

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Board of Registration in Medicine,
Petitioner

Docket No. RM-19-0527

v.

Julian A. Mitton, M.D.,
Respondent

Appearance for Petitioner:

Lisa L. Fuccione, Esq.
Patrick G. Fitzpatrick, Esq.
178 Albion St., Suite 330
Wakefield, MA 01880

Appearance for Respondent:

Ingrid S. Martin, Esq.
Julien M. Mundeale, Esq.
Todd & Weld LLP
One Federal St.
Boston, MA 02110

Administrative Magistrate:

Bonney Cashin

Summary of Recommended Decision

Dr. Mitton committed misconduct in the practice of medicine within the meaning of *Hellman v. Bd. of Reg. in Med.*, 404 Mass. 800 (1989). He intentionally texted Patient A and sought to convince her he was someone she knew, using information he obtained as her doctor. He asked her for photos and sent her sexually suggestive messages and a sexually explicit photo of himself. By crossing sexual boundaries with a patient and by showing a lack of candor, Dr. Mitton engaged in conduct that undermines the public confidence in the integrity of the medical profession.

RECOMMENDED DECISION

Introduction

On October 24, 2019, the Board of Registration in Medicine issued a Statement of Allegations charging Julian D. Mitton, M.D. with misconduct in the practice of medicine. The Board also alleged that Dr. Mitton lacked good moral character and had engaged in conduct that undermines the public confidence in the integrity of the medical profession, citing *Levy v. Bd. of Reg. in Med.*, 378 Mass. 519 (1979), *Raymond v. Bd. of Reg. in Med.*, 387 Mass. 708 (1982) and *Sugarman v. Bd. of Reg. in Med.*, 422 Mass. 338 (1996).

I held a hearing on September 14, 15, 16, and on November 4, 2020, which was transcribed.¹ On August 26, 2020, the parties filed a joint prehearing conference memorandum, which included a Stipulation of Facts, five agreed-to exhibits, and five proposed and disputed exhibits marked A-E. I admitted eight exhibits into evidence. I issued two written evidentiary rulings on October 30 and November 1, 2020. The Board offered testimony from the patient, referred to as Patient A, Dr. Mitton, Christine Griffin, Director of Health Information for Mass General Brigham, Ellen Nelson, Director of Employee and Labor Relations for Mass General Brigham, and a woman referred to as Acquaintance 1. Renee Sorrentino, M.D., a forensic psychologist, who testified over the Board's objection, and James Morrell, M.D., Medical Director of the Massachusetts General Hospital (MGH) clinic in Charlestown MA and a practicing physician, testified for Dr. Mitton.

FINDINGS OF FACT

Based upon the testimony and other evidence in the record and the reasonable inferences from them, as well as my assessment of witness credibility, I make the following findings of fact:

¹ References to the transcripts are "Tr. Volume #: page #". The transcript of the second day is identified as "Volume I on its title page, which is incorrect. I refer to it as Volume II.

1. Julian D. Mitton, M.D., the Respondent, was born in 1986 and graduated from Stony Brook University School of Medicine in 2013. (Stipulated Facts 1; Mitton Tr. II: 46.)

2. The Respondent completed an Internal Medicine residency at (MGH) in Boston in June 2017 and has been licensed to practice medicine in Massachusetts under certificate number 267146 since 2016. (Stipulated Facts 1; Mitton Tr. I: 86-87; Tr. II: 46-47.)

3. From approximately July 2017 to June 2018, the Respondent worked part time as an attending physician at MGH's Charlestown Health Care Center (CHCC), which entailed him seeing patients twice a week for two half-day sessions. (Stipulated Facts 2; Mitton Tr. I: 86-87; Tr. II: 46-47.)

4. In late June 2018, the Respondent began working as Chief Resident within MGH's Department of Medicine and curtailed his work at CHCC to one half-day session per week. (Mitton Tr. I: 86-87; Tr. II: 47.)

5. At the time of the hearing, Dr. Mitton was working in California as a researcher and program administrator for a national health organization. (Mitton Tr. I: 86.)

Background: Acquaintance 1 and Acquaintance 2

6. Dr. Mitton met Acquaintance 1 on an online dating website in late 2013 or early 2014. They communicated frequently through several social media websites and text messaging throughout 2014 and 2015. (Mitton Tr. I: 136-137, 138; Tr. II: 76-77, 83; Acquaintance 1 Tr. IV: 10, 11, 14, 18, 28; Ex. 7.)

7. When messaging, they talked generally about their lives and work and exchanged photographs, including some of a sexual nature. (Mitton Tr. I: 136-137, 138; Tr. II: 76-77, 83; Acquaintance 1 Tr. IV: 10, 11, 14, 18, 28; Ex. 7.)

8. Acquaintance 1 attended college, worked in the non-profit sector, and volunteered at Rosie's Place. (Mitton Tr. I: 139; Tr. II: 27; Acquaintance 1 Tr. IV: 8-10, 17.)

9. Acquaintance 1 knew Dr. Mitton as "Julian" and saved his phone number to her contact list as "Julien Mitton." He referred to himself as Julien when communicating with her. (Acquaintance 1 Tr. IV: 15, 16.)

10. Dr. Mitton usually initiated their messaging exchanges. He sent her between two and nine photos. Acquaintance 1 recalls sending two photos to Dr. Mitton, one of a tattoo on the back of her neck and another of her feet. (Acquaintance 1 Tr. IV: 10, 13, 19, 23, 25, 26-27.)

11. Acquaintance 1 recalled that she ended their initial messaging because "the conversation just started getting too sexual for me." (Acquaintance 1 Tr. IV: 13.)

12. Acquaintance 1 recalled that Dr. Mitton subsequently found her on Facebook and then Twitter, and she blocked him after a few exchanges. She believed he did not seem to understand she was not interested in what he was looking for. She thought it was "weird" that he followed her to different sites after she explained that she was not interested. (Acquaintance 1 Tr. IV: 19-21; Exhibit 7.)

