STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF OSTEOPATHIC MEDICINE,

Petitioner,

vs. Case No. 13-4756PL

DAVID SIMON, D.O.,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on May 20, 2014, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Yolonda Y. Green, Esquire
Mary S. Miller, Esquire
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Tallahassee, Florida 32399-3265

For Respondent: David W. Spicer, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, an osteopathic physician who had a year-long consensual affair with

one of his patients, committed sexual misconduct in the practice of osteopathic medicine; and if so, whether Petitioner should impose discipline on Respondent's license within the applicable penalty guidelines or take some other action.

PRELIMINARY STATEMENT

On July 11, 2013, Petitioner Department of Health issued an Administrative Complaint against Respondent David Simon, D.O. Petitioner alleged that Respondent had engaged in sexual misconduct with a patient. Dr. Simon timely requested a formal hearing, and on December 11, 2013, Petitioner filed the pleadings with the Division of Administrative Hearings, where an Administrative Law Judge was assigned to preside in the matter.

After one continuance, which was unopposed, the final hearing took place on May 20, 2014, as scheduled, with both parties present. Petitioner called Dr. Simon as its only witness. Joint Exhibit 1 was received, as were Petitioner's Exhibits 6 and 7.[1/] Dr. Simon presented two witnesses: Dr. Mary Scanlon and Helen Virginia Bush. Respondent's Exhibits 1, 2, and 3 were admitted as well.

The final hearing transcript was filed on June 9, 2014. Proposed recommended orders were due, and were filed, on July 15, 2014. Each party's Proposed Recommended Order has been considered.

Unless otherwise indicated, citations to the Florida Statutes and Florida Administrative Code refer to the provisions in effect at the time Respondent allegedly engaged in the conduct upon which Petitioner's charges against him are based.

FINDINGS OF FACT

1. Respondent David Simon, D.O. ("Simon"), is a family practitioner who was, at all times relevant to this case, licensed as an osteopathic physician in the state of Florida. His office was located in Palm Beach County, where he practiced medicine from 1985 through the events at issue and beyond, until at least the date of the final hearing.

2. Petitioner Department of Health (the "Department") has regulatory jurisdiction over licensed osteopathic physicians such as Simon. 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 Osteopathic Medicine has found that probable cause exists to suspect that the physician has committed a disciplinable offense.

3. In May 2005, a 30-something year-old woman named C.K. became a regular patient of Simon's. As C.K.'s primary care physician from 2005 until the end of 2011, Simon treated C.K. for a variety of physical and psychological disorders. The nature and quality of Simon's medical care of C.K. are not in

dispute, the Department having neither alleged nor proved that Simon's treatment of C.K. ever fell below the applicable standard of care, or that Simon's medical records failed to justify any course of treatment he undertook for her benefit.

4. In or around November 2010, while their otherwise unremarkable physician-patient relationship remained intact, Simon and C.K. entered into a mutually consensual sexual relationship. This affair had its genesis in a discussion between Simon and C.K. that occurred on October 12, 2010, during an office visit. While being seen that day, C.K. expressed concern about having been exposed recently to sexually transmitted diseases as a result of experiences which she not only related in some detail to Simon, but also corroborated with photographic evidence stored in her cell phone. In view of these disclosures, Simon lost his professional detachment and entered into a flirtatious conversation of a personal, even intimate, nature with C.K. that was outside the scope of his examination or treatment of C.K. as a patient. C.K. was a willing participant in the non-clinical sexual banter which ensued.

5. Some days or weeks later (the precise date is unavailable), C.K. stopped by Simon's office on a Friday afternoon after business hours, when Simon was there alone. The two resumed their previous, personal conversation, and C.K.

proposed that they have sexual relations with one another, a suggestion to which Simon responded positively.

6. Within weeks afterwards, Simon called C.K., and they made arrangements to meet privately after hours at his office, which they later did, as mentioned above, sometime in November 2010. Beginning with that visit, and continuing for about one year, Simon and C.K. met once or twice a month in Simon's office, alone, to engage in sexual activity.[2/] Simon used his cell phone to call or text C.K. to schedule these trysts.

