STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE Petitioner, vs. CARLOS A. COHEN, M.D., Respondent.	)	Case No. 10-3101PL

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on July 7, 2010, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Greg S. Marr, Esquire
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STATEMENT OF THE ISSUE

Respondent is a physician. In his office one morning he struck up a conversation with, and thereafter checked the blood pressure of, a nurse's assistant who, at the time, was working

under contract for one of Respondent's patients. Respondent invited the nurse's assistant to come back to his office later, by herself, so that he could recheck her blood pressure, and she accepted his offer. Following her return to the doctor's office, Respondent began to engage in sexual activities with the woman, but she refused to reciprocate his advances. The issue in this case is whether Respondent committed sexual misconduct with a patient, a patient's guardian, or a patient's representative.

PRELIMINARY STATEMENT

On October 23, 2009, Petitioner Department of Health issued an Administrative Complaint against Respondent Carlos A. Cohen, M.D. Petitioner alleged that Respondent had engaged in sexual misconduct with a patient. Dr. Cohen timely requested a formal hearing, and on December 15, 2009, Petitioner filed the pleadings with the Division of Administrative Hearings, where an Administrative Law Judge was assigned to preside in the matter.

The final hearing was to have been held on March 4, 2010. On February 24, 2010, however, Petitioner filed a Motion to Relinquish Jurisdiction, to enable a probable cause panel of the Board of Medicine to revisit the charges against Dr. Cohen. The motion, which was opposed, was granted on March 2, 2010.

On March 26, 2010, Petitioner issued an Amended Administrative Complaint against Dr. Cohen, which included

allegations supporting an alterative theory of the case, namely that Respondent had engaged in sexual misconduct with a patient's guardian or representative. Dr. Cohen again disputed the allegations, and on June 4, 2010, Petitioner filed the Amended Administrative Complaint with the Division of Administrative Hearings.

The final hearing took place on July 7, 2010, as scheduled, with both parties present. Petitioner called as witnesses Delray Beach Police Detective Troy Bear; Joseph Bensmihen, who owned the nurse registry for which the alleged victim worked; and M. L., the alleged victim. In addition, Petitioner's Exhibit 1 was received in evidence without objection.

Dr. Cohen testified on his own behalf and presented no other witnesses. Respondent's Exhibit 1 was admitted into evidence without objection.

The two-volume final hearing transcript was filed on July 22, 2010. Proposed Recommended Orders were due, and were filed, on August 3, 2010, the original deadline having been enlarged by one day at Respondent's (unopposed) request. Each party's Proposed Recommended Order has been considered.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2009 Florida Statutes.

FINDINGS OF FACT

1. Dr. Carlos A. Cohen ("Cohen") is a board-certified infectious disease specialist who was, at all times relevant to this case, licensed to practice medicine in the State of Florida. His office is located in Palm Beach County, and he has privileges at several hospitals in that area.

2. Petitioner Department of Health (the "Department") has regulatory jurisdiction over licensed physicians such as Cohen. In particular, the Department is authorized to file and prosecute an administrative complaint against a physician, as it has done in this instance, when a panel of the Board of Medicine has found that probable cause exists to suspect that the physician has committed a disciplinable offense.

3. The events that gave rise to this case occurred on July 5, 2009. On that Sunday morning, as on other weekend days, Cohen's office was open so that patients needing antibiotic infusion therapy could receive treatment. Cohen himself did not routinely attend to patients in his office on weekends. Rather, nurses administered the infusion therapy on his orders. Cohen did, however, make rounds at the local hospitals on weekends when he was on call, as he happened to be on this particular day.

4. At some point during the morning, Cohen's wife called him on his cell phone and told him that the power was out at his

office. Cohen does not clearly remember where he was when he received this call, but upon hearing that his office was without electricity, he stopped what he was doing and headed there to investigate.

