

THE COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss

Board of Registration in Medicine,
Petitioner

v.

Donald Berman, M.D.,
Respondent

Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
(781) 397-4700
www.state.ma.us/dala

Docket No. RM-18-0411

Appearance for Petitioner:

Erik R. Bennett, Esq.
Board of Registration in Medicine
178 Albion Street, Suite 330
Wakefield, MA 01880

Appearance for Respondent:

Megan Grew Pimentel, Esq.
Adler Cohen Harvey Wakeman Guekguezian LLP
75 Federal Street
Boston, MA 02110

Administrative Magistrate

James P. Rooney

Summary of Decision

Internist who was disciplined in the State of Washington for failing to obtain the consent of two female patients before performing breast exams is subject to discipline by the Board.

RECOMMENDED DECISION

On June 29, 2018, the Board of Registration in Medicine issued a Statement of Allegations ordering Donald Berman, M.D., who is board certified in internal medicine, to show cause why he should not be disciplined because he stipulated to informal discipline by

the State of Washington due to his failure to obtain consent from two female patients before performing a breast exam, his failure to communicate his intention to perform these breast exams, and his failure to offer these patients a chaperone prior to the examinations.¹

On January 11, 2023, by mutual agreement among the parties, Complaint Counsel filed a Joint Stipulation. The Stipulation is attached as Exhibit 1.

Other than the Stipulation and the admissions of fact it contains, I have not taken evidence with respect to the facts of this matter. I adopt the facts as stipulated. The conclusions of law set forth in the Stipulation are warranted and I therefore adopt them as well.

Based on the foregoing, I recommend that the Board impose such discipline on Dr. Berman as it deems appropriate in light of the facts and conclusions of law as stipulated by the parties. I note that the parties have recommended that the doctor be reprimanded.

DIVISION OF ADMINISTRATIVE LAW APPEALS



James P. Rooney
First Administrative Magistrate

Dated: **JAN 26 2023**

¹ Washington required the doctor to take courses in boundaries and patient communication.

EXHIBIT 1

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals
Docket No. RM-18-0411

_____)
Board of Registration in Medicine,)
Petitioner,)
v.)
_____)
Donald Berman, M.D.,)
Respondent.)
_____)

STIPULATION

Donald Berman, M.D. (Respondent), counsel for the Respondent, and Complaint Counsel agree that this stipulation shall be filed with the Administrative Magistrate for the Division of Administrative Law Appeals (DALA) as a resolution of questions of material fact and law as set forth by the Statement of Allegations in the above-captioned matter. Execution of this stipulation does not constitute an admission or denial of any allegations set forth in the Statement of Allegations. The Respondent admits to the Stipulated Facts described below and agrees that the Administrative Magistrate and the Board of Registration in Medicine (Board) may make the Conclusions of Law as set forth below.

BACKGROUND

1. The Respondent is a 1978 graduate of the State University of New York, Upstate Medical University, and he has been licensed to practice medicine in Massachusetts since June 23, 1980 under certificate number 45965.
2. The Respondent has been licensed to practice medicine in ten (10) other jurisdictions at various times. Some of those licenses are active and some have lapsed. According to the Federation of State Medical Boards (FSMB), the medical boards in Connecticut (active) and

Pennsylvania (active) have imposed discipline on the Respondent's licenses based upon informal disciplinary action taken against the Respondent's license in Washington.

STIPULATED FACTS

3. On December 20, 2017, the Board of Registration in Medicine ("BORIM") received notification from the FSMB that the State of Connecticut Department of Public Health Healthcare Quality and Safety Branch (Connecticut Board) imposed discipline on the Respondent's license in Connecticut as a result of a Stipulation of Informal Discipline that Dr. Berman entered into with the State of Washington with respect to the Respondent's license in that state.