13. After Dr. Mitton met his wife in July 2015, he messaged Acquaintance 1 less often and, at times, deleted her number from his phone. He did not cease contact entirely until after August 9, 2018. (Mitton Tr. I: 137-138, Tr. II: 77.)

14. Dr. Mitton reported he felt guilty and ashamed about his relationship with Acquaintance 1, particularly after he married. (Nelson Tr. III: 28.)

15. Dr. Mitton recalls that he last messaged with her in March 2018; Acquaintance 1 recalls their last text message was in 2016 or 2017. (Mitton Tr. I: 139-140; Nelson Tr. III: 28; Acquaintance 1 Tr. IV: 21, 24.)

16. Dr. Mitton recalled that he often had to remind Acquaintance 1 of who he was when they communicated less frequently. (Mitton Tr. I:146.)

17. Dr. Mitton and Acquaintance 1 never met in person. (Mitton Tr. I: 139; Tr. II:19; Nelson III: 27; Acquaintance 1 Tr. IV: 10, 28.)

18. Acquaintance 2 was another woman with whom he had messaged and exchanged sexual photographs. (Mitton Tr. I: 128-129.)

19. According to Dr. Mitton, Acquaintance 2 worked at a convenience store. (Mitton Tr. II: 23-24.)

20. Dr. Mitton contacted Acquaintances 1 and 2 and other women as a defense mechanism to manage stress, and because it was sexually gratifying. (Mitton Tr. I: 141; Tr. II: 44, 79.)

21. On the morning of August 9, 2018, Dr. Mitton intended to contact Acquaintance 1 when he had the opportunity. Before he left his home that morning, he wrote her number on a scrap piece of paper he used for notes throughout his day. (Mitton Tr. I: 125; Nelson Tr. III: 29.)

22. Dr. Mitton retrieved Acquaintance 1's phone number from inside a novel in which he had written phone numbers for women, including Acquaintance 1 and Acquaintance 2, with whom he had previously texted or messaged. (Mitton Tr. I: 128-130; Nelson Tr. III: 26; Exhibit 6.)

23. He was able to identify her number as one of two on the left side of the book page, although there were no identifiers next to any of the numbers on the page. (Mitton Tr. I: 133; Tr. II: 43, 45.)

24. Acquaintance 1 never worked at a convenience store. (Acquaintance 1 Tr. IV: 10.)

25. When he entered a committed relationship in the fall of 2015, Dr. Mitton removed contact information about Acquaintances 1 and 2 and other women he texted or messaged and wrote their phone numbers in the novel to create a barrier to contacting them. (Mitton Tr. I: 128, 130; Tr. II: 78, 81; Exhibit 6.)

August 9, 2018 Incident

26. On August 9, 2018, Dr. Mitton was scheduled to see patients at CHCC between 1:00 PM and 5:00 PM. He arrived at CHCC just after 1:00 PM. (Mitton Tr. I: 90.)

27. On August 9, 2018, Patient A, a twenty-one-year-old female, had an annual physical examination scheduled at 1:00 PM with Dr. Mitton at CHCC. (Stipulated Facts 3; Patient A Tr. I: 27, 28; Mitton Tr. I: 90.)

28. Patient A had resided in Charlestown, Massachusetts for twenty years and received her medical care at CHCC during that entire period. She previously had an annual exam with Dr. Mitton on August 10, 2017 after transferring from pediatric to adult care, and Dr. Mitton became her primary care provider. (Stipulated Facts 4; Patient A Tr. I: 25, 26; Mitton Tr. I: 89; Exhibit 1.)

29. Upon Patient A's arrival at CHCC for her appointment with the Respondent on August 9, 2018, she went to the main lobby and checked in at the reception desk, which required her to verify her address, phone number, insurance coverage and other information. (Patient A Tr. I: 29-30; Morrell Tr. II: 141, 151.)

30. Two phone numbers were listed in Patient A's medical record: her cell phone under "home" and "mobile" and her mother's phone under "other" and "work." (Patient A Tr. I: 30, 31, 75; Mitton Tr. II: 66-67; Exhibit 1: 420.)

31. CHCC uses a medical recordkeeping system known as EPIC, accessed through a unique username and password. If a user does not remain active within EPIC, it times out after 15 minutes or less. (Griffin Tr. II: 102.)

32. Employees so authorized (not including physicians) may conduct an “audit trail” that shows in detail a user’s interaction with a medical record in EPIC. For example, an “event” is an action taken in a part of the record, and an “encounter” is a view of a patient visit. A time stamp shows when an interaction occurred. Each employee accessing a record has a unique identifier. (Griffin Tr. II: 103, 105-107; Exhibits 2. 3.)

33. Patient A was subsequently taken to an exam room, where a nurse took her vital signs, conducted several routine screenings, and asked for verbal permission to record the visit.² During the screenings, Patient A disclosed that she was experiencing depression and suicidal thoughts. (Patient A Tr. I: 33, 34-35, 76; Mitton Tr. I: 94-96; Tr. II: 56; Morrell Tr. II: 141; Exhibits 1, 2.)

34. At some point before Dr. Mitton saw Patient A, he was informed of Patient A’s depression and suicidal ideation. (Mitton Tr. I: 109; Tr. II: 56.)

35. Shortly after Dr. Mitton viewed Patient A’s medical record at 1:06 PM, Patient A was brought into his exam room. (Mitton Tr. I: 92, 99; Tr. II: 58; Griffin Tr. II: 107; Exhibit 2.)

36. On August 9, 2018, from approximately 1:17 PM to 1:24 PM, Dr. Mitton viewed Patient’s A medical record of prior visits and test results while in the room with Patient A. This was not his usual practice, but he arrived a little late that day. (Mitton Tr. I: 106; Tr. II: 61-62; Nelson Tr. III: 23; Exhibit 2.)

² MGH used a transcription service named Scribble, which converted the recorded information into a doctor’s note that Dr. Mitton later reviewed, edited, and signed. (Mitton Tr. II: 58-59.)

37. During the appointment, Dr. Mitton and Patient A discussed her depression and suicidal ideation, and he conducted a limited, focused physical exam. (Stipulated Facts 5; Patient A Tr. I: 38-39; Mitton Tr. I: 109; Morrell Tr. II: 143; Nelson Tr. III: 23.)

