

**DOH** STATE OF NEW YORK  
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

September 10, 1998

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Leni S. Klaimitz, Esq.  
NYS Department of Health  
5 Penn Plaza - Sixth Floor  
New York, New York 10001

Matthew Miller, M.D.  
42-07 30th Avenue  
Astoria, New York 11103

Richard W. Nicholson, Esq.  
Schiavetti, Geisler et al.  
1633 Broadway  
New York, New York 10019

**RE: In the Matter of Matthew Miller, M.D.**

Dear Ms. Klaimitz, Dr. Miller and Mr. Nicholson:

Enclosed please find the Determination and Order (No.98-99) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct  
New York State Department of Health  
Hedley Park Place  
433 River Street-Fourth Floor  
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

Handwritten signature of Tyrone T. Butler in cursive, followed by the initials "nm".

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:nm

Enclosure

COPY

**STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)**

**In The Matter Of  
Matthew Miller, M.D. (Respondent)**

**Administrative Review  
Board (ARB)  
Determination and  
Order 98 - 99**

**Proceeding to review a Determination by a Hearing Committee (Committee)  
from Board for Professional Medical Conduct (BPMC)**

**Before Board Members : Briber, Grossman, Lynch, Price & Shapiro.  
Administrative Law Judge James F. Horan served as the Board's Administrative Officer.**

**For the Respondent: Richard W. Nicholson, Esq.  
For the Petitioner: Leni S. Klaimitz, Esq.**

In this proceeding, we consider whether the Respondent physician, non-psychiatrist, practiced medicine with negligence and with moral unfitness, by participating in a consensual sexual relationship with a patient (Patient B) during the time that the Respondent provided medical treatment to and prescribed medication for Patient B. After a hearing into charges that the Respondent committed misconduct due to his conduct involving Patient B and due to his medical treatment for another patient (Patient A), a BPMC Committee dismissed all the charges. The Petitioner now moves pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1998) for the ARB to review the Committee's Determination dismissing the negligence and moral unfitness charges concerning the conduct toward Patient B. After reviewing the record and submissions by both parties, we sustain the Committee's Determination dismissing the negligence charges, we overturn the Committee's Determination on moral unfitness and we sustain the charge that the Respondent practiced with moral unfitness for participating in a sexual relationship with Patient B, during the time he treated the Patient. We vote 4-1 to suspend the Respondent's New York Medical License for three years, to stay the suspension and to place the Respondent on probation for three years.

**Committee Determination on the Charges**

The Petitioner commenced the proceeding by filing charges with BPMC [Petitioner Exhibit 1] alleging that the Respondent violated N. Y. Educ. Law §§6530(3-6) & (21)(McKinney Supp. 1998), by:

- practicing medicine with negligence on more than one occasion;
- practicing medicine with gross negligence;

- practicing medicine with incompetence on more than one occasion;
- practicing medicine with gross incompetence; and,
- failing to maintain accurate records.

These charges related to the medical treatment that the Respondent provided to Patients A and B and to the Respondent's sexual relationship with Patient B. The Petitioner also charged that the Respondent's sexual relationship with Patient B evidenced moral unfitness in medical practice, a misconduct violation under N. Y. Educ. Law § 6530(20)(McKinney Supp. 1998). The record referred to the Patients by initials to protect their privacy. A hearing on those charges ensued before the BPMC Committee, who subsequently rendered the Determination now on review.

The Committee's Determination dismissed all charges against the Respondent. As relevant on this review, the Committee found that the Respondent engaged in a sexual relationship with Patient B for sixteen months, while he treated the Patient and prescribed medication for her. The Committee found no evidence that the Respondent used his ability to prescribe as a way to coerce the Patient into the sexual relationship, found that the Respondent prescribed Valium for the Patient for alcoholism and found that the Patient's alcohol consumption decreased during the treatment with Valium. The Committee found nothing in statute or in the American Medical Association's Code of Medical Ethics that established firm standards concerning relationships between patients and non-psychiatrist physicians<sup>1</sup>. The Committee found no negligence or incompetence in the Respondent's treatment for the Patient.

As to the sexual relationship, the Committee found that the relationship posed serious ethical questions that required a determination on a case-by-case basis. The Committee dismissed the moral unfitness charge upon concluding that no evidence existed showing that the Respondent exploited the Patient's trust, knowledge, emotions or influence. The Committee concluded that the Respondent's conduct represented an isolated incident of poor judgement, rather than a pattern of behavior.

In reaching their findings and conclusions, the Committee relied on the testimony by the Respondent. The Committee found Patient B lacking in credibility and found her testimony evasive,

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<sup>1</sup> Under N. Y. Educ. Law § 6530(44) (McKinney Supp. 1998), a psychiatrist commits misconduct by having contact of a sexual nature with a patient.

vindictive and unreliable. The Committee also rejected testimony by the Petitioner's expert witness, Dr. Tamarin, whom the Committee found to possess a poor grasp of acceptable standards for medical practice.

