To Be Argued By: James M. Hershler
Time Requested: 10 minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

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In The Matter of DANIELLE ROBERTS, D.O.,

Petitioner,

For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Case No.: 534554

- against -

THE NEW YORK STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT,

Respondent.

--x

BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

In this proceeding under Public Health Law § 230-c(5), petitioner Danielle Roberts, a physician, challenges a disciplinary order issued by a Hearing Committee of the New York State Board for Professional Medical Conduct (the "Committee") that revoked petitioner's medical license. Revocation was based on the Committee's finding that petitioner used an electrocautery device to brand seven women on their pelvic areas during their initiation into a cult, causing them to suffer second degree burns and creating permanent scars. The Committee found that petitioner's actions fell within its disciplinary jurisdiction and that she committed professional misconduct by failing to obtain informed consent for the procedures, failing to offer the women anesthesia for the intense pain that they suffered, and otherwise failing to abide by accepted medical standards in performing the medical procedures. It determined that petitioner committed further professional misconduct when, in violation of Health Department regulations, she failed to report a serious disease outbreak at a widely attended event, thereby endangering vulnerable children and elderly participants.

The Committee's decision is fully supported by the record and should be confirmed.

QUESTIONS PRESENTED

1. Does the record support the Committee's determination that petitioner engaged in the practice of medicine when she used an electrocautery device to brand seven women's pelvic areas, causing them to suffer painful second degree burns and creating permanent scars?

2. Does the record support the Committee's further determination that petitioner committed professional misconduct by performing the scarring procedures without receiving proper training on the device she used and without taking medical histories, conducting physical examinations, obtaining informed consent, offering anesthesia, using appropriate infection control measures, providing adequate follow-up care or keeping medical records?

3. Was petitioner deprived of a fair hearing because the administrative law judge did not admit into evidence a letter in which investigators initially decided not to pursue petitioner's actions and instead referred a complainant to law enforcement?

4. Did the Committee correctly determine that petitioner committed further professional misconduct by willfully failing to report to public health authorities a serious disease outbreak occurring at an event that was attended by over 400 persons, including children and other vulnerable individuals?

STATEMENT OF THE CASE

A. The Professional Misconduct Charges

By Amended Statement of Charges, dated April 27, 2020, the New York State Health Department's Bureau of Professional Medical Conduct ("Bureau") charged petitioner with committing professional misconduct when using a cauterizing device to brand seven female patients (A – G) on their pelvic regions, thereby creating permanent scars with the initials "KR" and/or "KAR" (Record [R]43-65). The Bureau alleged that petitioner deviated from accepted standards of care by, *inter alia*, concealing the brands' meaning and failing to obtain the women's informed consent for their procedures, not taking medical histories or performing physical examinations, failing to offer anesthesia, not using appropriate infection controls or personal protective equipment, failing to provide adequate follow-up care and

failing to keep medical records (R43-54). She was charged with, *inter alia*, gross negligence and incompetence, negligence and incompetence on more than one occasion, patient abuse, moral unfitness to practice, fraudulent medical practice, performing services unauthorized by patients and failing to keep medical records, in violation of Education Law §§ 6530 (2), (3), (4), (5), (6), (20), (26), (31), (32) and (47) (R56-65).

The Bureau further charged petitioner with willfully and recklessly failing to report to public health authorities a serious disease outbreak that occurred at an event held in Silver Bay, New York during the summer of 2016 where hundreds of the attendees became severely ill (R54-55, 61, 63-64).

B. The Disciplinary Hearing

Petitioner's disciplinary hearing was held on 13 dates from June 2020 to March 2021 during which the three-member Committee heard testimony from 18 witnesses. A summary of the key evidence follows:

1. The Branding Procedures

***a.* Petitioner**

Petitioner testified that she was a member of NXIVM, a personal development organization founded by Keith Raniere, and in 2016 she

joined a secret women's society known as DOS ("dominant over submissive") that was organized with Raniere's assistance (R962-963, 974, 980-985, 2271-2272). She testified that new DOS enrollees were required to commit to master-slave relationships with their teachers or mentors, submit "collateral" and get branded in their pelvic areas (R967-974, 985-987, 1040-1042, 1117-1118, 1276-1277).

At the request of DOS, petitioner branded 17 women for their initiations (including the 7 patients alleged in the charges) by using an electrocautery device (R991-994, 1042, 1277). The same symbol was used on all of the women, who had no choice about its content (R1160-1164, 1434). Petitioner did not tell them that the brand represented Keith Raniere's initials because that information was given to her in confidence by the society's leaders (R2197-2200, 2232-2233, 2237-2239).

Petitioner testified that the brandings involved a "very systematic" process in which the women were nude, they were held down and pain was an "integral part" (R1117-1118, 1406-1410, 1158-1160, 1272, 1279, 2261). The procedures were intensely painful, causing one or more of the women to scream and move despite being restrained, and they resulted in second degree burns and hypertropic

scars (R1325, 1454-1456, 2222, 2248-2249, 2266, 3065). Petitioner did not tell the women how painful it would be, nor did she offer them anesthesia because that was "completely counterintuitive to what they were trying to accomplish" through the experience (R1274, 1320-1321).

