

notice to the Respondent for a hearing to be conducted on January 21, 2005. The Respondent requested a continuance of that date to February 18, 2005, on which date the hearing was commenced. Thereafter, the proceedings continued over the course of several months during which time there were several more continuances granted due to the unavailability of Respondent's counsel. The evidentiary hearing concluded on August 17, 2005 with both parties requesting additional time for the filing of post hearing memoranda.

SUMMARY OF THE EVIDENCE AND FINDINGS OF FACT

The Summary Suspension Order issued by the Director of Health on January 11, 2005 charges that the Respondent engaged in unprofessional conduct by sexually molesting a female patient while she was undergoing knee surgery on December 23, 2005, that he violated professional boundaries by asking a patient out on a date,² and that he engaged in unprofessional conduct by asking a female hospital employee to view pornography with him in his "on-call" room at the hospital.³

² The parties presented several witnesses on the issue of whether the Respondent engaged in unprofessional conduct by asking an anesthesia patient out on a date. There was also conflicting testimony as to how the Respondent obtained the patient's telephone number. The Respondent claimed that the patient's relative provided him with the telephone number and urged him to call her. The relative denied that she did so, and the State asserted that Respondent obtained the patient's telephone number from her medical chart. Given the ultimate outcome of this matter, the Board deems it unnecessary at this time to decide whether a violation of ethical boundaries occurs when an anesthesiologist, subsequent to the provision of anesthesia and after discharge, contacts the patient for a date. Notwithstanding that fact, the more credible testimony was persuasive that the contact was not initiated by the patient or her relative, but rather by the Respondent himself.

³ The testimony is in conflict on this issue also. The Board declines to determine herein whether accessing pornographic websites while "on-call" within a private room within the hospital that was reserved for the Respondent constitutes unprofessional conduct. The Respondent admitted that he had accessed pornographic websites, that he was subsequently advised by the hospital administrator that doing so violated hospital policy and that thereafter he did not engage in that activity while in the hospital. That testimony by Respondent is supported by the testimony of Kent's network specialist who was called to testify for the State.

For purposes of this Decision the hearing officer and hearing panel focused on the charge that the Respondent sexually molested a patient in his care.

For its first witness, the State called upon the Respondent to testify as an adverse witness. The Respondent provided some general background information in response to the State's inquiry. However, in response to questions that were specific to the allegations set forth in the Summary Suspension Order, the Respondent invoked his 5th Amendment rights, citing an ongoing criminal investigation by the Office of Attorney General.⁴

The second witness called by the State was the patient who the Respondent is accused of sexually molesting. The patient is a 21 year old college student who injured her knee in October 2004 while playing collegiate soccer. The patient consulted with her primary care physician who referred her to Dr. Humbyrd for surgery to repair her torn ACL. The surgery was scheduled for December 23, 2004 at Kent County Hospital. The patient testified that she first met the Respondent on the morning of the surgery in the pre-operative anesthesia room. The patient chose a spinal anesthetic over general anesthesia so she would remain awake during the procedure. The patient was moved to the operating room where the surgery was commenced. The patient testified that she was wearing a blue johnny that opened in the back. She was lying flat on the table with her legs extended. Between the patient and the surgeon, there was a vertical drape that was located at or around her "belly button" that extended to a height above her so as to

⁴ After completion of the State's case, the Respondent did testify as part of his defense. The State was permitted to fully examine the Respondent at that time without limiting its questions to matters brought forward in the direct examination.

preclude her from seeing the surgeon and vice versa. The initial part of the surgery was arthroscopic and the surgeon had the drape lowered so she could see that part of the surgery on a television monitor. The patient testified that she was awake, alert and speaking to the surgeon during this part of the procedure. The Respondent was near her at the head of the bed on her side of the drape. After the arthroscopic portion of the surgery was completed, the television monitor was removed and the drape raised so that the patient could not see the more invasive portion of the surgery. The patient testified that the Respondent was behind her at the head of the bed. Once the drape was back in place, the patient stated that the Respondent began to massage her neck and shoulders with both hands. The patient stated that she was not in any pain and had not requested the "massage". In fact, she was confused by the Respondent's actions, wasn't sure if the massage was part of the procedure. The Respondent next began to touch her breast under the johnny. He bent down close to her face and told her not to tell anyone or he could lose his job. The patient asked Respondent if he did this all the time, to which he responded, "No, I just couldn't control myself". The patient testified that the Respondent told her at least three times that he would be in trouble if she told anyone. After her conversation with the Respondent, the patient fell asleep and did not awaken until she was being moved from the operating room to the recovery room. She was greeted by two nurses, one female, one male. When the male nurse left the room the patient confided to the female nurse what had transpired in the operating room. The nurse then reported the incident to hospital administrative staff, who in turn, asked the patient to recount her story. She did so several times that day.