38. Throughout her appointment, Patient A was wearing a tank top, sweatpants, and her hair was in a high ponytail, exposing her neck tattoo. (Tr. I: 36, 40, 41.)

39. Patient A recalled that, during the appointment, she disclosed she had recently lost her job at a 7-Eleven (previously a Tedeschi's), and Dr. Mitton commented on her tattoo. (Patient A Tr. I: 39-40, 41).

40. Dr. Mitton did not recall whether he discussed Patient A's work history with her, but noted that "Scribble would have recorded any conversation they would have had." (Mitton Tr. I: 111; Tr. II: 63-64; Tr. III: 19-20.)

41. Patient A appeared withdrawn and reserved during her appointment. (Mitton Tr. I: 109, 113.)

42. During their conversation, Patient A was looking down, and so she did not recall whether Dr. Mitton was typing on his computer. (Patient A Tr. I 38-39, 42.)

43. Dr. Mitton was concerned for her wellbeing and wanted her evaluated by the Behavioral Health Department. (Stipulated Facts 6.)

44. After receiving Patient A's consent to an evaluation, he arranged for her to be seen by a licensed mental health social worker. (Stipulated Facts 7; Patient A Tr. I: 42; Mitton Tr. I: 113; Tr. II: 64.)

45. According to Dr. Mitton, near the end of her appointment, he asked Patient A for her "preferred" phone number so that he could call her for a safety check. He recalled he did not ask her earlier when he had the demographics page of her medical record open because he

wanted to remain focused on the patient, not the computer screen. He said he wrote the number down on his to-do list rather than cross-checking it against the contact information in her medical record. (Mitton Tr. I: 121-122; Tr. II: 66; Nelson Tr. III: 22-23.)

46. Dr. Mitton routinely took notes throughout the day on a folded, letter-size piece of paper. His jottings were a mix of personal, administrative, and patient-related information. According to Dr. Mitton, the notes were not organized in any fashion and phone numbers were not labeled. (Mitton Tr. I: 125, 126-128.)

47. According to Patient A, she did not provide her cell phone number to Dr. Mitton at any time on August 9, 2018. (Patient A Tr. I: 45; Mitton Tr. III: 20-21; Tr. III: Nelson 52, 53.)

48. Dr. Mitton's behavior during the appointment was appropriate, and he did not touch her in a sexual manner during the exam. (Patient A Tr. I: 80.)

49. At around 2:00 PM, Dr. Mitton escorted Patient A to the Behavioral Health Department on the third floor to see the social worker. (Patient A Tr. I: 42-43, 81; Mitton Tr. I: 114.)

50. Around 2:56 PM, after the social worker determined that it was safe for Patient A to return home, she contacted the adult care front desk staff by phone to let them know Patient A was safe to return home and advised Patient A to return to the second floor to speak with Dr. Mitton. (Stipulated Facts 8; Patient A Tr. I: 43, 44; Mitton Tr. II: 18.)

51. According to Patient A, after she returned to the second floor, Dr. Mitton spoke to her in the lobby to confirm that she felt safe going home, to tell her he would call the next day for a safety check, and he gave her a CHCC business card. (Patient A Tr. I: 44-45.)

52. According to Dr. Mitton, around 3:00 PM when Patient A returned to the second floor, he spoke with her in his exam room to confirm that she felt safe going home and provided

her with a business card containing contact information for CHCC and his pager. (Mitton Tr. I: 115-116; Tr. II: 69.)

53. Patient A left CHCC shortly after 3:00 PM on August 9, 2018. (Mitton Tr. II: 68-69.)

54. At around 3:30 PM, Dr. Mitton had a break in his schedule when a patient failed to appear, so he used the time to catch up on personal and professional tasks. (Mitton Tr. II: 31-32, 33.)

55. At 3:27 PM, Dr. Mitton accessed Patient A's medical records and entered billing and diagnostic information. (Stipulated Facts 9; Mitton Tr. II: 72-73; Griffin Tr. II: 107-108; Exhibit 2.)

56. At 3:28 PM, Dr. Mitton accessed and viewed Patient A's contact information in her medical record. (Mitton Tr. II: 38-39, 66-67, 73-74; Griffin Tr. II: 108-109; Exhibit 2.)

57. According to Dr. Mitton, he accessed Patient A's contact information to confirm that the cell phone number she gave him and that he wrote down on his to-do list was the same number listed in her medical record. It was; her number had a 857 area code. (Patient A Tr. I: 31; Mitton Tr. II: 39-40, 45.)

58. According to Dr. Mitton, he did not verify the number earlier when speaking with Patient A because he did not have the demographics tab of her medical record open on his computer. (Mitton Tr. I: 121.)

59. After confirming that the phone number he had written down was the same as that in Patient A's medical record, Dr. Mitton did not update his to-do list by crossing out or otherwise altering Patient A's number. (Mitton Tr. II: 41.)

60. At 3:32 PM, four minutes after accessing Patient A's cell phone number, Dr. Mitton used his personal cell phone to send a text message. (Stipulated Facts 10; Patient A Tr. I: 77; Mitton Tr. II: 12, 42, 75; Exhibit 4.)

61. According to Dr. Mitton, he intended to text Acquaintance 1 and had typed in a phone number from his to-do list that he believed belonged to her. (Mitton Tr. I: 127, 129, Tr. II: 43, 75.)

62. Acquaintance 1's phone number had not changed throughout 2014 to August 2018 and had a 617-area code. (Mitton Tr. II: 12-13, 44; Exhibit 6.)

63. He sent his text message to Patient A, who did not know who was contacting her. (Patient A Tr. I: 47; Nelson Tr. III: 25, Exhibit 4.)

64. Patient A asked who was texting her; Dr. Mitton identified himself as "jay" and suggested they had met "online or something a little while back." (Patient A Tr. I: 47, 48, 63-69³; Mitton Tr. II: 75; Exhibit 4.)

