (Count I) By interposing himself between L.L. and her psychiatrist, respondent, in the course of practice, grossly failed to use and exercise on a particular occasion, that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, whether or not actual injury to a patient has occurred and whether or not committed within or without the state, which constitutes unprofessional conduct under 26 V.S.A. § 1354(22).

G. (Count II) By prescribing a two-months' supply of Klonopin for L.L. on October 3, 1992, respondent, in the course of practice, grossly failed to use and exercise on a particular occasion, that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, whether or not actual injury to a patient has occurred and whether or not committed within or without the state, which constitutes unprofessional conduct under 26 V.S.A. § 1354(22).

H. (Count IV) By prescribing Xanax for L.L. during the same time period in which he prescribed two other benzodiazepines for her, respondent, in the course of practice, grossly failed to use and exercise on a particular occasion, that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, whether or not actual injury to a patient has occurred and whether or not committed within or without the state, which constitutes unprofessional conduct under 26 V.S.A. § 1354(22).

I. (Count V) By prescribing an excessive amount of Xanax for L.L. in November 1992, respondent, in the course of practice, grossly failed to use and exercise on a particular occasion, that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, whether or not actual injury to a patient has occurred and whether or not committed within or without the state, which constitutes unprofessional conduct under 26 V.S.A. § 1354(22).

J. (Count VIII) By prescribing benzodiazepines for L.L. out of the context of a structured, therapeutic setting and as an adjunct of his personal and sexual relationship with her, respondent, in the course of practice, grossly failed to use and exercise on a particular occasion, that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, whether or not actual injury to a patient has occurred and whether or not committed within or without the state, which constitutes unprofessional conduct under 26 V.S.A. § 1354(22).

K. (Count IX) By providing the types and quantities of benzodiazepines prescribed for L.L. in October and November 1992, respondent, in the course of practice, grossly failed to use and exercise on a particular occasion, that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, whether or not actual injury to a patient has occurred and whether or not committed within or

without the state, which constitutes unprofessional conduct under 26 V.S.A. § 1354(22).

L. (Count X) By prescribing Klonopin, Halcion, and Xanax for L.L. in violation of 18 V.S.A. § 4214(a) and in a way that was not medically valid, respondent prescribed drugs for other than legal and legitimate therapeutic purposes, which constitutes unprofessional conduct under 26 V.S.A. § 1354(6).

M. (Count XI) **By committing statutory violations as charged in Counts I, II, IV, V, VI, VIII, IX, and X** of the amended specification of charges in Docket No. MPS79-0993, respondent, in the course of practice, failed to use and exercise on repeated occasions, that degree of care, skill and proficiency which is commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions, whether or not actual injury to a patient has occurred and whether or not committed within or without the state, which constitutes unprofessional conduct under 26 V.S.A. § 1354(22).

N. (Count XII) By grossly and repeatedly failing to uphold the statutory standard of care, by prescribing drugs for other than legal and legitimate therapeutic purposes, by impermissibly mixing clinical functions with an intense personal relationship with L.L., by prescribing excessive and dangerous quantities of drugs, by keeping no medical records for L.L., and by failing to contact her previous treating physician, respondent displayed conduct which evidences unfitness to practice medicine, which constitutes unprofessional conduct under **26 V.S.A. § 1354(7).**

Opinion

Immoral conduct under 26 V.S.A. § 1398 is conduct proscribed by common understanding and practices. See Brody v. Barasch, 155 Vt. 103, 111, 582 A.2d 132 (1990). Common understanding and practices dictate that engaging in sexual activities with a minor constitutes immoral conduct subject to Board discipline.

"Dishonorable" conduct under 26 V.S.A. § 1398 connotes disgraceful behavior. See American Heritage Dictionary 204 (2d college ed. 1983). Respondent's conduct with J.P. was disgraceful and therefore dishonorable. Respondent's conduct violated the fundamental ethical principles which form the basis of public trust of the medical profession.

Gross failure to uphold the statutory standard of medical care is the failure to exercise even a slight degree of care but is more than an error of judgment, momentary inattention, or loss of presence of mind. See Rivard v. Roy, 124 Vt. 32, 35, 196 A.2d 497 (1963). Respondent's conduct in this case constitutes gross failure to uphold the statutory standard of medical care, because

his prescribing excessive quantities of benzodiazepines to L.L. over a period of months without keeping medical records and without contacting her treating physician was more than a mere judgment error, inattentiveness, or loss of presence of mind.

