

2/18/05 at 70.) The Appellant had provided anesthesia during her operation on December 23, 2004. (Tr. 2/18/05 at 70.)

After a preliminary investigation pursuant to sec. 5-37-8, the Rhode Island Director of Health issued an order summarily suspending appellant's license to practice medicine in this state, effective January 11, 2005.¹ As required by statute, the Appellant received a hearing to appeal the Director's decision. The hearing commenced on February 18, 2005 and continued over a total of twelve sessions held on various dates over the next six months. The final evidentiary session of the hearing occurred on August 17, 2005.

Testimony of Patient A

Patient A first encountered the Appellant in the preoperative anesthesia unit on the morning of the actual surgical procedure. During their meeting, Patient A elected to receive a spinal anesthetic, which would leave her conscious during surgery. (Tr. 2/18/05 at 78-79.) Although the Administrative Decision notes that Patient A "chose to receive a spinal anesthetic so she would remain awake during the procedure" (Administrative Decision at 3), the record indicates that Patient A did not choose the spinal anesthetic because of any particular preference to stay conscious for her surgery. (Tr. 2/18/05 at 103.) Hospital staff moved Patient A to the operating room where she alleged surgeon

¹ The Director's Summary Suspension Order also included charges that the Appellant violated professional boundaries by asking a patient on a date and engaged in unprofessional conduct by asking a female hospital employee to view pornography with him on a hospital computer. The parties involved presented testimony to the Hearing Officer and Hearing Committee on both additional charges. However, the Board declined to rule on either matter. For the purposes of the decision now on appeal, the Hearing Officer and the Hearing Committee focused solely on the charge that the Appellant sexually molested a patient. Accordingly, this Court will consider only those portions of the record that address the molestation charge.

Danny E. Humbyrd, M.D. commenced the surgical procedure. During the procedure, Patient A was wearing a blue johnny² while lying flat on a surgical table with her legs extended. (Tr. 2/18/05 at 75, 77.) Hospital staff placed a vertical surgical drape between Patient A and the surgeons. (Tr. 2/18/05 at 76.) This drape was located at or around Patient A's navel and extended to a height of approximately one and a half feet above Patient A so as to preclude her from seeing the surgeons and vice versa. (Tr. 2/18/05 at 76.) The initial part of the surgery involved an arthroscopic³ examination of Patient A's knee. (Tr. 2/18/05 at 78.) One of the surgeons had the surgical drape lowered during the arthroscopic procedure, so Patient A could see that part of the surgery on a television monitor. (Tr. 2/18/05 at 78-79.) The Administrative Decision noted that someone removed this monitor, but Patient A did not testify to this fact. (Administrative Decision at 4.)

Patient A testified that she was awake, alert, and speaking to Dr. Humbyrd during the arthroscopic procedure. (Tr. 2/18/05 at 78.) At this point in the surgery, the Appellant was with Patient A at the head of the table on her side of the surgical drape. (Tr. 2/18/05 at 83.) After the surgeons completed the arthroscopic portion of the operation, hospital staff raised the surgical drape so that Patient A could not see the more invasive portion of the surgery. (Tr. 2/18/05 at 86.) Patient A stated that once hospital staff had repositioned

² johnny: a short-sleeved collarless gown with an opening in the back for wear by persons (as hospital patients) undergoing medical examination or treatment. Merriam-Webster's Medical Dictionary (Merriam-Webster, Inc.), available at <http://dictionary.reference.com/browse/johnny> (last accessed Dec. 7, 2006).

³ arthroscopy: medical procedure involving the use of a surgical instrument for the visual examination of the interior of a joint (as the knee). Merriam-Webster's Medical Dictionary (Merriam-Webster, Inc.), available at <http://dictionary.reference.com/browse/arthroscopy> (last accessed Dec. 7, 2006).

the surgical drape to occlude her view of the surgeons, the Appellant began to massage her neck and shoulders with both hands. (Tr. 2/18/05 at 83-84, 86.) According to Patient A, she did not feel any pain and had not requested the massage. (Tr. 2/18/05 at 84.) Instead, she stated that she felt confused by the Appellant's actions, because she was not sure if the massage was part of the surgical procedure. (Tr. 2/18/05 at 84-85.)