Petitioner received only minimal training on the electrocautery device that she used for the brandings (R1005-1016). She did not take medical histories, there was little protective equipment and medical records were not kept (R1070-1072, 1121, 1272, 1285-1288). Nor did she use sterile techniques or recommend prompt follow-up care or painkillers, terming the brandings a "very low risk, noninvasive procedure" that did not require "treatment of a second-degree burn" (R1185-1186, 1292-1293).

Petitioner did not dispute testimony by respondent's expert on the treatment standards for second degree burns (R2265-2267), but said they did not apply because she performed the brandings "as a technician," not a doctor (R1269-1270, 1407, 1411). However, many of the women knew that she was a doctor (R1080-1081, 1407, 1436-1437, 1521-1522), she reviewed photos of the brands and gave instructions on healing (R1103-1107, 1290-1292, 2209). Petitioner conceded that there

is an overlap between the skills of a doctor and a branding technician (R3076-3080) and that she could not ignore her medical knowledge when doing the procedures (R1179, 1269, 1295, 1300, 1305).

Petitioner expressed no regrets about her actions and stated that "I loved what we were doing in DOS. I feel very sad that it was twisted into something that it wasn't [and] used to scare people" (R2300-2301). She denied harming the women that she branded, claiming "[e]verybody is willing of their own free will to victimize themselves" and that "[w]e are all indoctrinated . . . in our society" (R2257, 2298).

b. Other NXIVM and DOS Members

S.E. testified that when recruited by DOS, she was told that her experience would be self-empowering and life changing (R1571-1573). But she first had to submit "collateral" including a nude photograph of herself and a letter admitting to sexual deviance, affairs and drug use (R1565-1571). She said the collateral exerted an "incredible amount of pressure" on her, like a "gun to my head" (R1587-1588, 1592, 1680).

S.E. testified that women at her initiation ceremony knew that petitioner was a doctor and she was comforted when realizing that petitioner would do her procedure (R1581-1583). However, she did not

know in advance that she would receive a brand, rather than a tattoo, or that it represented Keith Raniere's initials, and she would not have gone through with the procedure if she knew this (R1579-1584, 1690-1692, 1725-1727). She did not learn the brand's meaning until weeks later and felt defrauded by petitioner (R1626-1630, 1649-1650, 1693).

S.E. suffered "extreme pain" during her branding, describing it as an "acute fire in the most sensitive part of my body" (R1613). She could smell her burning flesh (R1614). She saw brandings of other DOS women where one screamed in pain and flipped off the table and another repeatedly asked to stop her procedure (R1593, 1607-1608).

S.E. further testified that petitioner did not offer anesthesia, the table was not disinfected between brandings, the women were all held down and their procedures were filmed (R1589-1593, 1602, 1607, 1635-video). Petitioner then provided instructions on changing bandages, applying Neosporin and submitting photos of the wounds (R 1598-1600). For any subsequent problems, S.E. was told to see petitioner and no one else, including S.E.'s own doctor (R1697-1698). Her brand did not heal well and she needed to apply ointments and creams for years before having plastic surgery to remove it (R1617-1621). S.E.'s branding video

was eventually released to the public after she broke her secrecy vow (R231, 1643-45, 2974-2975).

Vasco Bilbao, a former member of NXIVM, testified that S.E. said she had been deceived and was intensely pressured to go through with her branding (R814-818, 823-825, 849-852). Ariella Cepelinski, also a former NXIVM member, interviewed many women including S.E. who described their DOS experiences as "horrible," the ultimate intention appearing to be to "create an army of obedient women" (R1209-1214, 1218-1223, 1226).

Various members of DOS confirmed that Keith Raniere was the "grand master" or "architect" of the organization (R154, 2921-2923, 2960-2961, 2991), and though ostensibly intended for women's empowerment its enrollees had to submit to lifetime master-slave relationships (R194, 2471-2474, 2594, 2645, 2821-2822). The collateral was meant to ensure the group's secrecy and consisted of items such as the deed to a house or car, nude pictures (R163, 170, 177, 2642-2643), compromising letters to family or friends (R2593-2594, 2886, 2888), and other damaging information (R186, 2820-2821).

The DOS members confirmed that new enrollees were purposely not told that the brand symbol concealed Keith Raniere's initials (R167, 196, 203, 213, 228, 2490-2491, 2581-2882, 2800-2804, 2859-2861). They also confirmed that petitioner was known to be a doctor (R888-890, 895-896, 2480-2481, 2869-2870), and said that she was chosen to do the brandings as a skilled person with "a steady hand," "attention to detail," and a "very calm, caring demeanor" who was not "squeamish" (R2861-2862, 2894-2895, 2939).

c. Expert Witnesses

Respondent's expert, Dr. Robert Grant, board-certified in general and plastic surgery, regularly uses an electrocautery device as a scalpel and to seal bleeding vessels (R1878-1879, 1889-1897). He testified that using the device requires medical training, including operating under supervision (R1889-1890, 1897, 1903), and described necessary precautions such as testing, electrical grounding, sterility, anesthesia, protective equipment and smoke evacuation and general requirements for taking histories, creating plans of care, obtaining informed consent, providing follow up care and keeping medical records (R1892-1893, 1890-1928, 1944-1945, 1948, 1971-1973, 1982-1998).