In citing Rivard, the Board is aware that the Vermont Supreme Court has declared, in the context of a medical malpractice action, that "[t]he concept of gross negligence left our law with the repeal of the guest-passenger statute." Deyo v. Kinley, 152 Vt. 196, 207-208, 565 A.2d 1286 (1989). The Court's rejection of the word "gross" in connection with a negligence charge to a jury was based upon its belief that language instructing a jury that recovery could be had only if the defendant was found to have committed "gross" negligence that was "more than an error of judgment" was misleading and confusing and suggested that a standard of care higher than ordinary care must be found in medical malpractice cases. Id. at 208.

The concept of "gross" negligence or "gross" failure to uphold the standard of care appears in the Medical Practice Act at 26 V.S.A. § 1354(22). Whether the word "gross" in § 1354(22) means "more than an error of judgment" or not, it clearly means that respondent has violated a standard even more stringent than that of ordinary care,--and that is the concept that the Board has applied here. See, e.g., In re Peter L. Braun, D.M.D., No. DE16-0193 at 5-6 (Office of the Secretary of State, Appellate Officer, Sept. 29, 1994); Vivian v. Examining Board of Architects, 61 Wis. 2d 627, ___, 213 N.W.2d 359, 364, (1974) (term "gross negligence" in professional licensing statute distinguishes between gross or grave acts of negligence as compared to less serious or more ordinary acts of negligence).

Repeated failure to uphold the statutory standard of medical care involves acts or omissions related to quality of care sufficiently discrete to constitute separate occasions. See Luther Emerson, M.D., No. AO-MP12-1292, 10-16 (Office of the Secretary of State, Appellate Officer, Aug. 11, 1993). Respondent's conduct in this case constitutes repeated failure to uphold the statutory standard of care, because, on several separate occasions between October 3 and November 11, 1992, he prescribed regulated drugs for L.L. In so doing, respondent also prescribed excessive quantities of drugs, failed to keep medical records for L.L., and failed to consult her previous treating physician.

"Unfitness" to practice medicine connotes inappropriate behavior. See American Heritage Dictionary 739 (2d college ed. 1983). By grossly and repeatedly failing to uphold the statutory standard of care, by prescribing drugs for other than legal and legitimate therapeutic purposes, by impermissibly mixing clinical functions with an intense personal relationship with L.L., by prescribing excessive and dangerous quantities of drugs, by

keeping no medical records for L.L., and by failing to contact her previous treating physician, respondent engaged in highly inappropriate behavior that clearly demonstrates unfitness to practice medicine.

Prescribing drugs for other than legal and legitimate therapeutic purposes means writing prescriptions illegally and for medically invalid purposes. See Luther Emerson, M.D., No. AO-MP12-1292, 3-6 (Office of the Secretary of State, Appellate Officer, Aug. 11, 1993). Respondent's writing of the Klonopin and Xanax prescriptions for L.L. was illegal, because he did not write the prescriptions in good faith and in the course of his professional practice, as required under 18 V.S.A. § 4214(a). He prescribed the drugs for a person whom he knew to have substance abuse problems and an eating disorder and whom he knew to be under psychiatric treatment. Furthermore, respondent had never seen L.L. in his office, she was not a surgical patient of his, and he was involved in an intimate personal relationship with her.

The writing of the Klonopin and Xanax prescriptions was not medically valid, because, when respondent wrote the prescriptions, he was mixing clinical functions with an intense personal relationship. In addition, he kept no medical records for L.L., and he did not attempt to contact her previous treating physicians.

Under 26 V.S.A. § 1361(b), the Board is given broad discretion to impose disciplinary sanctions. The Board may reprimand, condition, limit, suspend, or revoke a medical license. The Board may also "take such other action relating to discipline or practice as the board determines is proper." Id. In this case, the Board is convinced that respondent must not be permitted, through his teaching activities, to serve as a role model for medical students and others. Therefore, pursuant to the broad discretion granted to it under § 1361(b), the Board will impose a restiction prohibiting respondent from engaging in medical teaching.

Order

IT IS HEREBY ORDERED by the Board of Medical Practice of the State of Vermont that:

1. Count III is DISMISSED.

2. Count VII is DISMISSED.

3. On the basis of each of the Conclusions of Law A, B, C, D, E, F, G, H, I, J, K, L, M, or N, and not a combination of any or all of them, respondent's license to practice medicine is SUSPENDED for six months, all STAYED.

