COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
1 Congress Street, 11th Floor
Boston, MA 02114
www.mass.gov/dala

Board of Registration in Medicine,
Petitioner

v

Docket No RM-13-462

Jason Faulhaber, M D ,
Respondent

Appearance for Petitioner

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Board of Registration in Medicine
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Wakefield, MA 01880

Appearance for Respondent

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Administrative Magistrate

Kenneth Bresler

SUMMARY OF RECOMMENDED DECISION

Respondent hugged and kissed Patient A during medical appointments discipline is recommended Respondent sent a Facebook message to Patient B referring to him as "sweetness ' and inviting him to a party, discipline is recommended Respondent acted as Patient 1 's doctor after having had a sexual and romantic relationship with him, but did not exploit trust, knowledge emotions or influence discipline is not recommended Respondent acted as Patient 2 s doctor while having a sexual and romantic relationship with him, discipline is recommended Petitioner did not prove that respondent acted as Patient 3 s doctor while having a sexual and romantic relationship with him or. if he terminated his

medical care of Patient 3 before conducting a sexual and romantic relationship with him, that respondent exploited trust knowledge, emotions, or influence, discipline is not recommended

RECOMMENDED DECISION

On September 11, 2013 the Board of Registration in Medicine (BRM) issued a Statement of Allegations against the respondent, Dr Jason Faulhaber Allegations involved patients designated as A, B, 1, 2, and 3 (BRM designated by number the patients whom Dr Faulhaber identified to BRM It designated by letter the patients whom Dr Faulhaber's employer identified (Tr 1-16)) BRM alleged that Dr Faulhaber had hugged and kissed Patient A during medical appointments, sent a Facebook message to Patient B referring to him as "sweetness ' and inviting him to a party, acted as Patient 1's doctor after having had a sexual and romantic relationship with him, acted as Patient 2's doctor while having a sexual and romantic relationship with him, and acted as Patient 3's doctor while having a sexual and romantic relationship with him (Ex 23) On October 2, 2013, Dr Faulhaber denied the allegations (Ex 24)

I held a hearing on November 18 and 19, 2014, at which a stenographer was present Testifying for BRM were Patients A, B, and 1, Drs Kevin Kapila and Alex Gonzales of Fenway Community Health Center, and Luke Simard, a BRM investigator Dr Faulhaber testified and called no other witness

I have accepted into evidence 25 exhibits Both parties submitted post-hearing briefs

Findings of Fact

1 Dr Jason Faulhaber has been licensed to practice medicine in Massachusetts since 2007 (Exs 23, 24)

2 From September 2007 through August 2012, Dr Faulhaber worked as a doctor at Fenway Community Health in Boston (Exs 23, 24)

3 Dr Faulhaber left Fenway Community Health for career reasons, unrelated to discipline (Tr II-188)

4 On September 11, 2013, BRM filed a Statement of Allegations against Dr Faulhaber involving five patients (Ex 25)[1]

Patient A

5 According to the Statement of Allegations, Dr Faulhaber hugged and kissed Patient A during office visits, making him uncomfortable and leading him to transfer his care to another doctor in October 2009 (Ex 25)[2]

6 On June 3, 2009, Patient A learned that he was HIV positive and became Dr Faulhaber's patient for that reason He was scared, nervous, and feeling vulnerable (Tr I-153-55, 158)

7 During Patient A's second appointment with Dr Faulhaber in early June 2009, Dr Faulhaber kissed him on the lips and hugged him (Tr II-153, 156)

8 During Patient A's later appointments, Dr Faulhaber kissed him on the lips and hugged him at the beginning and end of the appointments, for a total of approximately six to eight times (Tr II-173)

9 Dr Faulhaber's kisses shocked Patient A, took him aback, and confused him (Tr II-158)

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[1] The Statement of Allegations does not allege that Dr Faulhaber, in his role as a doctor, used social media or texting to communicate with patients in their role as patients BRM presented evidence on this topic, but I do not make findings of fact or a recommended decision on it because of its absence from the Statement of Allegations

[2] BRM had Patient A testify about alleged improprieties during his medical appointments with Dr Faulhaber that are not in the Statement of Allegations I do not make findings of fact or a recommended decision based on these alleged improprieties

10 Because Dr Faulhaber had crossed a boundary with him and because he was dissatisfied with Dr Faulhaber's attention to him as a patient when he was sick, Patient A soon transferred his care to another doctor (Tr II-165-66)

11 Dr Faulhaber's kissing and hugging of Patient A came to Fenway Community Health's attention in October 2010 (Ex 2)

12 On March 25, 2013, Dr Faulhaber told BRM's investigator that it might be beneficial and appropriate to hug a patient (Ex 25)

Patient B

13 According to the Statement of Allegations, on January 26, 2010, Dr Faulhaber sent to Patient B an electronic message via Facebook reading, "What up [sic] sweetness? Happy new year! Just wanted to say hi, and see if you're around 2/6 " It was signed "j " (Ex 25)