On cross-examination, Respondent's counsel tried to intimate that the patient mistook the Respondent's handling of the EKG leads and electrodes on her body for his having fondled her breast. The patient readily testified that there were electrodes placed on her chest to which the Respondent attached leads for monitoring purposes. She testified that as he attached the leads, the Respondent acted professionally and appropriately. During the arthroscopic portion of the surgery, the patient was able to watch the procedure on a monitor. Upon conclusion of that aspect of the surgery, the monitor was removed and the vertical surgical drape was raised occluding the patient's view of the surgical staff and vice versa. It was at that time that the patient clearly recalls being assaulted by the Respondent. She testified that at the time, there were two female nurses and the surgeon on the other side of the drape. She and the Respondent were alone on their side of the drape.

Respondent's counsel inquired as to why the patient did not immediately cry out to alert others that the Respondent was acting inappropriately. The patient testified that she was afraid that any movement or sound she made would distract the surgeon, thus exposing her to injury.

The next witness called to testify by the State was John R. Audette, M.D. Dr. Audette is the Vice President for Medical Affairs at Kent County Hospital, and he had been so for approximately four years prior to the subject incident. Dr. Audette testified that he initiated an investigation of the patient's complaint immediately upon learning of it. He interviewed the post-operative nurse, the circulating nurse who was in the operating room during surgery, Dr. Humbyrd, and several other staff members. Dr. Audette testified that among those present in the interviews was the hospital's Vice

President for Risk Management. He lead the interviews, encouraging all to tell a complete story. Following those interviews, they met with the Respondent to get his side of the events. Dr. Patrick and Dr. Andreani were present for the meeting with the Respondent.⁵ The Respondent admitted to the group that he had given the patient a neck and shoulder massage and told them that was his routine for patients who had epidural anesthesia when delivering babies by C section. He implied to the group that he could extend the massage therapy to other surgical patients who received local anesthetics. The Respondent told the group that in addition to the spinal, he had administered other drugs to the patient throughout the procedure, most notably, versed and propofol. In the meeting with the Respondent, one of his anesthesia group associates, Dr. Andreani offered that it was his experience that propofol could cause patients to think strange things, e.g. a patient might wake up thinking that he had been chopping wood in the backyard. The Respondent did not reply to his colleague's remarks.

After his interviews with staff and the Respondent, Dr. Audette went to meet with the patient and her family. Dr. Audette testified that he found the patient "fully aware", "communicative" and "intelligent". Dr. Audette suggested to the patient that the anesthesia drugs may have caused her to believe that the Respondent had assaulted her, when in fact he had not done so. Dr. Audette testified that the patient described in detail that the Respondent had started massaging her neck and shoulders, then moved his hands down to fondle her breasts. She told Dr. Audette that she was aware of the placement of the EKG leads and they had nothing to do with Respondent's touching her breasts. Dr. Audette stated that the patient was offended that he would suggest that she didn't know

⁵ The anesthesia staff at Kent County Hospital is not employed by the hospital. Rather, it is a private independent group that contracts with the hospital to provide anesthesia services.

the difference between a touching of the EKG leads and fondling her breasts. Upon completion of his interview with the patient, Dr. Audette concluded that the patient's story was credible. Administrative staff at the hospital then asked the Respondent to take an administrative leave from work at the hospital. The Respondent agreed. Dr. Audette testified that placing the Respondent on administrative leave would not require reporting the circumstances to the Department of Health and would give the hospital an opportunity to "sort things out" without continuing the Respondent on the premises.

The State's next witness was Susan Kelliher, R.N. Nurse Kelliher was employed at Kent County Hospital as the recovery room nurse on December 23, 2004. Nurse Kelliher saw the patient when she arrived in the recovery unit (also known as post anesthesia care unit "PACU") after her surgery. The patient was brought to the recovery room at approximately 11:40am. The patient was awake, but spinal anesthesia was in effect. The patient was numb from the waist down. Upon her arrival, the patient was evaluated every 15 minutes to determine whether sensation was returning to her lower extremities. Nurse Kelliher went to lunch sometime between 12:20pm and 12:30pm. At 12:35pm a nursing note (made by someone in Nurse Kelliher's absence) stated that the patient's eyes were closed, maybe sleeping, maybe just resting her eyes. The next nursing note by Nurse Kelliher was at 13:15pm. At 13:30pm the patient reported to Nurse Kelliher that someone at the "top of the bed" had inappropriately touched her during her surgery while the surgical screen was up and no one else could see it. The recovery room nurse testified that she immediately notified the charge nurse. Both she and Dr. Patrick then came to speak with the patient. The patient reiterated her story to them and told them that the person who had touched her was the same one who had given

her anesthesia. The patient denied to the three of them that she had complained of neck pain or discomfort as would warrant the neck massage. She repeated that she did not cry out or alert anyone as to what was going on during the surgical procedure as she was afraid to disrupt the procedure. She also stated that she was “ashamed” and “embarrassed”. The patient and the Respondent were on the other side of the surgical screen (or drape) where no one could see them. The patient felt that no one would believe her if she said anything. While recounting her story, the patient was tearful, crying, upset and she developed blotches.

