IN AND BEFORE THE OKLAHOMA STATE BOARD OF MEDICAL LICENSURE AND SUPERVISION STATE OF OKLAHOMA

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA STATE BOARD OF MEDICAL LICENSURE AND SUPERVISION,	)	FILED AUG 20 2018 Sept. 19, 2018 OKLAHOMA STATE BOARD OF MEDICAL LICENSURE & SUPERVISION
Plaintiff,	)	
v.	)	**Case No. 17-09-5531**
KELTON HILLARD OLIVER, M.D., LICENSE NO. MD 18031,	)	
Defendant.	)	

ORDER ACCEPTING VOLUNTARY SUBMITTAL TO JURISDICTION

The State of Oklahoma, *ex rel.* Oklahoma State Board of Medical Licensure and Supervision ("Board"), by and through the undersigned counsel for the Plaintiff, as represented by the Secretary of the Board, Billy H. Stout, M.D., and the Executive Director of the Board, Lyle Kelsey, and Kelton Hillard Oliver, M.D., ("Defendant"), Oklahoma medical license no. 18031, who appears in person, and through counsel Douglas A. Rice of Derryberry & Naifeh, LLP (collectively, the "Parties"), and offer this Order Accepting Voluntary Submittal to Jurisdiction (herein, "Order" or "Agreement") for acceptance by the Board. Okla. Admin. Code § 435:5-1-5.1.

By voluntarily submitting to jurisdiction and entering into this Order, Defendant admits to the allegations herein contained and further acknowledges that a hearing before the Board could result in some sanction under the Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act ("Act"). 59 O.S. § 480, *et seq.*

Defendant, Kelton Hillard Oliver, M.D., states that he is of sound mind and is not under the influence of, or impaired by, any medication or drug and that he fully recognizes his right to appear before the Board for an evidentiary hearing on the allegations made against him. Defendant hereby voluntarily waives his right to a full hearing, submits to the jurisdiction of the Board and agrees to abide by the terms and conditions of this Order. Defendant acknowledges that he has read and understands the terms and conditions stated herein, and that this Agreement has been reviewed and discussed with him by legal counsel.

If the Board does not accept this Order, the Parties stipulate that it shall be regarded as null and void. Admissions by Defendant herein, if any, shall not be regarded as evidence against him in a subsequent disciplinary hearing. Defendant will be free to defend himself and no

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inferences will be made from his willingness to have this Order accepted by the Board. The Parties stipulate that neither the presentation of this Order nor the Board's consideration of this Order shall be deemed to have unfairly or illegally prejudiced the Board or its individual members and, therefore, shall not be grounds for precluding the Board nor any individual Board member from further participation in proceedings related to the matters set forth herein.

FINDINGS OF FACT

The Plaintiff, Defendant, and Board staff stipulates and agree as follows:

1. In Oklahoma, Defendant holds medical license no. 18031, issued July 1, 1992.

2. Beginning in October 2013, Defendant used a website called www.sensualalaska.com to arrange several encounters with prostitutes. Defendant made arrangements through this criminal enterprise to purchase sessions with S.D. at his home and had sex with her during at least one of the sessions.

3. In the summer of 2014, Troopers investigated the Sensual Alaska sex trafficking operation and Defendant was arrested on August 23, 2014.

4. On March 24, 2015, Defendant pled guilty to Solicitation of Prostitution in violation of AS 11.66.100(a)(2), "offer[ing] a fee in return for sexual conduct," a class B misdemeanor in Alaska. Defendant received a six (6) month suspended sentence, a $2000 fine, and a $3000 charitable donation.

5. The Alaska Division of Corporations, Business and Professional Licensing filed a one-count accusation seeking disciplinary sanctions against Defendant after he was convicted of solicitation of prostitution. After an evidentiary hearing on the facts underlying this conviction, the Administrative Law Judge determined Defendant's conviction was a crime involving moral turpitude, in case OAH No. 16-1500-MED on June 22, 2017, and made recommendations of discipline. On August 3, 2017, the Alaska State Medical Board followed those recommendations and reprimanded the Defendant; imposed a fine of $7,500, with $5,000 suspended; and imposed a three-year period of probation.

6. On June 9, 2016, Defendant answered "Yes" on the OSBMLS Online Renewal Questions as to whether he had been investigated by a licensing or disciplinary agency and if he had been arrested, charged, or convicted of a felony or misdemeanor. Defendant admitted he was "convicted [in] May 2015 of solicitation of prostitution."

7. On June 28, 2017, Defendant stated on his OSBMLS Online Renewal that there was "an ongoing action in Alaska related to my previous relationship with a prostitute."

CONCLUSIONS OF LAW

8. The Board has jurisdiction over the subject matter and is a duly authorized agency of the State of Oklahoma empowered to license and oversee the activities of physicians and

surgeons in the State of Oklahoma pursuant to 59 O.S. § 480 *et seq*. and Okla. Admin. Code §§ 435:5-1-1 *et seq.*

9. Notice was given as required by law and the rules of the Board. 75 O.S. § 309(A); 59 O.S. § 504; Okla. Admin. Code §§ 435:3-3-5, 435:3-3-6.

10. The Board is authorized to suspend, revoke or order any other appropriate sanctions against the license of any physician or surgeon holding a license to practice medicine in the State of Oklahoma for unprofessional conduct. 59 O.S. §§ 503, 513(A)(1). The Board's action is authorized by 59 O.S. §§ 509.1(A)(3), (4), (D)(2).

11. This Board is authorized to accept voluntary submittals to jurisdiction mutually agreed-to by parties to a disciplinary action to resolve the action without need for a hearing. 75 O.S. § 309(E); Okla. Admin. Code § 435:5-1-5.1.

12. Based on the foregoing, the Parties stipulate and agree that Defendant is guilty of unprofessional conduct as follows:

    a. Dishonorable or immoral conduct which is likely to deceive, defraud, or harm the public. 59 O.S. § 509(8). Okla. Admin. Code § 435:10-7-4(11).

    b. Violation of any provisions of the medical practice act or the rules and regulations of the Board. 59 O.S. § 509(13). Okla. Admin. Code § 435:10-7-4(39).

    c. Commission of any act of sexual abuse, misconduct, or exploitation related or unrelated to the licensee's practice of medicine and surgery. Okla. Admin. Code § 435:10-7-4(23).

ORDERS

IT IS THEREFORE ORDERED by the Oklahoma State Board of Medical Licensure and Supervision as follows:

1. Effective from the date of an approved Attorney General Opinion, the Board hereby adopts the Agreement of the Parties in this Voluntary Submittal to Jurisdiction, including the findings of fact and conclusions of law stated herein.

2. **KELTON HILLARD OLIVER, M.D.**, Oklahoma medical license no 18031, is formally **REPRIMANDED**.

3. **KELTON HILLARD OLIVER, M.D.** shall be on a term of **PROBATION**, to run concurrent with the Alaska State Medical Board, Decision dated August 3, 2017, Case OAH No. 16-1500-MED, and will terminate simultaneously at the conclusion of the three (3) year probationary term imposed in Alaska. Any violation of the terms of probation set forth by the Alaska State Medical Board, attached hereto as **Addendum I**, shall be

considered a violation of this Board order. The additional terms of probation are as follows:

Standard Terms:

a. Defendant will conduct his practice in compliance with the Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act ("Act") as interpreted by the Board. Any question of interpretation regarding the Act or this Order shall be submitted in writing to the Board, and no action based on the subject of the question will be taken by Defendant until clarification of interpretation is received by Defendant from the Board or its authorized designee. 59 O.S. § 480, *et seq*.

b. Defendant will furnish a file-stamped copy of this Order to each and every state in which he holds licensure or applies for licensure and to all hospitals, clinics or other facilities in which he holds or anticipates holding any form of staff privileges or employment.

c. Defendant will keep the Board informed of his current address.

d. Defendant will keep current payment of all assessments by the Board for prosecution, investigation and monitoring of his case, unless Defendant affirmatively obtains a deferment of all or part of said fees upon presentation of evidence that is acceptable to the Board Secretary.

e. Until such time as all indebtedness to the Board has been satisfied, Defendant will reaffirm said indebtedness in any and all bankruptcy proceedings.

f. Defendant shall make himself available for one or more personal appearances before the Board or its authorized designee upon request.

g. Failure to meet any of the terms of this Order will constitute cause for the Board to initiate additional proceedings to suspend, revoke or modify Defendant's license after due notice and hearing. Immediately upon learning that a licensee is in violation of this Order, the Executive Director of the Board may summarily suspend the license based on imminent harm to the public and assign a hearing date for the matter to be presented at the next scheduled Board meeting.