14 Dr Faulhaber sent this message (Ex 17, Tr II-211, I-27-28)

15 February 6, 2010 was a Saturday Dr Faulhaber was not referring to a medical appointment

16 Patient B was Dr Faulhaber's patient at the time, although he did not return to Dr Faulhaber s care after receiving the message (Tr I-29)

17 Patient B had recently broken up with his romantic partner and the breakup had left him distraught (Tr I-33)

18 From serving as Patient B's doctor, Dr Faulhaber knew about Patient B s emotional state and the reason for it (Tr. II-211)

19 According to Dr Faulhaber, Patient B had revealed to him that he had just ended a long-term romantic relationship, doubted that he could find another romantic partner, and complained that he didn t have opportunities to meet new people Dr Faulhaber sent him that

message because he and Patient B had mutual friends on Facebook, he and a friend were planning a party, and he thought that Patient B could attend and meet new people (Tr II-211)

20 Patient B understood Dr Faulhaber s message as possibly an offer for a date (Tr I-29)

21 Dr Faulhaber's message confused Patient B and made him uncomfortable As a result, he left Dr Faulhaber's care and found a new doctor (Tr I-29-30)

22 On July 9, 2010 Patient B complained to Fenway Community Health (Ex 4)

Patient I

23 According to the Statement of Allegations, Dr Faulhaber saw Patient I in office visits from January to April 2008, engaged in a sexual and romantic relationship with the patient from Fall 2008 to March 2009, saw the patient in office visits from June 2009 through 2011, and otherwise treated the patient in 2012 (Ex 25)

24 Dr Faulhaber was Patient I's primary care physician for the first time between January and April 2008 Dr Faulhaber saw Patient I medically twice during that time (Tr II-177-78, 205)

25 Patient I was interested in dating Dr Faulhaber and chose a different primary care physician (Tr II-178, 182, Ex 25)

26 After leaving Dr Faulhaber's care, Patient I and Dr Faulhaber dated for four-and-one-half to five months from September or October 2008 until approximately February or March 2009 (Tr II-178-79, 207 Ex 25)

27 In May or June 2009, Patient I called Dr Faulhaber for a medical appointment and again became his patient (Tr II-180, 182)

28 On September 2, 2009 February 25, 2010, November 2, 2010, and January 5 2012,

Dr Faulhaber prescribed a medication for Patient 1 (Ex 10, pp 2-5)

29 According to Dr Gonzalez s affidavit he reviewed Patient 1 s complete and accurate medical records and determined that Dr Faulhaber

A saw Patient 1 in office visits between March 2010 and April 2012,

B prescribed medications for him during office visits and, apart from office visits, between August 2010 and June 2012,

C ordered tests for him between April 2010 and April 2012,

D engaged in electronic communications with him between October 2010 and April 2012, and

E engaged with telephone communications with him in April 2010 and December 2011 (Ex 13)

30 Dr Faulhaber did not provide medical care to Patient 1 while they were engaged in a sexual and romantic relationship

Patient 2

31 According to the Statement of Allegations, Dr Faulhaber saw Patient 2 in office visits between April 2009 and February 2010, began a sexual and romantic relationship with the patient in March 2010, wrote prescriptions for the patient in April and June 2010, and ordered tests for the patient in March, June, and October 2010 (Ex 23)

32 Although the Statement of Allegations does not allege when Dr Faulhaber's and Patient 2 s sexual and romantic relationship ended, it lasted at least through October 30, 2010 when Patient 2 s email to Dr Faulhaber ended with "Love you" and Dr Faulhaber s response ended with "Xoxo " (Ex 6, p 53)

33 Dr Faulhaber and Patient 2 maintained at least a social relationship at least through

January 6, 2011, when Dr Faulhaber said that he would be able to take Patient 2 to the airport and check on Patient 2's apartment while he was gone, and January 22, 2011, when Patient 2 emailed Dr Faulhaber about, apparently, a video game (Ex 6, pp 61, 65)

Why Patient 2 did not testify

34 Patient 2 did not testify at the hearing before me

35 When BRM's investigator contacted him, Patient 2 was not comfortable with an in-person interview, so the investigator interviewed him by Skype (Tr I-117)

36 When the investigator interviewed him, Patient 2 was sick and unemployed (Tr I-121)

37 Patient 2 did not want to participate in any hearing, confront Dr Faulhaber, or get him into any trouble In addition, his sickness made him unable to cope with the prospect of testifying at a hearing (Tr I-139)

38 Patient 2 did, however, forward to BRM's investigator his email exchanges with Dr Faulhaber (Ex 6)

39 Since interviewing Patient 2, the investigator has lost track of him Patient 2 is outside Massachusetts, possibly in Alabama The investigator located a possible phone number for Patient 2 and tried calling but the number did not accept incoming calls (Tr I-118)