Dr. Grant testified that all of these standards applied to petitioner's brandings because, like other cosmetic surgeries, they were painful, invasive medical procedures that reached and altered the deeper layers of skin (R1929, 1932-1935, 1948, 1994-1995). He further stated that reconstructive surgery is necessary to remove a brand, unlike a tattoo (R2051-2052).

After reviewing testimony by petitioner and other witnesses and video and photographic evidence of the brandings, Dr. Grant concluded that petitioner had not followed medical standards of care (R1888-1889, 1914-1915, 1943-1951, 1979-1993). He testified that her deviations were severe because, *inter alia*, her lack of training, the invasiveness of the procedures and the absence of consent discussions, medical histories, proper follow up care and record keeping presented serious risks to the women (R1943-1944, 1951, 1982, 1992-2000, 2053). He saw no legitimate medical purpose for her use of electrocautery on their skin without offering them anesthesia and said that her procedures caused excruciating pain, deep burns and abnormal scarring (R1892, 1904-1905, 1956-1965, 1981-1982, 2029-2030, 2034, 2043).

Dr. Grant further testified that medical standards apply to a doctor even if a layperson can perform the same procedure (R1994-1996, 1927-1928, 1932). He explained that doctors cannot enjoy the privileges that are unique to their profession without bearing the responsibilities (R1930-1932, 2046-2047), and while non-physicians can do minimally invasive procedures like body piercing, medical standards apply to physicians who perform them (R1926-1928).

Testifying for petitioner, Dr. David Mayer said that he received medical training on an electrocautery device and uses it for surgery (R2412). He nevertheless claimed that petitioner was not practicing medicine when branding because she could "put aside her white coat" and act "outside the profession of medicine," and was not addressing an abnormal condition like an "oversized nose" (R2441-2444). He said that her non-compliance with medical standards showed that the brandings were not within the practice of medicine (R2355-2357, 2459-2460).

However, Dr. Mayer tacitly admitted that medical practice can extend beyond treating abnormal conditions, such as performing a breast augmentation (R2444). He further conceded that one does not "stop being a physician . . . at different times" and that petitioner used

her medical knowledge when evaluating photos of the brands (R2438, 2451-2452). Nor did he dispute that the DOS women had second degree burns, or deny the medical treatment standards enunciated by Dr. Grant (R2382-2384, 2390). He admitted that anesthesia should be offered for painful procedures in medical practice, and that the women's collateral was possibly coercive (R2400, 2445-2446, 2409). Dr. Mayer said that he was "not here to justify" petitioner's actions because they were outside the practice of medicine (R2403-2405). He believed that her deception about the brand's meaning was "more in line of a criminal battery charge" (R2392-2393).

Steve Haworth, also a witness for petitioner, has done many electrocautery brandings and purportedly invented the technique (R2657, 2659). He said that second degree burns are far more painful and damaging than his brandings, which are "more like a scrape" (R2683-2685, 2723). He gave petitioner information on his methods by email and telephone, but never met her (R2661-2663, 3015). Haworth approved of her technique as shown in the video of S.E.'s branding, but could not explain her infliction of second degree burns and said that her

practice differed from his due to more frequent "starting and stopping" common for inexperienced branders (R2674-2675, 2702).

2. Vanguard Week

In August 2016, petitioner attended Vanguard Week, a celebration of the birthday of Keith Raniere, NXIVM's founder (R1477-1483). She taught fitness classes at the event and described it as a "working vacation" (R2122-2124). Petitioner became aware of the outbreak of an illness causing nausea, diarrhea, vomiting and fatigue, and admits that shutting down and disinfecting the facility was a potential response to prevent spread of the illness (R1484-1485, 1490-1491). But she did not report the outbreak, claiming that it was not her duty because she was not there as a physician (R1495-1498, 1503).

However, E. Carlson, who also attended Vanguard Week, testified that petitioner was seen as a "huge resource" by NXIVM for her expertise in physical health and "a doctor in our community that you could go to" (R2747, 2749). Carlson said that petitioner held exercise classes at the event "to improve . . . body mechanics and get healthier" (R2749-2750).

Other NXIVM members who attended testified that people came to the ten-day event from all over the world with their families, including pregnant women and young children (R787-789, 893-894, 1199-1200, 1244-1248). The outbreak spread rapidly and many, if not most, of the 400 attendees became ill with intense nausea, diarrhea and vomiting during the event (R879-882, 1201-1208, 1231-1233).