Specific Terms:

h. During Defendant's probation, any commission of any further crimes of moral turpitude may result in the summary suspension of Defendant's license, with the length of suspension, and other discipline, to be determined based on the facts of the case.

i. If the Defendant chooses to practice medicine in Oklahoma, in any category including locum tenens, tele-medicine, or supervising mid-level practitioners in

Oklahoma, prior to completion of probation, approval must be obtained in advance by the Board Secretary.

4. Promptly upon receipt of an invoice, Defendant shall pay all costs of this action authorized by law, including without limitation, legal fees, investigation costs, staff time, salary and travel expenses, witness fees and attorney's fees.

5. A copy of this Order shall be provided to Defendant as soon as it is processed.

This Order is subject to review and approval by the Oklahoma Attorney General, and this Order shall become final upon completion of the review by the Oklahoma Attorney General unless disapproved, in which case this Order shall be null and void.

Dated this 26th day of July, 2018.

Henry P. Ross, M.D., President
OKLAHOMA STATE BOARD OF MEDICAL LICENSURE AND SUPERVISION

Mark S. Fixley

Kelton Hillard Oliver, M.D.
License MD 18031

Billy H. Stout, M.D., Board Secretary
OKLAHOMA STATE BOARD OF MEDICAL LICENSURE AND SUPERVISION

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Attorney for Plaintiff

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Certificate of Service

This is to certify that on the 21st day of August, 2018, a true and correct copy of this Order was transmitted as indicated, postage prepaid, to the following:

U.S. Certified Mail
Kelton Hillard Oliver, M.D.
12900 Ridgewood Road
Anchorage, Alaska 99516
Defendant

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Attorney for Defendant,
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Nancy Thiemann, Legal Assistant

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ADDENDUM 1

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE ALASKA STATE MEDICAL BOARD

In the Matter of	)	
	)	
KELTON OLIVER, MD	)	OAH No. 16-1500-MED
	)	Agency No. 2014-001768

DECISION

I. Introduction

The Division of Corporations, Business and Professional Licensing filed a one-count accusation seeking disciplinary sanctions against physician Kelton Oliver after Dr. Oliver was convicted of solicitation of prostitution. After an evidentiary hearing on the facts underlying this conviction, this decision concludes that Dr. Oliver's conviction was for a crime involving moral turpitude for which the Board may and should impose discipline. This decision recommends that the Board reprimand Dr. Oliver; impose a fine of $7,500, with $5,000 suspended; and impose a three-year period of probation as to similar conduct.

II. Factual and Procedural History

A. Dr. Oliver's involvement with SensualAlaska.com

Beginning in October 2013, Anchorage physician Kelton Oliver used a website called www.sensualalaska.com to arrange several encounters with prostitutes.[1] "Sensual Alaska" was part of a criminal enterprise run by Amber Batts. The criminal investigation into Sensual Alaska ultimately culminated in Ms. Batts being charged with and convicted of felony sex trafficking. The term sex trafficking as it is used here refers broadly to a "handler" arranging, managing, and profiting from a prostitute's commercial sex work.[2]

Ms. Batts' arrangement with the "providers" she employed involved managing a website through which prospective customers could view provocative "boudoir photos" of prostitutes employed by Sensual Alaska, and then contact Ms. Batts (who was using the name "Miranda") to arrange encounters either at their own homes or at a location managed by Sensual Alaska.

The cost for a one-hour session was $300.[3] Of this, Ms. Batts would take $100, and the prostitute would retain the remaining $200.[4] Ms. Batts arranged encounters and the overall management of the business. Among the features of the business was a "loyalty card" system

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1 DeCoeur testimony; Doe testimony; Ex. A, pp. 11-18.
2 DeCoeur testimony; AS 11.66.120(a).
3 DeCoeur testimony; Ex. A, p. 18.
4 DeCoeur testimony; Ex. A, p. 17.

whereby patrons who purchased a certain number of sessions would be rewarded with either a free or discounted session.[5] Dr. Oliver had a Sensual Alaska "loyalty card."[6]

One of the young women trafficked by Ms. Batts was a teenager named Sarah Doe, who went by the name "Selena" on the Sensual Alaska website.[7] Ms. Doe had entered prostitution as an underage drug addict.[8] At the time of the events central to this case, Ms. Doe was 18 years old.[9] During her time working for Ms. Batts, Ms. Doe went on between 50-60 "dates" on behalf of Sensual Alaska, and followed the business's protocol, which included providing sexual services for money, and paying "Miranda" one-third of the rate charged.[10] Also during this time, Ms. Doe continued to struggle with substance abuse.[11]

On two or three occasions beginning in October 2013, Dr. Oliver, who was then 56 years old, made arrangements through "Miranda" to purchase sessions with "Selena" (Ms. Doe) at his home.[12] Dr. Oliver did not have sex with Ms. Doe on each of those occasions, but did do so during at least one of the sessions.[13] Dr. Oliver appears to have also made arrangements through "Miranda" to purchase at least one session in October 2013 with a different "provider" called "Carmen Foxx."[14]

B. Criminal investigation and arrest

In the summer of 2014, Troopers investigating the Sensual Alaska sex trafficking operation identified some of the business's patrons, including Dr. Oliver, through the business's electronic records. As part of an investigation that involved interviewing numerous customers and "providers," Troopers interviewed Ms. Doe, and unsuccessfully attempted to interview Dr. Oliver, as well as both "Carmen Foxx" and her mother.[15]

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5 DeCoeur testimony.

6 DeCoeur testimony; Ex. A, p. 18.

7 Doe testimony, DeCoeur testimony. A pseudonym is used here to protect Ms. Doe's privacy, particularly in light of the potentially identifying facts discussed in Section D. Ms. Doe told investigating Troopers that Ms. Batts controlled her by threatening to expose her real name "if she didn't stay in line." DeCoeur testimony.

8 DeCoeur testimony. Trooper DeCoeur testified, and Ms. Doe did not deny, that she said she first engaged in prostitution at age 14, to support a heroin habit. Her age when she started working for Ms. Batts was unclear. DeCoeur testimony (started working for Ms. Batts at age 17); Ex. A, p. 18 (same); Doe testimony (started working for Ms. Batts at 18, but also "maybe in 2012" – a year during which she was under 18 until late November).

9 Doe testimony; DeCoeur testimony; Ex. A, p. 18.

10 Doe testimony; DeCoeur testimony; Ex. A, p. 18.

11 Doe testimony; DeCoeur testimony.

12 DeCoeur testimony; Doe testimony; Ex. A, p. 18.

13 Doe testimony. Ms. Doe told Troopers that she had engaged in "multiple sex acts" with Dr. Oliver for payment. Ms. Doe also told Troopers that the sessions in which she and Dr. Oliver spent time together pursuant to arrangements made through Sensual Alaska and in which they did not have sex still involved "lace and lingerie" and "some level of intimacy," even if no sexual contact occurred. DeCoeur testimony; Ex. A, p. 18.

14 DeCoeur testimony; Ex. A, p. 18.

15 DeCoeur testimony; Ex. A, pp. 17-19.

Based on Ms. Doe's statements as well as the electronic evidence (namely, multiple emails between Dr. Oliver and Ms. Batts arranging sessions with Ms. Doe and with Ms. Foxx), a criminal complaint was filed against Dr. Oliver.[16]

Dr. Oliver was arrested on August 23, 2014. On March 24, 2015, he pleaded guilty to a single violation of AS 11.66.100(a)(2), "offer[ing] a fee in return for sexual conduct," a class B misdemeanor.[17]

C. The Division's investigation and attempts to resolve this dispute

Ms. Batts' arrest and prosecution, as well as the arrests of some Sensual Alaska customers as a result of the Troopers' investigation, generated considerable media attention.[18] Dr. Oliver's arrest, in particular, generated headlines such as "Doctor at Anchorage military base arrested in prostitution case," and "JBER Doctor Arrested in Prostitution Ring Investigation."[19] Through this news coverage, the Division became aware of Dr. Oliver's arrest.[20] As is typical when the Division becomes aware of criminal charges against a licensee, the Division opened a file to monitor the criminal matter.[21]

Although Dr. Oliver had reported his arrest on his December 2014 license renewal application, he did not separately inform the Board of his criminal conviction. Based on this failure to report, the Division initially initiated a complaint against him under 12 AAC 40.967(26), which addresses failures to timely report criminal charges, disciplinary action, or certain convictions.[22]

The Division proposed to Dr. Oliver that this complaint be settled with a civil fine of $1,000, without censure or reprimand.[23] Dr. Oliver indicated he was unaware of the requirement to separately report the conviction, and agreed to the proposed fine.[24] But the Medical Board, which has final authority to determine disciplinary sanctions, rejected the proposed resolution at its November 2015 meeting.[25]

Division investigators continued to evaluate and attempt to resolve the case. As the result of this process, a new proposal was developed whereby the Board would impose the previously-