65. According to Dr. Mitton, Jay is a nickname used by his friends, family, and acquaintances. (Mitton Tr. II: 75; Nelson Tr. III: 14.)

66. Patient A replied that she was not a social media user, and again Dr. Mitton suggested they met online and texted: "just remember how cute you are ha" to which she responded: "I think you have the wrong girl I don't give my number out." He replied: "I thought it was you" and asked for a "pic." (Exhibit 4.)

67. Patient A declined, again saying "pretty sure it wasn't me" after which Dr. Mitton replied that they may have met at a store, like Tedeschi's or 7-Eleven. (Patient A Tr. I: 48, 67; Exhibit 4.)

³ Patient A was asked to read portions of the text messages into the record.

68. Patient A admitted that she had worked at 7-Eleven, but texted that she did not recall giving out her phone number to anyone named Jay while she worked there.⁴ (Patient A Tr. I: 48, 49; Exhibit 4.)

69. Dr. Mitton again asked Patient A to send a photograph of herself, added “you were so happy and sweet...” Patient A declined because she did not want to send a picture to someone who would not identify himself. She asked him to send her a picture so that she would know who it was. (Patient A Tr. I: 48, 68-69; Exhibit 4.)

70. He responded: “can I send you something a little sultry lol”; she responded: “I’m not really that type of girl,” yet he persisted, and she again said: “I really think you have the wrong girl.” (Exhibit 4.)

71. Patient A was confused because she did not receive any information that would help her recollect who was texting her. (Patient A Tr. I: 48-49, 68.)

72. Patient A told Dr. Mitton twice that he must have the wrong person, yet Dr. Mitton did not provide her with more information about who he was. (Mitton Tr. II: 10-11; Exhibit 4.)

73. According to Dr. Mitton, he was trying to remind Acquaintance 1 who he was, as he had had to do in the past. (Mitton Tr. I: 146.)

74. Dr. Mitton did not refer to his most recent conversation with her in Spring 2018, or any other past interaction to remind her who he was. (Mitton Tr. II: 11.)

75. Dr. Mitton continued to compliment Patient A’s appearance, specifically her “super cute” neck tattoo and “sexy lips.” (Patient A Tr. I: 48; Exhibit 4.)

⁴ Patient A thought at one point that the texter might be one of the “army guys” who were customers at the convenience store, but none of them were named Jay. (Patient A Tr. I: 48-49.)

76. Patient A denied having a tattoo on her neck because she did not know who she was texting with and she was “getting freaked out.” She had a neck tattoo in August 2018, but she did not have one when she worked at 7-Eleven. (Patient A Tr. I: 68; Ex. 4.)

77. Patient A responded that she did not believe it would be safe to meet a stranger and that she felt weird talking to a person she did not know. (Exhibit 4.)

78. Dr. Mitton again asked Patient A for a photo, but she did not want to send a photo to someone who would not identify himself. (Patient A Tr. I: 68-69; Exhibit 4.)

79. Subsequently, Dr. Mitton, while still at CHCC, sent Patient A a text message asking if he could “see” her and a cropped version of a photograph originally taken in 2015. It depicted him from the chin down wearing a close-fitting tank top and bike shorts. According to Dr. Mitton, by “see” he meant see a picture. (Patient A Tr. I: 50; Mitton Tr. II: 24-25; Exhibit 4.)

80. At no time did Dr. Mitton refer to the person he was texting by name. (Mitton Tr. I: 143.)

81. At approximately 6:00 PM, Dr. Mitton left CHCC. Before his departure, Dr. Mitton disposed of his to-do list for that day in a hospital document shredder. (Mitton Tr. I: 124; Tr. II: 34; Griffin Tr. II: 111; Nelson Tr. III: 26.)

82. Dr. Mitton jogged home, arriving about 6:30 PM. (Mitton Tr. II: 35.)

83. At approximately 6:45 PM, after he showered, Dr. Mitton sent Patient A another photo of himself from the neck down, naked and holding his erect penis. (Patient A Tr. I: 51; Mitton Tr. II: 34-35, 36; Exhibit 4.)

84. Patient A did not respond to this message. She blocked and deleted his phone number. (Patient A Tr. I: 69.)

85. Later in the afternoon, Patient A had entered the phone number the texts were coming from into Snapchat, a social media platform, which indicated that the number belonged to Dr. Mitton. (Patient A Tr. I: 49, 53.)

86. Patient A and her stepmother reported the text messages to the Boston Police Department, who confirmed that the phone number was Dr. Mitton's. (Patient A Tr. I: 54.)

87. When following up with a patient disclosing depression and suicidal thoughts, Dr. Mitton would typically make sure a mental health specialist was directly involved in her care and follow-up, make sure the patient had a way to easily contact him or another clinic provider. He would make a follow-up call and if they do not answer, he would try again and also contact other team members. He would find out if the patient had an appointment scheduled with behavioral health. (Mitton Tr. I: 117-119.)

88. On August 10, 2018 between 8:40 AM and 8:43 AM, Dr. Mitton entered Patient A's medical record, edited the Scribble note that had been prepared, entered additional billing charges, and made a referral for Patient A. (Mitton Tr. II: 94; Griffin Tr. II: 112; Exhibit 3.)

89. According to Dr. Mitton, he did not call Patient A to conduct a safety check at that time because he was in a shared office with other individuals and did not have enough privacy to make such a phone call. (Mitton Tr. II: 94.)

90. On August 10, 2018 at approximately 6:00 PM, Dr. Mitton called Patient A from his office phone at the main MGH campus to check in on her. Patient A hung up the phone after realizing who was calling because she was scared. (Patient A Tr. I: 56; Mitton Tr. I: 119; Nelson Tr. III: 37.)

91. Dr. Mitton called Patient A again, but she did not answer. He left her a voicemail asking if Patient A was okay. (Patient A Tr. I: 57; Mitton Tr. I: 119-120.)

92. Dr. Mitton did not contact a behavioral health specialist to see if someone had spoken to Patient A or if she had an appointment scheduled. He made no further attempt to contact Patient A. (Mitton Tr. I: 120.)