7. C.K. consented to the sexual activity with Simon. She was, however, incapable of giving free, full, and informed consent to such activity with her physician.[3/] Because C.K. was, at all relevant times, a competent adult, the undersigned infers that her incapacity to freely give fully informed consent stemmed from Simon's powerful influence over her as a patient of his.

8. C.K. and Simon did not have sexual relations during, or as part of, any visit that C.K. made to Simon's office for the purpose of seeking medical advice or care. In other words, doctor's appointments did not provide occasions, or serve as cover, for intimate rendezvous. There is no persuasive evidence that Simon ever tried to convince C.K. that their sexual encounters would be therapeutic or were somehow part of a course

of purported medical treatment or examination. Rather, Simon testified credibly (and it is found) that he and C.K. kept their personal and professional relationships separate and distinct.[4/]

9. The Department has made much of the *type* of sexual acts that Simon and C.K. engaged in. Simon described their behavior, somewhat euphemistically, as "sexually adventurous." The Department, in contrast, has implied that Simon is a paraphiliac or pervert, a contention which the undersigned rejects as not just unsupported, but disproved by the evidence. Although at least some of the sexual conduct in question might fairly be dubbed unconventional, more important is that every interaction between these adults took place in private, within the context of mutual consent. There is, moreover, no clear and convincing proof in this record of sexual violence or aggression, nor any evidence of actual injury, damage, or harm. For reasons that will be discussed, the undersigned has concluded that the details of Simon and C.K.'s sexual encounters are irrelevant to the charges at hand; thus, no additional findings about the specific sexual activities are necessary.

10. Simon's liaison with C.K. lasted until late December 2011, at which time C.K. abruptly terminated the relationship. The evidence fails to establish C.K.'s reasons for doing so. Thus, the circumstances surrounding the end of

the affair, of which scant evidence was presented in any event, are irrelevant.

11. In the wake of the break up, Simon's affair with C.K. became a matter of public knowledge, gaining him the sort of notoriety few physicians would covet. Facing personal disaster and professional ruin, Simon sought counseling from Helen Virginia Bush, a specialist in sex therapy who is licensed both as a clinical social worker and as a marriage and family therapist. Ms. Bush counseled Simon on subjects such as professional boundaries and erotic transference. At her urging, Simon attended and successfully completed the PBI Professional Boundaries Course, a nationally recognized program for doctors and others at risk of developing inappropriate personal relationships with patients or clients. Ms. Bush testified credibly that in her opinion, which the undersigned accepts, Simon is unlikely to enter into another sexual relationship with a patient or attempt to do so.

12. Simon shares office space and staff with Mary Scanlon, D.O., a physician who, like Simon, specializes in family medicine. Although she has an independent practice, Dr. Scanlon works in close proximity to Simon, whom she met in 2000 during her residency when Simon was the attending physician. Dr. Scanlon believes Simon to be an excellent physician from whom she has learned much about practicing medicine, and her

credible testimony that Simon's patients hold him in high regard and have largely stood by him throughout this scandal is accepted.

13. Dr. Scanlon was an effective character witness for Simon who favorably impressed the undersigned with her earnest and forthright demeanor. That she has elected to continue practicing in the office she shares with Simon despite the public disclosure of Simon's disgraceful dalliance with C.K. (which she in no way condoned or tried to excuse), even though she is not contractually bound to stay there, manifests genuine support of and respect for Simon, and tells the undersigned—more persuasively than any testimony—that his career is worth saving.

14. This is the first time that any disciplinary action has been taken against Simon's medical license.

Ultimate Factual Determinations

15. The evidence establishes, clearly and convincingly, that Simon exercised influence within the patient-physician relationship, albeit probably unwittingly, for purposes of engaging C.K. in sexual activity. This ultimate finding is based in part on an inference which follows from the presumed fact of C.K.'s incapacity to consent to sexual activity with Simon, but also on other circumstances, the most salient of which are that the initial steps toward the affair were taken

during a medical examination, and that all of the sexual activity at issue occurred in the doctor's office.