Bruce F. Farber, M.D., board certified in internal medicine and infectious disease (R1762), testified that "any outbreak of infectious disease needs to be reported to the health department," whether or not a doctor is caring for patients (R1782-1784, 1800-1802). The goal is "to end it as soon as possible and prevent further spread," and that "if there is any question, you report it" (R1787, 1841).

Dr. Farber testified that noroviruses commonly cause outbreaks, are "extraordinarily unpleasant" and are dangerous for vulnerable people due to dehydration (R1779-1780). He has reported many such incidents and stated that, because Vanguard Week was a very large outbreak of a serious disease in a confined facility, petitioner should have known that medical standards required her to report it based on her training and experience (R1776-1777, 1784, 1789-1798). He found

her lapse to be significant because the facility needed to be closed immediately and decontaminated (R1785, 1795-1799, 1803-1804, 1836).

C. The Hearing Committee's Determination

On September 27, 2021, the Committee issued a Determination and Order that sustained the charges against petitioner and revoked her medical license (R 3472-3501).

1. The Committee Determined That Petitioner's Brandings Constituted Medical Practice

The Committee rejected petitioner's claim that she did not engage in medical practice when branding the women (R3482). It observed that Education Law § 6521, which defines the practice of medicine, is interpreted broadly by the courts (R3483). It credited Dr. Grant's testimony that the brandings were "surgical" in nature and found it "glaringly obvious" that petitioner "was operating on the women to alter the skin, appearance, and physical condition of their pelvic regions," within the statute's meaning (R3484).

The Committee further determined that it had jurisdiction over petitioner's conduct notwithstanding the lack of specific branding regulations. It noted that doctors are exempted from tattooing and body piercing regulations because "it is presumed that appropriate

medical standards will apply" to their conduct, and that such activities are medical procedures when performed by doctors (R3486).

The Committee was not persuaded by petitioner's claim that she could "compartmentalize" her life, cast aside "her privileged status as a licensed physician with specialized knowledge" and brand the women as a technician (R3487). It found her testimony evasive and contradictory, diminishing her credibility (R3481-3482) (*e.g.* R1044-1046, 1049, 1059-1066, 1079). It noted that she admittedly relied on her medical background "in everything she does" and that her status as a doctor was well known in the NXIVM community (R3488).

2. The Committee Found That Petitioner's Brandings Violated Numerous Medical Standards

The Committee determined that petitioner violated many professional standards when performing the branding procedures. It found that she lacked "serious and proper training in using an electrocautery device," noting testimony by her witness that he never causes second degree burns whereas visual evidence and witness testimony showed that she caused intensely painful second degree burns (R3489). The Committee found that her "poor technique was obvious" from the video of S.E.'s branding, "which showed sparks and

fire from the electrocautery device as she moved it across the skin" (R3489). It concluded that she lacked an understanding of how the device worked, the dangers in using it directly on the skin and the substantial pain and trauma that she caused (R3490).

The Committee credited Dr. Grant's opinion that "it is unethical for physicians to intentionally cause patients such harm" and that petitioner's severe deviations from medical standards "risked causing the women cauterized even deeper burns from not being able to remain still during the procedure," wound infections and psychological trauma (R3490-3492). It concluded that her failure to take medical histories, perform physical examinations and keep medical records created additional dangers, and that she should have known to discuss the risks, benefits and alternatives to the branding procedure with the women in order to obtain their informed consent (R3493-3494).

The Committee was particularly concerned about the coercive material submitted by the women and petitioner's failure to inform them of the brand's meaning (R3494-3495). It found that her "medically reckless" procedures violated the strict prohibition against doctors "going above and beyond what the patient expects," constituting fraud,

performing unauthorized services, moral unfitness to practice and patient abuse (R3496-3497).

3. The Vanguard Week Outbreak

The Committee held that petitioner committed further misconduct by her willful and negligent failure to comply with state requirements to report to public health authorities the widespread disease outbreak that occurred during Vanguard Week (R3498).

The Committee found that the definition of a "disease outbreak" which must be reported under 10 NYCRR §§ 2.1(c) and 2.2(d) was met because numerous attendees at the event, held in a confined location, suffered similar gastrointestinal symptoms (R3498). It credited Dr. Farber's testimony that petitioner should have known it was her duty to report the outbreak from her medical training and experience, even if on vacation (R3497-3498). It considered her failure to be "especially egregious" because of the potentially dangerous consequences for sick, elderly and other vulnerable people and the need to close the facility to prevent further spread of the disease (R3498).

4. The Penalty

The Committee found that petitioner's many acts of professional misconduct in this case showed that she abdicated her responsibilities as a physician (R3499). It was deeply concerned by her lack of remorse and observed that "instead of holding herself accountable for harming" S.E., who was severely traumatized by the branding, she accused S.E. of "victimizing herself" (R3499). The Committee determined that license revocation was necessary because petitioner's "distorted reality" presented the risk that others would be vulnerable to similar misconduct if she were to continue practicing (R3500).

This proceeding ensued.