The Appellant then allegedly began to touch her breasts under the johnny while asking if she had a boyfriend. (Tr. 2/18/05 at 86, 89.) Although the Administrative Decision found that they also talked about Christmas shopping (Administrative Decision at 20), Patient A did not recall having that conversation. (Tr. 2/18/05 at 117-118.) Patient A then testified that the Appellant bent down close to her face and told her not to tell anyone. (Tr. 2/18/05 at 87.) Otherwise, he could lose his job. (Tr. 2/18/05 at 87.) Patient A asked the Appellant if he did this all the time, to which he replied, "No, I just couldn't control myself." (Tr. 2/18/05 at 87-89.) The Appellant told her at least three times that he would get in trouble if she told anyone. (Tr. 2/18/05 at 88.) After her conversation with the Appellant, Patient A fell asleep and did not awaken until hospital staff members were moving her from the operating room to the recovery room. (Tr. 2/18/05 at 89-90.) Patient A awoke in the presence of two nurses, one male and one female. (Tr. 2/18/05 at 90.) After the male nurse left, Patient A told the female nurse what had transpired in the operating room. (Tr. 2/18/05 at 90.) The nurse then reported the incident to hospital administrative staff, who in turn asked Patient A to retell her story. (Tr. 2/18/05 at 91.) Patient A would recount her story several times that day. (Tr. 2/18/05 at 92.)

On cross-examination, the Appellant's counsel questioned Patient A about whether she mistook the Appellant's handling of the EKG leads and electrodes⁴ on her body for his having fondled her breasts. (Tr. 2/18/05 at 111-113.) Patient A acknowledged that the Appellant reached under her johnny to attach leads to electrodes on her chest for monitoring purposes. (Tr. 2/18/05 at 111-112.) She testified that when he attached the leads, the Appellant acted professionally and appropriately. (Tr. 2/18/05 at 117.) Patient A clearly recalled that the Appellant assaulted her only after the arthroscopic examination ended and hospital staff raised the surgical drape. She testified that at the time of the alleged assault, two female nurses and the surgeon were working on the sterile side of the drape, while she and the Appellant were alone on the non-sterile side. (Tr. 2/18/05 at 123.) Patient A seemingly did not recall the presence of assistant surgeon Michael Infantolino, M.D. during her operation. (Tr. 2/18/05 at 124.) Patient A also did not immediately alert others that the Appellant was acting inappropriately until several hours following the surgery. (Tr. 2/18/05 at 137.)

Testimony of John R. Audett, M.D

At the time of the incident, Dr. Audett was the Vice President for Medical Affairs at Kent County Hospital at the time of the incident. (Tr. 2/24/05 at 3.) Dr. Audett testified that when he learned of Patient A's complaint, he immediately initiated an investigation. (Tr. 2/24/05 at 6.) He interviewed the postoperative nurse, the circulating nurse stationed in the operating room during the surgery, Dr. Humbyrd, and several other staff members.

⁴ EKG leads and electrodes: equipment attached to a patient's body for the purpose of making a graphic recording of the electrical activity of the heart, used to evaluate cardiac function. See The American Heritage Science Dictionary. (Houghton Mifflin Co.), available at <http://dictionary.reference.com/browse/electrocardiogram> (last accessed Dec. 7, 2006).

(Tr. 2/24/05 at 6.) Dr. Audett testified that the hospital's Vice President for Risk Management led all the interviews and encouraged the interviewees to provide an account of their perceptions. (Tr. 2/24/05 at 9.) Representatives of the hospital's anesthesia group also observed the interviews. (Tr. 2/24/05 at 8.)

Following these interviews, Dr. Audett and the other investigators met with the Appellant to obtain his side of the events. (Tr. 2/24/05 at 12.) The Appellant admitted to the group that he had given the patient a neck and shoulder massage and told them that he routinely provided massages to patients who had epidural anesthesia when delivering babies by Caesarian Section. (Tr. 2/24/05 at 12.) He implied to the interviewers that he could effectively extend the massage therapy to other surgical patients who received local anesthetics. (Tr. 2/24/05 at 13.) The Appellant told the group that in addition to the spinal anesthetic, he had administered other drugs to Patient A throughout the procedure, most notably Versed and Propofol. (Tr. 2/24/05 at 21.) In the meeting with the Appellant, one of his anesthesia group colleagues, Marc S. Andreani-Fabroni, M.D., stated that in his experience, Propofol could cause patients to think strange thoughts. (Tr. 2/24/05 at 24.) For example, a patient might awaken thinking that he had been chopping wood in the backyard. (Tr. 2/24/05 at 24.) According to Dr. Audett, the Appellant did not reply to his colleague's remarks. (Tr. 2/24/05 at 25.)

Following his interviews with the staff involved in Patient A's surgery and the Appellant, Dr. Audett met with Patient A and her family. (Tr. 2/24/05 at 28.) Dr. Audett testified that he found Patient A "fully aware," communicative and intelligent. (Tr. 2/24/05 at 29-30.) He testified that Patient A described in detail that the Appellant had started massaging her neck and shoulders, then moved his hands down to fondle her

breasts. (Tr. 2/24/05 at 31.) She told Dr. Audett that she was aware of the placement of the EKG leads and that she knew they had nothing to do with the Appellant touching her breasts. (Tr. 2/24/05 at 32.) Dr. Audett stated that Patient A seemed offended that he would suggest that she did not understand the difference between incidental touching due to placing the EKG leads and fondling her breasts. (Tr. 2/24/05 at 32.)