5. Meantime, a nurse's assistant named "M. L." was driving "Jane Doe," an elderly patient of Cohen's, to the doctor's office for infusion therapy. M. L. worked for a nurse registry that provided licensed caregivers on a contractual basis to persons needing assistance, such as Jane Doe. M. L. had not met Jane Doe before that morning (and, it turned out, would not see her again after July 5, 2009). M. L.'s job that day was to help Jane Doe get dressed, take her to the doctor's office, bring her back home, prepare a meal or snack for her, provide physical assistance as needed to allow Jane Doe to complete her daily activities, and generally watch out for the patient's safety. M. L. had not been informed of Jane Doe's medical condition and was not authorized to make medical decisions on Jane Doe's behalf. She neither had nor needed access to Jane Doe's medical records.

6. Cohen arrived at his office, coincidentally, at about the same time as M. L. and Jane Doe. All three were outside, walking towards the entrance to the building, when an electrical transformer exploded overhead, making a loud noise. This startling event unsettled M. L.

7. Once inside, Jane Doe was taken back for treatment. M. L. remained in the front reception area to wait for Jane Doe to return. Cohen soon entered this front room as well, to wait for the arrival of a crew from the electric company, which, he had been told, was on its way to fix the problem with the transformer. As they waited together, M. L. deduced that Cohen was a doctor from the fact that others were addressing him by that title.

8. In time, Cohen took a seat next to M. L., and the two struck up a conversation. M. L.'s primary language is Haitian Creole, and she has a limited command of English. Cohen's native tongue is Spanish, but he is fluent in English. The two communicated in English.

9. M. L. told Cohen that the explosion earlier had made her nervous. She also mentioned to him that she needed medicine to control her blood pressure, which she had forgotten to take that morning. Cohen offered to take M. L.'s blood pressure, and she agreed to let him do so. To accomplish this, Cohen led M. L. out of the reception area and into a hallway leading to the examination rooms. While M. L. sat on a stool in the hallway, Cohen took her blood pressure, which was elevated. Cohen informed M. L. that her blood pressure was high.

10. In the course of their conversation, M. L. made Cohen aware that she would be off duty that afternoon. Cohen needed

to complete his rounds at the hospitals, but he, too, would be free later in the day. Cohen invited M. L. to return to his office, alone, at 4:00 p.m. so that he could recheck her blood pressure.[1] Cohen knew that no one else would be in the office at that time. M. L. accepted the doctor's invitation.

11. Cohen and M. L. then went their separate ways. Cohen remained at the office for a while, until the electricity came back on, after which he left to complete his rounds. M. L. took Jane Doe home and finished her shift.

12. The two met again that afternoon, as planned, at Cohen's office around 4:00 p.m. Once inside the office, where the two were alone, Cohen took M. L.'s blood pressure. This time, the numbers were normal, and Cohen so informed M. L. M. L. stood up to shake Cohen's hand, thank him, and say goodbye. Suddenly, Cohen pulled M. L. into an embrace, which she did not welcome. Cohen continued to force himself upon M. L., pinning her against the wall. He kissed her, sucked her breasts, and exposed his penis, demanding that she "kiss" it. All of this was against M. L.'s will.[2]

13. M. L. managed to break free, and she fled Cohen's office.[3] Cohen chased after her. They got in their respective cars and drove away, M. L. heading home, Cohen following her in hot pursuit.[4] When she arrived at her house, Cohen pulled up

behind her. M. L. went inside, and Cohen left without further incident.

Ultimate Factual Determinations

14. The evidence is insufficient to establish, clearly and convincingly, that M. L. was either a "guardian" or "representative" of Jane Doe as those terms are used in Section 456.063(1), Florida Statutes, which proscribes "[s]exual misconduct in the practice of a health care profession." Even if M. L. were in fact Jane Doe's proxy, however, the evidence is insufficient to establish that Cohen had a professional relationship with M. L. qua Jane Doe's proxy. To the contrary, the evidence clearly and convincingly proves that the relevant professional relationship was that which existed between Cohen and M. L. in her own right; that is, in all of her relevant dealings with Cohen, M. L. acted exclusively in her personal capacity and on her own behalf, no one else's. Thus, Cohen is not guilty of engaging in sexual misconduct with a patient's guardian or representative.