ARGUMENT

THE COMMITTEE'S DETERMINATION THAT PETITIONER ENGAGED IN NUMEROUS ACTS OF PROFESSIONAL MISCONDUCT IS RATIONALLY SUPPORTED BY THE RECORD

A. Petitioner's Branding Procedures Were A Medical Practice Within The Committee's Jurisdiction.

There is no merit to petitioner's argument that her brandings were a non-medical practice that was beyond the Committee's disciplinary authority. Quite the contrary, the record amply supports

the Committee's finding that her performance of these procedures was subject to numerous medical standards.

Judicial review of the Committee's determination "is limited to whether it is supported by substantial evidence." *Tsirelman v. Daines*, 61 A.D.3d 1128, 1129 (3d Dep't 2009). Of particular relevance here, the question of "[w]hether the alleged misconduct actually occurred within the practice of medicine is a factual determination to be made by the [Hearing] Committee which will not be disturbed if it has a rational basis." *Matter of Adei v. State Bd. For Professional Med. Conduct*, 278 A.D.2d 551, 552 (3d Dep't 2000).

Education Law § 6521 defines the practice of medicine as "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition." As the Committee observed, this law has been broadly interpreted by courts and the determination of whether conduct falls within it must be based on the facts presented "and not upon the name of the procedure, its origins or legislative lack of clairvoyance." (R3483) (quoting *People v. Amber*, 76 Misc. 2d 267, 273 (Sup. Ct. Queens 1973) (finding acupuncture within the practice of medicine); *see also People v. Rubin*, 113 Misc.2d 117, 119

(App. Term 2d Dep't 1981) (finding hair implantation to be a medical practice).

The evidence in this case showed that petitioner's branding procedures were excruciatingly painful and resulted in permanent and abnormal scars that would require sophisticated plastic surgery to repair (R129-151, 564-599, 1593, 1607-1608, 1613, 2051-2052). The Committee rationally credited Dr. Grant's expert testimony that petitioner's invasive procedures, which caused second degree burns and reached the deeper layers of skin, constituted "operating" within the meaning of medical practice (R3484-3485). *Cf. Rubin*, 113 Misc.2d at 119 (hair implantation is the practice of medicine because, *inter alia*, it involves "violation of the scalp by a foreign object" and "potential or actual complications resulting from such procedure").

Petitioner even concedes that her electrocautery procedures "arguably" could be considered "operating" within Educ. L. § 6521, but nonetheless claims there is no evidence that she addressed a "physical condition" (Br. at 10). However, it was rational for the committee to find that petitioner "operat[ed]" "for" a "physical condition" when she caused second degree burns and created permanent scars on her

subjects. The Committee found that "just as rhinoplasty to change the appearance of a nose alters the physical condition of the face [the petitioner's] branding to inflict a permanent and very visible scar alters the skin, appearance, and physical condition of the pelvic region" (R3485-3486). Her claim that the women were healthy (Br. at 10) is beside the point - - cosmetic plastic surgery is often performed to alter or enhance a normal patient's appearance (R1926-1927, 2444).

Petitioner's further claim that she could simply cast aside her physician's role when branding the women (Br. at 14-15) is likewise difficult to reconcile with the painful, violative nature of the procedures. The Committee was not required to accept this excuse, especially when she lacked credibility and admittedly relied on her medical background "in everything that she does" (R3488). Record evidence showed that petitioner's status as a doctor was well known, she was chosen to perform the brandings for her specialized skills and DOS enrollees were relieved knowing that it was her doing their procedures (R3488). Indeed, her expert conceded that doctors cannot simply forget their training, while declining to defend her ethics (R2438, 2451).

The Committee rationally credited Dr. Grant's testimony that a doctor can never simply cast aside professional responsibilities and deem herself to be a mere "technician" when performing a medical procedure (R3487). It agreed with his firm statement that "given the privilege of being a physician comes with responsibilities. You can't decide when you are going to enjoy the privileges, but not have the responsibilities" (R3487). Moreover, to the extent his testimony conflicted with the views of petitioner's expert, the Committee carefully explained why it found Dr. Grant more convincing (R3484-3486). Making these credibility determinations and weighing the evidence are the Committee's sole province. *Matter of Anghel v. Daines*, 86 A.D.3d 869, 872 (3d Dep't 2011); *Patin v. State Bd. for Professional Medical Conduct*, 77 A.D.3d 1211, 1214 (3d Dep't 2010) (rejecting doctor's excuses for not taking patient histories or performing physical examinations after finding him "evasive on questioning"); *Cf. Matter of Pardo v. Novello*, 2 A.D.3d 991, 992 (3d Dep't 2003) (finding ample basis for misconduct findings despite expert witness's "guarded testimony" supporting physician's "marginal or outright lacking" conduct).