Dr. Audett also suggested to Patient A that the anesthesia drugs may have caused her to believe mistakenly that the Appellant had assaulted her. (Tr. 2/24/05 at 33-34.) He stated that his suggestion offended Patient A. (Tr. 2/24/05 at 34.) Finally, when Dr. Audett asked Patient A why she did not say anything when the Appellant was allegedly massaging her breast, she responded that she did not want to distract Dr. Humbyrd and adversely affect the outcome of the procedure. (Tr. 2/24/05 at 35-36.) Upon completion of his interview with Patient A, Dr. Audett concluded that her story was credible. (Tr. 2/24/05 at 37.) Administrative staff at the hospital then asked the Appellant to take an administrative leave from work at the hospital. (Tr. 2/24/05 at 37.) According to Dr. Audett, the Appellant agreed to the request. (Tr. 2/24/05 at 38.)

Testimony of Susan Kelliher, R.N.

At the time of the alleged molestation, Nurse Kelliher worked at Kent County Hospital as a recovery room nurse for Patient A's surgical procedure. (Tr. 2/24/05 at 54-55.) Nurse Kelliher first saw Patient A when she arrived in the post-anesthesia care unit ("PACU") after her surgery at approximately 11:40 AM. (Tr. 2/24/05 at 55.) She testified that when Patient A first arrived in the recovery room, Patient A was awake, but still under the effects of the spinal anesthetic. (Tr. 2/24/05 at 71.) According to Nurse Kelliher, she and other nurses evaluated Patient A's condition approximately every

fifteen minutes. At 1:30 PM, Patient A reported to Nurse Kelliher for the first time that someone at the top of the surgical table had inappropriately touched her during surgery while the surgical drape was raised and no one else could see the physical contact. (Tr. 2/24/05 at 77, 85.) Nurse Kelliher testified that she immediately notified the charge nurse about Patient A's allegation. (Tr. 2/24/05 at 77.) Both the charge nurse and Mark Patrick, M.D., the Chief of Anesthesiology at Kent County Hospital, then spoke with Patient A. (Tr. 2/24/05 at 80-81, 90.) Patient A reiterated her story to them and told them that the person who had touched her was the same person that had provided her anesthesia. (Tr. 2/24/05 at 85.) Patient A denied to Nurse Kelliher, Dr. Patrick, and the charge nurse that she had complained of neck pain or discomfort that would warrant a neck massage. (Tr. 2/24/05 at 90-91.) Patient A repeated that she did not cry out or alert anyone about the incident during the surgical procedure because she was afraid to disrupt the surgery. (Tr. 2/24/05 at 88-89.) She also stated that she felt "ashamed" and "embarrassed." (Tr. 2/24/05 at 88.) Patient A said that she believed that no one would believe her if she said anything. (Tr. 2/24/05 at 88.) According to Nurse Kelliher, Patient A was tearful, crying, and upset while recounting her story, and she developed blotches on her skin. (Tr. 2/24/05 at 92.)

Testimony of Martha Galeota, R.N.

Nurse Galeota participated in the surgical procedure to a limited extent. She worked as the circulating nurse while the primary circulating nurse, Lee-Ann Falcone, R.N., was taking a coffee break. (Tr. 2/24/05 at 110-111.) Therefore, Nurse Galeota was present during the surgery for approximately fifteen minutes. (Tr. 2/24/05 at 111.) According to Nurse Galeota, a circulating nurse keeps an accurate record of a patient and

his or her surgical procedure and assists the operating room nurse and surgeon as needed. (Tr. 2/24/05 at 109.) Nurse Galeota testified that when she came into the operating room, she received a report from the primary circulating nurse on duty. (Tr. 2/24/05 at 114.) She then began completing her paperwork on Patient A's progress and on the surgical procedure. (Tr. 2/24/05 at 114.) Nurse Galeota stated that she observed the Appellant at the head of the surgical table with Patient A. (Tr. 2/24/05 at 114.) The Appellant sat very close to Patient A and leaned over the end of the table. (Tr. 2/24/05 at 114-115.) Nurse Galeota did not observe what the Appellant was doing or hear whether he said anything to Patient A. (Tr. 3/2/05 at 82.)