4. The Washington Board placed conditions on the Respondent's license due to his failure to obtain the consent of two female patients before performing a breast examination, his failure to communicate his intention to perform said breast examinations, and his failure to offer those patients a chaperone prior to the examinations. The Washington Board Order is attached as Exhibit 1 and incorporated herein by reference.

5. Based on the Washington Board's decision, the Connecticut Board of Medicine reprimanded the Respondent's license to practice medicine in Connecticut, and the Pennsylvania Board of Medicine assessed a civil penalty against the Respondent's license to practice medicine in Pennsylvania.

CONCLUSIONS OF LAW

A. The Respondent has violated 243 CMR 1.03(5)(a)12, by having been disciplined in another jurisdiction in any way by the proper licensing authority for reasons

substantially the same as those set forth in M.G.L. c. 112, § 5 or 243 CMR 1.03(5).

More specifically, the Respondent has:

1. engaged in conduct that places into question the Respondent's competence to practice medicine in violation of 243 C.M.R. 1.03(a)(5)3;

2. committed misconduct in the practice of medicine in violation of 243 C.M.R. 1.03(a)(5)18.

B. The Respondent has engaged in conduct that undermines the public confidence in the integrity of the medical profession. *See Levy v. Board of Registration in Medicine*, 378 Mass. 519 (1979); *Raymond v. Board of Registration in Medicine*, 387 Mass. 708 (1982).

SANCTIONS

The Respondent, the Respondent's attorney, and Complaint Counsel expressly acknowledge that the Board may impose sanctions against the Respondent based on the above Stipulated Facts and Conclusions of Law. The Respondent, the Respondent's attorney, and Complaint Counsel jointly agree to recommend to the Board that it impose as a sanction a reprimand. The parties hereto understand that the Recommended Sanction is not binding on the Board, and that the Board may impose a different sanction on the Respondent.

At the time the Board considers this Stipulation, it will inform the parties of its inclination as to sanction. If the Board's sanction differs from the one recommended by the parties, the Respondent will be given an opportunity to either accept or reject the proposed sanction. If the

Respondent rejects the proposed sanction, the Respondent will be given the opportunity to proceed to a hearing on the merits in accordance with the adjudicatory process as provided in General Laws chapter 30A and 801 CMR 1.00 et seq.

EXECUTION OF THIS STIPULATION

It is agreed that the approval of this Stipulation is left to the discretion of the Administrative Magistrate and the Board. As to any matter this Stipulation leaves to the discretion of the Administrative Magistrate or the Board, neither the Respondent, nor anyone else acting on his behalf has received any promises or representations regarding the same.

The signature of the Respondent, his attorney, and Complaint Counsel are expressly conditioned on the Administrative Magistrate and the Board accepting this Stipulation.

If the Administrative Magistrate rejects any provision contained in this Stipulation, the entire document shall be null and void and the matter will be scheduled for a hearing pursuant to General Laws c. 30A and 801 CMR 1.00 et seq.

If the Board rejects any provision in this Stipulation, the entire document shall be null and void and the matter will be recommitted to DALA for a hearing pursuant to General Laws c. 30A and 801 CMR 1.00 et seq.

Neither of the parties nor anyone else may rely on the Stipulation in these proceedings or in any appeal therefrom.



Donald Berman, M.D.
Respondent

Date

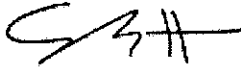
12/7/2022



Megan Grew Pimentel, Esq.
Attorney for Respondent

Date

1/8/22



Erik R. Bennett, Esq.
Complaint Counsel

Date

01-09-2023

Washington Board Order



STATE OF WASHINGTON
DEPARTMENT OF HEALTH
Olympia, Washington 98504

RE: Donald E. Berman, MD
Master Case No.: M2015-632
Document: Stipulation to Informal Disposition

Regarding your request for information about the above-named practitioner; attached is a true and correct copy of the document on file with the State of Washington, Department of Health, Adjudicative Clerk Office. These records are considered Certified by the Department of Health.

