COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
1 Congress Street, 11th Floor
Boston, MA 02114
www.mass.gov/dala

Board of Registration in Medicine,
Petitioner

v. Docket No. RM-13-223

John E. Fattore, M.D.,
Respondent

Appearance for Petitioner:

Tracy Morong, Esq.
Stephen C. Hoctor, Esq.
Complaint Counsel
Board of Registration in Medicine
200 Harvard Mill Square
Suite 330
Wakefield, MA 01880

Appearance for Respondent:

Douglas A. Morgan, Esq.
Rindler Morgan
133 Portland Street
Suite 500
Boston, MA 02114-1728

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF RECOMMENDED DECISION

Board of Registration in Medicine did not prove by a preponderance of evidence that the respondent touched Patient A's breasts or viewed her buttocks, and discipline is not recommended on that basis. However, discipline is recommended for Dr. Fattore's conduct undermining the public confidence in the integrity of the medical profession for ending up in the recovery bay of a woman who was not his patient, for no medical purpose, when his interest in her was well beyond casual, friendly, and social.

RECOMMENDED DECISION

The petitioner, Board of Registration in Medicine (Board), ordered the respondent, Dr. John Fattore, on April 10, 2013 to show cause why it should not discipline him. On May 1, 2013, Dr. Fattore timely appealed.

I held a hearing on September 16 and 17, 2013, which I recorded digitally.

The Board's witnesses were Patient A and the following nurses at Norwood Hospital: Theresa Seeley, Ruth Bailey, Barbara N. Glavin, and Jean Pulcini. Dr. Fattore testified, and called two witnesses, Cynthia Jaquith, his office manager; and Kathleen Bergman, a nurse at Norwood Hospital.

I accepted into evidence 13 exhibits, A through M. Both parties submitted post-hearing briefs.

Findings of Fact

Norwood Hospital

1. Norwood Hospital (which this recommended decision sometimes refers to as "the hospital"), in Norwood, Massachusetts, comprises at least two buildings, the Lorusso Building and the Draper Building. (Fattore testimony, Tr. II-212, 213).

Dr. Fattore

2. Dr. Fattore is a plastic surgeon. (Fattore testimony, Tr. II-205.) His practice includes removing skin cancer and moles; taking care of trauma, mainly lacerations; operating on hands, including digital amputation, surgery for carpal tunnel syndrome, and repairing nerves and lacerated tendons; and performing reconstructive surgery, minor burn surgery, and breast augmentation. (Fattore testimony, Tr. II-208-09.)

3. Dr. Fattore is affiliated with Norwood Hospital. (Fattore testimony, Tr. II-20.)

4. Dr. Fattore's medical office is in the Guild Medical Building, which is across Washington Street from the hospital. (Fattore testimony, Tr. II-207-08.)

Patient A

5. Patient A was 46 on the relevant date of July 6, 2012. (Ex. A, p. 13.) She is a dance instructor who owns her own business. (Patient A testimony, Tr. I-86.)

6. She reported to Norwood Hospital on July 6, 2012 at 8:00 a.m. for a colonoscopy. (Patient A testimony, Tr. I-86, 87, Ex. A.)

7. Patient A's doctor was Dr. Joseph Perrotto. (Ex. A.)

8. Patient A has never been a patient of Dr. Fattore. (Patient A testimony, Tr. I-87.)

9. After July 6, 2012, Patient A realized that when her son, who was 19 years old at the time of the hearing, had been approximately 6 years old and needed stitches, Dr. Fattore had stitched him at Norwood Hospital. Other than that interaction, Patient A had not interacted with Dr. Fattore before July 6, 2012. (Patient A testimony, Tr. I-87.)

Morning of July 6, 2012

10. In the morning of July 6, 2012, Dr. Fattore went to his office and then the hospital to discharge a patient. (Jaquith and Fattore testimony; Tr. II-196, 212.)

11. Dr. Fattore and Patient A saw each other in the Draper Building lobby near the elevators. (Patient A and Fattore testimony, Tr. I-88, 105, Tr. II-214-15, Ex. C.)

12. After Patient A took the elevator to the endoscopy unit, one floor above the lobby, she and Dr. Fattore conversed in the waiting area of the unit. (Patient A, Fattore, and Bergman testimony, Tr. I-89-90, Tr. II-219-21, 263, Ex. C.)

Patient A's procedure and chronology

12. The conversation between Patient A and Dr. Fattore ended when the check-in nurse, Ms. Bergman, called Patient A into the admitting room. (Patient A, Fattore, and Bergman testimony, Tr. I-90, Tr. II-223, 263, Ex. C.)

13. The conversation did not look uncomfortable to the nurse. (Bergman testimony, Tr. II-263.)

14. The conversation ended between 8:30 and 8:40 a.m. (Bergman testimony, Tr. II-274, Ex. A, p. 9.)[1]

15. In the admitting room, Patient A changed into a johnny. (Patient A testimony, Tr. I-91.)

16. In the admitting room, four patches with leads to medical monitors were placed on Patient A, two above and two below her breasts. (Seeley testimony, Tr. I-42-43.)

17. Before patients are moved from one location to another, such as from the admitting room to the procedure room to the recovery room, the leads are detached from the monitors. After they are moved, the leads to the monitors in the new location are attached to the patient's patches. (Seeley testimony, Tr. I-43.)

18. To attach the patches, and to attach and detach monitors, a nurse reaches down the neckline of a patient's johnny. With a female patient, such as Patient A, such attaching and detaching entails a nurse's reaching past the patient's breasts. (Seeley and Bailey testimony, Tr. I-42-44, 74.)