15. Cohen provided medical attention to M. L. on two separate occasions while acting in his professional capacity as a physician. On both occasions, Cohen was in his office, a place where his authority as a doctor is greatest. Moreover, because Cohen was in his office, surrounded by the tools of his trade, M. L. reasonably could have expected that the doctor

would do more than simply take her blood pressure if, in his professional judgment based on her blood pressure or other reasons, he determined that she needed additional treatment. Such an expectation was especially justified in this instance because Cohen knew that M. L. suffered from hypertension when he invited her to *return* to his office for the purpose of *rechecking* her blood pressure, which was elevated that morning because (as Cohen also knew) M. L. had forgotten to take her medicine and had been startled by an explosion. In this context, M. L. was reasonably entitled to place her trust and confidence in Cohen, and to rely upon his special expertise and judgment as a physician in determining whether she was alright.

16. As it happened, Cohen determined, after rechecking M. L.'s blood pressure, that further medical intervention was unnecessary. This was, in fact, a professional judgment upon which M. L. reasonably could (and apparently did) rely. A doctor's decision that all is well, even if based on little more than a routine procedure such as a blood pressure test, is an exercise of professional judgment, no less than if the doctor concludes that something is amiss and orders additional tests or treatment. It was this exercise of professional judgment that distinguished Cohen's taking of M. L.'s blood pressure from, e.g., M. L.'s performing a self-test at home or in a drugstore.

17. The evidence establishes, clearly and convincingly, that, although the physician-patient relationship was casual or informal in nature, M. L. was nevertheless a patient of Cohen's for purposes of the statutes which prohibit a doctor from engaging in sexual activity with a patient. It is therefore determined, as a matter of ultimate fact, that Cohen is guilty of engaging in sexual misconduct with a patient, which is a disciplinable offense pursuant to Sections 456.072(1)(v) and 458.331(1)(j), (nn), Florida Statutes.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, and 120.57(1), Florida Statutes (2010).

19. The Department has brought three charges against Cohen. All three are founded on the same conduct, namely Cohen's sexually aggressive behavior vis-à-vis M. L. The Department contends, alternatively, that M. L. was either: (a) a "guardian" or "representative" of Cohen's patient Jane Doe; or (b) a patient of Cohen's in her own right. The undersigned rejects theory (a) and accepts theory (b), for the reasons that follow.

20. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So.

2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Cohen by clear and convincing evidence. Department of Banking & Fin., Div. of Sec. & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

21. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District

Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

22. In Count I of the Amended Administrative Complaint, the Department charged Cohen under Section 456.072(1), Florida Statutes, which provides in pertinent part as follows:

> (1) The following acts shall constitute grounds for which . . . disciplinary actions . . . may be taken:
>
> * * *
>
> (v) Engaging or attempting to engage in sexual misconduct as defined and prohibited in s. 456.063(1).

Section 456.063(1), Florida Statutes, defines "sexual misconduct in the practice of a health care profession" as meaning a

> violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of such health care profession. Sexual misconduct in the practice of a health care profession is prohibited.

(Emphasis added.)

23. Being penal in nature, the foregoing statutes "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

24. The terms "guardian" and patient's "representative" are not defined in Section 456.063(1), Florida Statutes. The undersigned concludes, however, that these terms are technical in nature because they each have acquired a peculiar meaning in the law. Moreover, the respective technical meanings of these terms are appropriate to the statute in question. The law requires, therefore, that these legal terms of art be given their technical meanings, unless a contrary intention is plainly shown, which is not the case here. See Ocasio v. Bureau of Crimes Compensation, Div. of Workers Compensation, 408 So. 2d 751, 752-53 (Fla. 3d DCA 1982); see also Tampa v. Thatcher Glass Corp., 445 So. 2d 578, 579 n.2 (Fla. 1984)("The presumption favoring the 'popular signification' of technical terms applies unless the profession to which the technical term belongs is the legal profession. Terms of special legal significance are presumed to have been used by the legislature according to their legal meanings.".