16. It is therefore determined, as a matter of ultimate fact, that Simon is guilty of engaging in sexual misconduct with a patient, as more fully defined in section 459.0141, Florida Statutes, which is a disciplinable offense punishable under section 459.015(1)(l).

CONCLUSIONS OF LAW

17. 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 (2013).

18. The Department has brought two charges against Simon, each founded on the same conduct, namely Simon's affair with C.K., which the Department alleges Simon carried out through the use of the patient-physician relationship, which gave him exploitable influence over C.K.

19. 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. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Simon by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. 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. Dep't of Bus. & Prof'l Reg., Bd. of Med., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

20. 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 in 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).

21. Taking the instant charges in reverse order, the Department accused Simon, in Count Two of the Administrative Complaint, with sexual misconduct under section 459.015(1)(l), Florida Statutes, which provides in pertinent part as follows:

> (1) The following acts shall constitute grounds for . . . disciplinary action[:]
>
> * * *
>
> (l) 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.

22. The kind of inappropriate sexual activity between physicians and patients that subjects a physician to discipline under section 459.015(1)(l) is also the focus of section 459.0141, which defines "[s]exual misconduct in the practice of osteopathic medicine" as meaning a

> violation of the osteopathic physician-patient relationship through which the osteopathic physician uses the 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 osteopathic medicine is prohibited.

(emphasis added).

23. In Count One of the Administrative Complaint, the Department charged Simon, under section 459.015(1)(pp), with

having violated section 459.0141 by committing sexual misconduct in the practice of osteopathic medicine. Section 459.015(1)(pp) defines a catchall offense that subjects licensees to discipline for violating any provision of chapter 459 "or chapter 456, or any rules adopted pursuant thereto." The Department considers the last sentence in section 459.0141 ("[s]exual misconduct . . . is prohibited") to be an independently violable provision of chapter 459 and consequently takes the position that sexual activity with a patient is punishable not only under section 459.015(1)(l), but also as a separate catchall offense under paragraph (pp).

24. As a threshold matter, the undersigned finds it necessary to consider whether section 459.015(1)(l) defines a disciplinable offense distinct from that which the Department believes is described in sections 459.015(1)(pp)/459.0141. When determining the meaning of disciplinary statutes, such as these, the law demands that the pertinent language "be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)("[W]here a statute provides for revocation of a license the grounds must be strictly construed

because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011)(statutes imposing a penalty must never be extended by construction).

25. It will be observed initially that sections 459.015(1)(l) and 459.0141 are in pari materia——that is, they address the same subject, i.e., sexual misconduct by an osteopathic physician. As the Florida Supreme Court has explained:

> [It is a] well-settled rule that, where two statutes operate on the same subject without positive inconsistency or repugnancy, courts must construe them so as to preserve the force of both without destroying their evident intent, if possible. It is an accepted maxim of statutory construction that a law should be construed together with and in harmony with any other statute relating to the same subject matter or having the same purpose, even though the statutes were not enacted at the same time.

Mann v. Goodyear Tire & Rubber Co., 300 So. 2d 666, 668 (Fla. 1974)(footnotes omitted); see also, e.g., Mehl v. State, 632 So. 2d 593, 595 (Fla. 1993)(separate statutory provisions that are in pari materia should be construed to express a unified legislative purpose); Lincoln v. Fla. Parole Comm'n, 643 So. 2d 668, 671

(Fla. 1st DCA 1994)(statutes on same subject and having same general purpose should be construed in pari materia).

26. No inconsistency exists between sections 459.015(1)(l) and 459.0141. To the contrary, the two statutes are complementary. Section 459.015(1)(l) makes it a disciplinable offense to "[e]xercise influence within a patient-physician relationship" for the purpose of seducing a patient. Section 459.0141 supplies a definition of "sexual misconduct in the practice of osteopathic medicine" whose essence is "us[ing] the [patient-physician] relationship" to seduce a patient. There is no semantic difference between "exercising influence within a patient-physician relationship," on one hand, and "using the patient-physician relationship," on the other, when each of the phrases is plainly intended, as here, to identify a wrongful means of seduction. Behind both formulations is the notion that the physician holds the upper hand in the patient-physician relationship, and therefore, if so inclined, can exploit this relatively powerful position to overreach the patient in a sexual transaction. Both of the statutes at issue——sections 459.015(1)(l) and 459.0141——express the same policy of discouraging physicians from using their position of authority as leverage to persuade patients to indulge in sexual relations.