On cross-examination, the nurse testified that when the patient first arrived in the recovery room, she was alert, oriented and communicative. She was talking, but said nothing about the incident until 1:30pm.⁶

Martha Galeota, R.N. was the next witness. She participated in the surgical procedure to a limited extent. Nurse Galeota worked as the circulating nurse while the primary circulating nurse was on coffee break. Therefore, she was present during the surgery for only a brief amount of time (approximately 15 minutes). It is the circulating nurse’s responsibility to keep an accurate record of the patient and surgical procedure and to assist the operating room nurse and surgeon to the extent that she is required to do so. Nurse Galeota testified that when she came into the operating room she got a report from the primary circulating nurse on duty and then began completing her paperwork of the progress of the patient and surgical procedure. The witness stated that she observed the Respondent at the head of the of the bed with the patient. She testified that the Respondent was very close to the head of the bed, leaning forward over the bed and very

⁶ The patient’s testimony was that when she arrived in the recovery room there was a male nurse present also. She did not say anything until he left at which time she confided in Nurse Kelliher.

close to the patient. She did not observe what the Respondent was doing or hear whether he said anything to the patient.

However, she testified that the Respondent was hovering close to the patient in an “intimate” manner. The nurse testified that the Respondent was leaning over the patient with his arms on the bed, but the surgical drape (screen) prevented her from seeing his hands. Nurse Galeota then went to the foot of the bed to assist the surgical team. The witness observed that the Respondent was seated next to the head of the patient’s bed at all times when she was in the room. The nurse did not hear any conversation that may have taken place between the patient and the Respondent. However, she testified that the Respondent’s head was very close to the patient as if a conversation was in progress.

Mark Patrick, M.D. was the next witness. Dr. Patrick is the managing partner of the Respondent’s anesthesia group. Dr. Patrick was on call in the hospital from 7:30am on December 23, 2004 through 7:30am on December 24th. On the afternoon of the 23rd, he was approached by a nurse from the PACU who asked to speak with him. She advised him in general terms about the patient’s complaint and he immediately went to see her. When he arrived in the PACU, the patient was “sobbing”. She told him that the man at the head of her operating room bed who gave her anesthesia “rubbed” her breasts. The patient stated that she had been trying to “put it out of her head”, but couldn’t, so she finally spoke to someone about it. She said the man kept asking her if she had a boyfriend. He also told her that he couldn’t control himself and asked her not to tell anyone. The patient told Dr. Patrick that she was afraid to tell anyone as it was happening for fear the surgeon would injure her knee. Dr. Patrick testified that while he was talking with the patient, the Respondent came into the recovery room with another

patient. As soon as the Respondent started speaking, the patient said to Dr. Patrick, "That's him, that's the voice. I'll never forget it".

Dr. Patrick said he asked the patient about the placement of the leads and wires. He testified that the patient then put up her hands and told him in no uncertain terms that the fondling of her breasts had nothing to do with the EKG leads, that they were attached in the beginning and that the assault took place during the surgical procedure.

Dr. Patrick was then questioned relative to the drug regimen that had been given to the patient. Dr. Patrick examined the patient's record which formed the basis for his testimony. The doctor testified that the patient met with Dr. Misra for her pre-operative anesthesia screening. The patient chose a spinal anesthetic rather than general anesthesia. Dr. Patrick explained that a "spinal" and an "epidural" anesthetic were essentially the same thing in that they are local anesthetics. The two differ in the point of injection. The patient was administered 1% tetracaine at the L4 interspace. The expectation with this administration is that the patient would have numbness and lack of mobility from T10 to R5. That is, the patient would be numb and unable to move below the waist. The patient was administered 2mg of versed in the holding area before she went to surgery. In the surgical suite, the spinal was administered to the patient. Intraoperatively, the patient was given 3 more dosages of versed 2mg which was injected at three different times during the operation. Dr. Patrick explained that versed is an anti-anxiety medication that reduces stress and produces amnesia. The patient was also administered propofol, 50mg at 9:15am and another 50mg at 9:50am. Dr. Patrick was also asked about placement of EKG electrodes and wires. Though the patient's record did not indicate the number of leads that were placed, three would be typical. One lead would be placed just below each

shoulder and the third under the left arm, a little toward midline near the armpit. He testified that the leads would never be placed on the breasts, but they would be close to them.

The next witness pertinent to the sexual assault allegation was the operating surgeon, Danny Humbyrd. Dr. Humbyrd testified generally about the procedure and what transpired during the surgery. He was unable to offer any evidence that supported or disputed the patient's allegations of unwarranted touching because he was on the opposite side of the drape and could not see the patient's upper body. Dr. Humbyrd did state, however, that he was able to hear some limited conversation between the Respondent and the patient. His impression was that the Respondent's conversation was too friendly. He thought that the questions Respondent posed to the patient would be more appropriate coming from a person closer in age to the patient. Dr. Humbyrd didn't pay particular attention to the details of the conversation. He felt that the Respondent may have been trying to allay any fears that the patient had about undergoing surgery.