40 The investigator also tried locating Patient 2, who is a nurse, through professional databases, but was unable to do so (Tr I-119)

Dr Faulhaber's medical care of Patient 2

41 Dr Faulhaber was Patient 2's primary care physician, as well as providing Patient 2's HIV treatment (Tr I-94)

42 Dr Faulhaber wrote various prescriptions, including Viagra, for Patient 2 on October

30 2009 (five prescriptions), November 19, 2009 (three prescriptions), December 2, 2009, and March 4, June 2, 2010, and July 2, 2010 (Exs 7, 9)

43 According to Dr Gonzalez's affidavit, he reviewed Patient 2 s complete and accurate medical records and determined that Dr Faulhaber

A saw Patient 2 in office visits on April 8, October 30, November 19, December 2, and December 15 2009, and February 21, March 4, and August 16, 2010,

B prescribed medications during office visits and also on April 9, 2009, November 24, 2009, December 1, 2009, December 21, 2009, February 10, 2010, April 22, 2010, and June 2, 2010,

C ordered tests on April 8, 2009, October 30, 2009, December 2, 2009, February 12, 2010, March 16, 2010, March 18, 2010, June 17, 2010, and October 25, 2010,

D engaged in electronic communications with him on November 20, 2009, December 9, 2009, February 25, 2010, and June 2, 2010,

E engaged in telephone communications with him on December 14, 2009, July 2 2010, and October 25, 2010 (Ex 13)

Dr Faulhaber and Patient 2 s non-medical relationship

44 By February 3, 2010, Dr Faulhaber and Patient 2 were engaged in both a medical relationship and a social relationship (Ex 3)

45 On February 3, 2010 Patient 2 emailed Dr Faulhaber – but by his first name He wrote, Hi Jason" and referred to Dr Faulhaber s 'text from last night Patient 2 continued, "Sounds like you had a good time Karaoke is not my thing," indicating that Dr Faulhaber had texted him about having engaged in karaoke Patient 2 shifted the discussion to ' the referral to

the nutritionist " He asked Dr Faulhaber if he, Patient 2, needed to call the nutritionist for an appointment (Ex 3)

46 Dr Faulhaber responded to Patient 2's email with the name of "our Nutritionist" and her telephone number He continued, "Make sure you let them know you're my patient and it is a referral " Immediately following, Dr Faulhaber shifted to the personal and wrote, "I did have fun last night ' and inserted a smiley face It is unclear from the context what Dr Faulhaber was referring to (Ex 3)

47 On February 10 and 11, 2010, Dr Faulhaber and Patient 2 exchanged emails that were clearly personal and not medical Patient 2 addressed Dr Faulhaber as "Jason," and Dr Faulhaber responded from an email account whose address was dreuteboy@ [Internet service provider] Dr Faulhaber wrote, "[S]orry about last night," apparently referring to their inability to reach each other (Ex 6, p 3)

48 On March 25 2010, Dr Faulhaber sent Patient 2 a list of cities he was scheduled to be in for the next two months (Ex 6, p 4)

49 On April 2, 2010, Patient 2 emailed Dr Faulhaber, implying that Dr Faulhaber was "[a]dorable " (Ex 6, p 5)

50 On April 12, 2010, Dr Faulhaber emailed Patient 2 informing him of his schedule that day, concluding with ' then [he would] be ready for pick-up" (although it was unclear which of them would be picking up the other) and 'see you later alligator ' (Ex 6, p 6)

51 May 25, 2010, Patient 2 emailed Dr Faulhaber that he Patient 2, had "left [his] phone at home ' Dr Faulhaber responded, apparently to the news about Patient 2's telephone, 'That s because we were rushed this morning "

52 Dr Faulhaber's email to Patient 2, from his dreuteboy email account, shifted to a medical discussion The context was unclear The email continued

> So headache is bad, as is pain is scapula
> I typed out a timeline of the syncopal episodes
> "Situational" syncope vs True neurocardiogenic syncope does not require driving restriction
> Will let you know what he thinks [3]
> I have a feeling it'll be either an MRI or CT of the brain, especially because of the headaches

(Ex 6, p 8)

53 Patient 2 responded, "I have BC/BS," apparently referring to Blue Cross Blue Shield "It'll need prior auth, so likely not to happen next week " (Ex 6, p 8)

54 On May 29, 2010, Patient B emailed Dr Faulhaber The subject line was 'this is what i appear to have on my hand ' The URL of the link included the words ' fungal tinea magnum " (Ex .6, p 10)

55 On July 24, 2010, Dr Faulhaber emailed a photograph to Patient 2 The message read, "This is what you're missing[ ] I mean, besides me) " (Ex 6, p 15) The photograph is not in evidence

56 On July 27, 2010, Dr Faulhaber emailed Patient B, apparently responding to a photograph that Patient B had sent him Dr Faulhaber wrote, "[Y]ou look more fabulous than she does!" (Ex 6, p 16)