27. Given the identity of meaning, the undersigned cannot imagine a scenario (and concludes there is none) in which a

physician who exercised influence within a patient-physician relationship to engage a patient in sexual activity could not also be said to have used the relationship to engage the patient in sexual activity, or vice versa, where the use of a patient-physician relationship for such a purpose would not simultaneously entail the exercise of undue influence within the relationship. The Board of Osteopathic Medicine evidently has come to the same conclusion, for in its penalty guidelines the board describes the offense defined in section 459.015(1)(l) as "[s]exual misconduct within the patient physician relationship." See Fla. Admin. Code R. 64B15-19.002(13). This summary clearly conflates——and thus equates——"[s]exual misconduct in the practice of osteopathic medicine" (§ 459.0141) with "[e]xercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity" (§ 459.015(1)(l)).

28. When the two statutes are read together, the statement in section 459.0141 that sexual misconduct "is prohibited" stands as a declaration of the fact that such misconduct *is* prohibited——under section 459.015(1)(l), which specifically subjects a physician to disciplinary action for taking advantage of a patient by enticing him or her to engage in sexual activity. It is concluded that because, according to the plain and unambiguous language of the statutes in question,[5/] sexual misconduct in the practice of osteopathic medicine as defined in

section 459.0141 is the specific offense punishable under section 459.015(1)(l), the same misconduct cannot also be punishable under paragraph (pp) as a general catchall offense.[6/] Therefore, although the Administrative Complaint contains two counts, there is but one disciplinable offense in back of the charges.

29. The next legal issue to resolve concerns the operation of the presumption of incapacity set forth in section 459.015(1)(l), which provides that a "patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician." Under the plain language of the statute, this presumption is irrebuttable, or conclusive. See Hall v. Recchi Am., 671 So. 2d 197, 200 (Fla. 1st DCA 1996)("A presumption is conclusive if a party is not given a reasonable opportunity to disprove either the predicate fact or the ultimate fact presumed."). Pursuant to section 459.015(1)(l), if sexual activity between physician and patient (the basic or predicate fact) is shown to have occurred, then the fact finder must determine (as a presumed or ultimate fact) that the patient was incapable of giving full, free, and informed consent to the activity, at least where such a determination is relevant to the disposition of the case.

30. The presumption of incapacity has two implications that are fairly readily apparent. One is confirmation that lack

of consent is not a constituent element of the offense. The Department, in other words, need not prove that an instance of sexual activity between a physician and his patient was nonconsensual in order to establish a disciplinable act. The other is that consent is not an affirmative defense: a physician can be found guilty of sexual misconduct involving a patient even if the evidence shows that, as a matter of historical fact, the patient consented to the sexual activity.[7/]

31. There is a third implication that is less apparent. The presumption of incapacity propagates the idea that *all* patients are vulnerable, regardless of the particular circumstances surrounding each individual case, because *no* patient can ever be found to have been capable of freely giving fully informed consent. The only thing that *all* patients who have had sex with their doctors have in common, however, is that each of them has had sex with his or her doctor. This means that the *cause* of a patient's presumed incapacity must be related, not to any characteristics unique to the given patient (for all patients are equally incapable in the eyes of the law), but to the fact that the patient's sexual partner was a doctor. Because the sole common denominator is the patient-physician relationship, that relationship must somehow be the *reason for* the patient's incapacity to consent.

32. Just how the patient-physician relationship causes such incapacity is not stated in the statute. The only explanation that makes logical sense, however, depends upon the assumption that any consent which the patient may have given as a matter of historical fact was the product of the physician's irresistible, overpowering influence, rather than the patient's free exercise of fully independent judgment. Necessarily embedded within such assumption is the presupposition that behind every instance of sexual activity between a patient and physician is a physician who took advantage of his or her superior position vis-à-vis the patient when obtaining the patient's consent to sex.