On cross-examination, Dr. Humbyrd testified that there is a door opening up into the surgical suite from the hallway. The door has a window in it and is located right behind the area where the Respondent and patient were located at the head of the bed. He testified that anyone passing by the window could look into the room. However, he disputed that the Respondent and patient would be in plain view of anyone looking into the window. He stated that the anesthesia apparatus is a large piece of equipment that extends inward toward the bed, thus obstructing the view from the window in the door. Dr. Humbyrd did testify that people do come through the door during surgery. Neither he nor the Respondent control access to the room.

The next factual witness relevant to the allegation of sexual abuse was a female surgery patient for whom the Respondent had provided anesthesia in August of 2000 while he was working at Wing Memorial Hospital in western Massachusetts.⁷ On the date of the surgery at Wing, the patient was 24 years old, a single mother. She went to the hospital for the surgical removal of a cyst on her left wrist. The Respondent provided anesthesia to her. The patient testified that her upper body was on one side of a surgical screen. The surgical screen rose vertically to obstruct her view of the surgical team on the other side of the screen. Her left arm was extended through a hole in the drape (or screen) so that the surgery could take place on the sterile side of the screen. The Respondent remained with the patient at the head of the bed on the non-sterile side of the screen. The patient stated that she was sedated and fell asleep for about 15 or 20 minutes, after which time, she awakened. The patient testified that the Respondent then began a conversation with her. He asked if she were single and whether she had any children. He then commented about a small tattoo the patient had on her neck. He asked her if she had any more, and she told him that she had one on her stomach. He asked if he could look at it, and she said that he could. Instead of looking at the tattoo, however, the Respondent then placed both of his hands on the patient's chest and began massaging and squeezing both of her breasts. He then asked the patient if he could play with her breasts. She said no. At that point, the Respondent leaned down closer to the patient and whispered into her right ear, "Don't tell anyone. I could get in a lot of trouble". The patient testified that she didn't tell anyone. She was afraid and wanted to leave the hospital as fast as she

⁷ This woman read about the Respondent's Summary Suspension in Rhode Island and contacted the Board during the course of the proceeding. She had a similar experience with the Respondent. Counsel for Respondent argued that her testimony should be excluded under § 42-35-10(a) and Rule 404(6) of the Rhode Island Rules of Evidence. This hearing officer disagreed and entered a written Interim Order on April 26, 2005 (copy attached to this Decision).

could. The patient's grandmother came to the hospital to take her home. Once there, the patient told her grandmother what the Respondent had done to her. The patient then called her parents, both of whom immediately came home from work. The patient reported the incident to the local police that same day. The patient also reported the incident to Wing Memorial Hospital. She was initially interviewed by the Medical Director of the hospital, then subsequently by a six-person investigatory team from the University of Massachusetts Medical Center.⁸ The patient testified that she was not satisfied with the investigation because the team kept focusing on whether the assault she described really happened. They did not appear to believe her. The patient testified that she wanted the police to charge the Respondent, but they didn't do so. She does not know why the police concluded their investigation without charging the Respondent. Likewise, the hospital took no action as far as the patient knows. The patient did not initiate any legal action against the Respondent, nor did she attempt to obtain any money from him. She stated that she reported the assault to the police and hospital authorities because she didn't want to be a "victim".

The Respondent presented testimony from Karen Stitsinger who was the circulating nurse in the surgery that was performed at Wing Memorial Hospital. The witness was adamant in her testimony that, as the circulating nurse on that day, she was able to view the patient and the Respondent at all times. She did not observe any untoward activity on the part of the Respondent. The evening of the surgery, the nurse was contacted by a supervisor who inquired whether anything unusual had transpired that day in the operating room. The witness stated that she had no idea what the supervisor was talking about, that she had observed nothing unusual that day. A few days later a

⁸ Wing Memorial Hospital is apparently an affiliate of the University of Massachusetts Medical Center.

hospital vice president asked her again whether she had observed anything out of the ordinary during the patient's surgery. The witness replied that she had seen nothing. A few days or perhaps a week after her talk with the vice president, the witness was summoned to the hospital CEO's office where she was again interrogated about the surgery. The witness stated that it was on that date that she first learned of the patient's allegation that she was sexually assaulted by the Respondent. The witness testified that she was friendly with the Respondent, that he once gave her anesthesia, and that after he left the employ of Wing Memorial Hospital she had talked to him several times, once seeking a reference from him and at other times just to gossip.