57 On August 9, 2010, Dr Faulhaber informed Patient B about his schedule, including references to "stay[ing] with you' on August 11 and 12 (Ex 6, p 18)

58 On August 25, 2010, Dr Faulhaber and Patient 2 exchanged emails that included a discussion of travel plans together to Puerto Vallata, Mexico Patient 2's email included this

[3] It is unknown to whom "he ' refers

excerpt "You are always welcome[] to stay with me or not I personally enjoy your being there and your company " It ended with ' You can let me know what you want to do later ' and "Xoxoxo Dr Faulhaber's email included this excerpt 'Will let you know re tonight If I end up not staying over, then I will tomorrow night So, will stay at your place Friday night ' (Ex 6, 20)

59 On August 26, 2010. Dr Faulhaber informed Patient B about his schedule through mid-September, it included multiple references to "your place" and 'my place " (Ex 6, pp 24-25)

60 On August 30, 2010, Dr Faulhaber emailed Patient 2, estimating that he'd get to Patient 2 at 9 00 or 10 00 and stating that he "[w]ill let you know when I m leaving Chelsea to head to you " Dr Faulhaber referred to a present from Patient 2 and ended with "Thanks babe "

61 On September 2, 2010, Dr Faulhaber emailed Patient 2 about their vacation plans to and in Las Vegas He signed it "xoxo " (Ex 6, p 26)

62 On September 7, 2010, Dr Faulhaber emailed Patient 2 with a grocery list and ended with "Xoxo ' (Ex 6, p 27)

63 On September 9 201, Dr Faulhaber emailed Patient 2 with another grocery list Dr Faulhaber ended the email with "thank you baby / love you / xoxo " Patient 2 responded that day with an email ending 'love you too " (Ex 6, p 28)

64 On September 15, 2010, at 8 21 a m , Dr Faulhaber emailed Patient 2, informing him that he Dr Faulhaber, had left his phone at Patient 2's home He ended the email with "xo ' Patient 2 responded

> Is there any way John and I could get the genotype and phenotype paperwork? Saw Ryan There is a plan that includes taxol for 6 months

(Ex 6, p 36) (It is unknown who John and Ryan are)

65 On October 8, 2010, Patient 2 wrote to Dr Faulhaber 'Miss sleeping with you (xoxo really ' (Ex 6, p 46)

66 On October 18 2010, Dr Faulhaber informed Patient 2 about his schedule, including references to "my house ' and "your house " (Ex 6, p 53)

67 On October 30, 2010, Patient 2 emailed Dr Faulhaber, his message ended with 'Love you " Dr Faulhaber s email in response ended with "Xoxo ' (Ex 6, p 55)

68 On November 1, 2010, Patient 2 emailed Dr Faulhaber about making travel plans together to Puerto Vallarta, Mexico (Ex 6, p 56) Ultimately, Patient 2 traveled alone in January 2011 (Ex 6, p 64)

69 Dr Faulhaber provided medical care to Patient 2 while they were engaged in a sexual and romantic relationship

Patient 3

70 According to the Statement of Allegations, Dr Faulhaber saw Patient 3 in office visits from March through November 2010, engaged in a sexual and romantic relationship with the patient between February and August 2011, wrote a prescription for the patient in April 2011, and saw the patient in office visits in December 2011 and April 2012 (Ex 25)

71 Patient 3 did not testify

72 BRM's investigator had a telephone number for what may have been Patient 3's workplace a salon, but did not want to leave a message He obtained Patient 3 s probable address from the Registry of Motor Vehicles and mailed a letter to him at that address (Tr I-137), but apparently did not hear back

73 According to Dr Gonzalez's affidavit, he reviewed Patient 3's complete and accurate medical records and determined that Dr Faulhaber

A saw Patient 3 in office visits between January 2008 and September 2009, on February 25, 2010, and on October 31, 2011,

B prescribed medications during office visits and also in March and November 2010, October 2011, and January 2012,

C ordered tests on between April 2008 and November 2010, in October 2011, and May 2012,

D engaged in electronic communications with him on between January and November 2010, on November 1, 2011, and twice in May 2012, and

E engaged in telephone communications with him on October 12, 2011 (Ex 13)

74 In addition to the dates in the previous paragraph, Dr Faulhaber prescribed medication for Patient 3 on April 21, 2010 (three or four prescriptions), May 20, 2010, August 11, 2010 (three or four prescriptions), December 16, 2010 (two prescriptions), and April 8, 2011 (three prescriptions (Ex 11, pp 1-14)

75 Dr Faulhaber and Patient 3 had a sexual and romantic relationship between April and August 2011 (Tr II-247)

Fenway Community Health's advice and warnings to Dr Faulhaber

76 On December 30, 2009, Fenway Community Health personnel including Dr Gonzalez and Jeff Lieberman, the compliance officer, met with Dr Faulhaber about his kissing and hugging Patient A (Ex 2, *e g*, Tr I-72)