33. To be sure, section 459.015(1)(l) does not require the fact finder to presume, from the predicate fact of sexual activity with a patient, that the physician exercised influence within the patient-physician relationship to bring about the sexual activity. Only the patient's incapacity to consent must be presumed from that basic fact. The patient's presumed incapacity to consent, however, strongly implies physician overreaching as the only reasonable explanation for an otherwise competent adult's inability to give free, full, and informed consent to sexual activity. The undersigned concludes that the ultimate fact of incapacity to consent which follows as a matter of law from sufficient proof of sexual activity in turn gives

rise to a permissive inference that the physician exercised influence within the patient-physician relationship for purposes of engaging the patient in sexual activity. The fact finder is allowed but not required to draw such inference, and the burden remains throughout on the Department to prove the elemental fact.[8/] If, despite the allowable inference, the fact finder is unable to determine that the physician used the patient-physician relationship as a means to engage the patient in sexual activity, then the charge of sexual misconduct in the practice of osteopathic medicine is not proved, and the presumed fact of incapacity to give consent becomes irrelevant.

34. In this case, as explained above, the inference of physician overreaching, together with other circumstantial evidence which corroborates that implied fact, convinced the undersigned to determine, as a matter of ultimate fact, that Simon exercised influence within the patient-physician relationship for purposes of engaging C.K. in sexual activity.

35. The Board of Osteopathic Medicine imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B15-19.002. The range of penalties for a first offense comprising a single violation of the statutes prohibiting sexual misconduct in the practice of osteopathic medicine is set forth in rule 64B15-19.002(13) as follows:

MINIMUM	MAXIMUM
probation and $10,000 fine	denial of licensure or revocation and $10,000 fine

36. Aggravating and mitigating circumstances are listed in rule 64B15-19.003 and include without limitation the following:

> (1) The danger to the public;
> (2) The length of time since the violations;
> (3) The number of times the licensee has been previously disciplined by the Board;
> (4) The length of time the licensee has practiced;
> (5) The actual damage, physical or otherwise, caused by the violation;
> (6) The deterrent effect of the penalty imposed;
> (7) The effect of penalty upon the licensee's livelihood;
> (8) Any effort of rehabilitation by the licensee;
> (9) The actual knowledge of the licensee pertaining to the violation;
> (10) Attempts by the licensee to correct or stop violations or refusal by licensee to correct or stop violations;
> (11) Related violations against licensee in another state, including findings of guilt or innocence, penalties imposed and penalties served;
> (12) The actual negligence of the licensee pertaining to any violations;
> (13) The penalties imposed for related offenses;
> (14) The pecuniary gain to the licensee;
> (15) Any other relevant mitigating or aggravating factors under the circumstances. Any penalties imposed by the board may not exceed the maximum penalties set forth in Section 459.015(2), F.S.

The undersigned has considered all of these factors and concludes that none warrants a deviation from the recommended penalties for a first offense involving sexual misconduct with an individual patient.

37. Determining the appropriate penalty presents a challenge nonetheless, for the prescribed range of penalties starts with probation, which is serious but not necessarily career ending, and tops out at revocation, the severest punishment that a regulatory board can impose on a licensee. The Department urges the undersigned to recommend revocation on the grounds that Simon poses a danger to the public and did not himself break off the relationship with C.K. But the Department has not cited any similar cases in which the Board of Osteopathic Medicine imposed such a stringent penalty for a first offense of this nature.

38. At hearing, the Department argued that stern discipline was warranted based on the types of sexual acts Simon and C.K. enjoyed. The statutes, however, do not distinguish between types of sexual activity, much less suggest that some acts are more opprobrious than others for purposes of imposing discipline against a doctor who has had sexual relations with a patient. At least in the absence of circumstances not proved here, such as, e.g., sexual violence or aggression, or the intentional infliction of physical injury or emotional distress,

all acts falling within the category of "sexual activity" are equal, and none justifies a harsher penalty than another. That is why, in this case, a detailed account of the specific sexual activities was unnecessary. The Department's contention that Simon is especially culpable for having performed certain sexual acts is rejected.