The Respondent presented testimony from Michael J. Infantolino, M.D. Dr. Infantolino participated in the December 23rd surgery. Dr. Humbyrd was the primary surgeon and Dr. Infantolino was the first assistant. He testified that he is very familiar with the drugs propofol and versed. They are the medications that are commonly used in surgery. Dr. Infantolino testified that he sat on the patient's left side, near her hip and on the sterile side of the drape. As surgeons, Dr. Infantolino stated that he and Dr. Humbyrd concentrate their attention on the surgical area (in this case, the patient's knee), but they note all activity of the patient. From where Dr. Infantolino was sitting, he could wheel his stool in and out of the of the sterile field. He could look at the patient and the Respondent at any time. Dr. Infantolino indicated that he neither saw, nor heard, anything unusual during the operation. He testified that he recalls arriving in the operating room just after the surgery had commenced, although it is possible that he was there at the outset. He can't specifically recall. He likewise was not sure that he stayed in the operating room for the duration of the surgery; may have exited early.

Anecdotally, Dr. Infantolino testified that he himself had undergone similar surgery for repair of a torn ACL. During the procedure, the doctor testified that he experienced a sore neck. The attending nurse anesthetist (CRNA) massaged his neck and applied traction at that time. Dr. Infantolino's take on the allegation against the Respondent was that it was "ludicrous" to think that the Respondent could have assaulted the patient in a room full of people.

The last factual witness presented by the Respondent was Lee-Ann Falcone, RN who was the circulating nurse at the December 23rd surgery. Nurse Falcone testified that it was her responsibility to take care of the patient, assist anesthesia, provide sterile equipment and operate equipment as needed, keep notes and to move about the room. The nurse testified that her "station" is to the patient's right side, about six feet away from the anesthesia provider, on the non-sterile side of the screen. In this case, the nurse estimated that she spent approximately 15% of her time in that position. The remaining 85% of the time she was hanging fluids, running equipment, making notes, etc. She did not specifically hear or see the Respondent say or do anything inappropriate.

On cross-examination, nurse Falcone described the sterile drape as being about six feet wide across the patient's upper body. The drape covered the patient's arms, not her chest. The height that the drape rises vertically above the patient's body is approximately two feet. The patient's head, lying on the operating room table is about four feet off the floor, so the sterile screen is about six feet high from the floor. The nurse testified that the anesthesia giver usually sits behind the patient's head and cannot be seen on the sterile side of the drape. During the surgical procedure, the anesthesia care giver cannot see the surgeons, nor can the surgeons see the anesthesia person. Nurse

Falcone testified that at the conclusion of the operation, the patient was awake and speaking to the surgeon about the surgery. Nurse Falcone did not hear the patient say that anything had happened to her during the procedure.

Although the Respondent refused to answer questions posed to him by the State when Respondent was initially called as an adverse witness, the Respondent thereafter did take the witness stand and testify in the defense portion of the case.

The Respondent provided extensive testimony concerning the allegations that he inappropriately accessed pornographic websites while at work in Kent County Hospital. The witness essentially admitted that he engaged in this activity while he was off duty but on-call in the hospital. Once advised by hospital administration that surfing pornographic websites was against hospital policy, there is no evidence that the Respondent engaged in this activity at the hospital again. Likewise, the Respondent admitted that he had tried to arrange a date with a person to whom he had administered anesthesia, although the Respondent's testimony was that he did so at the behest of the patient's relative who worked at the hospital. The relative disputed that testimony and intimated that the Respondent gained access to the patient's telephone number via the patient's medical record.

The Respondent testified that he became aware of the patient's complaint late in the day on December 23rd when he was interviewed by Drs. Patrick, Audette and Andreani in conjunction with the Risk Manager, Mr. DePietro. The Respondent testified that he didn't recall what explanation he gave when he was interviewed. The Respondent does admit that he gave the patient "neck traction" and stated that he used that term interchangeably with "neck massage". Dr. Patrick testified that the Respondent told him

that he gave the patient a neck massage. There is a difference between neck traction and neck massage. The Respondent stated that when applying the neck traction with respect to this patient that at no time were his hands under the sheet. In response to Nurse Galeota's testimony that she could not see his hands, the Respondent testified that perhaps they were under the patient's head or obscured by the pillow. The Respondent also disputed Nurse Falcone's testimony that the sterile drape rises off the patient's chest area at a 90 degree angle. The Respondent stated that the angle was less severe allowing him to see above it.

The Respondent recalled that it was Dr. Andreani who suggested that the medications administered to the patient may have caused her to hallucinate the whole sexual touching.

With regard to the allegations surrounding the Wing Memorial Hospital surgery, the Respondent denied any wrongdoing. He could not recall specifically the medications that were administered during that surgery. He thought probably versed and couldn't recall propofol. At any rate, he stated that he was interviewed regarding the incident and that nothing further came of it.