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16 DeCoeur testimony; Ex. A, pp. 17-19.
17 Ex. A, pp. 21-22.
18 Birt testimony; Ex. A, pp. 3, 49.
19 Ex. A, p. 49; Ex. C.
20 Birt testimony.
21 Birt testimony.
22 Ex. A, pp. 3, 7; Ex. Oliver-D, p. 1.
23 Ex. Oliver-A; Ex. A, p. 7.
24 Ex. Oliver-A; Ex. Oliver-B.
25 Ex. F, p. 4.

proposed fine, again without censure or reprimand, but with a cautionary letter. In the course of preparations for the next Board meeting, the Division investigator assigned to this case prepared a draft letter to Dr. Oliver in anticipation of the Board accepting this proposal.[26] The letter, however, was never actually sent to Dr. Oliver.[27] The letter was part of the Division's file that went to the Board for its consideration and review, but, because the Board ultimately rejected the proposal outlined in the letter, it was never sent.[28] The Board rejected the Division's proposal at its February 2016 meeting. When the Board went back on record following a 30-minute executive session, a Board member summarized the Board's deliberations as follows:

> The Board chose to reject the proposed agreement presented for Board consideration because it did not include the violation under professional regulation 12 AAC 40.967(17) for unprofessional conduct, including a felony or a crime involving moral turpitude. Although the conviction for solicitation of prostitution is not specifically included in the list under the cited regulation, it was noted that the list is not all-inclusive. It was the unanimous agreement of the Board that solicitation of prostitution is a crime of moral turpitude. The fact that the criminal conviction did not involve patient care was considered relevant by the Board. Had it involved patient care, the sanctions by the Board would have been more severe.
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> It was further noted, that every physician and physician assistant takes the Hippocratic Oath, and is expected to uphold the dignity of humanity and to hold themselves to the highest of standards.
>
> The Board determined to refer the case back to Investigations with recommended sanctions for
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> (1) the violation involving the conviction of a crime of moral turpitude to include a $5,000 fine and a reprimand, and
>
> (2) the violation involving failure to disclose the conviction to include an imposition of $1,000 fine.[29]

The Board thus unanimously rejected the proposed agreement, and referred the matter back to the Division.[30]

D. Board Member Doe

Against the backdrop of this matter being presented to the Board twice for review comes an unusual procedural twist, one that was not known to the Division until shortly before the hearing. The complication is that, at both times this matter was brought before the Medical Board, Ms. Doe's father was a member of the Board. The criminal complaint against Dr. Oliver

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26 Ex. Oliver-E.
27 Birt testimony.
28 Birt testimony; Ex. Oliver-D, p. 2.
29 Ex. G, p. 3.
30 Ex. G, pp. 3-4.

refers to Ms. Doe only by her initials. Accordingly, the Division was unaware, as these events unfolded, that one of the Board members deliberating on this matter had been, improbably enough, Ms. Doe's father.

Further, based on the evidence in the record, it is more likely than not that Board Member Doe was aware that these charges involved his daughter. According to Ms. Doe, her father knew that she had some sort of relationship with Dr. Oliver, having once picked her up from Dr. Oliver's house. And, although Ms. Doe and her parents have never spoken directly about her work for Sensual Alaska, she is "pretty sure" they knew about it. She believes Troopers told her parents about her involvement with Sensual Alaska during their investigation in August 2014. Ms. Doe also testified that her father told her, before one of the Board meetings, that the Board was considering a matter involving someone that she knew.[31]

Under the totality of these circumstances, it is more likely than not that Board Member Doe knew that the solicitation conviction at issue in this case was related to his daughter. There is no evidence in the record about what, if anything, Board Member Doe told the rest of the Board about his daughter's involvement in this matter. But neither he nor Dr. Oliver made this apparent conflict known to the Division, or – until the filing of prehearing briefs in this matter – the Administrative Law Judge.

E. Procedural history of the administrative appeal

After the Division's second unsuccessful presentation of the parties' agreement to the Board, and after the Board took the position that any resolution should involve a larger fine and a public reprimand, Dr. Oliver retained counsel. Further attempts at resolution were unsuccessful, and in November 2016, the Division filed a one-count accusation seeking disciplinary sanctions against Dr. Oliver. The three-paragraph Accusation alleges that Dr. Oliver's conviction under AS 11.66.100 constitutes unprofessional conduct for which a license holder may be sanctioned.[32]

Dr. Oliver, through counsel, filed a Notice of Defense admitting the conviction, but denying that it was for "a crime involving moral turpitude as a matter of law or fact," and also alleging, without explanation, that he was "being treated in a disparate fashion."

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[31] Ms. Doe initially testified that her father had told her the Board was considering a matter "that involved me, and a doctor that I knew." Ms. Doe later backtracked to say that her father had just said the matter involved "someone [she] knew."

[32] The Accusation did not allege that Dr. Oliver improperly failed to disclose his conviction. As explained in the Division's prehearing brief, although the prior proposed settlement agreements alleged a violation of 12 AAC 40.967(26), that regulation only requires licensees to report convictions referenced in AS 08.64.326(a)(4) – essentially, specified felonies or crimes involving unlawful drugs. Because Dr. Oliver's conviction is not referenced in that statute, the Division did not pursue an allegation of failure to disclose. Division's Prehearing Brief, p. 5, fn. 1.

On February 1, 2017, the Division filed a motion for Rule of Law, requesting an order that, as a matter of law, Dr. Oliver's conviction "is grounds for discipline because it is a crime of moral turpitude under 12 AAC 40.967." After full briefing by the parties, an order was issued declining to declare solicitation a *per se* crime of moral turpitude, but also rejecting the argument, advanced in Dr. Oliver's opposition brief, that solicitation could *never* be a crime of moral turpitude under the Board's regulation.

The order on the rule of law motion was issued on April 4, 2017. No further motions were filed by either party, and the matter proceeded to hearing. The evidentiary hearing was held on May 25, 2017. The Division was represented by Assistant Attorney General Robert Auth. Mr. Oliver was represented by Kevin Fitzgerald. Testimony was taken from Alaska State Trooper David DeCoeur, Division Chief Investigator Angela Birt, and Ms. Doe. Dr. Oliver attended the hearing, but neither party called him as a witness. The record was held open for post-hearing briefs, but none were filed, and the record closed on May 31, 2017.

In the meantime, because of the highly unusual procedural history of this matter, and, specifically, the possibility that a Board member with a conflict of interest participated in deliberative session without revealing that conflict, the Office of Administrative Hearings requested that the Department of Law assign an independent Assistant Attorney General to investigate the issues raised and advise the Board vis-à-vis conflicts of interest, including whether any such conflicts implicate final decisionmaker authority in this case.

III. Discussion

A. Evidentiary issues

Where a hearing is held under the Administrative Procedure Act, the technical rules of evidence do not apply.

> Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action.[33]

Hearsay that is not admissible in court is admissible in APA proceedings, but its use is restricted depending on whether it is corroborated by other evidence. Thus, AS 44.62.460(d) provides that:

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33 AS 44.62.460(d).

> Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil finding.[34]

Against this backdrop, three evidentiary issues raised at the hearing are addressed below.

First, during the hearing, Dr. Oliver's counsel objected on relevance grounds to Trooper DeCoeur's testimony that none of the prostitutes in the Sensual Alaska investigation was charged with a crime, because they are considered victims of sex trafficking. Dr. Oliver's relevance objection is misplaced. This testimony is relevant to whether the crime of which Dr. Oliver was convicted is or is not morally turpitudinous. And Trooper DeCoeur's informed insights into the impacts of the sex trafficking enterprise through which Dr. Oliver engaged prostitution services satisfies the APA's threshold of "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." The testimony was properly admitted.

Second, at the close of the hearing, Dr. Oliver's counsel objected to admission of the Division's Exhibit A, the entire 56-page agency record. When asked to identify the specific basis for his objection, counsel objected on hearsay grounds to the admission of Trooper DeCoeur's complaint affidavit, which was attached to and incorporated into the criminal complaint against Dr. Oliver, and obtained by Division investigators when they requested the charging documents from the court system. The objection to admission of the affidavit was overruled, and that ruling stands. As noted above, hearsay evidence is admissible in APA proceedings; its hearsay status may limit how the evidence can be used, but it does not govern the threshold question of admissibility.