Petitioner fails to address, much less distinguish, the cases relied on by the Committee which hold that while a procedure such as circumcision is not a medical practice when done by a religious official, it is when performed by a physician (R3487). *See, e.g. Y.Y.B. v. Rachminov*, 48 Misc. 3d 1055, 1059 (Sup. Ct. Queens 2015). Nor can she reasonably deny the Committee's common sense rationale, based on those cases, that while a layperson may perform a given procedure, when doctors undertake such treatment they are bound by the established standards of their profession (R3486).

Equally unavailing is petitioner's reliance on the lack of branding regulations in New York (Br. at 16-17). The State is not required to enact specific rules for every single procedure that a doctor may perform in governing the vast field of medical practice. *Cf. Matter of Gross v. Ambach*, 71 N.Y.2d 859, 861 (1988) (finding autopsies constitute medical practice despite the lack of an explicit statutory reference); *People v. Amber*, 76 Misc. 2d at 273 (Legislature was not required to envision accupuncture when enacting Educ. L. 6521); *Rubin*, 113 Misc.2d at 119 (*accord*). As the Committee aptly reasoned, it is presumed that accepted standards will apply to a given medical

procedure performed by a physician even in the absence of specific regulations (R3486).

Similarly, the fact that laypersons can purchase electrocautery devices and do brandings does not obviate a physician's duty of care (Br. at 3). Anyone can also buy and use tweezers, bandages, a stethoscope, a blood pressure kit, over the counter pills, etc. However, when removing splinters, dressing wounds, checking heart rates, taking blood pressures and recommending medications, physicians are held to higher standards by virtue of their training and license to practice medicine.

As a final matter, petitioner asserts that the Committee's decision implies that doctors will not be able to hold exercise classes or chaperone elementary school students without performing EKG tests, doing physical examinations and taking medical histories (Br. at 18). But she cites no authority that accepted practice standards reasonably contemplate those extreme measures. Nor would routine, non-medical activities be comparable to the type of invasive, traumatizing procedures seen in this case that "physically and permanently altered [women's] bodies" (R3494).

B. Petitioner's Repeated Violations Of Medical Standards Constituted Professional Misconduct.

In its exhaustive determination, the Committee cited abundant evidence that petitioner violated numerous medical standards of care applicable to her branding procedures and that her misconduct reached egregious levels due to the risks involved.

The Committee relied on voluminous testimony by Dr. Grant, petitioner and her own expert witness, the accounts of various NXIVM and DOS members, scar photos and a video recording of a branding by petitioner. This evidence demonstrated petitioner's severe medical lapses, including negligent and incompetent use of the electrocautery device, failing to take medical histories and perform physical examinations, failing to obtain informed consent, ignoring infection controls, neglecting adequate follow up care and keeping no medical records (R3474-3481, 3488-3497). While petitioner disputes the evidence, the "assessment and resolution of conflicting evidence and witness credibility are within the exclusive province of the Hearing Committee." *Patin*, 77 A.D.3d at 1214-15 (confirming findings of negligence, incompetence and fraud based on, *inter alia*, a physician's own admissions and lack of credibility) (citations omitted); *Anghel*, 86

A.D.3d at 872, 875 (deferring to hearing committee's resolution of conflicting expert testimony).

Rather than defending her practices, petitioner largely rests on her contention that they were simply outside the Committee's jurisdiction for lack of a "nexus" to the practice of medicine (Br. at 14). But her case is not comparable to situations where doctors committed acts that were extraneous to the practice of medicine, such as making unwarranted sexual advances to co-workers (Br. at 12-13). Here, petitioner's misconduct arose directly from her use of an electrical surgical instrument to cause second degree burns and create permanent, abnormal scars. *Cf. Rubin*, 113 Misc.2d at 119. Petitioner's claim that her very failure to abide by accepted standards of care when performing the brandings proves that her acts were unregulated (Br. at 6, 15) cannot be right. Her position, if accepted, would incentivize other doctors to forgo medical standards in order to avoid disciplinary review, an unacceptable result.

Equally flawed is petitioner's claim that the "usual indicia of medical practice" were absent because "branding was simply part of a ritual" for which critical items such as medical histories, physical

examinations and anesthesia for pain were irrelevant (Br. at 14-15). To the contrary, this Court has held that "[t]here are no different standards for licensed physicians based on their philosophy, religion or personal approach to their calling," and that "[i]t is well settled that a patient's consent to or even insistence upon a certain treatment does not relieve a physician from the obligation of treating a patient with the usual standard of care." *Metzler v. New York State Bd. for Professional Medical Conduct*, 203 A.D.2d 617, 619 (3d Dep't 1994) (confirming license revocation for homeopathic physician who did not recognize the necessity for physical examinations and laboratory testing).

Ample evidence in the record supported the Committee's determination that petitioner's many deviations from practice standards reached egregious levels. It found that she chose her allegiance to the NXIVM and DOS organizations over her profound responsibilities as a physician (R3499), to the point of concealing the meaning of the symbols that she painfully emblazoned on the women in this case. Her conduct showed a "deliberate deceit which violates the trust the public bestows on the medical profession." *Patin*, 77 A.D.3d at 1215. *Cf. Matter of Smith v. New York State Dept. of Health*, 66 A.D.3d

1144, 1148 (3d Dep't 2009) (confirming misconduct findings against plastic surgeon who conducted false evaluation for a breast augmentation); *Matter of Conteh v. Daines*, 52 A.D.3d 994, 996 (3d Dep't 2008) (confirming fraud and moral unfitness charges against doctor for prescribing controlled substances without sound medical reasons).