4. On the basis of each of the Conclusions of Law A, B, C, D, E, F, G, H, I, J, K, L, M, or N, and not a combination of any or all of them, respondent's license to practice medicine is CONDITIONED and RESTRICTED as follows:

(a) Within one year of the effective date of this order, respondent shall attend and successfully complete the mini-residency, "The Proper Prescribing of Controlled Dangerous Substances," directed by forensic and educational consultant William Vilensky, R.Ph., D.O., and held at the Robert Wood Johnson Medical School of the University of New Jersey. **Respondent shall provide Dr. Vilensky with any and all authorization necessary to permit Dr. Vilensky to communicate fully with the Board regarding respondent's attendance at and participation in the mini-residency.**

(b) If respondent fails to attend the mini-residency as required in paragraph **4(a)** above, the stay imposed upon the suspension of his medical license, as set forth in paragraph **3** above, shall immediately be lifted, and respondent's medical license shall be suspended until such time as respondent shall successfully complete the mini-residency required in paragraph **4(a)** above.

(c) Respondent shall not write prescriptions outside of his medical practice of otolaryngology.

(d) Respondent shall continue to particpate in therapy at least one hour per week with a therapist **approved by the Board and** specifically trained to deal with sexually deviant behavior.

(e) Respondent shall not serve as a faculty member nor in any other capacity teach medical students, residents, or hospital support staff in a classroom, operating room, or office setting.

(f) Respondent shall write a journal article of publishable quality on the impact of moral offenses by physicians upon public trust of the medical profession and upon the physician-patient relationship. A copy of said journal article shall be filed with the Board within six months of the effective date of this order. The Board shall provide a copy of said journal article to the Dean of the University of Vermont College of Medicine, to the faculty member(s) responsible for teaching medical ethics courses at the College of Medicine, **to the Board's South Investigating Committee, to the Vermont Medical Society,** and to other individuals or entities whom the Board deems may benefit from reading it.

(g) Respondent shall authorize and cause his probation officer to submit to the South Investigating Committee (Committee) of the Board, in writing and on forms approved by the

Committee, monthly reports showing evidence of satisfactory progress with the terms of his probation. The first such report shall be due during the month immediately following the date of entry of this revised order.

(h) Respondent shall authorize and cause his treating professional to submit to the South Investigating Committee (Committee) of the Board, in writing and on forms approved by the Committee, monthly reports showing evidence of satisfactory progress with the treatment required in paragraph 4(d) above. The first such report shall be due during the month immediately following the date of entry of this revised order.

(i) Respondent shall authorize and cause the chief of surgery at any hospital where he has privileges to submit to the South Investigating Committee (Committee) of the Board, in writing and on forms approved by the Committee, monthly reports showing evidence of respondent's satisfactory work performance. The first such report shall be due during the month immediately following the date of entry of this revised order.

5. The conditions and restrictions imposed by this order shall remain in effect until removed by the Board. Violation of any of the conditions or restrictions imposed by this order may result in a hearing to show cause. Such hearing may result in further discipline, including revocation of respondent's license.

6. Respondent shall bear all costs of complying with this order.

7. Pursuant to 3 V.S.A. § 131(c)(2)(C), this document is a public record.

8. Except as stated in paragraphs 4(g), 4(h), and 4(i) above, the effective date of this order is June 29, 1994, the date of entry of the Board's original order in this case.

Appeal Rights

This is a final administrative determination. A party may appeal by filing a written notice of appeal with the Director of the Office of Professional Regulation, Office of the Secretary of State, within 30 days of the effective date of this order. **In this case, both parties have filed notices of appeal. Those notices will be treated as having been timely filed for purposes of this revised order.**

Dated: December 7, 1994

VERMONT BOARD OF MEDICAL PRACTICE

Susan M. Spaulding

Susan M. Spaulding
Public Member
Hearing Panel Chair

Date of entry: December 8, 1994

DISSENTING OPINION

Petitioner filed a motion for reconsideration of the Board's June 29, 1994 order, to which the Board has responded. I agree with the majority's conclusions of law in this case, as set forth in the attached order. However, I disagree with the majority's findings of fact and disposition of the matter. I believe that respondent's license to practice medicine in the State of Vermont should be revoked.

Dated: December 7, 1994

Sally S. Hackett

Sally S. Hackett
Public Member