Certain information may have been withheld pursuant to Washington state laws. While those laws require that most records be disclosed on request, they also state that certain information should not be disclosed.

The following information has been withheld: **NONE**

If you have any questions or need additional information regarding the information that was withheld, please contact:

Customer Service Center
P.O. Box 47865
Olympia, WA 98504-7865
Phone: (360) 236-4700
Fax: (360) 586-2171

You may appeal the decision to withhold any information by writing to the Privacy Officer, Department of Health, P.O. Box 47890, Olympia, WA 98504-7890.

**STATE OF WASHINGTON
MEDICAL QUALITY ASSURANCE COMMISSION**

In the Matter of the License to Practice
as a Physician and Surgeon of

DONALD E. BERMAN, MD
License No. MD60471576

Respondent.

No. M2015-632

**STIPULATION TO INFORMAL
DISPOSITION**

Pursuant to the Uniform Disciplinary Act, Chapter 18.130 RCW, the Medical Quality Assurance Commission (Commission) issued a Statement of Allegations and Summary of Evidence (Statement of Allegations) alleging the conduct described below. Respondent does not admit any of the allegations. This Stipulation to Informal Disposition (Stipulation) is not formal disciplinary action and shall not be construed as a finding of unprofessional conduct or inability to practice.

1. ALLEGATIONS

1.1 On June 23, 2014, the state of Washington issued Respondent a license to practice as a physician. Respondent is board certified in Internal Medicine – pulmonary disease and critical care. Respondent's license in Washington State is expired. Respondent has been licensed as a physician and practiced since 1981, and currently holds licenses in several other states.

1.2 On July 16, 2014, Respondent treated Patient A, a 72-year old woman, for complaints of a non-productive persistent cough accompanied by some increase in shortness of breath. Patient A had an extensive history of emphysema. Patient A also had been diagnosed with insulin-dependent diabetes. Patient A was not wearing a bra under her shirt due to reduced mobility in her shoulder.

1.3 Respondent did not communicate to Patient A that the exam would require a breast exam, he did not offer Patient A an opportunity to change into a gown, and he did not offer for a chaperone to be present.

1.4 Respondent had Patient A sit up on the exam table so that he could lift the back of her shirt and listen to her lungs. Respondent then had Patient A lie down, he

pulled up the front of her shirt, and he lifted her breasts one at a time while continuing his examination. Patient A abruptly sat up and Respondent apologized.

1.5 On or about July 18, 2014, the pulmonary clinic practice manager and Respondent discussed Respondent's interaction with Patient A. Respondent denied that he had done anything improper. The practice manager explained to Respondent that it was the clinic protocol to communicate with patients regarding what was going to be done before touching them, and that Respondent was expected to follow the communication protocol.

1.6 On September 8, 2014, Respondent preformed a pre-operative exam lung function test on Patient B to determine whether she was healthy enough for general anesthesia in the course of a planned surgery. Patient B had a history of cancer. Respondent did not communicate to Patient B that the pre-operative exam would include a breast exam, he did not offer Patient B an opportunity to change into a gown, and he did not offer for a chaperone to be present.

1.7 Respondent reached up under Patient B's shirt while she was lying down and he placed his hand on her left breast over her bra as part of a breast cancer exam. Respondent sensed Patient B's discomfort and he removed his hand. Respondent did not ask Patient B about her discomfort or otherwise communicate his purpose in placing his hand on her breast. Respondent did not chart that he began but did not complete the breast examination.

1.8 Respondent states that he has never had any complaint or action taken against him in any jurisdiction prior to this case.

2. STIPULATION

2.1 The Commission alleges that the conduct described above, if proven, would constitute a violation of RCW 18.130.180(4).

2.2 The parties wish to resolve this matter by means of a Stipulation pursuant to RCW 18.130.172(1).

2.3 This Stipulation is of no force and effect and is not binding on the parties unless and until it is accepted by the Commission.