Further, Trooper DeCoeur was asked on direct whether he disagreed with anything in the original affidavit. He testified – without objection – that he did not. Dr. Oliver thus had notice that the affidavit testimony was at issue, and had ample opportunity to object to the question and/or to cross-examine Trooper DeCoeur about his testimony adopting the contents of his affidavit. Trooper DeCoeur's testimony adopting the contents of his complaint affidavit corroborates his prior sworn statements for purposes of AS 44.62.460(d). And Dr. Oliver's failure to either inquire on cross or timely object when Trooper DeCoeur was asked to adopt the affidavit ignored the prehearing order's caution that:

> *Because the hearsay status of documents or testimony is not always self-evident and because technical hearsay issues can be curable, the*

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[34] AS 44.62.460(d).

limitation regarding use of hearsay in AS 44.62.460(d) will be applied only if a hearsay objection is timely asserted at the hearing.[35]

Finally, Trooper DeCoeur's testimony about Dr. Oliver's interactions with Ms. Doe during the Trooper's investigation and after he was arrested – and, specifically, relating to the issue of a no-contact order – was also admitted over objection. Upon reconsideration, that testimony was not relevant to the issues to be decided here. That is, that testimony does not help inform the question whether Dr. Oliver's underlying crime – which occurred well before the events described in this testimony – was morally turpitudinous. It has therefore been given no weight in this decision.

B. The Board's authority to discipline a licensee for unprofessional conduct is not limited to conduct "in connection with the delivery of professional services to patients"

The sole allegation raised in the Accusation was that Dr. Oliver's conviction for solicitation of prostitution was grounds for discipline as unprofessional conduct – namely, the conviction of a crime of moral turpitude. As noted above, the parties engaged in prehearing motions practice on the question whether solicitation is a crime involving moral turpitude under the Board's regulations. The order on that motion, discussed in more detail in Section C, below, concluded that solicitation could potentially be a crime of moral turpitude under the regulation, depending on the surrounding circumstances.

At the evidentiary hearing, Dr. Oliver advanced for the first time a new legal theory as to why the conviction could not serve as a basis for disciplinary action. While the Division's prehearing motion concerned the Board's regulations, Dr. Oliver's new argument is based on the statute under which the Board may impose sanctions. Although neither party has briefed this issue, it was raised at the hearing and so is discussed here.

The Board's authority to impose disciplinary sanctions arises from AS 08.64.326. The provision at issue in this case is Paragraph 326(a)(9), which provides:

> (a) The board may impose a sanction if the board finds after a hearing that a licensee . . .

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[35] January 13, 2017 Scheduling Order, p. 2 (emphasis in original). To the extent Dr. Oliver contends that the affidavit should be excluded as an inadmissible police report, this argument fails both because a complaint affidavit is not a "police report," and because hearsay (including hearsay police reports) is still admissible in APA cases. *See generally, Beshaw v. State*, 2012 WL 1594210 (Ct. App. 2012) (unpub.) (finding error in admission of complaint affidavit where, unlike here, defendant did not have opportunity to cross-examine Trooper affiant); *see also, Ahnagnatoguk v. State*, 2009 WL 1911552 (Ct. App. 2009) (unpub.) (no error for court to rely on facts in the complaint affidavit in sentencing phase where, like here, court has discretion to consider hearsay and other evidence that would be inadmissible at trial).

> (9) engaged in unprofessional conduct, in sexual misconduct, or in lewd or immoral conduct in connection with the delivery of professional services to patients[.][36]

At the hearing, Dr. Oliver argued for the first time that his solicitation conviction cannot form the basis for a disciplinary action because it was unrelated to patient care.[37] Dr. Oliver points to the language of AS 08.64.326(a)(9), which he reads to limit disciplinary action for "unprofessional conduct" to such conduct occurring "in connection with the delivery of professional services to patients." But neither the language, structure, nor history of subsection (a)(9) support Dr. Oliver's reading of the statute.[38]

First, Dr. Oliver's reading is not supported by the legislature's use of the word "conduct" twice in its list of proscribed activities – separately naming both "unprofessional *conduct*" and "lewd and immoral *conduct* in connection with the delivery of patient services." If the phrase "in connection with the delivery of patient services" was meant to modify both types of "conduct," the word "conduct" would not need to be included twice; the legislature could have just prohibited "unprofessional or lewd and immoral conduct in connection with the delivery of patient services."

Similarly, the legislature's inclusion of the word "in" before each of the three types of prohibited conduct ("engaged *in* unprofessional conduct, *in* sexual misconduct, or *in* lewd or immoral conduct in connection with the delivery of professional services"), as well as its omission of a comma after the final phrase, allows each of those three items – "unprofessional conduct," "sexual misconduct," and "lewd or immoral conduct in connection with the delivery of professional services to patients" – to stand alone. If the legislature wanted "in connection with the delivery of professional services" to modify all three types of misconduct, it would have written: "engaged in unprofessional conduct, sexual misconduct, or lewd or immoral conduct, in connection with the delivery of professional services." Instead, it listed three items, separating

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36 AS 08.64.326(a)(9). Subsection (a)(9) goes on to define sexual misconduct. *See* n. 40, *infra*.

37 Dr. Oliver did not raise this argument before the hearing, even after the Division filed a rule of law motion about the Board's authority to impose discipline under the facts of this case. *See* Oliver Response to Rule of Motion. Dr. Oliver noted the "in connection with" language in a footnote in his prehearing brief, but even there offered no argument or analysis suggesting that discipline was impermissible in this case. *See* prehearing brief, p. 3, fn. 2.

38 *See Muller v. BP Expl. (Alaska) Inc.*, 923 P.2d 783, 787 (Alaska 1996) ("In construing the meaning of a statute, we look to the meaning of the language, the legislative history, and the purpose of the statute in question."); *Employment Sec. Comm'n v. Wilson*, 461 P.2d 425, 428 (Alaska 1969) ("Because we may assume that the legislature knew and understood the rules of grammar, we are justified in relying on such rules in the interpretation of our laws.").

each by the preposition "in" and by a serial comma, with no comma then setting off "lewd or immoral conduct" from the requirement that the conduct be in connection with patient care.[39]

The conclusion that the legislature intended the three listed terms to be separate, with "in connection with the delivery of professional services" only modifying the last term in the list, is also supported by both the original phrasing of the section, and how it has been modified. As initially enacted in 1983, Section 326(a)(9) allowed the Board to impose a sanction upon finding that the licensee had "engaged in unprofessional conduct or in lewd or immoral conduct in connection with the delivery of professional services to patients."[40] Thus, from the outset, the legislature had separated engaging "in unprofessional conduct" from engaging "in lewd or immoral conduct in connection with" patient care. Again, had the legislature wanted "in connection with" to modify all the terms, it could simply have proscribed a licensee from "engaging in unprofessional or lewd or immoral conduct in connection with" patient care.

In 1995, the legislature amended section 326(a)(9) to authorize sanctions for "sexual misconduct," and to define that term.[41] Of note, that definition encompasses sexual contact or attempted sexual contact with a patient during the term of the physician-patient relationship, regardless of the patient's consent, unless a dating relationship predated the physician-patient relationship. Key to the issues here is that this prohibition does not merely prohibit sexual contact during "the delivery of professional services." It is sexual misconduct for a physician to begin a sexual relationship with an existing patient as long as the physician-patient relationship continues. Because this definition encompasses sexual contact outside of "the delivery of professional services," the modifier "in connection with the delivery of professional services to patients" plainly does not modify the phrase "sexual misconduct" in Section 326(a)(9). It would be incongruous to then read "in connection with the delivery of professional services to patients" as

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39 *See O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017) (discussing use of serial comma, and concluding that presence of serial comma would have identified term that followed as "the last item in the list"); Garner's Modern American Usage, p. 676 (Third Ed. 2009) ("Whether to include the serial comma has sparked many arguments. But it's easily answered in favor of inclusion because omitting the final comma may cause ambiguity, whereas including it never will.").

40 SLA 1983, ch. 48, § 14. A 1990 amendment to Section 326 did not affect (a)(9). SLA 1990, ch. 126, § 22.

41 SLA 1995, ch. 52, § 1. The definition reads: "In this paragraph, 'sexual misconduct' includes sexual contact, as defined by the board in regulations adopted under this chapter, or attempted sexual contact with a patient outside the scope of generally accepted methods of examination or treatment of the patient, regardless of the patient's consent or lack of consent, during the term of the physician-patient relationship, as defined by the board in regulations adopted under this chapter, unless the patient was the licensee's spouse at the time of the contact or, immediately preceding the physician-patient relationship, was in a dating, courtship, or engagement relationship with the licensee."

modifying the first and third items in Section 326(a)(9)'s list, while not modifying the middle item.[42]