25. The relevant technical meanings of the words in question properly can be ascertained from other statutes, on the

principle that "when statutes employ exactly the same words or phrases, the legislature is assumed to intend the same meaning." Schorb v. Schorb, 547 So. 2d 985, 987 (Fla. 2d DCA 1989), disapproved, Coleman v. Coleman, 629 So. 2d 103, 105 (Fla. 1993)(noting that the Schorb court's analysis would have been correct had the statute at issue been ambiguous). The term "guardian" is defined in Section 744.102(9), Florida Statutes, to mean "a person who has been appointed by the court to act on behalf of a ward's person or property, or both." It is concluded that this is what the legislature intended the term "guardian" to mean in the context of Section 456.063(1), Florida Statutes. As stated above, the Department failed to prove that M. L. was, in fact, Jane Doe's guardian.

26. The term "patient representative" is defined in Section 408.051(2)(g), Florida Statutes, as follows:

> "Patient representative" means a parent of a minor patient, a court-appointed guardian for the patient, a health care surrogate, or a person holding a power of attorney or notarized consent appropriately executed by the patient granting permission to a health care facility or health care provider to disclose the patient's health care information to that person. In the case of a deceased patient, the term also means the personal representative of the estate of the deceased patient; the deceased patient's surviving spouse, surviving parent, or surviving adult child; the parent or guardian of a surviving minor child of the deceased patient; the attorney for the patient's surviving spouse, parent, or adult

> child; or the attorney for the parent or guardian of a surviving minor child.

It is concluded that the foregoing definition illuminates the legislative intent with regard to the meaning of the term "representative of the patient" as used in Section 456.063(1), Florida Statutes. As stated above, the Department failed to prove that M. L. was, in fact, a "representative of the patient" referred to herein as Jane Doe.

27. Further, it is clear from the plain language of Section 456.063(1), Florida Statutes, that, to commit sexual misconduct in violation of this section, the health care professional must misuse "the professional relationship" between himself and the patient or the patient's proxy *as a proxy*. In this case, however, the Department failed to prove the existence of any relationship, professional or otherwise, between Cohen and M. L. qua Jane Doe's proxy (assuming M. L. served Jane Doe in a representative capacity). The only relevant "professional relationship" here was that which existed between Cohen and M. L. *as M. L.* Thus, even if M. L. were a "guardian" or "representative" of Jane Doe, the evidence yet would be insufficient to establish that Cohen committed "sexual misconduct in the practice of a health care profession" against a patient's guardian or representative.

28. In Counts II and III of the Amended Administrative Complaint, the Department charged Cohen, respectively, under Subsections (j) and (nn) of Section 458.331(1), Florida Statutes, which provide as follows:

> (1) The following acts constitute grounds for . . . disciplinary action[:]
>
> * * *
>
> (j) Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.
>
> * * *
>
> (nn) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

29. The particular provision of Chapter 458 that the Department accused Cohen of having violated (thereby allegedly committing a disciplinable act pursuant to Section 458.331(1)(nn)) is Section 458.329, Florida Statutes, which provides as follows:

> The physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of medicine means violation of the physician-patient relationship through which the physician uses said relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient.

> Sexual misconduct in the practice of medicine is prohibited.

30. Florida Administrative Code Rule 64B8-9.008 amplifies the foregoing statutory provisions relating to sexual misconduct in the practice of medicine. The Rule provides in relevant part as follows:

> (1) Sexual contact with a patient is sexual misconduct and is a violation of Sections 458.329 and 458.331(1)(j), F.S.
> (2) For purposes of this rule, sexual misconduct between a physician and a patient includes, but it is not limited to:
> (a) Sexual behavior or involvement with a patient including verbal or physical behavior which
> 1. May reasonably be interpreted as romantic involvement with a patient regardless of whether such involvement occurs in the professional setting or outside of it;
> 2. May reasonably be interpreted as intended for the sexual arousal or gratification of the physician, the patient or any third party; or
> 3. May reasonably be interpreted by the patient as being sexual.
> (b) Sexual behavior or involvement with a patient not actively receiving treatment from the physician, including verbal or physical behavior or involvement which meets any one or more of the criteria in paragraph (2)(a) above and which
> 1. Results from the use or exploitation of trust, knowledge, influence or emotions derived from the professional relationship;
> 2. Misuses privileged information or access to privileged information to meet the physician's personal or sexual needs; or
> 3. Is an abuse or reasonably appears to be an abuse of authority or power.
>
> * * *

(4) The determination of when a person is a patient for purposes of this rule is made on a case by case basis with consideration given to the nature, extent, and context of the professional relationship between the physician and the person. The fact that a person is not actively receiving treatment or professional services from a physician is not determinative of this issue. A person is presumed to remain a patient until the patient physician-relationship is terminated.

