

**BEFORE THE  
CALIFORNIA ACUPUNCTURE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:	)	Case No. 1A-2017-10
	)	
SUNWOO KIM, L.Ac.	)	OAH No. 2018080723
	)	
Acupuncture License No. AC 9766	)	
	)	
Respondent.	)	
_____	)	

**DECISION AND ORDER**

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the California Acupuncture Board, Department of Consumer Affairs, as its Decision in this matter.

This Decision shall become effective on March 21, 2019.

It is so ORDERED February 19, 2019.



Amy Matecki, MD, L.Ac.  
Acupuncture Board  
Department of Consumer Affairs  
State of California

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ACUPUNCTURE BOARD  
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In the Matter of the Accusation Against:

SUN WOO KIM, L.Ac.

Acupuncturist License No. AC 9766,

Respondent.

Case No. 1A-2017-10

OAH No. 2018080723

**PROPOSED DECISION**

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on December 17-18, 2018, in Los Angeles, California.

Wendy Widlus, Deputy Attorney General, appeared and represented complainant Benjamin Bodea, Executive Officer of the Acupuncture Board, Department of Consumer Affairs (Board).

Respondent Sun Woo Kim appeared and represented himself with language assistance provided by Hysun Sunny Lee, certified court interpreter.

The parties submitted the matter for decision on December 18, 2018.

**FACTUAL FINDINGS**

*Background and Jurisdictional Facts*

1. Complainant brought the Accusation in his official capacity. The Board seeks to discipline respondent's acupuncturist license for unprofessional conduct because he engaged in consensual sexual relations with a patient, identified herein as Patient 1 to protect her privacy. Respondent timely submitted a Notice of Defense.

2. Respondent was trained in acupuncture in Korea. From 1999 to 2001, he was an instructor of acupuncture at Taegu University, Young Nam University, and the YMCA in Korea. (Ex. 19.) In addition, respondent studied business law at the Hanyang University from 1992 to 1995; he never practiced law in Korea and is not licensed by the California State Bar.

3. On March 30, 2004, the Board issued respondent license number AC 9766. Respondent's license is valid and is scheduled to expire on July 31, 2019. He has no public record of discipline.

*Sexual Relations with a Patient*

4. Patient 1 began receiving acupuncture treatments from respondent in 2007. Her chief complaint was numbness relating to an automobile accident. Patient 1 also exhibited "nervousness and anxiety related to the accident." (Ex. 12, p. 243.) Acupuncture treatment was "focused on relieving pain, stiffness, and nervousness." (*Id.*) Patient 1 expressed to respondent that she suffered from depression, but no medical evidence was presented to show that respondent treated her for depression. At various times, respondent also treated Patient 1's husband and three children for various symptoms.

5. In January 2015, respondent moved his practice to a location on Campus Drive in Newport Beach. The new location was near Patient 1's place of employment, which led to an increase in treatments, as well as social interactions. Patient 1 visited respondent at his office after work and they met for lunch at nearby restaurants.

6. In 2015,<sup>1</sup> Patient 1 and respondent began having consensual sexual relations while Patient 1 was married to another man. Patient 1 testified that their sexual activity was unrelated to treatment, that she loved respondent, and that she expressed her love to him before they began having sexual relations. Patient 1 testified that her marriage had been getting "worse and worse," that she was the aggressor in pursuing a relationship with respondent, and that she told him that she had feelings for him.

7. Patient 1 became pregnant during her consensual sexual relations with respondent. Respondent helped Patient 1 find a physician qualified to perform an abortion. On October 23, 2015, respondent accompanied Patient 1 to a medical office for the procedure and paid for the services.

8. Respondent presented copies of text messages that were exchanged between himself and Patient 1, the nature of which was common to an amorous relationship. Respondent wrote to Patient 1, "I love you as my best friend." Patient 1 wrote to respondent, "I've been in love with you for so long," "I told you over and over how much I care about you and love and worry about you I mean it," and "Even if you don't love me I always will." Respondent and Patient 1 both testified that they exchanged hundreds of text messages and that Patient 1 sent respondent naked photos of herself. Their relationship ended in July 2016 when Patient 1's husband discovered the naked photos and text messages.

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<sup>1</sup> Conflicting evidence was presented as to the specific date the sexual relationship began. Respondent informed the investigator that it began "around March or April" but that he could not remember exactly. (Ex. 7, p. 135.) Patient 1 informed the investigator that the start date "was like, uh, September, October. Something like that." (Ex. 6, p. 109.) Both testified that the sexual relationship lasted approximately one year ending in July 2016.