All of the foregoing supports the conclusion that Section 326(a)(9) does not limit the Board's authority to impose discipline for unprofessional conduct to such conduct occurring "in connection with the delivery of professional services to patients." Further, the conclusion that the Board can impose discipline for unprofessional conduct – particularly, morally turpitudinous conduct – outside the context of patient care is consistent with other decisions in Alaska and elsewhere acknowledging the appropriateness of such authority. In the context of other professions, the Alaska Supreme Court has acknowledged that licensing boards may discipline licensees for morally turpitudinous conduct occurring outside the scope of their professional practice. As the Court observed in *Wendte v. State, Bd. of Real Estate Appraisers,* arguments to the contrary "fail[] to recognize that criminal violations may bear on one's fitness to practice a particular profession, regardless of whether the violations are committed while the licensee performs professional duties."[43] Thus, both the Alaska Supreme Court and other courts have "interpreted professional disciplinary statutes authorizing sanctions against licensees who have committed crimes involving moral turpitude to cover crimes not committed while they performed professional activities."[44] The Court, in upholding a license suspension by the Board of Real Estate Appraisers, quoted approvingly the Superior Court's conclusion that "when professionals commit crimes involving moral turpitude, 'their fitness to hold a position of trust is necessarily called into question.'"[45]

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[42] Nor is it the case – to the extent Dr. Oliver so contends – that, because solicitation's morally turpitudinous nature arises from "lewd and immoral conduct," and the statute expressly proscribes such conduct in the context of patient care, solicitation may only form the basis for discipline if it is connected to patient care. In addition to proscribing "lewd and immoral conduct in connection with the delivery of patient care," the legislature also gave the Board broad authority to impose discipline for unprofessional conduct. The Board, in turn, enacted regulations defining unprofessional conduct. As discussed in the rule of law order and below, that definition includes convictions for crimes of moral turpitude. The Board is well within its authority to define unprofessional conduct for the practice of medicine to include such convictions, and the statute does not prohibit the Board from adopting a definition that encompasses such conduct even outside the delivery of patient services.

[43] *Wendte v. State, Bd. of Real Estate Appraisers*, 70 P.3d 1089, 1092 (Alaska 2003).

[44] *Id.* at 1092.

[45] *Id.* at 1093. *Cf., Storrs v. State Medical Board*, 664 P.2d 547, 552 (Alaska 1983) ("While 'professional incompetence' is a broad term, it is not so vague that the administrative agency responsible for implementing the statute cannot formulate standards for professionals subject to its dictates. Read together, the statute and administrative regulation are not so ambiguously drawn that a qualified practitioner with ordinary intelligence and knowledge of professional ethics would be deprived of fair notice of the minimum standard of competence required.").

C. The Board's authority to discipline a licensee for conviction of a crime involving moral turpitude

Having concluded that AS 08.64.326(a)(9)'s proscription against unprofessional conduct is not limited to conduct in the delivery of patient services, the related question – addressed in the April 2017 order but discussed for completeness here – is whether Dr. Oliver's conduct rises to the level of sanctionable unprofessional conduct under the Board's regulations.

The Board has defined the term "unprofessional conduct" in 12 AAC 40.967. After first broadly defining "unprofessional conduct" to mean "an act or omission by an applicant or licensee that does not conform to the generally accepted standards of practice for the profession . . . which the licensee is authorized to practice under AS 08.64," the regulation then lists an array of acts and omissions that this definition specifically "includes."[46] Among these identified forms of "unprofessional conduct" is "conviction of a felony *or a crime involving moral turpitude.*"[47]

Broadly speaking, "crimes of moral turpitude" are "crimes that involve either fraud or 'base, vile, and depraved' conduct that "shock[s] the public conscience."[48] Courts have long acknowledged "the inherent ambiguity of the phrase 'moral turpitude.'"[49] As Maryland's Court of Special Appeals observed – in upholding the denial of a massage therapist's license based on the licensing board's conclusion that a solicitation conviction reflected a crime of moral turpitude – "the phrase is chameleon-like, adopting different shades of meaning in different legal contexts."[50]

Although the phrase's origins lie in rules of witness exclusion and, later, witness impeachment, its use has evolved and broadened in the field of administrative law. And while in the witness context the phrase "speaks primarily to truthfulness," when considered in the context of professional licensing,

> [T]he expression strikes the broader chord of public confidence in the administration of government. That is, a person who has credibility to testify may not have the public's confidence to practice certain professions[.][51]

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46 2 AAC 40.967. Prior Medical Board decisions have held that this list is not exhaustive. *Matter of Abbott*, OAH Case No. 09-0937-MED (State Medical Board, Feb. 2010).

47 2 AAC 40.967(17) (emphasis added).

48 *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010).

49 *Nunez*, 594 F.3d at 1131 (9th.Cir.).

50 *Stidwell v. Maryland State Bd. of Chiropractic Examiners*, 799 A.2d 444, 446 (Md. App. 2002).

51 *Stidwell*, 799 A.2d at 447-448.

The same broader scope has been observed in the professional licensing context within Alaska. Thus, while "[i]n general, crimes of moral turpitude are crimes that involve dishonesty, [or] 'depraved and inherently base' conduct," they can also include "at the lower end of the spectrum—acts that indicate 'bad character' or that reflect adversely on one's 'personal values.'"[52]

In the case of the Board's regulations, after identifying "conviction . . . of a crime involving moral turpitude" as unprofessional conduct, 2 AAC 60.967(17) further provides:

> Under this paragraph, a 'crime involving moral turpitude' *includes* the following: (A) homicide; (B) manslaughter; (C) assault; (D) stalking; (E) kidnapping; (F) sexual assault; (G) sexual abuse of a minor; (H) unlawful exploitation of a minor, including possession or distribution of child pornography; (I) indecent exposure; (J) unlawful distribution or possession for distribution of a controlled substance[.][53]

The Board has previously treated this list as non-exhaustive, concluding in *Matter of Kaniadakis* that 12 AAC 40.967(17) also covers fraud convictions, even though fraud is not expressly listed as one of the offenses "included" within the meaning of "crime involving moral turpitude."[54]

D. "Offering a fee in return for sexual conduct" can be a "crime involving moral turpitude" for purposes of the Medical Board's definition of unprofessional conduct

Prior licensing decisions have observed that, while some offenses are crimes of moral turpitude *per se*, and others are simply regulatory offenses that always fall beneath the threshold for moral turpitude, there is an intermediate category of crimes in which the question of moral turpitude turns on the particularized facts of a given conviction.[55] The April 2017 order on the Division's rule of law motion concluded that solicitation was not a *per se* crime involving moral turpitude, but instead falls into the middle ground of offenses for which the question of moral turpitude turns on the underlying facts of the conviction.

As Dr. Oliver correctly noted in his opposition to the Division's motion, neither prostitution nor the solicitation of prostitution is expressly identified in the Board's regulation as a crime of moral turpitude. Dr. Oliver broadly argued that solicitation cannot be a crime of moral turpitude under the Board's regulation because it is not specifically identified as one in the regulation. Dr. Oliver contended that the extension of 12 AAC 40.967(17) to include offenses not

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52 *Matter of L.R.C.*, OAH Case No. 08-0625-SGL, at p. 4 (Comm'r of Pub. Safety 2009) ("Thus, while moral turpitude encompasses heinous crimes, it also can encompass conduct that is not punished especially heavily by the penal system.").

53 2 AAC 40.967(17) (emphasis added).

54 *Matter of Kaniadakis*, Case No. 2804-99-005 (State Medical Board Decision, Jan. 15, 2004).

55 *See, e.g., Matter of L.R.C.*, OAH Case No. 08-0625-SGL (Comm'r of Public Safety 2009).

specifically itemized in (17)(a)-(j) "is violative of due process considerations."[56] But it is well-established by statute in Alaska that use of the phrase "includes" denotes a non-inclusive list. AS 01.10.040(b). Further, as noted above, the Board has previously specifically treated the list of offenses identified in 12 AAC 40.967(17) as non-exhaustive.

At the same time, however, while the word "includes" indicates a non-exhaustive list, it is also generally construed to group items that are categorically similar. This principle appears in the legal doctrine of *ejusdem generis* ("of the same kind"), which tells us that, "where general words follow an enumeration of persons or things, . . . such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned."[57] There is at least a question under *ejusdem generis* of whether "offering a fee in return for sexual conduct" is reasonably within the same general category of offenses identified in 2 AAC 40.967(17). Some of the offenses are plainly distinguishable from the one of which Dr. Oliver was convicted, in that they involve either taking a life or physical violence (homicide, manslaughter, assault), and are easily classified as inherently turpitudinous. And the only offenses listed in 2 AAC 40.967(17) that involve sexual conduct are characterized either by a lack of consent (e.g. sexual assault, indecent exposure) or by the exploitation of a vulnerable victim who is legally incapable of consent (e.g. sexual abuse of a minor, sexual exploitation of a minor).

Because one way that a Board can identify *per se* morally turpitudinous offenses is to specifically list them as such in its regulations, the omission of both prostitution and solicitation from 2 AAC 40.967(17) stands out against the sexual conduct offenses that the Board did expressly list, offering the impression that – at least as a *per se* matter – prostitution-related offenses are not considered as "vile, baseless, and depraved" as those offenses the Board has specifically identified as *per se* morally turpitudinous, e.g. sexual assault, sexual abuse of a minor, and sexual exploitation of a minor.[58]

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[56] Opposition, p. 6.