39. Simon holds up Department of Health v. Magrann, Case No. 02-4826PL (Fla. DOAH Aug. 5, 2003), rejected in part, Case No. 2000-14334 (Fla. DOH Sept. 22, 2003), as an apt example of the board's exercising its discretion soundly in penalizing a similarly situated physician. The undersigned agrees that Magrann provides guidance in determining a fair penalty here. In that case, as here, an osteopathic physician had a mutually consensual sexual relationship with an adult patient. Although the affair there was briefer (three months) than Simon's with C.K., the doctor and his paramour in the previous case saw each other far more frequently, making their relationship roughly comparable to the one at hand.

40. Unlike Simon, though, the doctor in Magrann had actively pursued his initially reluctant patient with increasingly transparent ploys, resorting eventually, during an ostensible medical examination, to a risky hands-on approach which subjected his patient to unsolicited kissing and sexual touching, making her nervous and uncomfortable. She shed her

misgivings soon enough and became an apparently willing participant in the ensuing affair, but the facts of Magrann paint a much clearer picture of physician overreaching than do the facts found herein. At a minimum, it cannot fairly be concluded that Simon's conduct was *worse* than that of the physician in Magrann. Therefore, Simon's punishment——for the same offense arising from equivalent if not less blameworthy circumstances——should be in line with the discipline imposed in the earlier case.

41. Interestingly, in Magrann the administrative law judge recommended that the board suspend the offending physician's license for one year and impose a $2,000 fine. The Board of Osteopathic Medicine, however, rejected the recommended penalties and imposed the following *more lenient* sanctions:

> 1. The Respondent shall undergo an in-depth psychological evaluation coordinated through the Professional's Recovery Network (PRN) from a psychiatrist, psychologist or other licensed psychotherapist experienced in the treatment of boundary violations/sexual misconduct. The licensee shall supply a copy of this order to the evaluator. The evaluation must contain evidence that the evaluator knows of the reason for referral. The evaluator must specifically advise this Board that the licensee is presently able to engage in the safe practice of medicine or recommend the conditions under which safe practice could be obtained. The Board reserves the right to impose terms of probation and other reasonable conditions when the Respondent appears before the Board to demonstrate the

ability to engage in the safe practice of medicine.

2. If PRN recommends that Respondent enter into monitoring, treatment, or other such contract, the Respondent shall enter into said contract and comply with all its terms. The Respondent shall provide the Board with a copy of the PRN contract and execute a release authorizing PRN to release information and medical records (including psychiatric records and records relating to treatment) to the Board as needed to monitor the progress of the Respondent. The Director of PRN shall report to the Board any instance of noncompliance, any problems that may occur with Respondent, and any violations of Chapter 456 or 459, Florida Statutes, or any other relevant statute, within thirty (30) days of the occurrence.

3. The Respondent shall provide the Board with a copy of the PRN evaluation and contract (if required by PRN) by November 5, 2003 and appear before the Board with a representative from PRN at the December 5-6, 2003 Board meeting in Orlando, Florida. In the event PRN is unable to complete Respondent's evaluation within the above-referenced deadlines, Respondent shall submit his evaluation to the Board immediately thereafter and appear before the Board at the next regularly scheduled Board meeting.

4. Respondent shall not examine or treat any female patients outside the physical presence of a female Florida licensed healthcare practitioner.

Thus, the doctor's license was not even suspended, much less revoked.