9. Throughout their sexual relationship, Patient 1 received acupuncture treatments from respondent approximately once per week until July 2016. Throughout 2015, Patient 1 received acupuncture point treatments to treat “shoulder pain, neck stiffness, and sweating.” (Ex. 10.) Patient 1 paid for treatments in cash or credit card, and also received treatments without charge.

10. Patient 1 testified that respondent suggested she see another provider after they started having sex, that she was not informed that it was unprofessional for respondent to treat her while having sexual relations, and that she never thought the relationship was inappropriate. Patient 1 testified that the relationship would have continued if her husband had not discovered the affair, that she “suffered no harm from the relationship other than the stress and feeling bad for everybody,” and that she did not blame respondent for her depression.

### *Complaint and Investigation*

11. On January 17, 2017, the Board received a complaint filed by the husband of Patient 1. Investigator Jon Genens was assigned to investigate the complaint. Investigator Genens verified the complaint with the husband, marshalled pertinent medical records, researched public information about respondent’s practice, and corresponded with respondent about the pending investigation.

12. Respondent submitted to recorded interviews with Investigator Genens on May 13, 2017, and December 6, 2017. Respondent cooperated with the investigation and affirmed the period of time during which he treated Patient 1 and the period of time they had consensual sexual relations together. Respondent further admitted that he was not married to Patient 1 and that he did not terminate treatment or refer her to another health care provider during the time of their consensual sexual relations. Respondent furnished Investigator Genens with copies of text messages and nude photos of Patient 1.

13. The Board retained Kevin McNamee, DC, L.Ac., to render an expert opinion on the standard of care. Dr. McNamee reviewed 69 exhibits, including the complaint and investigation synopsis.

14. In Dr. McNamee’s opinion, the recommended standard of care prohibits an acupuncturist from having a sexual relationship with a patient under the acupuncturist’s care unless the patient is a spouse or person in an equivalent domestic relationship. He further opined that if respondent and Patient 1 decided to explore a sexual relationship, respondent should have terminated treatment and referred her to another health care provider. Dr. McNamee explained that the standard applies even if the patient is the aggressor, comparing the circumstance to a game of tennis: “If a player doesn’t hit the ball back, the game is over.” In his view, if Patient 1 was in pursuit of a relationship, respondent should not have returned calls or made appointments which would have caused the relationship to end. Accordingly, Dr. McNamee concluded that respondent committed “an extreme departure from the standard of practice in the community” by engaging in a consensual sexual relationship with Patient 1. (Exhibit 5.)

### *Respondent's Evidence in Mitigation*

15. Respondent testified that he understood and believed that his relationship with Patient 1 was private, that the law did not interfere with a personal and romantic relationship between a man and a woman, and that the freedom to pursue happiness was a basic human right. He described his relationship with Patient 1 as “a good relationship” that soured, and testified that he held her out to others as his girlfriend or wife, and that he and Patient 1 discussed her desire to divorce her husband and their mutual intent to marry each other.

16. Respondent testified that, after his discovery of the affair, Patient 1's husband threatened respondent by way of multiple text messages and phone calls, posted negative reviews about respondent on the internet that adversely affected his practice, and filed a small claims action against respondent. Respondent testified that he suffered economic loss as a result of the husband's actions and feared for his safety. He considered the husband's complaint with the Board an act of retaliation and viewed himself as a victim of the circumstances.

17. Respondent presented evidence of favorable reviews posted on Yelp.com and Google. (Ex. F.) Patients posted comments including: “Doctor Kim is my #1 best doctor I could ever find,” “Dr. Kim is the best acupuncture doctor in the world!” and “Visiting Dr. Kim is one of the best life-choices I've made.”

18. Respondent testified that he would accept fault if he is found to have violated Business and Professions Code section 726, that he is willing to take courses in ethics, and that he will “make sure that something like this does not get repeated.”

### *Costs*

19. Complainant presented no evidence in support of the prayer in the Accusation to recover costs incurred in the investigation and prosecution of this case. Accordingly, no finding is made to support the relief requested.