[57] Black's Law Dict. (5th ed. 1979) at 464. An example of an application of *ejusdem generis* would be the interpretation of the phrase "horses, cattle, sheep, goats, or any other farm animal"; in the absence of contrary factors, the doctrine would suggest that "any other farm animal" would encompass only similarly large mammals, and would exclude chickens. *West v. Municipality of Anchorage*, 174 P.3d 224, 228 (Alaska 2007).

[58] The Board's specific identification of consent-based offenses (sexual assault) and offenses involving children (sexual abuse of a minor) is consistent with other licensing entities whose regulations attempt to define the scope of moral turpitude. *See, e.g.,* 20 AAC 10.035 (professional teaching practices commission); 13 AAC 62.020(b)(2)(A) (emergency guard qualifications). The exception appears to be the Board of Massage Therapists, which has chosen to identify prostitution as a crime involving moral turpitude *per se* – but whose regulations also vest the Board with discretion to determine whether or not a particular conviction for a crime involving moral

The last offense listed in the Board's regulation involves the distribution of controlled substances. This offense is in some ways most comparable to "offering a fee in return for sexual conduct," in that both implicate commercial transactions that are illegal even if entered into willingly by both participants. But the better analogy to *distribution*-related crimes is not solicitation of prostitution, but crimes related to *promoting* prostitution, as with Ms. Batts' conviction. Further, the close nexus between controlled substances and the role of the medical professional makes obvious the choice to specifically carve out such offenses as *per se* morally turpitudinous for a member of that profession.

The order on the Division's rule of law motion also considered case law, both from the professional licensing context and from other contexts in which courts have considered whether solicitation is a crime involving moral turpitude. Certainly, numerous courts have so held in other contexts.[59] Most notable is the large volume of federal immigration case law upholding the determination by the Board of Immigration Appeals that both prostitution and solicitation are *per se* crimes of moral turpitude for purposes of federal immigration law.[60] That Board recently rejected a challenge to this line of cases by the American Immigration Lawyers Association, which argued that evolving social mores warranted revisiting this *per se* stance.[61] Ultimately,

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turpitude "affect[s] the person's ability to practice competently and safely." *See* AS 08.61.030(9); 12 AAC 79.910(11). But the broader general pattern of excluding prostitution-related offenses from enumerated list of crimes of moral turpitude, while including sexual conduct crimes implicating consent and/or legal disability supports the conclusion that prostitution is not in the category of offenses generally considered so vile, base and depraved that they *per se* shock the public conscience.

[59] *See, e.g. Gardner v. Holland*, 218 F.3d 1048, 1058 (N.D. Cal. 2016) (for purposes of witness impeachment, prostitution was crime of moral turpitude); *Green v. State*, 728 S.E.2d 668, 673-74 (Georgia 2012) (upholding refusal to allow impeachment of witness based on prostitution conviction only because "moral turpitude is no longer the standard" for impeachment under state law); *Collins v. State*, 223 P.3d 1014, 1019 (Crim. App. OK 2009) (recognizing prostitution convictions as "misdemeanors involving moral turpitude"); *Clark v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 465 So.2d 1135, 1139-1140 (Ct. Civ. App. Ala. 1984) (in context of failure to disclose prior conviction on homeowners' insurance application, conviction for prostitution was relevant crime of moral turpitude); *Holgin v. State*, 480 S.W.2d 405, 408 (Tex.Crim.App.1972) ("It has long been the rule in this State that a conviction for prostitution involves moral turpitude"); *City of Seattle v. Jones*, 475 P.2d 790, 794 (Wash. App. 1970) (in upholding constitutionality of anti-loitering ordinance, holding that under Washington law, "[p]rostitution is unquestionably a crime involving moral turpitude"), *aff'd*, 488 P.2d 750 (1971).

[60] *See, e.g., Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012) ("solicitation of prostitution is always base, vile, and depraved"); *Gomez-Guttierez v. Lynch*, 811 F.3d 1053 (8th Cir. 2016); *Reyes v. Lynch*, 835 F.3d 556 (6th Cir. 2016). These decisions are discussed in more detail in the order on the Division's motion. Worth noting is that these decisions are not binding precedent here, and are heavily influenced by the high degree of "of "Chevron deference" that federal appellate courts afford immigration authorities' initial administrative determinations. *See generally, Chevron, USA., Inc. v. Nat. Res. Def. Council, Inc.* 476 U.S. 837, 843-44 (1984).

[61] *See In Re: Ranjit Singh Sehmi*, 2014 WL 4407689, at *4 (DCBABR Aug. 19, 2014) (unpubl.) (summarizing arguments by *amicus curiae* the American Immigration Lawyers Association, "that consensual, adult sexual relations, even those with a commercial element, should not be punished with deportation for either individual[;] [t]hat, separate and apart from human trafficking, which is both punished separately and morally turpitudinous, the long-held presumption that simple prostitution is a crime involving moral turpitude is based on an archaic and mistaken understanding of consensual, adult sexual relations that is incompatible with contemporary social norms and our

however, the Board declined to alter its view of prostitution and solicitation "as inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons and, in particular, to society in general."[62]

The professional licensing decisions are far fewer.[63] In *Stidwell v. Board of Chiropractic Examiners*, the Maryland Court of Special Appeals concluded that the applicant's prior conviction for solicitation of prostitution reflected moral turpitude vis-a-vis the license she sought, concluding that "[s]he may be qualified to give testimony, or to be certified in another profession, but in the particularly intimate setting of a massage parlor, her prurient offense cases an unsavory, even menacing, shadow."[64] And in *Matter of Koch*, the Arizona Supreme Court likewise held that a judge's conviction for solicitation was a crime of moral turpitude, particularly given the judge's obligation to uphold the laws he was charged with enforcing.[65]

Against the foregoing legal backdrop, the order on the Division's rule of law motion rejected the Division's argument that, as a matter of law and without exception, no matter what

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contemporary view of sex outside of marriag[e]; [t]hat the current motivation for criminalizing simple prostitution as a regulatory offense is to prevent public disorder, not public immorality, and is a quality of life crime, not a crime involving moral turpitude[;] [t]hat international norms, as demonstrated by a comparative analysis of other nations, indicates that simple prostitution is neither base nor depraved[;] and [t]hat the Board should not be bound by [the Ninth Circuit's 2012 decision in] *Rohit*[,] in particular because it relied on *Matter of Lambert*, [a 1947 decision], as this was the Board's most recent published opinion on the subject of prostitution as a crime involving moral turpitude, and much has changed in the intervening five decades.").

62 *Id.*, 2014 WL 4407689, at *7 (unpubl.). Several federal appellate courts have since relied on this more recent (albeit technically non-precedential) analysis in confirming that, evolving social mores notwithstanding, prostitution "and, derivatively, solicitation of prostitution" remain "contrary to the accepted rules of morality" and remain crimes of moral turpitude for purposes of federal immigration laws. *Reyes* 835 F.3d at 561; *Perez v. Lynch*, 630 F. App'x 870, 873 (10th Cir. 2015) (unpubl.); *see also, Florentino-Francisco v. Lynch*, 611 F. App'x 936, 939 (10th Cir. 2015) (unpubl.) ("[W]e disagree with [the] characterization of prostitution and solicitation of prostitution as mere regulatory offenses. Regulatory offenses typically 'concern[ ] filing, reporting, and licensing requirements.' [citation]. In contrast, prostitution has been deemed 'hurtful to the cause of sound private and public morality and to the general well-being of the people.' [citation]. Prostitution, and derivatively solicitation of prostitution, are thus inherently wrong, not just wrong because of a statutory proscription.").

63 In his opposition to the Division's motion, Dr. Oliver failed to identify a single professional licensing case in which solicitation of prostitution was held to not be a crime of moral turpitude. My own research identified only one such case – a 1990 decision by the Review Department of the State Bar Court of California, which concluded, without explanation, that an attorney's misdemeanor conviction for soliciting an act of prostitution did not implicate a crime of moral turpitude. *Matter of Buckley*, 1990 WL 157497 (St. Bar Ct of CA). In an interesting demonstration of the shifting and contextual nature of the question of moral turpitude, though, the respondent in *Buckley* was convicted of the same offense deemed morally turpitudinous in *Rohit v. Holder*. *Compare Rohit*, 670 F.3d at 108 (concluding that California Penal Code § 647(b), which prohibits disorderly conduct involving prostitution, is categorically a crime of moral turpitude), with *Buckley* (concluding that § 647(b) does not involve a crime of moral turpitude).

64 *Stidwell*, 799 A.2d, at 448.