77 At the December 30, 2009 meeting, Fenway Community Health also orally advised Dr Faulhaber not to text patients or use social media to communicate with them, seek to meet a patient outside of a medical setting, act in a way that a patient could reasonably perceive was an

attempt to build a non-professional relationship, or engage in a sexual or romantic involvement with a patient (Ex 4)

78 On July 22, 2010, Dr Gonzalez wrote a warning to Dr Faulhaber as a result of Dr Faulhaber's communicating with Patient B

79 The two-and-one-half-page letter also instructed

> • If you have engaged or attempted to engage in sexual or romantic or otherwise nonprofessional interactions with a current or recently former patient – consensual or non-consensual – you will
>
> 1 provide me with a list of names of these patients with whom you engaged or attempted to engage in these types of interactions
> 2 no longer engage or attempt to engage in these interactions with a current or recently former patient

(Ex 4)(ellipsis in original) Both uses of the phrase "recently former patient" were followed by an asterisk The excerpt from the letter above was immediately followed with this excerpt

> (*recently former patient = any patient who in any way shape or form was under your care within six months of the initiation of sexual, romantic, or otherwise nonprofessional interactions There is little consensus in the medical profession regarding the ethics of medical professionals engaging in sexual or romantic interactions with former patients under some circumstances, sexual contact or a romantic relationship with a former patient may always be unethical)

(Ex 4)

80 In response to the letter, which Dr Faulhaber acknowledged by signing, he did not reveal that he was then conducting a sexual and romantic relationship with Patient 2 (Ex 4, Tr I-80, 109-10)

81 In response to the letter, Dr Faulhaber did not reveal that he had conducted a sexual and romantic relationship with Patient 1 from September or October 2008 until approximately February or March 2009 (Ex 4, Tr I-80, 109-10) However, Patient 1, although a former patient may not have been a *recently* former patient when he and Dr Faulhaber began their sexual and romantic relationship

Discussion

Ethics of doctors' conducting sexual and romantic relationships with patients

American Medical Association (AMA) Opinion 8 14, Sexual Misconduct in the Practice of Medicine, states in part

> Sexual contact that occurs concurrent with the patient-physician relationship constitutes sexual misconduct Sexual or romantic interactions between physicians and patients detracts from the goals of the physician-patient relationship, may exploit the vulnerability of the patient, may obscure the physician's objective judgment concerning the patient's health care, and ultimately may be detrimental to the patient's well-being
>
> If a physician has reason to believe that non-sexual contact with a patient may be perceived as or may lead to sexual contact, then he or she should avoid the non-sexual contact At a minimum, a physician's ethical duties include terminating the physician-patient relationship before initiating a dating, romantic, or sexual relationship with a patient

(Ex 14) It was issued in December 1989 and updated in March 1992 (Ex 14) It is therefore relevant to these allegations dating back to 2008

Ethics of doctors' conducting sexual and romantic relationships with former patients

The parties chose not to call expert witnesses on the ethics of doctors' conducting sexual and romantic relationships with former patients (*See* Tr I-63-64, II-256-57) In the absence of expert testimony on the issue, I am left with the following

- AMA Opinion 8 14, which states in part

> Sexual or romantic relationships with former patients are unethical if the physician uses or exploits, trust, knowledge, emotions, or influence derived from the previous professional relationship

(Ex 14)

- Dr Gonzalez's written acknowledgment that in July 2010 that

> [t]here is little consensus in the medical profession regarding the ethics of medical professionals engaging in sexual or romantic interactions with former patients

> under some circumstances, sexual contact or a romantic relationship with a former patient may always be unethical

(Ex 4, Tr I-105)

• Fenway Community Health's ban on one doctor's – Dr Faulhaber's – conducting sexual or romantic relationships with former patients sooner than six months after the medical relationship ends (Ex 4) Dr Kapila was not aware of any written policy governing sexual and romantic relationships between an internist and former patient (Tr I-56)

• Dr Gonzalez's non-expert understanding and opinion that in some circumstances, a doctor should never conduct a sexual or romantic relationship with a former patient, including when the doctor is a psychiatrist, the doctor treated the patient for a long time, the doctor treated the patient for a particularly grave condition, no matter the length of treatment, or otherwise when the doctor and former patient could not interact as roughly equal (Tr I-81, 105-06, 111)

• An excerpt from Fenway Community Health's personnel manual, issued January 2010, informing employees that they may be terminated for " inappropriate sexual conduct " The policy presumably refers to sexual conduct with a patient, but does not so state, does not mention former patients, and does not define "inappropriate " (Ex 16)