## LEGAL CONCLUSIONS

### *Standard of Proof*

1. The standard of proof applied in this proceeding is clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.)

2. Complainant has the burden to offer proof that is clear, explicit, and unequivocal—so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

### *Governing Law*

3. The Board may take disciplinary action against a licensed acupuncturist for unprofessional conduct. (Bus. & Prof. Code, § 4955, subd. (a).) Unprofessional conduct includes, but is not limited to, gross negligence. (Bus. & Prof. Code, § 4955.2, subd. (a).)

4. Business and Professions Code section 726 provides:

- (a) The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed [as an acupuncturist].
- (b) [Business and Professions Code section 726] shall not apply to consensual sexual contact between a licensee and his or her spouse or person in an equivalent domestic relationship when that licensee provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship.

### *Sexual Relations with a Client*

5. In this case, respondent engaged in a sexual relationship with Patient 1, who was neither respondent's spouse nor a person in an equivalent domestic relationship. This conduct directly contravenes Business and Professions Code section 726. Although respondent argued that he was unaware of any statute or regulation prohibiting the conduct, "ignorance of a law is no excuse for a violation thereof" in civil or penal law. (*People v. Snyder* (1982) 32 Cal.3d 590, 592–593; *Stark v. Superior Court* (2011) 52 Cal.4th 368, 396–397.) An acupuncturist practicing in California is presumptively aware of the requirements of Business and Professions Code section 726 because "California law attributes to all citizens constructive knowledge of the content of state statutes." (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 501; see also *People ex rel. Harris v. Sunset Car Wash, LLC* (2012) 205 Cal.App.4th 1433, 1441.)

6. The testimony and text messages between respondent and Patient 1 in which they expressed love for each other has some bearing as mitigation evidence, but the evidence is not exculpatory of the alleged violation of Business and Professions Code section 726. The plain and ordinary meaning of the statute prohibits all sexual relations with a patient and whether the parties share mutual feelings of love is not considered within the narrow exception to the general rule.

7. Moreover, the fact that their sexual relations were unrelated to respondent's treatment of Patient 1 is not part of the standard applied in disciplinary cases involving sexual misconduct, as explained by the court in *Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, as modified (July 18, 1996), citing *Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, reh'g denied and opinion modified (Aug. 27, 1992), as follows:

[T]he *Gromis* court considered the language from *Atienza*<sup>2</sup> limiting liability under [Business and Professions Code] section 726 to “sexual conduct under guise of treatment” to be dictum, and declined to apply such standard to a disciplinary proceeding. (*Gromis v. Medical Board, supra*, 8 Cal.App.4th at pp. 597–598, 10 Cal.Rptr.2d 452.) The court observed: “To take the approach urged by plaintiff presupposes that the only reason for proscribing physician–patient sexual activity is the potential for deception by the doctor. Hence, plaintiff reasons that when the patient has not been deceived there is no basis for discipline. Yet, plaintiff has overlooked other reasons for proscribing sexual activity: for example, the doctor may use his or her status to induce the patient’s consent to sexual activity, or the doctor’s medical judgment may be compromised by his or her sexual interest in the patient. Because situations can be contemplated where the physician’s professional duties will affect or be affected by a sexual relationship with the patient, we decline to hold as a matter of law that only sexual conduct under guise of treatment can serve as grounds for discipline. Rather, the question must be decided on a case–by–case basis: whether under the circumstances the sexual conduct bears some relationship to the physician’s qualifications, functions or duties.” (*Id.* at pp. 597–598, 10 Cal.Rptr.2d 452.)

(*Green v. Board of Dental Examiners, supra*, 47 Cal.App.4th at 802.)

8. Although there was evidence of some effort to refer Patient 1 to another practitioner, the fact that respondent continued to treat Patient 1 throughout the sexual relationship was undisputed. While respondent and Patient 1 expressed mutual love and discussed potential marriage, they never lived together in a domestic relationship equivalent to marriage.

9. Cause exists to take disciplinary action against respondent’s acupuncturist license pursuant to Business and Professions Code section 726, subdivision (a), because his consensual sexual contact with Patient 1 constituted unprofessional conduct.

#### *Gross Negligence*

10. Gross negligence is “an extreme departure from the ordinary standard of conduct.” (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 941; *Van*

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<sup>2</sup> The court in *Atienza* held that a physician’s consensual sexual relationship with a patient during the time of treatment could not serve as the basis for a medical malpractice claim if not initiated by the physician under the guise of treatment. (*Atienza v. Taub* (1987) 194 Cal.App.3d 388.)