2.4 If the Commission accepts the Stipulation it will be reported to the National Practitioner Data Bank (45 CFR Part 60), the Federation of State Medical Boards' Physician Data Center and elsewhere as required by law.

2.5 The Statement of Allegations and this Stipulation are public documents. They will be placed on the Department of Health's website, disseminated via the Commission's listserv, and disseminated according to the Uniform Disciplinary Act (Chapter 18.130 RCW). They are subject to disclosure under the Public Records Act, Chapter 42.56 RCW, and shall remain part of Respondent's file according to the state's records retention law and cannot be expunged.

2.6 The Commission agrees to forego further disciplinary proceedings concerning the allegations.

2.7 Respondent agrees to be bound by and to successfully complete the terms and conditions of this informal disposition.

2.8 A violation of the provisions of Section 3 of this Stipulation, if proved, would constitute grounds for discipline under RCW 18.130.180 and the imposition of sanctions under RCW 18.130.160.

3. INFORMAL DISPOSITION

The Commission and Respondent stipulate to the following terms.

3.1 **Boundaries Coursework.** Respondent must attend and successfully complete either the ProBE course offered by the Center for Personalized Education for Physicians (CPEP), Denver, CO, or Maintaining Proper Boundaries course offered by the Vanderbilt University Medical Center's Center for Professional Health, Nashville, TN. Coursework must be completed within six (6) months of the effective date of this Stipulation. Successful completion means that Respondent must receive an unconditional pass at the conclusion of the course. Respondent must submit to the Commission copies of any papers that he is required to produce as part of the coursework and his certificate of completion.

3.2 **Patient Communications Coursework.** Respondent must attend and successfully complete the Managing Difficult Communications in Medical Practice course offered by Case Western Reserve University and the Mt. Sinai Skills and Simulation

Center, Cleveland, OH. Coursework must be completed within six (6) months of the effective date of this Stipulation. Successful completion means that Respondent must receive an unconditional pass at the conclusion of the course. Respondent must submit to the Commission copies of any papers that he is required to produce as part of the coursework and his certificate of completion.

3.3 **Examination Protocol.** Respondent must explain to female patients the purpose of any examination involving the exposure or touching of breasts or genitalia prior to performing the examination while practicing in Washington State. Further, Respondent must offer female patients an opportunity to change into a gown and for a chaperone to be present before performing any such examination.

3.4 **Personal Disclosure.** Respondent must provide a copy of this Stipulation to the department chair or medical director where he may be employed as a physician or possess privileges when practicing in the state of Washington.

3.5 **Personal Reports.** Respondent shall submit personal reports to the Commission disclosing whether there are complaint investigations pending before a licensing authority in any state where he practices medicine. Respondent's personal reports also must identify dates and persons who were provided a copy of this Stipulation pursuant to Paragraph 3.4 above. The first report shall be due thirty (30) days from the effective date of this Stipulation and reports shall be submitted every three (3) months thereafter until this Stipulation is terminated. Respondent should send reports to: Compliance Officer, Medical Quality Assurance Commission, PO Box 47866, Olympia, Washington 98504-7866.

3.6 **Cost Reimbursement.** Respondent agrees to reimburse costs to the Commission in the amount of one thousand dollars (\$1,000.00) which must be received by the Commission within twelve (12) months of the effective date of this Stipulation. The reimbursement shall be paid by certified or cashier's check or money order, made payable to the Department of Health and mailed to the Department of Health, Medical Quality Assurance Commission at P.O. Box 1099, Olympia, Washington 98507-1099.

3.7 **Termination of Stipulation.** Respondent may petition the Commission in writing to terminate this Stipulation no sooner than one (1) year from the effective date of

this Stipulation. The Commission will issue a notice scheduling a date and time for Respondent to appear, unless the Commission waives the need for an appearance.

3.8 **Obey Laws.** Respondent must obey all federal, state and local laws and all administrative rules governing the practice of the profession in Washington.