Ultimately, the only authoritative and definitive source before me is AMA Opinion 8 14 My task is not to determine whether Dr Faulhaber violated Fenway Community Health's directive to him Nor is its directive indicative of the medical community's opinion about the ethics of a doctor conducting a sexual or romantic relationship with a former patient To the contrary, the directive denies that a consensus exists on the issue

To the extent that Dr Faulhaber offers his supposed compliance with Fenway Community Health s directive as a defense to BRM's Statement of Allegations, it is not a valid defense To the extent that Dr Faulhaber argues that Dr Gonzalez gave him permission to date

former patients six months after ending the physician-patient relationship that, too is not a valid defense to the Statement of Allegations (*E g*, Tr II-201-02, Resp Br at 6)

Dr Faulhaber's lack of credibility

Dr Faulhaber variously testified that he waited one month (Tr II-220) and six months (Tr II-195) after ending the medical relationship with Patient 2 to have a sexual and romantic relationship with him Not only does the varying testimony undermine his credibility, neither time period is correct Dr Faulhaber treated Patient 2 while they were engaged in a sexual and romantic relationship Yet he testified otherwise (Tr 208, 220) and told BRM's investigator otherwise (Ex 25) Nor did he reveal to Fenway Community Health his then-current sexual and romantic relationship with Patient 2, despite its directive to him and his apparent agreement to comply with it (Ex 4)

Ultimately, however, Dr Faulhaber's credibility is an issue but not a major one in this appeal Dr Faulhaber admitted to certain facts, such as communicating with Patient B by Facebook And Patient 2's email exchanges establish certain facts

Patient A

Dr Faulhaber testified that he did not remember whether he kissed Patient A on the mouth, but testified that he may have kissed him on the cheek When asked on direct examination why that would have been appropriate, Dr Faulhaber testified that it was a way of reaching out to the patient, providing comfort, and saying goodbye (Tr II-214)

With Patient A testifying that Dr Faulhaber kissed him on the lips, Dr Faulhaber not denying it, but testifying that he didn t remember it, and Dr Faulhaber conceding that he may have kissed the patient on the cheek, and justifying a kiss as appropriate, I take that as enough

confirmation for Patient A's testimony on this point to find that Dr Faulhaber kissed Patient A on the lips

With Patient A testifying that Dr Faulhaber hugged him and Dr Faulhaber not testifying on this issue, and with Dr Faulhaber telling BRM's investigator that it might be beneficial and appropriate to hug a patient (Ex 25), I take that as enough evidence to find that Dr Faulhaber hugged Patient A

Dr Faulhaber's kissing and hugging Patient A violated AMA Opinion 8 14 It was either "[s]exual contact that occur[red] concurrent with the patient-physician relationship" or "non-sexual contact with a patient [that] may be perceived as or may lead to sexual contact " (Ex 14)

Dr Faulhaber's hugging and kissing of Patient A demonstrated that he engaged in conduct that places in question his competence to practice medicine, G L c 112, § 5, ¶ 9(c), 243 CMR 1 03(5)(a)3, committed misconduct in the practice of medicine, 243 CMR 1 03(5)(a)18, and engaged in conduct that undermines the public confidence in the integrity of the medical profession *Sugarman v Board of Registration in Medicine*, 422 Mass 338, 343-44 (1996), *Raymond v Board of Registration in Medicine*, 387 Mass 708, 713 (1982), and *Levy v Board of Registration in Medicine*, 378 Mass 519, 528 (1979)

Furthermore, Dr Faulhaber hugged and kissed a patient, Patient A, who had recently been diagnosed as being HIV positive Dr Faulhaber knew or should have known that Patient A was scared, nervous, and vulnerable Dr Faulhaber took advantage of Patient A's fear, nervousness, and vulnerability for his personal reasons, including pleasure This, too, is conduct that places in question his competence to practice medicine, misconduct in the practice of medicine, and conduct that undermines the public confidence in the integrity of the medical profession

Patient B

Dr Faulhaber does not dispute that he sent Patient B a message on Facebook, calling him "sweetness" and inviting him to a party

By sending Patient B that message, Dr Faulhaber violated AMA Opinion 8 14 The message was "non-sexual contact with a patient [that] may be perceived as or may lead to sexual contact " (Ex 14) A reasonable person would perceive Dr Faulhaber's use of the word "sweetness" and a party invitation as possibly leading to sexual contact And Patient B did so perceive it, he saw the message as possibly an offer for a date (Tr 1-29)

Dr Faulhaber's Facebook message to Patient B demonstrated that he engaged in conduct that places in question his competence to practice medicine, G L c 112, § 5, ¶ 9(c), 243 CMR 1 03(5)(a)3, committed misconduct in the practice of medicine, 243 CMR 1 03(5)(a)18, and engaged in conduct that undermines the public confidence in the integrity of the medical profession *Sugarman*, 422 Mass at 343-44, *Raymond*, 387 Mass at,713, and *Levy*, 378 Mass at 528