*Meter v. Bent Cons. Co.* (1956) 46 Cal.2d 588, 594.) The standard of care for a given profession is a question of fact and in most circumstances must be proven through expert witnesses. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997-998, 1001; *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215.)

11. In this case, credible expert testimony established that respondent committed an extreme departure from the ordinary standard of care by engaging in a consensual sexual relationship with a patient. (Factual Findings 13-14.)

12. Cause exists to discipline respondent's license under Business and Professions Code section 4955.2, subdivision (a), because clear and convincing evidence established that he engaged in unprofessional conduct based on gross negligence.

#### *Unprofessional Conduct*

13. Cause exists to discipline respondent's license under Business and Professions Code section 4955 because clear and convincing evidence established that he engaged in unprofessional conduct based on Factual Findings 5 through 13, and Legal Conclusions 3 through 12.

#### *Costs*

14. A licensee found guilty of unprofessional conduct may be ordered to pay the Board a sum not to exceed actual and reasonable costs incurred to investigate and prosecute the case. (Bus. & Prof. Code, § 4959, subd. (a).)

15. Cause does not exist to award costs under Business and Professions Code section 4959 because complainant presented no evidence of costs incurred to investigate and prosecute the allegations against respondent.

#### *Level of Discipline*

16. In reaching a decision on the appropriate level of discipline, the Board must consider the guidelines entitled "Department of Consumer Affairs, Acupuncture Board, 'Disciplinary Guidelines' 1996" (Guidelines). (Cal. Code Regs., tit. 16, § 1399.469.) Deviating from the Guidelines is appropriate where the facts of the particular case warrant such a deviation, such as the presence of mitigating factors. (Cal. Code Regs., tit. 16, § 1399.469.)

17. Pursuant to the Guidelines, the Board's primary mission is protecting consumers of acupuncture services from potentially harmful licensees. Generally, the task in disciplinary cases is preventative, protective and remedial, not punitive. (*In re Kelley* (1990) 52 Cal.3d 487.)



18. The Guidelines provide no recommended discipline for violations of Business and Professions Code section 726 or for unprofessional conduct. For gross negligence resulting in minimal harm to a patient, the Guidelines recommend a minimum penalty of five years' probation, 60 days' suspension, a psychological evaluation prior to resumption of practice, a practice monitor, clinical examination, coursework, and standard terms and conditions.

19. Respondent's consensual sexual relationship with Patient 1 is a reflection of a lack of sound professional judgment. Although he was not treating Patient 1 for depression and anxiety, he was aware of her vulnerabilities relating to her state of mind. His sense of victimization is misplaced and his failure to acknowledge the wrongfulness of his conduct heightens the need for discipline.

20. However, respondent has no record of prior disciplinary action and he has been licensed for over 15 years with substantial evidence of having performed to the satisfaction of the general public. His relationship with Patient 1 appears to be an isolated incidence, as no other patient has made similar allegations to the Board against respondent. In spite of his claimed ignorance of the law and defensive attitude at hearing, respondent cooperated with the investigation and expressed a willingness to learn and comply with the law and regulations.

21. Revocation or suspension of respondent's acupuncturist license would be unduly punitive under the circumstances. The remaining recommended terms and conditions of probation—including remedial coursework in ethics and professional boundaries, and five years of practice monitoring—are calculated to aid in respondent's rehabilitation and will adequately protect the public.

## ORDER

Acupuncturist license number AC 9766 issued to respondent Sun Woo Kim is revoked. However, the revocation is stayed and respondent is placed on probation for five years on the following terms and conditions:

### *1. Psychological Evaluation*

Within 90 days of the effective date of this decision and on a periodic basis thereafter as may be required by the Board or its designee, respondent shall undergo a psychological evaluation (and psychological testing, if deemed necessary) by a Board appointed California licensed psychologist. The Board shall receive a current DSM-V diagnosis and a written report regarding respondent's judgment and/or ability to function independently as an acupuncturist with safety to the public, and whatever other information the Board deems relevant to the case. Respondent shall execute a release authorizing the evaluator to release all information to the Board. The completed evaluation is the sole property of the Board.

If the Board concludes from the results of the evaluation that respondent is unable to practice independently and safely, he shall immediately cease practice and shall not resume practice until notified by the Board. If the Board concludes from the results of the evaluation that respondent would benefit from ongoing psychotherapy, respondent shall comply with the Board's directives in that regard.