3.9 **Costs.** Respondent must assume all costs of complying with this Stipulation.

3.10 **Violations.** If Respondent violates any provision of this Stipulation in any respect, the Commission may take further action against Respondent's license.

3.11 **Change of Address.** Respondent must inform the Commission and the Adjudicative Clerk Office in writing, of changes in his address of record within thirty (30) days of such change.

3.12 **Effective Date.** The effective date of this Stipulation to Informal Disposition is the date the Adjudicative Clerk Office places the signed Stipulation into the U.S. mail. If required, Respondent shall not submit any fees or compliance documents until after the effective date of this Stipulation.

4. COMPLIANCE WITH SANCTION SCHEDULE

4.1 The Commission applies WAC 246-16-800, *et seq.*, to determine appropriate sanctions, including stipulations to informal dispositions under RCW 18.130.172.

Respondent's alleged conduct falls in Tier A of the "Practice Below Standard of Care" schedule, WAC 246-16-810. Respondent's alleged failure to appropriately communicate with patients before touching them in the course of performing physical examinations and his alleged failure to present patients with gown/chaperone options prior to the start of examination caused minimal patient harm or a risk of patient harm. However, the nature of the touching caused both patients to take great offense.

4.2 WAC 246-16-800(3)(c) directs the Commission to identify aggravating or mitigating factors to determine appropriate sanctions. It is mitigating that Respondent has a lengthy history in practice, has had a distinguished career. Respondent states that he has not had any complaint or action taken against him in any jurisdiction prior to this case. Respondent's alleged conduct was not intentional as he sought to deliver health services to these two patients that went beyond the scope of their referral. However, Respondent failed to appreciate the way that female patient care has changed

In recent years. It is aggravating that Respondent was involved in two incidents of poor communications and that both patients were emotionally impacted.

4.3 Tier A sanction terms range from a minimum of zero to a maximum of three years in duration. WAC 246-16-800(3)(d) states that the starting point for the duration of oversight is the middle of the range and then aggravating and mitigating factors move the appropriate sanctions towards the maximum or minimum ends of the range. The factors noted in this sanction schedule analysis justify a term in the low-middle end of the sanction range. This Stipulation requires Respondent to complete an extensive course of continuing medical education to address an alleged knowledge deficit, to communicate with and protect female patients, to make personal reports, and to make maximum cost reimbursement. The sanctions stated in this Stipulation are sufficient to protect the public and ensure that similar alleged violations do not occur.

5. RESPONDENT'S ACCEPTANCE

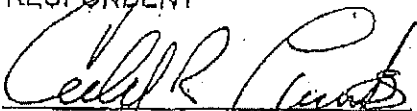
I, DONALD E. BERMAN, MD, Respondent, certify that I have read this Stipulation to Informal Disposition in its entirety; that my counsel of record, GERALD R. TARUTIS, has fully explained the legal significance and consequence of it; that I fully understand and agree to all of it; and that it may be presented to the Commission without my appearance.

If the Commission accepts the Stipulation to Informal Disposition, I understand that I will receive a signed copy.



DONALD E. BERMAN, MD
RESPONDENT

February 10, 2016
DATE



GERALD R. TARUTIS, WSBA #4599
ATTORNEY FOR RESPONDENT

02/10/2016
DATE

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ORIGINAL

6. COMMISSION'S ACCEPTANCE

The Commission accepts this Stipulation to Informal Disposition. All parties shall be bound by its terms and conditions.

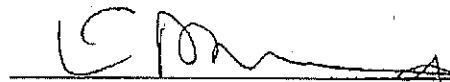
DATED: 2/11, 2016.

STATE OF WASHINGTON
MEDICAL QUALITY ASSURANCE COMMISSION



PANEL CHAIR

PRESENTED BY:



LAWRENCE J. BERG, WSBA#22334
DEPARTMENT OF HEALTH STAFF ATTORNEY