65 *Matter of Koch*, 890 P.2d 1137, 1139 (Arizona 1995). In reaching that conclusion, the *Koch* court also observed that the offense of which the judge was convicted appears in the section of the City Code entitled "Offenses Involving Morals." Here, the offense of which Dr. Oliver was convicted – AS 11.66.100 – is similarly categorized under the Alaska criminal code as an "offense against public health and decency," a category that includes prostitution-related offenses (including sex trafficking), gambling-related offenses, and offenses involving "adult entertainment businesses." *See generally*, AS 11.66.

the context, a misdemeanor conviction for solicitation of prostitution always and necessarily implicates one's professional competence or "the public's confidence to practice certain professions."[66] The absence of solicitation and related offenses from the list set out in the regulation weighs strongly against finding solicitation to be a *per se* crime of moral turpitude. Although the Board has previously found fraud to be a *per se* crime of moral turpitude under the regulation despite not being listed as one, fraud-based offenses have long been considered a stand-alone category of obviously morally turpitudinous offenses.[67] It does not follow that solicitation is likewise a *per se* crime of moral turpitude – particularly where, as discussed above, the application of *ejusdem generis* does not otherwise support its inclusion on the list of *per se* offenses. And, while prostitution and solicitation largely continue to be found morally turpitudinous under the federal immigration framework, those decisions necessarily arise in the context of federal courts' deference to a separate administrative tribunal (the Board of Immigration Appeals) charged with a very different task than this Board.

For all of these reasons, the order rejected the Division's position that a conviction for offering a fee in exchange for sexual conduct is a *per se* crime of moral turpitude under 12 AAC 40.967(17). At the same time, however, legal authority across multiple legal contexts amply supports the view that solicitation may well be an act that is sufficiently "base and depraved," and a sufficiently poor reflection on one's "personal values," as to warrant classification as a crime involving moral turpitude.[68] Accordingly, the order concluded that solicitation falls within that middle ground of offenses for which case-specific factual development is necessary to determine whether the particular offense in question involved moral turpitude.[69]

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66 *Stidwell*, 799 A.2d at 447-448.

67 *See, e.g., Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010) ("In general, we have 'divided crimes involving moral turpitude into two basic types: those involving fraud and those involving grave acts of baseness and depravity'"; and describing court's framework for determining whether "non-fraud" offenses are morally turpitudinous) (internal citations omitted).

68 *See Nunez*, 594 F.3d at 1131 ("base, vile, and depraved conduct that shocks the public conscience"); *Stidwell*, 799 A.2d at 447-448 (moral turpitude in professional licensing context "strikes the broader chord of public confidence in the administration of government"); *Matter of L.R.C.*, OAH Case No. 08-0625-SGL, at p. 4 (crimes of moral turpitude include not only "depraved and inherently base conduct," but also "acts that indicate 'bad character' or that reflect adversely on one's 'personal values.'").

69 *Accord Cartwright v. Board of Chiropractic Examiners*, 548 P.2d 1134 (Ca. 1976) (disciplinary proceedings following conviction for "willfully residing" in "a house of ill-fame" required "competent evidence of the circumstances surrounding the offense" to determine whether conviction reflected moral turpitude, particularly with reference to professional fitness).

E. Dr. Oliver's conviction for solicitation was a conviction of a crime involving moral turpitude

The question for the evidentiary hearing was whether Dr. Oliver's conviction was a crime of moral turpitude. The Division satisfied its burden of establishing that it was.[70] Dr. Oliver's conviction under AS 11.66.100(a)(2) conclusively established only that he had offered a fee in return for sexual conduct. The evidence at the hearing, however, provided a factual context showing conclusively that the conduct underlying that conviction was indeed morally turpitudinous.

The evidence established that Dr. Oliver's act of solicitation was carried out using the services of a sex trafficker. Dr. Oliver knew that he was paying "Miranda" to arrange sexual encounters on his behalf. He had a customer "loyalty card" with her sex trafficking operation. And the prostitute whose services he solicited in this manner was a teenaged substance abuser. This was "inherently base" and morally turpitudinous conduct.[71]

Dr. Oliver has argued that the nature of Ms. Batts' criminal enterprise was not relevant to the inquiry here. I disagree. The Division persuasively established that Ms. Doe was a victim of sex trafficking by Ms. Batts and that Ms. Batts' conduct towards Ms. Doe was exploitative. The factual underpinnings of Dr. Oliver's conviction include the fact that he used Ms. Batts' services to arrange sexual encounters with Ms. Doe. By patronizing Ms. Batts' service, Dr. Oliver enabled the ongoing exploitation of her victims. While his crime may well have been morally turpitudinous even without Ms. Batts' involvement, it was more so because it was carried out in that particularly abusive context.

Dr. Oliver has also argued that his relationship with Ms. Doe later morphed into a "dating relationship" that had an ultimately beneficial impact on [Ms. Doe's] life trajectory. At some point in late 2013, Ms. Doe became ill and stopped working for Sensual Alaska. Thereafter, she moved into Dr. Oliver's home for at least several months. Ms. Doe characterizes this as a "dating" relationship, whereas Trooper DeCoeur opined that the relationship was inherently exploitative, driven by Ms. Doe's continued economic dependence on Dr. Oliver in the face of her ongoing substance abuse problems. But it is ultimately not necessary to adopt either characterization of these later developments. Engaging in non-turpitudinous behavior after the

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70 *See* AS 44.62.460(e)(1) (The Division has the burden of proving all facts necessary to support the Accusation by a preponderance of the evidence).

71 *See Matter of L.R.C.*, OAH Case No. 08-0625-SGL, at p. 4 (Commissioner of Public Safety 2009) (crimes of moral turpitude may involve "'depraved and inherently base' conduct," and "can also include 'at the lower end of the spectrum—acts that indicate 'bad character' or that reflect adversely on one's 'personal values.'").

fact does not strip the underlying crime of its turpitudinous nature. Whatever its nature, Dr. Oliver's later relationship with Ms. Doe after their initial paid sexual encounters in no way alters the conclusion that his underlying crime – having paid sexual encounters with a drug-addicted teenage prostitute he hired through a sex trafficker – was a crime of moral turpitude.

F. What level of sanction, if any, is appropriate

Because Dr. Oliver's conviction was for a crime of moral turpitude under 12 AAC 40.967, it constitutes unprofessional conduct in violation of AS 08.64.326(a)(9). The Board therefore may, but is not required to, impose disciplinary sanctions.[72] "Professional sanctions reinforce professional standards, deter other practitioners from committing similar violations, and protect the public."[73] The Board has the authority to administer a range of disciplinary sanctions, including reprimands, censure, probation, license limitations, and civil fines. In determining what sanction is appropriate, the Board considers "the nature and circumstances of the conduct," "the licensee's experience and professional record," and "any other relevant information."[74] The Board also considers the disciplinary action imposed in prior decisions and in prior agreements with licensees, as it is required to be consistent with prior disciplinary actions, or to explain its departure from prior actions.[75]

Here, the Division takes the position that the appropriate level of discipline is reflected in the Board's February 2016 proposal: a $5,000 fine and a reprimand. Dr. Oliver counters that no discipline should be imposed, and that if any discipline is imposed, it should not exceed the original $1,000 civil fine proposal.[76] For the reasons that follow, this decision rejects both of these positions.

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72 AS 08.64.331.

73 *Matter of Cooper*, OAH No. 10-0148-MED, at p. 16 (Medical Board 2011).

74 *Matter of Kohler*, OAH No. 07-0367-MED, p. 13 (Medical Board 2008) (citing 12 AAC 40.055(b), 12 AAC 40.967). Here, neither side presented evidence about "the licensee's professional record." Because the Division has the burden of proof, and did not present evidence on this topic, Dr. Oliver's professional record is presumed to be a positive mitigating factor.