93. Dr. Mitton did not follow his customary practice after seeing a patient with depression and suicidal ideation. (Mitton Tr. I: 119-120.)

94. Patient A felt anxious and nervous upon hearing Dr. Mitton's voice. (Patient A Tr. I: 58.)

95. On August 12, 2018, Dr. Mitton was informed by the CHCC Director, James Morrell, M.D., that the text messages he sent on August 9, 2018 were sent to Patient A and reported to CHCC. (Mitton Tr. II: 84; Morrell Tr. II: 148.)

96. On or around August 13, 2018, MGH placed Dr. Mitton on administrative leave. (Mitton Tr. II: 85; Morrell Tr. II: 148-149.)

97. Patient A was not comfortable returning to MGH for her medical care. She cancelled an appointment scheduled in September 2018, delaying her medical care, and eventually began receiving her medical care at Beth Israel, about a 50-minute drive from her home. (Patient A Tr. I: 55-56.)

Investigations

98. Ellen Nelson, an MGH Human Resources representative, contacted Patient A, and they met on August 27 and October 12, 2018. Patient A's mother accompanied her. Ms. Nelson asked Patient A to show her the text messages and asked for screenshots of them, which she used when interviewing Dr. Mitton. (Patient A Tr. I: 59-61, 69-70; Nelson Tr. III: 10, 11-12, 13 52-53.)

99. Ms. Nelson interviewed Dr. Mitton on September 24, 2018. (Nelson Tr. III: 13.)

100. According to Dr. Mitton, he was feeling stressed and burned out shortly after taking on the demanding responsibilities of Chief Resident. He was also dealing with the after effects of a trainee's suicide and the death of a close faculty member's child, as well as marital troubles at home because of his long hours. (Mitton Tr. I: 141-142; Tr. II: 47-48, 48-49.)

101. Dr. Mitton had a desire to contact Acquaintance 1 on August 9, 2018. When he texted Patient A, he described himself as "sort of caught up momentarily in that [the desire]." (Mitton; Tr. II: 44, 79.)

102. Dr. Mitton told MGH investigators that, while texting, he thought Acquaintance 1 worked at a convenience store at Logan Airport. He thought he saw her working once when he was traveling. (Mitton Tr. II: 16-17, 23; Nelson Tr. III: 27-28; Sorrentino Tr. III: 78-79.)

103. When Dr. Mitton and his attorney returned to the interview after a 10-minute break, he told the investigators that he was mistaken. The woman who worked at the convenience store was Acquaintance 2, not Acquaintance 1. (Mitton Tr. II: 24, 147; Nelson Tr. III: 31-32; Sorrentino Tr. III: 82.)

104. MGH required Dr. Mitton to undergo a psychological evaluation before returning to work. (Mitton Tr. II: 85.)

105. Renée Sorrentino, M.D., a forensic psychiatrist, was asked to determine if Dr. Mitton was competent to practice medicine safely in particular, to evaluate the level of risk he posed for crossing boundaries with patients. (Sorrentino Tr. II: 169-170, 175.)

106. She interviewed Dr. Mitton on March 26, 2019. Her colleague, Kaitlyn Peretti, Psy.D., a psychologist who is routinely part of a fitness for duty evaluation, also interviewed Dr. Mitton. He also completed a detailed questionnaire related to his sexual interests and behaviors. (Mitton Tr. II: 85; Sorrentino Tr. II: 171, 172.)

107. In addition to Dr. Mitton, Dr. Sorrentino interviewed his attorney and several MGH employees and reviewed records provided to her. She did not interview Patient A, Acquaintances 1 or 2, or his wife. (Tr. II: 170-171; Tr. III: 67.)

108. Dr. Sorrentino testified as an expert witness in the evaluation and treatment of individuals with paraphilic disorders.⁵ (Sorrentino Tr. II: 167.)

109. Based on her evaluation, she identified four risk factors for problematic sexual behaviors: a time period of sexual preoccupation; using sex as a coping strategy; poor problem solving skills; and relationship problems or conflict. (Sorrentino Tr. II: 173.)

110. She identified four mitigating factors: Dr. Mitton's history of social supports; prosocial attitudes; absence of a criminal record; and absence of a substance use disorder. (Sorrentino Tr. II: 173.)

111. Dr. Sorrentino opined that Dr. Mitton did not meet the criteria for a mental disorder in August 2018 based on a history inconsistent with the signs or symptoms of a mental illness. (Sorrentino Tr. II: 174-175.)

112. Dr. Sorrentino opined that Dr. Mitton was at low risk for crossing boundaries with patients, based on his lack of history of doing so and that he did not believe he crossed boundaries with Patient A because he thought he was communicating with Acquaintance 1. (Sorrentino Tr. II: 175; Tr. III: 68.)

113. Dr. Sorrentino opined that Dr. Mitton "had a sense of personal responsibility which would allow him to move forward responsibly as a physician" because he understands the context in which this "mistake" was made. (Sorrentino Tr. III: 74-75.)

⁵ Paraphilic disorders are medical or mental illnesses that are sexual behaviors causing distress for the individual or that put the individual or others at risk of harm or interfere with the individual's ability to function. (Sorrentino Tr. II: 167-168.)

114. Dr. Sorrentino's opinions about Dr. Mitton's low risk for crossing boundaries and his acceptance of personal responsibility could be affected if he intended to contact Patient A, but that would be one factor in evaluating all the information. (Sorrentino Tr. III: 74-75.)

115. Dr. Sorrentino agreed that if Dr. Mitton intended to contact Patient A, his behavior is not an example of accepting personal responsibility for his action. (Sorrentino Tr. III: 75.)

116. Dr. Sorrentino viewed the text messages as supporting Dr. Mitton's view that he thought he was texting Acquaintance 1. (Sorrentino Tr. III: 68.)

117. Dr. Sorrentino further opined that Dr. Mitton was competent to practice medicine safely. (Sorrentino Tr. II: 175.)

118. Dr. Mitton planned to improve communication with his wife and modify his work schedule so they could spend more time together. (Sorrentino Tr. II: 176.)