Furthermore, Dr Faulhaber collected confidential information from Patient B – about his emotional state and the reason for it – in a medical context He misused it for his own personal and social purposes Dr Faulhaber did not merely bring to Patient B's attention a social outlet for him – which was inappropriate in any event, Dr Faulhaber invited Patient B to *Dr Faulhaber's* party This, too, is conduct that places in question his competence to practice medicine, misconduct in the practice of medicine, and conduct that undermines the public confidence in the integrity of the medical profession

Patient 1

Dr Faulhaber provided medical care to Patient 1 They then ended the doctor-patient relationship, as both Dr Faulhaber and Patient 1 testified (Tr II-178, 182, 206, Ex 25) Some evidence exists that Patient 1 was himself a doctor (Tr II-250), so I give weight to his assessment that he had left Dr Faulhaber's medical care Considering Dr Faulhaber's and Patient 1's testimony, the absence of a notation in Patient 1's medical record that Dr Faulhaber was no longer Patient 1's doctor (Tr I-91) does not establish by a preponderance of the evidence, that Dr Faulhaber remained Patient 1's doctor *See Fisch v Board of Registration in Medicine*, 437 Mass 128, 131 (2002) (The Board's final decision, in turn, is reviewable under the substantial evidence standard G L c 30A, § 1(6), *Duggan v Board of Registration in Nursing*, 456 Mass 666, 674 (2010))

Five to six months after Dr Faulhaber ended his medical care for Patient 1, they began a sexual and romantic relationship (Again my task is not to determine whether Dr Faulhaber violated Fenway Community Health's directive that he wait six months after ending medical care before starting a sexual or romantic relationship with a patient) Approximately two to four months after they ended their sexual and romantic relationship, Dr Faulhaber again provided medical care to Patient 1

According to AMA Opinion 8 14,

> Sexual or romantic relationships with former patients are unethical if the physician uses or exploits, trust, knowledge, emotions, or influence derived from the previous professional relationship

(Ex 14) BRM did not present evidence, nor did it even suggest, that Dr Faulhaber exploited his knowledge or influence or Patient 1's trust or emotions To the contrary, Patient 1 s reluctance to testify – he had to be subpoenaed (Tr II-175) – suggests that Patient 1 did not feel exploited

Again, some evidence exists that Patient 1 was himself a doctor (Tr II-250), so he was probably less susceptible to any exploitation by Dr Faulhaber and probably would have been more conscious of it had it occurred

Regarding Patient 1, Dr Faulhaber did not engage in conduct that places in question his competence to practice medicine, G L c 112, § 5, ¶ 9(c), 243 CMR 1 03(5)(a)3, did not commit misconduct in the practice of medicine, 243 CMR 1 03(5)(a)18, and did not engage in conduct that undermines the public confidence in the integrity of the medical profession *Sugarman*, 422 Mass at 343-44 (1996), *Raymond*, 387 Mass at 713 (1982), and *Levy*, 378 Mass at 528 (1979)

Patient 2

According to the Statement of Allegations, Dr Faulhaber saw Patient 2 in office visits between April 2009 and February 2010, began a sexual and romantic relationship with the patient in March 2010, wrote prescriptions for the patient in April and June 2010 and ordered tests for the patient in March, June, and October 2010 (Ex 25)

While engaged in a sexual and romantic relationship with Patient 2, Dr Faulhaber wrote prescriptions for him on April 22, June 2, 2010, and July 2, 2010, ordered tests for him on June 17 and October 25, 2010, engaged in electronic medical communications with him on June 2, 2010, and engaged in medical conversation by telephone with him an July 2 and October 25, 2010 (Exs 7, 13)

While engaged in at least a social relationship with Patient 2, Dr Faulhaber on February 10 and March 4, 2010 prescribed various medications, including Viagra, for Patient 2 (Exs 7, 9, 13), saw Patient 2 in an office visit on March 2010, ordered tests for him on February 12, March 16, and March 18, 2010, and engaged in electronic medical communications with him on February 25, 2010 (Ex 13)

(The prescription dates in this opinion do not correspond to the prescription dates in the Statement of Allegations I consider that an insignificant discrepancy Dr Faulhaber was on notice that BRM had charged him with writing prescriptions for a patient while engaged in a sexual and romantic relationship with him The discrepancy in dates is unlike, for example, BRM's introducing testimony of Dr Faulhaber's alleged improprieties with Patient A, improprieties not contained in the Statement of Allegations)

Regarding Patient 2, Dr Faulhaber engaged in conduct that places in question his competence to practice medicine, G L c 112, § 5, ¶ 9(c), 243 CMR 1 03(5)(a)3, committed misconduct in the practice of medicine, 243 CMR 1 03(5)(a)18, and engaged in conduct that undermines the public confidence in the integrity of the medical profession *Sugarman*, 422 Mass at 343-44 (1996), *Raymond*, 387 Mass at 713 (1982), and *Levy*, 378 Mass at 528 (1979)