75 AS 08.64.331(f); AS 08.01.075(f).

76 In his opposition to the rule of law motion, and at the evidentiary hearing, Dr. Oliver argued that the Board was precluded from imposing discipline on any terms other than those initially proposed by the Division. Dr. Oliver bases his argument on the presence in the Division's files of a letter signed by John Clark, but never mailed. The letter – dated nearly two months before the Board meeting – purports to extend a settlement offer on behalf of the Board. The letter was never sent, however, because the Board never approved the settlement terms proposed by the Division. The unmailed letter was retained in the Division's files, and was therefore produced as part of the agency record in this case. The unmailed letter prepared in anticipation of Board action does not, as Dr. Oliver has suggested, constitute or reflect "an executed agreement." It is black letter law that "[t]he formation of a valid contract requires an offer encompassing all essential terms, unequivocal acceptance by the offerree, consideration, and an intent to be bound." *Davis v. Dykman*, 938 P.2d 1002, 1006 (Alaska 1997). The unmailed letter fails at the first step of that inquiry – it was not an offer because it was never actually extended to Dr. Oliver. Nor is there any evidence of acceptance, consideration, or an intent to be bound. The letter was a draft, prepared in advance in hopeful

The Division acknowledges that there appear to be no prior Board cases involving misdemeanor crimes of moral turpitude. My own review of prior Board disciplinary orders and memoranda of agreement did not produce any remotely comparable cases from which we might draw comparisons. The Board therefore has no established record against which it can assess the nature of the appropriate discipline in this case.[77]

At the hearing, the Division presented proposed disciplinary sanction matrices adopted by the Board in October 2010 and November 2016.[78] These guidelines reveal that disciplinary violations that involve patient care or morally turpitudinous conduct are recommended for the highest level of sanction.[79] For "sexual misconduct" involving patients, the Board's proposed sanctions involve license suspensions, large civil fines, required training on ethics and boundaries, and probationary periods.[80] Violations seen as "technical violations not related to the delivery of health care" are recommended for the lowest level of sanction; at the time of Dr. Oliver's actions giving rise to this appeal, the proposed sanction for such violations included fines ranging from $1,000-$2,000.[81] And the only types of violations recommended for civil fine with no sanction or reprimand are "technical violations not related to the delivery of health care."[82]

The matrices are not particularly helpful, other than for identifying what this conduct was not. Plainly, this is not a case of sexual misconduct related to patient care or in the professional setting, nor a case in which the unprofessional conduct related to patient care at all. The Board's matrices list violations involving crimes of moral turpitude as warranting a high-level sanction – including "immediate automatic suspension" pending further review – that neither party advocates here and that would plainly be disproportionate under these facts.[83] Similarly, for the morally turpitudinous conduct of submitting false or misleading information to the Board or with a license application, the matrix suggests a fine of $10,000, a license suspension, a reprimand, and

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anticipation of how the Board might proceed. It was not, and does not reflect, an executed agreement, and is not binding on the resolution of this matter.

77 The lack of prior Board discipline under similar contexts should not be read to suggest that Dr. Oliver has been singled out for unfair treatment. No evidence has been presented of similar convictions having been brought to the Board's attention and ignored.

78 Ex. H. "These guidelines are not adopted regulations, and while they may be used by the Board, the Board is still required to consider each case individually[.]" *Matter of Midgen*, OAH No. 10-0376-MED, p. 10 (Med. Board 2011).

79 *See*, e.g., Ex. H, pp. 1, 6 (prescribing issues: possible suspension and minimum fine of $25,000), pp. 3, 7 (abusive behavior to patients or staff: suspension, $5,000, evaluation, reprimand); pp. 4, 8 (conviction of felony or crime involving moral turpitude: immediate automatic suspension with further discipline depending on the nature of the conviction).

80 Ex. H, p. 5.

81 Ex. H, pp. 6-7.

82 *See* Ex. H, pp. 1-2, 6-7.

83 Ex. H, p. 4.

a required ethics course.[84] But that morally turpitudinous conduct is directed specifically at undermining the Board's ability to regulate the profession. Again, then, this is not a helpful comparison. At the same time, the conduct here is also not comparable to the more routine and technical nondisclosure cases, which are virtually the only context in which the Board routinely considers a civil fine without some sort of reprimand.

In short, the Board's prior cases and guidelines offer no direct assistance in identifying the appropriate level of sanction here. And yet, it is apparent from the facts of this case that a sanction is warranted. As discussed above, Dr. Oliver's conduct here was not only criminal, but morally turpitudinous. On the one hand, Dr. Oliver's crime of moral turpitude was neither a felony nor one of the *per se* crimes identified by the Board's regulation, nor was it related to patient care. At the same time, his conduct went far outside the bounds of decency and dignity expected of the medical profession, and both could and did reflect negatively on the profession as a whole. "Physicians are held to high personal and professional standards because of the public trust that is placed in them."[85] Unprofessional conduct in general reflects negatively on the medical profession as a whole, and undermines public confidence in the profession. It is in the interest of all licensees, as well as in the public interest, to deter conduct that undermines public faith in the profession.

Both parties have approached the proposed sanction in terms of a fine. The Board has previously noted that, in determining the amount of a fine, the fine should be large enough to impress upon licensees the importance of avoiding unprofessional conduct.[86] But the conduct at issue here appears particularly unlikely to be remediable through fines alone. Dr. Oliver has demonstrated his willingness to pay considerable sums to engage in the turpitudinous conduct at issue. Presumably, others who are similarly inclined to engage in such conduct are likewise, by definition, willing to pay handsomely to do so. The monetary cost of this conduct is not a deterrent.

And yet, plainly, the disciplinary goal of deterring similar conduct by other licensees is important. Indeed, its importance is amplified when the conduct in question is "unprofessional" because of its morally turpitudinous nature. Physicians, having sworn an oath acknowledging their special obligations to all fellow human beings, are rightly held to a higher standard of moral conduct. When physicians commit "base, vile, or depraved" crimes of moral turpitude – even

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84 Ex. H, pp. 2-3.

85 *Matter of Kohler*, OAH No. 07-0367-MED, p. 18.

86 *See Matter of Midgen*, OAH Case No. 10-0376-MED, p. 11 (Med. Board 2011).

where those crimes are, as here, unrelated to patient care – public confidence in the profession as a whole is affected. There is a strong public interest – and a strong interest on the part of the broader medical community – in deterring conduct that undermines public faith in the sound moral judgment of medical professionals.

In light of that strong public interest, and the unlikelihood that a fine, alone, will best serve the intended purpose of deterrence, this decision recommends that the Board impose (1) a reprimand; (2) a fine of $7,500, with $5,000 suspended; and (3) a three-year period of probation during which commission of any further crimes of moral turpitude will cause the suspended portion of the fine to come due and will result in the summary suspension of Dr. Oliver's license, with the length of suspension, and other discipline, to be determined based on the facts of the case. This sanction is not unfairly punitive, is targeted to both deterrence among other licensees and direct prevention as to this licensee, appropriately conveys the seriousness with which the Board regards this conduct, and is reasonable under the totality of the circumstances.

IV. Conclusion

The Division met its burden of proving that Dr. Oliver's conviction constituted a crime of moral turpitude and that discipline is warranted. This decision recommends that the Board:

(1) Reprimand Dr. Oliver for engaging in morally turpitudinous conduct contrary to the dignity of the medical profession;

(2) Impose a fine of $7,500, with $5,000 suspended pending successful completion of a probationary period; and

(3) Impose a three-year period of probation as described above.

DATED: June 22, 2017.

By: _____
Cheryl Mandala
Administrative Law Judge

Adoption

The Alaska State Medical Board adopts this decision as final under the authority of AS 44.64.060(e)(1) and (e)(4). The Board modifies the decision by adding the following factual finding, and adopts the decision as final, as modified.

> Board members Dr. Roderer, Dr. Liu, and Mrs. Carlson, confirmed that when they participated in the November 2015 and February 2016 consideration of the proposed consent agreements in Dr. Oliver's case, they did not know that a former board member's daughter was involved with Dr. Oliver, were not influenced by the former board member in their consideration of those proposed consent agreements, and do not believe that their former association with the former board member would affect their consideration of the Administrative Law Judge's current proposed decision in Dr. Oliver's case. Board members Dr. Clift, Dr. Neyhart, Mr. Mertz, and Mr. Olson, also confirmed that they have no conflict of interest in this matter.

Judicial review of this decision may be obtain by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 3rd day of August, 2017.

By: _____
Grant Roderer, MD
President, State Medical Board

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-330A

Billy H. Stout, M.D., Board Secretary
State Board of Medical Licensure and Supervision
101 N.E. 51st Street
Oklahoma City, OK 73105

September 18, 2018

Dear Dr. Billy H. Stout, M.D., Board Secretary:

This office has received your request for a written Attorney General Opinion regarding action that the State Board of Medical Licensure and Supervision intends to take in case 17-09-5531. On the licensee's renewal application, the licensee admitted to having a criminal conviction for soliciting a prostitute. The licensee was disciplined by the Alaska State Medical Board for these actions. The Board proposes to reprimand the licensee, to place the licensee on probation for three years to run concurrent with the Alaska probation, and to require the licensee to comply with the other terms of the Alaska discipline.

The Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act authorizes the Board to suspend or revoke a license and order other appropriate sanctions against a licensee for unprofessional conduct, which includes "[d]ishonorable or immoral conduct which is likely to deceive, defraud, or harm the public" and "[c]ommission of any act of sexual abuse, misconduct, or exploitation." 59 O.S.Supp.2017, §§ 503, 509(8); OAC 435:10-7-4(23). The Board may reasonably believe that the proposed action is necessary to deter future violations.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State's policy of protecting the health, safety, and welfare of the citizens of Oklahoma.

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

AMANDA OTIS
ASSISTANT ATTORNEY GENERAL

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