119. Dr. Sorrentino works part-time for MGH, consulting for patients and employees and teaching, in addition to her private practice. She took her relationship with MGH into account and conferred with Dean Hashimoto, M.D., Chief Medical Officer for occupational health services at Partners Healthcare System, about accepting the work with Dr. Mitton. Dr. Hashimoto made the final decision. Her relationship with MGH was not a factor in her assessment of Dr. Mitton. (Sorrentino Tr. III: 60-61, 80.)

120. Dr. Sorrentino has assessed a physician on at least one occasion at the Board's behest. (Sorrentino Tr. III: 64-65.)

121. Dr. Mitton was to return to supervised clinical work at an MGH outpatient clinic in October 2019. (Mitton Tr. II: 85-86, 87.)

122. The Board interviewed Dr. Mitton on September 11, 2019. (Mitton Tr. I: 100.)

123. Dr. Mitton signed a Voluntary Agreement Not to Practice, which the Board ratified on October 24, 2019.⁶ (Board of Registration in Medicine Order of Reference to DALA, October 25, 2019.)

Mitigation

124. Since August 2018, Dr. Mitton has removed his presence on any dating websites and social media platforms. He no longer has access to contacts for Acquaintances 1 and 2. He focuses on avoiding stress. He meditates and exercises frequently. He sought out and continues to attend counseling with his wife and individually. (Mitton Tr. II: 81-82, 88-89, 91-92.)

125. Because of how “awful” this experience has been for Dr. Mitton and his family, he has “no desire” to engage in sexting and is confident it will not happen again. The barriers he has in place are additional protection. (Mitton Tr. II: 89, 92.)

126. Dr. Mitton recognizes that Patient A has been “deeply impacted” in “an unfortunate way.” (Mitton Tr. II: 88.)

DISCUSSION

Applicable Law

The Board of Registration in Medicine alleges that Dr. Mitton committed misconduct in the practice of medicine and engaged in conduct that undermines the public confidence in the integrity of the medical profession.⁷ The Board may discipline a physician for misconduct in the practice of medicine. 243 CMR 1.03(5)(a)(18); *Hellman v. Bd. of Reg. in Med.*, 404 Mass. 800 (1989). It may also discipline a physician who has engaged in conduct that undermines the public confidence in the integrity of the medical profession. *Levy v. Bd. of Reg. in Med.*, 378 Mass. 519

⁶ The record is unclear as to whether Dr. Mitton in fact returned to practice before he signed the Voluntary Agreement Not to Practice.

⁷ In its Statement of Allegations, the Board alleged that Dr. Mitton lacked good moral character. The Board did not include this argument in its closing brief, therefore, I consider the allegation waived.

(1979), *Raymond v. Bd. of Reg. in Med.*, 387 Mass. 708 (1982). The Board has the burden of proving its allegations by a preponderance of the evidence. *Craven v. State Ethics Com.*, 390 Mass. 191, 200 (1983). *Cf. Randall v. Mass. Bd. of Reg. in Med.*, SJ-2014-0475 slip op. at 3 (June 9, 2015).

“‘Misconduct,’ in general, is improper conduct or wrong behavior, but as used in speech and in law it implies that the conduct complained of was willed and intentional. It is more than that conduct which comes about by reason of error of judgment or lack of diligence. It involves intentional wrongdoing or lack of concern for one's conduct. Whether or not an act constitutes misconduct must be determined from the facts surrounding the act, the nature of the act, and the intention of the actor.” Citations omitted. *Hellman*, 404 Mass 804.⁸

Whether the Board has proven that Dr. Mitton committed misconduct in the practice of medicine turns on whether it has established that Dr. Mitton's actions involved “intentional wrongdoing or lack of concern for one's conduct.” *Id.* I conclude that the Board has met its burden of proof by a preponderance of the evidence. Dr. Mitton's access of Patient A's medical record on August 9, 2018, just after her appointment; the content of the text messages sent to Patient A that he claimed were by mistake; his actions and inactions on August 10, 2018; and the inconsistencies within his retelling of what happened on these days to investigators and in his testimony illustrate that his words and actions were not a mistake.

⁸ Ironically, while *Hellman* is often cited for its definition of misconduct and gross misconduct, the Supreme Judicial Court did not decide whether Dr. Hellman committed misconduct. “We do not reach or decide whether the erroneous judgment of Dr. Hellman constitutes “misconduct” but not gross misconduct because the regulations in effect in 1983 required “gross misconduct” for the imposition of sanctions. Subsequently, a new subsection (18) has been added to 243 Code Mass. Regs. Section 1.03 (5) (a). The new subsection permits discipline for misconduct which is not gross. *Hellman* at 806 n.5.

Frame of Mind on August 9, 2018

Dr. Mitton intended to contact Acquaintance 1 on August 9, 2018. He retrieved her phone number early that morning from a book where he kept it hidden to create a barrier to the temptation to contact her. He wrote the number down on a piece of paper that he routinely kept with him during the day to jot down reminders to himself about personal and professional responsibilities.

This was a stressful time in Dr. Mitton's life. He had taken on new responsibilities in late June as Chief Resident, a demanding position. He and his wife were communicating less frequently, which strained their marital relationship. During times of high stress, he had coped over several years by "sexting" with Acquaintance 1 and other women. He was not happy with using sexting as a coping mechanism, particularly after he married. He likely was ashamed and embarrassed. Nonetheless, he had come to rely on sexting to relieve stress, indeed, he expressed a desire to contact Acquaintance 1 that day.

Patient A's Appointment

Patient A was Dr. Mitton's first patient on the afternoon of August 9, 2018. It was a longer-than-average yearly wellness check because Patient A had disclosed that she was depressed and thinking of suicide.

There are inconsistencies between Dr. Mitton's and Patient A's recollections of the appointment. Some, but not all, of the inconsistencies are ultimately of little consequence. For instance, Patient A did not recall or answered differently than Dr. Mitton about details including the time of her appointment, the location of some conversations or events, and some aspects of her medical history. (Tr. I: 76-77, 78-79, 80, 81-82.) This is unsurprising and does not affect my assessment of Patient A's testimony as reliable. She candidly explained what she did or did not

recall. Patient A was new to the adult care location and routine at CHCC. She was, no doubt, preoccupied with her mental health concerns. Finally, the visit itself was overshadowed in her mind by what occurred after it. Dr. Mitton's recall of locations is unsurprising because he is familiar with the clinic and its routines.