* * *

(7) A patient's consent to, initiation of, or participation in sexual behavior or involvement with a physician does not change the nature of the conduct nor lift the statutory prohibition.

* * *

(9) Upon a finding that a physician has committed unprofessional conduct by engaging in sexual misconduct, the Board will impose such discipline as the Board deems necessary to protect the public. The sanctions available to the Board are set forth in Rule 64B8-8.001, F.A.C., and include restriction or limitation of the physician's practice, revocation or suspension of the physician's license.

31. To support a charge of sexual misconduct in the practice of medicine, the physician-patient relationship may be an informal one, as here. For example, in Agency for Health Care Administration v. Lortz, DOAH Case No. 96-0793, 1996 Fla. Div. Adm. Hear. LEXIS 3252 (Aug. 13, 1996), a young woman told a doctor with whom she was casually acquainted but had no prior professional relationship that "if he would like to see her

naked," he could perform a "physical examination" upon her, which she needed "because she was moving to Australia." Id. at *4. The doctor agreed to perform the "physical" at his home. By so agreeing, it would later be determined, the doctor "formed a physician/patient relationship with [the young woman] at that time." Id. The couple eventually settled on a date, and in due course the woman and her "little dog" arrived at the doctor's doorstep; she "was carrying a beer, a bottle of wine, and a box of chocolates." Id. at *5-*6. Based on the ensuing events, which ended badly after the woman bit the doctor's penis, leading to an altercation, the doctor was found guilty of, among other things, sexual misconduct in the practice of medicine. The finding that a "physician-patient relationship did exist" as soon as the doctor agreed to "perform the physical examination in his home" was subsequently upheld on appeal. See Lortz v. Department of Health, 700 So. 2d 383, 384 n.7 (Fla. 1st DCA 1997).

32. Consider the facts of this case as compared to those of Lortz. Here, Cohen offered to check a hypertensive woman's blood pressure in his office upon learning that she had forgotten to take her medicine that morning and that she was still nervous as a consequence of having been nearby, a short time earlier, when an electrical transformer exploded. Because the woman's blood pressure was elevated, Cohen invited her back

to his office later in the day for a follow-up test, for which there was at least some medical indication. In Lortz, by contrast, a doctor agreed to physically "examine" a "twenty-two year old college student"[5] in his home, ostensibly so that she could obtain a visa to move to Australia. The doctor's agreement in Lortz to perform a "physical examination" on the young woman gave the arrangement a sufficient patina of medical purpose to support the determination that the woman was a "patient" of the doctor, even though the circumstances as a whole suggested that their relationship was predominantly social in nature. The facts of the instant case, in sum, form a firmer foundation for the determination that a physician-patient relationship existed than those of Lortz because here there was more than a veneer of medical purpose: M. L. actually suffered from a disease which Cohen offered to (and did) monitor, albeit on an informal basis, in his office no less, not his home.

33. It is concluded that the law supports the determinations of ultimate fact set forth above, including the finding that M. L. was Cohen's patient, which establish Cohen's guilt on the charge of sexual misconduct in the practice of medicine.

34. The Board of Medicine imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B8-8.001. The range of

penalties for a first offense comprising a single violation of the statutes prohibiting sexual misconduct in the practice of medicine is set forth in Rule 64B8-8.001(2)(j) as follows:

> From one (1) year suspension to be followed by a period of probation and a reprimand, 100 to 200 hours of community service, and an administrative fine of $5,000.00 to revocation or denial and an administrative fine of $10,000.00.

