

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.