I resolve the significant inconsistencies between Dr. Mitton and Patient A as follows. Patient A did not give Dr. Mitton her cell phone number. While she was uncertain during her first interview with Ms. Nelson whether she had done so, at her second interview and when testifying she was quite certain she did not provide it to him.⁹ Dr. Mitton was less certain. He testified he did not recall whether he asked for her number, then later testified he asked for her preferred number, which, arguably, was already in her record as her cell phone. (Finding 45.) Dr. Mitton added that Scribble would have recorded the conversation, but that is true only if the conversation took place in the exam room and Scribble was recording. Doctors at CHCC did not have to routinely ask about phone numbers because patients were asked to update their phone numbers and other contact information when they checked in.

Dr. Mitton testified inconsistently about when he accessed her number and why he needed it. (Findings 56-59.) In the end, it is more likely than not that he accessed her demographic information at 3:28 PM and wrote the number on his to-do list.

Patient A talked about her work at 7-Eleven with Dr. Mitton. Patient A was fired from 7-Eleven, unfairly, in her view. It is more likely she raised the topic. Also, when a patient presents with depression and suicidal ideation, it seems improbable to me that a doctor would not inquire about all significant aspects of one's life, including work life. Dr. Mitton's specific reference during the text messaging to a 7-Eleven, formerly Tedeschi's, is too coincidental to be

⁹ Were it true that her later recall was inaccurate, this would not alter the uncontroverted evidence that Dr. Mitton accessed her demographic information after her appointment ended.

believable. Her medical record states she worked at a grocery store, in which case Stop & Shop comes to mind more readily than 7-Eleven.

The absence of any mention of work history in the August 9, 2018 clinical note is more difficult to explain. The Scribble recording is not available. It is possible that the scribe who prepared the office note did not reference the conversation. It is possible that Scribble was not recording the entire time, particularly after Patient A returned from seeing the social worker. Perhaps they discussed her work when traveling to or from the social worker's office. It is possible that Dr. Mitton edited out the reference. There are plausible explanations, but no real evidence, to explain the absence of Patient A's recent work history in the note. In the end, I conclude that the weight of the evidence supports a finding that Dr. Mitton and Patient A discussed her work.

August 9, 2018 Text Messaging

If Dr. Mitton's texts were intended for Acquaintance 1 and received by Patient A by mistake, then Dr. Mitton would have no reason to hide his identity. Conversely, if he were texting a patient he had just seen, he would have every reason to hide his identity. The text exchange reveals Dr. Mitton's intention at several points. He introduces himself as Jay, a nickname used by family, friends, and colleagues, but not by Acquaintance 1. She knew him as Julien. He then says they met online "a little while back...." Dr. Mitton and Acquaintance 1 met online 4 or 5 years previously. Dr. Mitton said he last spoke with Acquaintance 1 in the spring of 2018, but he does not use this information to try and refresh the memory of the woman he is speaking with.

Patient A responds in part "I don't have social media." This is not an ambiguous statement. Dr. Mitton's reply indicates he did not misunderstand her response. Yet he and

Acquaintance 1 met at an online media site and continued to message each other on different sites. This strikes me as an obvious disconnect that requires no reflection to comprehend. Why does he not question her response?

Dr. Mitton asks for a photo, Patient A declines, and he says “maybe you worked at a store or something. This says nothing about who he is; it does, however, suggest something he knows about her. He continues “like Tedeschi maybs or 7-11 or something.” Dr. Mitton’s explanation for his statement is too farfetched for me to accept, as discussed in more detail *infra*. Next, he claims to have gotten her number at the store from her or a friend, clearly referencing a face-to-face encounter. This exchange makes no sense if he thinks he is texting Acquaintance 1, who he never met in person. He asks again for a photo, so he can make sure she is the person he thinks she is.

He mentions her tattoo, something else that reveals nothing about who he is, but is something he knows Patient A and Acquaintance 1 share---a neck tattoo. Only Patient A did not have one when she worked at 7-Eleven. Patient A is now confused and troubled.

Dr. Mitton becomes more persistent and sends her a photo with most of his face cropped away. He edited the photo while texting. He claims he did not want photo to fall into the wrong hands. The unedited photo on his phone would have identified him and presumably was on his phone because he had sent it previously. Patient A shows her concern by questioning whether to continue the exchange with a “stranger.” He does not respond to her use of this term, although he and Acquaintance 1 are not strangers. He does not provide more information to remind her who he is. Instead, he asks again for a photo. Patient A stops responding and the exchange ends.

During the texting exchange, Patient A moves from confused, to concerned, then scared. She received some information to suggest she might know this person, but other information

made her uncomfortable. She responded as a polite young woman who is trying to be helpful, not as someone who was trying to keep the conversation going.

Dr. Mitton jogged home from CHCC. He arrived home about 6:30 PM and showered. At about 6:45 PM, he sent a sexually explicit photo of himself to Patient A. She did not respond. She was upset enough to tell her mother and go to the police station. Dr. Mitton sent the photo over three hours after the earlier text exchange. Dr. Mitton can no longer claim to be acting “in the moment.” There has been a “cooling off period” so to speak. He also has had an opportunity to reflect on the text exchange, although it is not clear whether he did so. His act of sending the second photo to the same number he previously texted, to a person who stopped responding during their earlier exchange, is intentional conduct.

Dr. Mitton explains his side of the exchange as being “in the moment;” a quick text exchange without reflection. Thus, he maintains he missed clues that in hindsight look more obvious. This argument might have more credence but for Dr. Mitton’s actions prior to the texting. His explanation also suggests a lack of concern about his conduct. Accepting his explanation for argument’s sake, his use of “in the moment” may as easily be viewed as indicating an urgent desire that caused him to ignore what is plainly evident, which is no doubt not what he intended.