However, Nurse Galeota testified that the Appellant was hovering close to the patient in an "intimate" manner. (Tr. 3/2/05 at 82.) She testified that the Appellant was leaning over the patient with his arms on the table, but the surgical screen prevented her from seeing his hands. (Tr. 3/2/05 at 82.) Nurse Galeota then went to the foot of the table to assist the surgical team. (Tr. 3/2/05 at 83.) She observed that the Appellant sat next to the head of the table while she was in the operating room. (Tr. 3/2/05 at 84.) Nurse Galeota did not hear any conversation that may have taken place between Patient A and the Appellant. (Tr. 3/2/05 at 87-88.) However, she testified that the Appellant's head was very close to Patient A as if they were conversing. (Tr. 3/2/05 at 88.)

Testimony of Mark Patrick, M.D.

Dr. Patrick is the Managing Partner of the anesthesia group working at Kent County Hospital.⁵ (Tr. 3/2/05 at 10.) On the afternoon of December 23, 2004, a nurse

⁵ Anesthesia staff members at Kent County Hospital are not hospital employees. The anesthesia staff operates as an independent group that contracts with the hospital to provide anesthesia services.

from the PACU advised him in general terms about Patient A's complaint. (Tr. 3/2/05 at 17-18.) Dr. Patrick immediately went to see her. When he arrived at the PACU, Patient A was "sobbing." (Tr. 3/2/05 at 18.) She told him that the man that sat at the head of the operating room table and gave her anesthesia had "rubbed" her breasts. (Tr. 3/2/05 at 18.) According to Dr. Patrick, Patient A stated that she had tried to "put it out of [her] mind." (Tr. 3/2/05 at 18.) Failing that, she decided to speak to someone about the incident. She said the man kept asking her if she had a boyfriend. (Tr. 3/2/05 at 18.) He also told her that he could not control himself and asked her not to tell anyone. (Tr. 3/2/05 at 18.) Patient A told Dr. Patrick that she was afraid to tell anyone during the incident for fear that the surgeon would injure her knee. (Tr. 3/2/05 at 20.) Dr. Patrick testified that while he was talking to Patient A, the Appellant entered the PACU with another patient. (Tr. 3/2/05 at 20.) As soon as the Appellant started speaking, Patient A said to Dr. Patrick, "That's him, that's the voice. I'll never forget it." (Tr. 3/2/05 at 20.)

With regard to the drug regimen given to Patient A, Dr. Patrick stated that he examined her record, which provided the basis for his testimony. (Tr. 3/2/05 at 20.) He noted that she received a spinal anesthetic — a localized anesthetic — rather than general anesthesia. (Tr. 3/2/05 at 27-28.) While waiting in the holding area prior to her surgery, Patient A received a 2mg dose of Versed. (Tr. 3/2/05 at 35.) Once in the surgical suite, the Appellant administered a spinal with 1% Tetracaine, which would render Patient A numb and unable to move below her waist. During the operation, Patient A received three more doses of 2mg of Versed, which the Appellant injected at three distinct times during the operation. (Tr. 3/2/05 at 65.) Dr. Patrick explained that Versed is an anti-anxiety medication that reduces stress and induces amnesia. (Tr. 3/2/05 at 66.) Patient A also

received two doses of 50mg of Propofol, the first at 9:15AM and the second at 9:50AM. (Tr. 3/2/05 at 67.)

Dr. Patrick also testified about the placement of the EKG leads and electrodes on Patient A's body. Though Patient A's record did not indicate the number of leads, Dr. Patrick stated that five would be a typical number, but could vary depending on the doctor's medical judgment. (Tr. 3/2/05 at 38, 71.) Dr. Patrick testified that an anesthesia provider would place leads near a patient's breasts, but never on them. (Tr. 3/2/05 at 40.)

Testimony of Danny E. Humbyrd, M.D.

Dr. Humbyrd operated on Patient A's knee. (Tr. 4/8/05 at 11.) He testified generally about what transpired during the surgery, including the configuration of equipment in the operating room. (Tr. 4/8/05 at 13-20.) However, Dr. Humbyrd could not offer any evidence that supported or disputed Patient A's allegations of unwarranted touching because he was on the opposite side of the surgical drape and could not see the patient's upper body. However, Dr. Humbyrd did state that he could hear some limited conversation between the Appellant and Patient A, including some questioning regarding whether Patient A was feeling stiffness in her neck. (Tr. 4/8/05 at 25.) He recalled that Patient A responded affirmatively. (Tr. 4/8/05 at 26.) Dr. Humbyrd further testified that he thought that the Appellant's conversation was too friendly and that the questions he posed to Patient A would be more appropriate coming from a person closer in age to her. (Tr. 4/8/05 at 26-27.) Dr. Humbyrd stated that he did not pay particular attention to the details of the conversation, but he felt that the Appellant may have been trying to allay any fears that Patient A had about undergoing surgery. (Tr. 4/8/05 at 26.)