### **Review History and Issues**

The Committee rendered their Determination on May 18, 1998. This proceeding commenced on June 4, 1998 when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's reply brief. The record closed when the Respondent submitted his reply on July 9, 1998.

The Petitioner alleges that the Committee erred in their Determination by:

- failing to apply properly the standards that the Committee articulated in their own findings, thereby reaching an inconsistent Determination; and,
- permitting its sympathy for the Respondent and antipathy for Patient B to affect the Committee's Determination.

The Petitioner argues that a reasonably prudent physician would not have maintained a sexual relationship while treating a patient and that engaging in such a relationship constitutes exploiting the patient. The Petitioner requests that the ARB sustain both the negligence and moral unfitness charges and impose an appropriate penalty.

The Respondent raised the following issues in reply to the Petitioner's brief:

- The Committee made a sound decision, because no statute or standard prohibits a sexual relationship between a patient and a non-psychiatrist physician.
- The Committee made their Determination by evaluating the hearing record rather than through sympathy or antipathy for either party.
- The Respondent provided medically appropriate care to Patient B.

The Respondent asks that the ARB affirm the Hearing Committee's Determination in all respects.

## Determination

All ARB Members participated in this case, considered the record and considered the parties' briefs. We sustain the Committee's findings and their judgement on credibility, we reject any suggestion that the Committee's Determination may have resulted from bias, we sustain the Committee's Determination on the negligence charge involving the care for Patient B, we overturn the Committee and sustain the charge that the Respondent engaged in conduct evidencing moral unfitness in medical practice, we vote to suspend the Respondent's License, we stay the suspension and we place the Respondent on probation. The ARB voted unanimously in reaching all conclusions, except that different 4-1 majorities made the Determination as to the length and terms for the probation.

**Judgement on the Evidence:** The Committee based their findings in large part on the Respondent's testimony, rejecting contrary testimony by Patient B and rejecting expert testimony by Dr. Tamarin. Contradictory evidence in the record merely creates factual issues for the Committee to resolve as the fact finder. In this case, the Committee stated clearly their reasons for accepting the Respondent's testimony and their reasons for rejecting Patient B and Dr. Tamarin as credible witnesses. The ARB owes the Committee deference in their judgement on credibility and we see no reason to overturn the Committee's judgement on credibility from this record.

The Petitioner alleges that the Committee based their Determination on sympathy for the Respondent and antipathy toward Patient B. We take this as an allegation that the Committee acted from bias in making their Determination. We disagree. To annul a Determination for bias, we must find facts demonstrating that a Determination flowed from bias only, Matter of Moss v. Chassin, 209 A.D.2d 889, 618 N.Y.S.2d 931 (Third Dept. 1994). We have already held above that evidence in the record supported the Committee's findings.

**Negligence Charge:** Evidence that the Committee found credible proved that the Respondent provided appropriate medical care, according to accepted standards, to Patient B during the time at issue here. When the Patient began treatment with the Respondent, she expressed concern about her drinking. The Respondent prescribed Valium, which the Committee found indicated for treating

alcoholism (Finding of Fact 11). The Committee also found that the Patient's daily alcohol consumption decreased. The ARB holds that the Committee's findings supported their Determination dismissing the negligence charge. We considered, but rejected, making a holding that the Respondent committed negligence per se by treating Patient B while participating in a sexual relationship with the Patient.

**Moral Unfitness:** The Committee found serious ethical questions when a non-psychiatrist, physician provides medical care to a patient while maintaining a sexual relationship with the patient. The Committee concluded, however, that a Determination on whether the situation amounts to professional misconduct requires a case-by-case analysis and their analysis in this case resulted in the Determination dismissing the charge. Under our statutory authority, the ARB may substitute our judgement for the Committee's judgement in imposing a penalty, Matter of Bogdan v. Med. Cond. Bd., 195 A.D.2d 940, 606 N.Y.S.2d 381 (Third Dept. 1993), or in sustaining or dismissing charges, Matter of Spartalis v. State Bd. for Prof. Med. Cond., 205 A.D.2d 940, 613 N.Y.S.2d 759 (Third Dept. 1994). We elect to exercise that authority here. The ARB holds that the facts in this case support a Determination that the Respondent's conduct did evidence moral unfitness and we find the Committee's Determination dismissing that charge inconsistent with the Committee's Determination.

In discussing their reasons for dismissing the moral unfitness charge, the Committee reached certain conclusions that contradicted their findings. The Committee found that the Respondent and Patient B engaged in their sexual relationship exclusively at her residence, rather than at the Respondent's Office during treatment. The ARB notes that the pair's initial sexual encounter at her residence occurred, however, during a house call (Finding of Fact 14). The ARB considers a house call the same as an office visit. The Committee also stated that the relationship constituted an isolated act. Although the case involved a single patient, the ARB finds this case involved more than an isolated act. The Committee's findings established that the relationship lasted for sixteen months (Finding of Fact 15).