To credit Dr. Mitton’s explanation that the texting exchange with Patient A was a mistake, I would have to accept his explanation for believing that Acquaintance 2 was Acquaintance 1 when he said he saw her at Logan Airport. His testimony strikes me as an explanation after the fact to support his claim of mistake.¹⁰ His attempt to explain away his

¹⁰ See also Board’s Closing Brief at 13.

reference to her having worked in a 7-Eleven strains credulity, particularly when read in its entirety. (Tr. II: 18-24.)

Patient A had no difficulty recalling the text messaging. She testified accurately and in detail from memory before she was shown Exhibit 4. (See Tr. I: 62-63.) She recalled how she felt as she was seeing the messages. Patient A had no reason to fabricate the text exchange or any other aspect of her testimony.

Dr. Mitton was cautious when testifying, circumspect, and sometimes nonresponsive. A few examples should suffice. He professed not to recall what he had said when confronted with prior inconsistencies with statements made during his MGH and Board interviews. (Tr. II: 16-18, 19, 20, 22, 23.) He sometimes used the subjunctive tense, expressing possibility rather than actually testifying to what he did or did not do. (Tr. II: 33, 39, 44, 65-66, 92.) Other times he said he could not recall “the specifics” of a topic in response to a question that could be answered yes or no. (Tr. II: 16.) He used the phrase “in the moment” in an attempt to explain why he could not answer a question directly, or to preface a statement about what he believed, which may have been different from what he knew. (Tr. II: 17, 18, 44.) His obfuscation leads me to conclude he was not a reliable narrator of events, particularly when explaining his side of the text messages.

August 10, 2018

The following day, August 10, 2018, Dr. Mitton did not call Patient A until 6:00 PM for a safety check. Upon hearing his voice, Patient A hung up. Dr. Mitton called again, no one answered, and he left a message. His behavior does not comport with his recitation of his usual follow-up with a patient in Patient A’s frame of mind. Hearing her say hello is not an adequate basis for concluding Patient A was safe. Dr. Mitton’s delay in calling her, based on a flimsy rationale, and his failure to converse with her to fully assess her mental status, or to call someone

else to do so, tend to show he was aware that he had texted Patient A and not Acquaintance 1 the day before.¹¹

MGH Investigation

Patient A and Dr. Mitton were interviewed by Ms. Nelson. I found her to be a reliable witness. She testified from memory initially, but reasonably explained inconsistencies with her written report when they were brought to her attention. I accept her recollection of the interviews, yet recognize they were preliminary and did not go into great detail.

Dr. Sorrentino was asked to assess Dr. Mitton's ability to practice safely, particularly with respect to crossing boundaries with patients. She was thorough and candid when explaining the methodology of her assessment. I found her testimony relevant and helpful on the question of intent. She acknowledged that it was a fitness evaluation and a snapshot in time. She accepted Dr. Mitton's explanation that he texted Patient A by mistake. My contrary conclusion leaves open whether Dr. Mitton will take responsibility for his actions. These limitations affect the utility of her assessment to some extent, but do not provide adequate reasons to discount or exclude her testimony.

One of the risk factors she identified---relationship problems or conflict---has improved, by Dr. Mitton's account. He is still married, and he and his wife continue counseling. Two other risk factors, a period of sexual preoccupation and using sex as a coping strategy, would appear to now present reduced risk, given Dr. Mitton's attention to reducing stress and removing himself from social media platforms. It is for the Board to decide if a more up-to-date assessment is needed.

¹¹ Dr. Mitton was in the office for the entire day. This suggests it was a regular workday for him and that he knew he would be in the office and able to access Patient A's medical records. Consequently, he did not need to ask for her number to contact her.

I found Dr. Mitton's testimony about the changes he has made since August 2018 to be more reliable than that about the text messaging exchange. He seemed sincere in his shame and understanding of the effect of his behavior on others, as if jolted out of a need to continue what he realized were unhealthy behaviors for him.

CONCLUSION

Not every question can be resolved by the evidence presented. Dr. Mitton presumably was aware his identity could be traced when his given name and phone number were linked in Snapchat. Why would he use his personal cell phone if he intended to contact Patient A? Why did his intent the morning of August 9 to contact Acquaintance 1 become an intent to contact Patient A by mid-afternoon? What was his motivation to use his limited break time to engage at work in such risky behavior? While I might infer the answers are based on his desire for relief from the many stressors he felt, there is no hard evidence that directly addresses all these questions. Nonetheless, the weight of the evidence overall tilts toward the Board has proved its case.

Dr. Mitton committed misconduct in the practice of medicine within the meaning of *Hellman*. He intentionally texted Patient A and sought to convince her he was someone she knew, using information he obtained as her doctor. He asked her for photos and sent her sexually suggestive messages and a sexually explicit photo. By crossing sexual boundaries with a patient Dr. Mitton engaged in conduct that undermines the public confidence in the integrity of the medical profession.

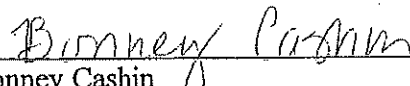
Dr. Mitton's lack of candor during the investigations into his conduct and when testifying also support a conclusion that he engaged in conduct that undermines the public's confidence in the integrity of the medical profession. Such conduct "shows an absence of simple honesty and

Bd. of Reg. in Med. v. Mitton, Docket No. RM-19-0527

fairness.” *Bd. of Reg. in Med. v. O’Connor*, Docket No. RM-20-021 (Div. Admin. Law App., May 26, 2021), *adopted in relevant part*, Final Decision and Order, Case No. 2020-009 (Oct. 21, 2021). *See Matter of Sushchyk*, SJC- 13077 (Mar. 23, 2022) (telling a tale rather than the truth supports conclusion that respondent was attempting to evade responsibility for his act; judges will not be penalized for defending themselves but must not make deliberately false statements in the process).

I recommend that the Board adopt this decision and discipline Dr. Mitton using its sound discretion.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Bonney Cashin
Administrative Magistrate

DATED: March 29, 2022