C. The Exclusion Of A Letter By Investigators Initially Declining To Pursue A Complaint Against Petitioner Did Not Deprive Her Of A Fair Hearing By The Committee.

Petitioner further claims that the Committee's determination should be annulled because the administrative law judge excluded from evidence a letter in which the Office of Professional Medical Conduct (OPMC) initially declined to pursue S.E.'s complaint (Br. at 20-22). This contention too is meritless.

It is well-established that the petitioners in these proceedings are "not entitled to the same due process rights afforded to criminal defendants" and that the Committee "is not bound by traditional rules of evidence." *Smith*, 66 A.D.3d at 1147. Thus, in order to warrant annulment, "an erroneous evidentiary ruling must infect the entire proceeding with unfairness." *Matter of Sundaram v. Novello*, 53 A.D.3d 804, 806 (3d Dept. 2008) (citations omitted). That is hardly the case

here since the letter in question was irrelevant and its exclusion did not deprive petitioner of a fair hearing on the charges.

The essential point overlooked by petitioner is that while the OPMC conducts investigations, it does not decide disciplinary cases. She fails to suggest how the OPMC's opinion regarding a misconduct complaint constituted evidence when the Committee has sole authority to make findings of fact and conclusions of law in professional misconduct cases. *See* PHL 230(10)(g). The excluded letter did not contain any *factual* material relevant to the charges of professional misconduct, but rather stated an investigator's legal conclusion that was not binding on the Committee. Moreover, while the OPMC initially directed the complainant to law enforcement authorities (R3527), it ultimately brought a misconduct investigation against petitioner after she was not criminally charged.

This case is unlike *Matter of McBarnette v. Sobol*, 83 N.Y.2d 333 (1994) (Br. at 21), where a physician wanted to introduce a complaint made against him to cross-examine the patient. Here, the petitioner had no similar purpose but instead wanted the OPMC's letter in evidence so that the Committee could "see what allegations had been

rejected" (Br. at 22). However, that would have invited pointless speculation since the OPMC does not rule on misconduct charges, and the disciplinary case the Bureau brought against petitioner years later involved many more women that she branded, photographic and video evidence of her procedures and lengthy testimony by both sides. The essential point is that petitioner had ample opportunity to defend the case at her hearing, including presenting testimony by her expert on whether she had engaged in medical practice. *Cf. Sundaram*, 53 A.D.3d at 807 (exclusion of medical texts at physician misconduct hearing was non-prejudicial because both sides presented experts on the relevant issues); *Tsirelman*, 61 A.D.3d at 1131 (rejecting evidentiary claim where the excluded records were redundant and irrelevant).

Petitioner's argument boils down to an estoppel theory that would bind the respondent to a preliminary decision made by its investigators. But estoppel is generally unavailable to prevent an agency from enforcing its administrative duties. *Matter of Binenfeld v. New York State Department of Health*, 226 A.D.2d 935, 936 (3d Dep't 1996) ("[i]n all but rare cases, estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties"). Nor is this

a situation where administrative *stare decisis* would apply, because the Committee made no prior determination that could be binding on it. *Cf. Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516, 517 (1985) ("A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious").

The exclusion of OPMC's letter hardly tainted the entire proceeding or deprived petitioner of the opportunity to fully defend the charges. Consequently, she does not approach the high threshold for setting aside a disciplinary determination based on evidentiary error. *Tsirelman*, 61 A.D.3d at 1130 (petitioner must show that an evidentiary error "infected the entire proceeding with unfairness"); *Smith*, 66 A.D.3d at 1147 (finding no merit to physician's claim that he was substantially prejudiced by reference in the prosecutor's opening statement to a charge that was later withdrawn).

D. Petitioner Committed Further Misconduct By Failing To Report A Large-scale Outbreak Of A Serious Illness.

Petitioner also challenges the Committee's determination that she committed further misconduct by failing to report to public authorities the widespread disease outbreak at Vanguard Week. Her argument, however, relies on an unduly restrictive interpretation of state reporting requirements, while ignoring unrebutted evidence by respondent's expert that she violated medical standards by failing to report the outbreak of a highly infectious and potentially dangerous illness (Br. at 22-27).

The evidence in this case showed that many of the over 400 Vanguard Week attendees became acutely ill with similar gastrointestinal symptoms in a short period of time, falling squarely within state reporting requirements (R3498). In relevant part, these regulations provide that "it shall be the duty of every physician to report" to local public health authorities every case of a "communicable disease," any "outbreak of communicable disease," "any unusual disease" and any "unusual disease outbreak" (10 N.Y.C.R.R. § 2.10). They further require that all such reports be immediately forwarded to

the State Department of Health (10 N.Y.C.R.R. § 2.1 (b)), and that any "disease outbreak" or "unusual disease" shall *also* be reported to the State Department of Health. 10 N.Y.C.R.R. § 2.1(c).