Respondent shall pay all costs associated with the psychological evaluation. Failure to pay costs will be considered a violation of the probation order.

## 2. *Practice Monitor*

Within 90 days of the effective date of this decision, respondent shall submit to the Board for its prior approval, the name and qualifications of one or more California licensed acupuncturists whose license is clear (no record of complaints) and current and who has agreed to serve as a practice monitor. Once approved, the monitor shall submit to the Board a plan by which respondent's practice shall be monitored. The monitor's education and experience shall be in the same field of practice as that of respondent. The monitor shall submit written reports to the Board on a quarterly basis verifying that monitoring has taken place and providing an evaluation of respondent's performance. It shall be respondent's responsibility to assure that the required reports are filed in a timely fashion. The respondent shall provide access to the monitor of respondent's fiscal and client records and shall be permitted to make direct contact with patients. Further, the monitor shall have no prior business, professional, personal or other relationship with respondent. Respondent shall execute a release authorizing the monitor to divulge any information that the Board may request.

Respondent shall notify all current and potential patients of any term or condition of probation which will affect their treatment or the confidentiality of their records (such as this condition which requires a practice monitor). Such notification shall be signed by each patient prior to continuing or commencing treatment.

If the monitor quits or is otherwise no longer available, respondent shall not practice until a new monitor has been approved by the Board. All costs of monitoring shall be borne by respondent. Monitoring shall consist of at least one hour per week of individual face to face meetings.

## 3. *Restriction of Female Patient Population*

Respondent shall not treat female patients without the presence of another person. Within 30 days from the effective date of this decision, respondent shall submit to the Board, for prior approval, a plan to implement this restriction. Respondent shall submit proof satisfactory to the Board of compliance with this term of probation.

Respondent shall notify all current and prospective patients of the restricted ability to perform any acupuncture procedure on females by posting a written notification visible to all patients before they receive any acupuncture treatment. Respondent shall submit

documentation which provides satisfactory evidence of compliance with this term of probation.

4. *Coursework*

Respondent shall take and successfully complete not less than 20 semester units or 30 quarter units of coursework in the following areas: ethics and professional boundaries. All coursework shall be taken at the graduate level at a school approved by the Board. Classroom attendance must be specifically required. Course content shall be pertinent to the violation and all coursework must be completed within the first three years of probation. The required coursework must be in addition to any continuing education courses that may be required for license renewal.

Within 90 days of the effective date of this decision, respondent shall submit a plan for the Board's prior approval for meeting the educational requirements. All costs of the coursework shall be borne by respondent.

5. *Obey All Laws*

Respondent shall obey all federal, state and local laws and all regulations governing the practice of acupuncture in California. A full and detailed account of any and all violations of law shall be reported by respondent to the Board in writing within 72 hours of occurrence.

6. *Quarterly Reports*

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

7. *Surveillance Program*

Respondent shall comply with the Board's probation surveillance program and shall, upon reasonable notice, report to the assigned investigative district office. Respondent shall contact the assigned probation surveillance monitor regarding any questions specific to the probation order. Respondent shall not have any unsolicited or unapproved contact with 1) victims or complainants associated with the case; 2) Board members or members of its staff; or 3) persons serving the Board as expert examiners.

8. *Interview with the Board or Its Designee*

Respondent shall appear in person for interviews with the Board or its designee upon request at various intervals and with reasonable notice.

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9. *Changes of Employment*

Respondent shall notify the Board in writing, through the assigned probation surveillance compliance officer of any and all changes of employment, location and address within 30 days of such change.

10. *Tolling for Out-of-State Practice or Residence*

In the event respondent should leave California to reside or to practice outside the State, respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside California will not apply to the reduction of this probationary period.

11. *Employment and Supervision of Trainees*

Respondent shall not employ or supervise or apply to employ or supervise acupuncture trainees during the course of this probation. Respondent shall terminate any such supervisorial relationship in existence on the effective date of this probation.

12. *Violation of Probation*

If respondent violates probation in any respect, the Board may, after giving respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stated. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No petition for modification or termination of probation shall be considered while there is an accusation or petition to revoke probation pending against respondent.

13. *Completion of Probation*

Upon successful completion of probation, respondent's license will be fully restored.

DATED: January 10, 2019

DocuSigned by:  
*Matthew Goldsby*  
MATTHEW GOLDSBY  
Administrative Law Judge  
Office of Administrative Hearings