Patient 3

Dr Faulhaber told BRM's investigator that his sexual and romantic relationship with Patient 3 lasted from February to August 2011 (Ex 25) That is the apparent source of that time period in the Statement of Allegations (Ex 23)

At the hearing, he testified to a shorter time period, April to August 2011 (Tr II-247), as well as a different time period, one starting in November 2010 (Tr II-210)

I discount his testimony about the relationship starting in November 2010 It is slightly more likely that the relationship happened in 2011, because he twice reported 2011 as the year that the relationship happened once in his interview with BRM's investigator, and once at the hearing

As for whether the relationship lasted from February to August 2011 or April to August 2011 I accept April 2011 as the starting month although just barely I do so because Dr

Faulhaber testified under oath to April 2011 He also described the relationship as short and, "[t]o the best of [his] recollection four months maximum" (Tr II-210) April to August is a period of four months, February to August is a period of six

Nonetheless, whether the relationship started in February or April is a close call I do not find Dr Faulhaber credible In addition, it can be convincingly argued that the starting month of February 2011 is more accurate because Dr Faulhaber provided it first (in March 2013) and because it was closer to the relationship

As for when in April 2011 Dr Faulhaber and Patient 3 began their sexual and romantic relationship, there is no evidence Dr Faulhaber wrote three prescriptions for Patient 3 on April 8, 2011 (Ex 11, pp 12-14) BRM has not proved by a preponderance of the evidence that Dr Faulhaber was conducting a sexual and romantic relationship with Patient 3 on that date

Although prescriptions that Dr Faulhaber wrote for Patient 3 were *filled* on May 10, 2010 (three) and June 7, 2010 (three) (Ex 11, p 15), there was no evidence that Dr Faulhaber *wrote* them when he and Patient 3 were in a sexual and romantic relationship The prescriptions appear to be on-going and regularly refilled (Ex 11, p 15)

Dr Faulhaber waited less than a month after prescribing medication for Patient 3 to become sexually and romantically involved with him Nonetheless, BRM did not present evidence, nor did it even suggest, that Dr Faulhaber exploited his knowledge or influence or Patient 3's trust or emotions (*See* Ex 14)

BRM did not prove by a preponderance of the evidence that Dr Faulhaber wrote three prescriptions on April 8, 2011 for a patient with whom he was conducting a sexual and romantic relationship Nor did it prove by a preponderance of the evidence that Dr Faulhaber exploited a former medical relationship with a former patient to engage in a sexual and romantic relationship

with him

Regarding Patient 3, Dr Faulhaber did not engage in conduct that places in question his competence to practice medicine, G L c 112, § 5, ¶ 9(c), 243 CMR 1 03(5)(a)3 did not commit misconduct in the practice of medicine, 243 CMR 1 03(5)(a)18, and did not engage in conduct that undermines the public confidence in the integrity of the medical profession *Sugarman*, 422 Mass at 343-44 (1996), *Raymond*, 387 Mass at 713 (1982), and *Levy*, 378 Mass at 528 (1979)

Conclusion and Order

Dr Faulhaber hugged and kissed Patient A during medical appointments, thereby engaging in conduct that places in question his competence to practice medicine, misconduct in the practice of medicine, and conduct that undermines the public confidence in the integrity of the medical profession

Dr Faulhaber sent a Facebook message to Patient B referring to him as "sweetness" and inviting him to a party, thereby engaging in conduct that places in question his competence to practice medicine, misconduct in the practice of medicine, and conduct that undermines the public confidence in the integrity of the medical profession

Dr Faulhaber acted as Patient 1's doctor after having had a sexual and romantic relationship with him, but did not exploit trust, knowledge, emotions, or influence, and therefore did not engage in conduct that places in question his competence to practice medicine, misconduct in the practice of medicine, or conduct that undermines the public confidence in the integrity of the medical profession

Dr Faulhaber acted as Patient 2's doctor while having a sexual and romantic relationship with him, thereby engaging in conduct that places in question his competence to practice medicine misconduct in the practice of medicine, and conduct that undermines the public

confidence in the integrity of the medical profession

BRM did not prove that Dr Faulhaber acted as Patient 3's doctor while having a sexual and romantic relationship with him, or, if he terminated his medical care of Patient 3 before conducting a sexual and romantic relationship with him, that Dr Faulhaber exploited trust, knowledge, emotions, or influence Therefore, BRM did not prove that Dr Faulhaber engaged in conduct with Patient 3 that places in question his competence to practice medicine, misconduct in the practice of medicine, or conduct that undermines the public confidence in the integrity of the medical profession

I recommend that Dr Faulhaber be disciplined for his conduct with Patients A, B, and 2, but not for his conduct with Patients 1 and 3

DIVISION OF ADMINISTRATIVE LAW APPEALS

Kenneth Bresler
Administrative Magistrate

Dated FEB 18 2015