Contrary to petitioner's analysis (Br. at 25), these regulations are not limited to the communicable diseases listed in 10 N.Y.C.R.R. § 2.1(a) or "unusual diseases." Petitioner misreads the requirement that doctors must also report "any disease outbreak" to the Department of Health (Br. at 25). *See* 10 N.Y.C.R.R. §§ 2.1(c). Because section 2.1(b) already requires "communicable" and "unusual" disease reports to be forwarded immediately to the State Health Department, section 2.1(c)'s requirement that "any disease outbreak" be reported is meaningless if limited to those illnesses.

Further, the Committee's straightforward view of this regulation (R3497-3498) does not extend to routine or seasonal colds, strep throats and the like, as petitioner contends (Br. at 25). The regulations define an "outbreak" as "an increased incidence of a disease above its expected or baseline level," providing indicative factors such as the "size and type of population exposed" and "time and place of occurrence," precluding an unnecessarily wide reach. *See* 10 N.Y.C.R.R. § 2.2(d).

Petitioner's reading of the regulatory scheme, on the other hand, would eliminate the reporting requirement precisely when it is critical, namely, when a large event attended by people from various locations, including children and other vulnerable individuals, is struck by a rapidly spreading disease (R787-788, 893-894, 1199-1200, 1794-1795). Even if her narrow view of a doctor's reporting duties made sense, the Committee's rational interpretation of its own agency's regulation should be deferred to "in the absence of weighty reasons." *Matter of Elcor Health Services, Inc. v. Novello*, 100 N.Y.2d 273, 280 (2003) ("That the Department's interpretation might not be the most natural reading of the regulation, or that the regulation could be interpreted in another way, does not make the interpretation irrational").

For similar reasons, petitioner's claim that the Committee's determination lacked evidentiary support (Br. at 26-27) is meritless. Contrary to her contentions, Dr. Farber did not view the Vanguard Week outbreak as a "routine," "garden variety" illness limited to a small community function, but testified that it was "very unusual" and "one of the largest" disease outbreaks he has seen in New York (R1795, 1820, 1836). He has reported many outbreaks of norovirus, the likely

infectious agent, and gave unrefuted testimony that medical standards required a doctor to report it to the Health Department so that the facility would be closed to prevent further spread of the highly contagious disease (R1784-1789, 1796-1798). He firmly stated that physicians have this duty whether or not they are taking care of patients, "morally, ethically and legally" (R1776-1777, 1783-1784).

The Committee was not compelled to accept petitioner's excuses for failing to comply with a critical infection control requirement. The evidence showed that she knew about the outbreak, that her status as a physician was well known in the NXIVM sphere, and that she even engaged in health-related activities at the Vanguard Week event (R1484-1485, 2747-2750). Moreover, the fast-spreading illness was a potentially serious health threat for attendees and anyone else infected who had co-morbidities (R1779-1780). Consequently, there was ample support for the Committee's determination that petitioner's failure to report the outbreak was egregious and constituted professional misconduct (R3498-3499). *Cf. Anghel*, 86 A.D.3d at 872 (finding substantial evidence that physician willfully failed to comply with laws

regulating medical practice after inferring his knowledge of laboratory certification requirements from the record facts).

CONCLUSION

The Committee's determination should be confirmed and the petition should be dismissed.

Dated: New York, New York
November 22, 2022

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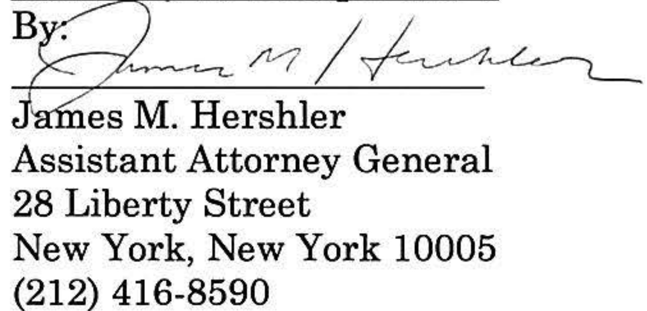
By: 

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AFFIRMATION OF SERVICE

James M. Hershler, an attorney duly admitted to practice before the Courts of this State, declares and affirms under the penalties of perjury that the following is true and correct:

On November 22, 2022, I served the following document:

- BRIEF FOR RESPONDENT

upon counsel for the petitioner in this proceeding:

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by depositing a true copy of the same enclosed in a postage prepaid Fedex Overnight Mailing envelope directed to said attorney at the above address in an official Fedex depository located in New York, NY. Additionally, I emailed a copy of said document to petitioner's counsel on this date to woodscher@aol.com .

Dated: New York, NY
November 22, 2022

James M. Hershler