The ARB concludes that the Respondent's relationship with Patient B evidenced moral unfitness, because the Respondent violated his fiduciary relationship with the Patient. Although a non-psychiatrist, the Respondent, as a family practitioner, holds a position of trust with his patients and

has training to deal with psychiatric conditions. We conclude further that the relationship evidenced moral unfitness, because the relationship called into question the Respondent's independent judgement. The Respondent admitted during his testimony that:

"...sometimes it gets hard to separate doctor from social relationship, and it gets hard sometimes to not let the social relationship color your decision making." (Tr. 447)

Despite the danger that the relationship could color his decision making for Patient B, the Respondent continued with the relationship. We conclude that the Respondent ignored such danger for his own sexual gratification. We find further that the Respondent evidenced moral unfitness because conduct such as the Respondent committed brings disrepute to the medical profession.

**Penalty:** In fashioning a penalty for the Respondent's misconduct, we must assure that the sanction will safeguard the public, deter similar misconduct in other physicians and rehabilitate the Respondent. We gave no consideration to revoking the Respondent's License. We felt that an actual suspension would send a clear message to the public and to the Respondent to reinforce our Determination, that the Respondent's conduct demonstrates moral unfitness for a physician. We conclude, however, from the record that we can assure rehabilitation for the Respondent and protection for the public with a stayed suspension and a period on probation. The record demonstrates that the Respondent's misconduct involved a single patient, who instigated the relationship and continued in the relationship willingly. We see the Respondent as no danger to repeat his conduct and we see no evidence to present the Respondent as a predator. The Respondent has indicated his remorse for the relationship and has admitted his ethical lapse.

We vote 5-0 to suspend the Respondent's License, stay the suspension and place the Respondent on probation, except that the members vote differently as to the length and terms for probation. We vote 4-1 to make the period for the stayed suspension and probation three years. Mr Shapiro dissents and votes for eighteen months stayed suspension and probation. Dr. Price recommended that the probation terms include a chaperon for all examinations on female patients. The ARB rejected that recommendation by a 4-1 vote. The majority has already concluded that the Respondent presents no danger to repeat his conduct. If we had considered the Respondent a predator, we would have imposed a much more severe penalty.

**ORDER**

**NOW**, based upon this Determination, the Review Board renders the following **ORDER**:

1. The ARB **SUSTAINS** the Committee's Determination dismissing the charge that the Respondent practiced with negligence in treating Patient B.
  
2. The ARB **OVERTURNS** the Committee's Determination dismissing the charge that the Respondent practiced with moral unfitness.
  
3. The ARB **SUSTAINS** the charge that the Respondent practiced medicine with moral unfitness.
  
4. The ARB **SUSPENDS** the Respondent's New York Medical License for three years, **STAYS** the suspension in full and votes 4-1 to **PLACE** the Respondent on probation for three years, under the terms that appear in the Appendix.

**Robert M. Briber**

**Sumner Shapiro**

**Winston S. Price, M.D.**

**Stanley L. Grossman, M.D.**

**Therese G. Lynch, M.D.**

# APPENDIX

## **Terms of Probation**

- 1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.**
- 2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), 433 River St., 4th Floor, Troy, New York 12180; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.**
- 3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.**
- 4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.**

5. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.

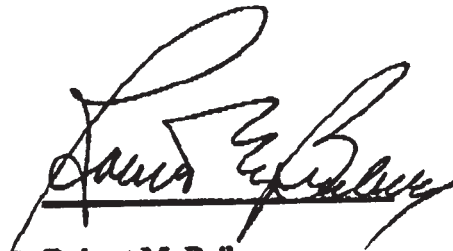
6. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

7. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.

**In The Matter Of Matthew Miller, M.D.**

**Robert M. Briber, a member of the Administrative Review Board for Professional Medical  
Conduct, concurs in the Determination and Order in the Matter of Dr. Miller.**

Dated : Sept 7, 1998



**Robert M. Briber**

**In The Matter Of Matthew Miller, M.D.**

**Stanley L. Grossman, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Miller.**

**Dated: September 4, 1998**

 Stanley L. Grossman M.D.

**Stanley L. Grossman, M.D.**

**In The Matter Of Matthew Miller, M.D.**

**Sumner Shapiro**, a member of the Administrative Review Board for Professional Medical Conduct, affirms that this Determination and Order represents the majority decision by the Review Board in the Matter of Dr. Miller.

**DATED:** September 2, 1998

  
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**Sumner Shapiro**

**In The Matter Of Matthew Miller, M.D.**

**Therese G. Lynch, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Miller.**

Dated: Aug 31 . 1998

Therese G. Lynch M.D.

**Therese G. Lynch, M.D.**