35. Aggravating and mitigating circumstances are set forth in Rule 64B8-8.001(3). In addition, Rule 64B8-8.001(4) prescribes aggravating circumstances that, if found to have been present in connection with the commission of sexual misconduct in the practice of medicine, authorize the Board of Medicine to consider revocation as an appropriate penalty. Neither party has urged that either a harsher or less stringent penalty should be imposed based upon the application of any of the aggravating and mitigating circumstances. The undersigned nevertheless has considered all of these factors and concludes that none warrants a deviation from the recommended penalties for a first offense involving a single act of sexual misconduct.

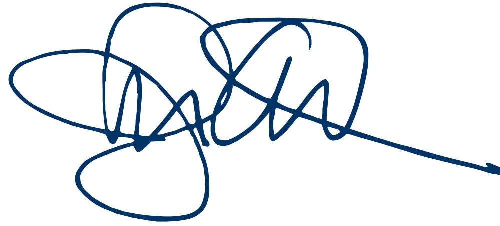
36. The Department, however, has proposed, without explanation, a set of penalties that does not include a one-year suspension and hence is more lenient than the minimum set forth in Rule 64B8-8.001(2)(j). While the undersigned is reluctant to recommend a more severe punishment than the prosecutor seeks, in

this case he is unable to identify circumstances that justify a downward departure from the minimum discipline set forth in the penalty guidelines. Therefore, it is recommended that the Board of Medicine impose penalties consistent with Rule 64B8-8.001(2)(j).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order finding Cohen guilty of committing a single act of sexual misconduct with a patient, in violation of Section 458.329, Florida Statutes. Because this is Cohen's first such offense, it is further RECOMMENDED that the Board of Medicine: (a) suspend Cohen's medical license for one year, to be followed by both (i) a period of two years' probation, one condition of which should be the completion of five hours of continuing medical education in risk management, and (ii) a reprimand against Cohen's license; (b) require that Cohen complete 100 hours of community service; and (c) impose an administrative fine of $5,000.00.

DONE AND ENTERED this 14th day of September, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of September, 2010.

ENDNOTES

[1]/ Cohen claims that he asked M. L. to return to his office, not for another blood pressure test, but so that she could give him her name and phone number, which information he, in turn, could pass along to patients of his who might be interested in retaining M. L. as a private-duty nurse's assistant. At some point Cohen did, in fact, suggest to M. L. that he could refer business prospects to her, and M. L. did provide Cohen with her name and phone number when the two met for the second time, on Sunday afternoon. M. L. denies, however, that Cohen mentioned to her *in the morning* that he could be a source of referrals, but instead insists that he raised this possibility for the first time in the afternoon. This particular dispute is ultimately immaterial because the undersigned rejects as incredible Cohen's testimony that the only ostensible reason for inviting M. L. to return to his office was to obtain readily available information that he easily could have taken on the spot——or been provided later by telephone. M. L., in short, did not need to see Cohen again to give him her name and number; she did, however, need to come back to his office if he were going

to recheck her blood pressure. The undersigned credits M. L.'s testimony that Cohen invited her to return in the afternoon for the purpose of rechecking her blood pressure, which he had just found to be elevated.

[2]/ The undersigned rejects as incredible Cohen's testimony that he and M. L. engaged in consensual sexual activities. While the undersigned accepts that Cohen possibly believed or hoped M. L. would respond favorably to his forceful advances, M. L.'s testimony that she was *not* a willing participant was clear and convincing.

[3]/ The undersigned rejects as incredible Cohen's testimony that he called it quits when M. L. asked him for money to help pay her bills.

[4]/ The undersigned rejects as incredible Cohen's testimony that M. L. flirted with him as they were driving. Likewise rejected is Cohen's testimony that he: (a) followed M. L. home to instill in her the hope that he would call her later to arrange a tryst at that location, having learned how to get there; and (b) believed such hope of a future liaison would cause M. L. not to be upset with him for prematurely terminating their previous sexual encounter, thereby lessening the possibility that M. L. might falsely accuse him of having attempted to rape her.

[5]/ Lortz, 700 So. 2d at 384.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.