With respect to medications, the Respondent testified that he is a "minimalist". He does not give more medication than is required. In the Wing surgery, he guessed that he had given versed and couldn't recall what else, if anything. With respect to the Kent surgery, the Respondent administered four separate dosages of versed at 2mg, one pre-operative and the other three during the course of the procedure. He also administered two dosages of propofol at 50mg and, at the end of the surgery, benadryl for itching.

In addition to factual witnesses, both parties presented witnesses who are expert in the anesthesiology field.

The State produced testimony from Kathleen Hittner, M.D. Dr. Hittner testified that she worked as a full time anesthesiologist from 1979 until 2000, when she assumed the presidency of Miriam Hospital. Dr. Hittner is a diplomat of the American Board of Anesthesiologists. Dr. Hittner testified that despite her position as president of a hospital, she nevertheless practices anesthesia at least one full day per week and more if the anesthesia department needs additional help. Dr. Hittner is also a full Clinical Professor of Anesthesia at Brown University Medical School. Dr. Hittner testified that she is very familiar with the drugs versed, propofol and fentanyl. She testified that when propofol was introduced to the market, she was employed as the Chief of Anesthesia and that she initiated use of the drug at Miriam. She stated that she has administered propofol in “thousands and thousands of cases” in various operating room settings. She further testified that she has used propofol in “every dose that is required for sedation of a patient”. In support of Respondent’s case, the defense placed into evidence several published articles of case studies involving the administration of propofol and associated patient fantasies, specifically those that were sexual in nature. Dr. Hittner was asked by the State to comment on the articles, from her own experience as an anesthesiologist and as the supervising Chief of a group of anesthesia providers. Dr. Hittner testified that despite thousands and thousands of cases wherein she administered propofol, there were only two cases wherein she could recall anything happening of a sexual nature. In the case of one male patient, he “pinched” her backside. Another patient, a female reached, reached out to touch her. Other than those two experiences, she has not observed, nor did

she receive any reports of similar cases. She further stated that these two instances occurred during the period of time in which use of propofol was in the beginning stages. As time went on and more was learned about the drug, it became common to sedate patients using a combination of drugs, propofol and something else, versed e.g. Dr. Hittner testified that in preparation for her testimony, she had consulted the Physicians Desk Reference (PDR) concerning the use and effects of propofol. The statistic cited on the PDR are that the occurrence of sexual fantasies with use of propofol is less than 1%. Dr. Hittner further stated that there have been no documented controlled experiments regarding the use of propofol and that the literature is not scientific, but rather is composed of reported case studies. The case studies, she testified, can be broken down into two specific types of fantasies. In the first type, the patient reaches out to the medical personnel either verbally or physically. In the second type, the patient feels she has been assaulted sexually. Case studies have revealed that the incidence of these fantasies occurs in cases wherein the surgical procedure involves a part of the body normally identified with sexual acts. Dr. Hittner gave examples of an endoscopy, involving insertion of a tube in the patient's throat wherein the patient fantasizes that she has had oral sex, or surgery involving the placement of vaginal sponges wherein the patient fantasizes that she has had intercourse. Dr. Hittner stated that the introduction of the use of versed in conjunction with propofol reduces the tendency of patients to act out. Dr. Hittner was asked to compare the reported cases to the incident reported by the Kent County Hospital patient. Dr. Hittner stated that to a reasonable degree of medical certainty she could differentiate the case studies from the allegations against the Respondent. Dr. Hittner testified that the patient's allegations differ substantially from

the cases that Dr. Hittner personally observed and from the reported case studies. In Dr. Hittner's personal experiences, and as borne out by the case studies, the sexual fantasy comes about from a release of the patient's own inhibitions that causes the patient to act out or to say things that a person would not otherwise say. In the instant case, the patient reported that the Respondent initiated a conversation with her, asked about her boyfriend and Christmas shopping, progressed to massaging her neck, then fondled her breasts and told her not to say anything. Dr. Hittner testified that the patient's allegations do not fit any of the reported case studies. Dr. Hittner also stated that though she found the "massage unusual", the patient seemed okay with it. The Respondent admitted that he did massage the patient's neck and shoulders. Given that the patient understood and agreed to the massage, it is then even more difficult to believe that the patient then imagined the physical touching and the Respondent's admonition that she not tell anyone.

In reviewing the patient's medication record, Dr. Hittner testified that she did not find a problem with two dosages of propofol, 50mg. However, she stated that the four dosages of versed were more than she would have used, and the administration of benadryl near the end of the operation was also unusual. She stated that from the patient's record and the anesthesia record, it appeared that the initial dosage of versed in tandem with two administrations of propofol were sufficient for the procedure. The patient stated that after the Respondent fondled her breasts and admonished her not to disclose it to anyone, she fell asleep. Dr. Hittner's opinion was that the additional dosages of versed were administered to make the patient sleep and forget what happened. The addition of benadryl furthers that purpose.