42. Another case which is instructive on the issue of appropriate sanctions is Department of Health v. Cohen, Case

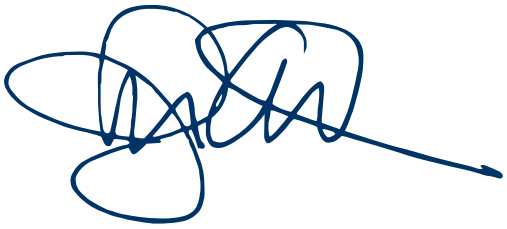
No. 10-3101PL, 2010 Fla. Div. Admin. Hear. LEXIS 105 (Fla. DOAH Sept. 14, 2010; Fla. DOH Jan. 5, 2011). In Cohen, a medical doctor was found guilty of sexual misconduct with a patient, but the sexual activity there——in contrast to the consensual affair at the heart of this case——was *nonconsensual*. The doctor committed a sexual battery upon a patient who had come into his office to have her blood pressure checked. Curiously, despite the egregious nature of the doctor's behavior, the Department urged the administrative law judge to impose a less stringent penalty than was called for under the applicable guidelines, and proposed that his license not be suspended. The ALJ, however, recommended that the doctor's license be suspended for one year, together with other sanctions including two years of probation after reinstatement and a $5,000 fine. The Board of Medicine adopted the penalty recommended by the ALJ.

43. Cohen is distinguishable because the sexual misconduct which gave rise to the disciplinable offense was clearly more wrongful than Simon's. The doctor's behavior in Cohen was criminal in nature; the same cannot be said of Simon's affair with C.K. Significantly, even under the facts of Cohen, the offending doctor's license was not revoked, and if the Department had gotten its way, his license would not have been suspended, either.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Osteopathic Medicine enter a final order finding Simon guilty of committing sexual misconduct with a patient, which is punishable under section 459.015(1)(l), Florida Statutes. Because this is Simon's first such offense, it is further RECOMMENDED that Simon be placed on probation for two years subject to such reasonable terms and conditions as the board deems appropriate, and that an administrative fine of $10,000 be imposed.

DONE AND ENTERED this 30th day of July, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of July, 2014.

ENDNOTES

[1/] Petitioner's Exhibit 7 consists of excerpts from Dr. Simon's deposition. The particular portions that were admitted into evidence are fully described in the Order on Objections to Deposition Testimony, which was entered on June 25, 2014.

[2/] The location of the assignations at issue——the doctor's office——is not as telling as it might seem at first blush. Simon had reasons for not wanting to be seen in public with C.K., and his office provided a convenient place for C.K. and him to meet secretly and discreetly. That is not to say, however, that the location is without significance, for the medical office is the place where the physician's authority as a physician——and hence ability to influence a patient——is greatest.

[3/] This finding is a function of the conclusive presumption of incapacity established in section 495.015(1)(l), Florida Statutes ("A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.").

[4/] In making these and all findings of fact herein, the undersigned is constrained to rely "exclusively on the evidence of record and on matters officially recognized." § 120.57(1)(j), Fla. Stat. (emphasis added). Because C.K. did *not* testify at hearing, her version of the relevant events is dehors the record. The absence of C.K.'s account from the evidence of record means that the *only* persuasive proof of what transpired between Simon and C.K. behind closed doors is Simon's testimony, which gives an inherently one-sided (and perhaps a little sanitized) report of the historical facts——and does not include any other statements he might have made outside of this proceeding that the Department chose not to put into evidence.

[5/] "Using the basic tenet of *in pari materia* to construe together statutes relating to the same or similar subject matter does not imply ambiguity." Dep't of Juv. Just. v. Okaloosa Cnty., 113 So. 3d 1074 (Fla. 1st DCA 2013).

[6/] If each specific offense defined in section 459.015(1) could also be punished under paragraph (pp) as a catchall violation of chapter 459, then every specifically enumerated disciplinable act (all of which constitute violations of chapter 459) would give rise to two separate offenses. Obviously that is not the intended operation of paragraph (pp), whose purpose is to make

an actionable offense out of any administrative violation *which otherwise would not be punishable*.

[7/] Consent is, however, a factor which reasonably may be considered in determining the severity of the violation, should one be found. Generally speaking, a physician who has committed an actual sexual battery upon a patient, where *no* consent was given as a matter of historical fact, should be dealt with more harshly than one who has had sex with a consenting adult patient, notwithstanding that the patient's consent, though in fact given, must be found by operation of law *not* to have been "free, full, and informed."

[8/] See Ibarrondo v. State, 1 So. 3d 226, 232 (Fla. 5th DCA 2008)(permissive presumption or inference allows but does not require fact finder to infer the existence of an elemental fact from proof of a basic fact and places no burden on defendant).

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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.