As to the physical aspects of the operating room and the placement of people therein, Dr. Hittner testified that in this case, the surgeons would have been on the sterile side of the drape outside the view of the patient and anesthesiologist. The anesthesiologist had access to the patient from her head to almost the waist area and could reach under the patient drape.⁹

On cross-examination by Respondent's counsel, Dr. Hittner reiterated that the case studies proffered by the defense are merely that, anecdotal stories without scientific foundation. Dr. Hittner also pointed out that the articles suggest that reports of the hallucinogenic properties of propofol are often used to disguise incidents of patient abuse. Further, the articles specifically state that the case studies should not be used in defense of criminal charges of sexual abuse. Further, upon cross-examination, the doctor stated that she did not believe that the removal of the EKG leads could serve as the stimuli that would provoke a sexual fantasy inasmuch as standards in the practice dictate that the electrodes would have been placed above the breast area, higher on the chest. Dr. Hittner also noted that the Respondent charted itching and administered benadryl. The doctor said she was skeptical about the itching. It was not charted by the operating room nurse, nor was it reported in the recovery room or anywhere except the anesthesia chart. Dr. Hittner reiterated her opinion that the benadryl was administered to make the patient sleep and forget what happened to her. The doctor testified that between the propofol and the spinal anesthetic (fentanyl) that were administered, she believes versed was excessive.

⁹ The patient drape covers the patient like a blanket. It is distinguished from the surgical or sterile drape which is at a 90 degree angle to the patient separating the patient's upper body from the surgical field.

Dr. Hittner did not provide any testimony with respect to the Wing Memorial Hospital surgery as the circumstances involving that incident became known to the State only after the witness' testimony.

The Respondent presented William Dodd, a CRNA as one of his expert witnesses. The witness has been a CRNA for 30 years. Mr. Dodd testified that he has used propofol in his cases on a daily basis for approximately the last 20 years. He reported that in 2005, he attended at a surgery that involved the administration of general anesthesia and an airway mask. He testified that when he removed the airway mask, the patient exclaimed, "God, that was the best sex I ever had".

Mr. Dodd further testified that in operations such as the one performed at Kent, the dosages of medications administered by the Respondent were standard operating procedure.

On cross-examination, the witness testified that he does not usually engage in conversations with his patients.

The Respondent's second expert was Frederick Burgess, M.D. Dr. Burgess is board certified in anesthesia and has a bachelor's degree in pharmacy. He testified that he examined the anesthesia record of the December 23rd surgery. He stated that he was familiar with versed and that it came into use in about 1986. He is also familiar with the use of propofol which came into popular use in about 1990. He stated that he assists in operations similar to the subject one on a monthly basis. He utilized versed and propofol in literally every operation. Dr. Burgess testified that the combined use of versed and propofol is common practice. He explained that versed is used to put the patient out and to diminish pain. Propofol is given to make the patient wake up with less of a

“hangover”. The doctor further testified that itchiness is often associated with the use of narcotics and that the administration of benadryl is the most usual treatment. Dr. Hittner acknowledged that fact in her testimony, too. Dr. Burgess testified that conversation between the anesthesia giver and the patient is not unusual and, in his opinion, is preferred as it places the patient at ease and distracts the patient from the pain. Dr. Burgess was questioned about the neck massage/traction. He responded that it was not unusual to keep the patient comfortable. He explained that patients who receive spinal blocks that create numbness and prevent movement can become stiff and uncomfortable.

Dr. Burgess was questioned at length about the anesthesia articles that had been introduced into evidence by Respondent’s counsel. Dr. Burgess testified that the literature would suggest that patients who receive lighter drug dosages are more likely to dream and that, with the use of propofol, rapid recovery from the effects of the anesthetic might permit verbal communication before the patient had forgotten the dream. On cross-examination, Dr. Burgess acknowledged that absent a complaint of pain from the patient, he would not introduce neck traction or massage, but he admitted another might do so.

CONCLUSIONS

The Respondent is charged with unprofessional conduct in that he is alleged to have sexually molested a female patient while he was administering anesthesia to her. Certainly, if true, the Respondent’s conduct is at a minimum in violation of § 5-37-5.1 generally, and specifically subsections (7)(19) and (30) thereof. The testimony given by the patient relative to the Kent County Hospital is both credible and compelling. The patient testified in significant detail as to what was said between herself and the

Respondent and what was done to her. She testified that the Respondent initiated a conversation with her about her boyfriend and her Christmas shopping. The patient did not express any discomfort of her neck or shoulders, but she did acquiesce in the Respondent's suggestion that he give her a massage (see testimony of Dr. Humbyrd). He then moved his hands down to her breast and began fondling or rubbing them. When the patient asked the Respondent if this is something he routinely did, the Respondent told her he couldn't help himself. He then leaned down closer to her and told her not to tell anyone because, if she did so, he would be in a lot of trouble. The patient then said she fell asleep and did not wake up until the surgery was completed. In addition to the patient's testimony, Dr. Hittner's observations were noteworthy. Dr. Hittner has been administering anesthesia for in excess of 25 years, since 1979. The Board accepts Dr. Hittner as an expert in her field despite Respondent's attempt to characterize her as an anesthesiologist turned administrator. Dr. Hittner testified that while the Respondent did utilize limited dosages of versed and propofol to sedate the patient, in her opinion, the amounts used in combination were excessive. She noted that the initial administration of versed followed by two hits of propofol were sufficient to numb the patient and mask the pain. More medication was not necessary. Dr. Hittner correctly noted that the addition of more versed would bring on sleep and possibly cause the patient to think that she had not been awake at all. Dr. Hittner also noted that benadryl would contribute to the patient's sleep and amnesia upon waking. She questioned why the nurse's notes made no mention of the "itchiness" for which the Respondent claims to have given the patient the benadryl. Dr. Hittner surmised that the Respondent administered the later dosages of versed and benadryl in the hopes that the patient would not remember what Respondent

had done to her or would believe that it had been a dream. Dr. Hittner also was quick to note that the Respondent admitted to having a conversation with the patient and to giving her a neck massage. She questioned why the patient would be so clear on that part of her recollection and not on Respondent's actions that followed. In other words, the Respondent would have the Board accept half of the patient's testimony, but not the balance. The Board is constrained to accept Dr. Hittner's testimony as reliable and credible. The Board recognizes, too, the expertise of the Respondent's witness, Dr. Burgess. In fact, his testimony as to the practice of anesthesiology was, for the most part, in agreement with that of the state's expert with the exception of the conclusions drawn therefrom.

The testimony of the patient to whom the Respondent administered anesthesia at Wing Memorial Hospital was also credible and damning to the Respondent. It is clear that the actions and statements by the Respondent on that occasion mirror those alleged by the Kent County Hospital patient, down to the exact actions and words used by the Respondent. In that case, the Respondent also engaged the patient in a conversation about her personal life, whether she had a boyfriend and/or children. He observed that she had a tattoo. In response to her further probing, the patient told the Respondent that she had a second tattoo on her stomach. He asked to look at it and she acquiesced. Instead, the Respondent then moved his hands down to her breasts and began squeezing them. He asked her if he could play with them. When she replied in the negative, he leaned down closer to her and told her that he could not help himself and that she shouldn't say anything because he would be in trouble. The circumstances dictate against coincidence. The patients did not know each other and are from different states.

The circulating nurse at Kent County Hospital testified that only 15% of her time is devoted to the patient, while 85% of her time she attends to other duties in the room. The circulating nurse at Wing Memorial Hospital testified that she did not leave the Respondent's side during that surgery. The Board does not accept as credible that testimony, inasmuch as it is the duty of a circulating nurse to move about the operating room performing various functions on both the sterile and non-sterile sides of the drape (or screen).

Of the many witnesses who testified only the Respondent stated that from his position at the head of the patient's bed he could observe persons on the sterile side of the drape. It was unclear from Dr. Infantolino's testimony whether he claimed to be able to see over the sterile screen while he was seated on the other side assisting in surgery or that he would be able to see beyond the screen only if he wheeled his chair to the right, away from the patient. The Board does not accept as true that a physician seated and performing surgery on the sterile side of the screen can simultaneously see over the screen to the head of the bed. It was clearly Dr. Humbyrd's testimony that he could not see over the sterile screen while he was seated on the opposite side.

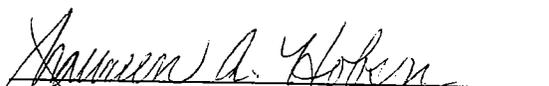
The case studies and articles presented by the Respondent were read and considered by the Board. They do not represent controlled experiments and there is cautionary language that they not be used in sexual molestation defense cases. Some of the material also acknowledges that reported cases have been used to conceal patient abuse. The weight attributed to the cases detailed in these articles is minimal when measured against the testimony given by the two patients in this case.

ORDER

Based upon the testimony and evidence on the record, the Respondent's license to practice medicine in the State of Rhode Island is hereby **REVOKED**. This order takes effect on the date of entry.

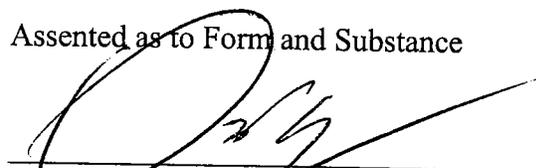
Entered this 8th day of December, 2005.

The hearing panel herein unanimously adopted the above Administrative Decision as its final decision.



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Assented as to Form and Substance


David R. Gifford, M.D., M.P.H.
Director of Health

If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws § 42-35-15.

CERTIFICATION

I hereby certify that I have mailed a copy of the within Administrative Decision by regular mail, postage prepaid, to David Carroll, Esquire, 10 Weybosset Street, Providence, RI 02903 on this 8th day of December 2005.

Carole Allsworth