19. Patient A entered the procedure room at 9:30 a.m. (Ex. A, p.11.)

---

[1] Dr. Fattore agrees that he conversed with Patient A in the waiting area (Fattore testimony, Tr. II-219-21), but insists that he was in his office between 8:00 and 11:00 a.m. (Fattore testimony, Tr. II-227).

20. Shortly after entering the procedure room, Patient A first received Versed, Fentanyl, and Benadryl. (Ex. A, pp. 11 (9:53 a.m.), 17 (9:37 a.m.)

21. Versed is a sedative. (Bailey testimony, Tr. I-68.)

22. Fentanyl is a narcotic, given in anticipation of a patient's pain. (Bailey testimony, Tr. I-68.)

23. Versed and Fentanyl are given so that a patient does not feel pain or remember surgery; the medications induce short-term amnesia. (Bailey testimony, Tr. I-68-69.)

24. Benadryl is given to potentiate the other medications. (Bailey testimony, Tr. I-69-70.)

25. Because of the sedation, the hospital does not let patient leave without another person to drive the patient home. (Bailey testimony, Tr. I-74.)

26. Patient A's colonoscopy began at 9:59 a.m. (Ex. A, p. 11.)

27. In the procedure room, after the colonoscopy, Patient A said, "I still have my breasts." (Bailey testimony, Tr. I-78.) Ms. Bailey was under the impression that Patient A was under the effects of anesthesia. (Bailey testimony, Tr. I-78.)

28. Patients sometimes say unusual things while under the effects of anesthesia. (Bailey testimony, Tr. I-79.)

29. Patient A was transferred from the procedure room to the recovery room at 10:25 a.m. (Ex. A, p. 11; Bailey testimony, Tr. I-60.)

30. Dr. Fattore was in the hallway as Patient A was wheeled by. Patient A said, "Hi, Dr. Fattore." (Bailey and Fattore testimony, Tr. I-63, II-233.)

31. Patient A does not remember saying hi to Dr. Fattore in the hallway. (Patient A testimony, Tr. I-115.)

Dr. Fattore's presence in the endoscopy unit

32. At approximately 9:25 a.m., Dr. Fattore appeared in the endoscopy unit again (after having spoken with Patient A in the waiting area), specifically at a nurses' station. He conversed with Ms. Glavin and Ms. Bailey, and said that he was getting to the age when he would need a colonoscopy. (Seeley, Bailey, and Glavin testimony, Tr. I-35, 59, II-148.)[2]

33. Some time after 9:25 a.m., Ms. Seeley and Dr. Fattore said hello to each other in the endoscopy unit and asked about each other's children. (Seeley and Fattore testimony, Tr. I-38, II-230.)[3]

34. Twice before 10: 25 a.m., when Patient A was transferred to the recovery room (Ex. A, p. 11; Bailey testimony, Tr. I-60)), Dr. Fattore appeared again in the endoscopy unit, specifically in the recovery room, and conversed with Ms. Pulcini. (Pulcini testimony, Tr. II-167.)

35. The first time, Dr. Fattore asked Ms. Pulcini if Patient A had arrived in the recovery room. She said no, and he said he would come back. (Pulcini testimony, Tr. II-168.) [4]

36. The second time, Ms. Pulcini asked Dr. Fattore if he wanted her to page him when Patient A arrived. He said no. (Pulcini testimony, Tr. II-168.)

---

[2] The approximate 9:25 a.m. time can be established, because this conversation happened roughly an hour or less (Bailey testimony, Tr. I-62-63) before Patient A was wheeled out of the procedure room at 10:25. (Ex. A, p. 11; Bailey testimony, Tr. I-60.) Dr. Fattore agrees that this conversation about colonoscopies occurred, but places it after 11:00 a.m. and after he had asked about Patient A in the recovery room. (Fattore testimony, Tr. II-231-33.)

[3] Dr. Fattore agrees that this conversation with Ms. Seeley occurred, but places it after 11:00 a.m. (Fattore testimony, Tr. II-232-33.)

[4] Dr. Fattore agrees that he went to the recovery room to ask about Patient A, and learned that she had not arrived there yet, but places the conversation after 11:00 a.m. (Fattore testimony, Tr. II-230, 232-33.)

37. Dr. Fattore was in the hallway as Patient A was transferred from the procedure room to the recovery room. (Fattore testimony, Tr. II-233.)[5]

38. Nurses saw Dr. Fattore in the endoscopy unit throughout the morning. Ms. Seeley, Ms. Pulcini, and Ms. Bergman each saw him three times. (Seeley, Pulcini and Bergman testimony, Tr. I-35-39, 49, 167, Tr. II-263, 272, 275.)

39. Ms. Seeley had not seen Dr. Fattore in the endoscopy unit before July 6, 2012, and has not seen him since then. (Seeley testimony, Tr. I-34-35.)

40. Ms. Glavin had not seen Dr. Fattore in the endoscopy unit before July 6, 2012, and has not seen him since then. (Glavin testimony, Tr. II-148-49.)

41. Ms. Pulcini had not seen Dr. Fattore in the endoscopy unit before July 6, 2012, and has not seen him since then. (Pulcini testimony, Tr. II-172.)

The Recovery Room

42. Curtains in the recovery room, which surround patient bays and run on tracks in the ceiling, are routinely kept two-thirds closed. (Pulcini testimony, Tr. II-179-81, Exs. H-J.)

43. When the curtains are closed, nurses outside the curtains can hear the medical monitors, patients who call out to them, and muffled tones of any conversations inside. (Pulcini testimony, Tr. II-177.)

44. When Patient A was in the recovery room, Dr. Fattore entered it and closed the curtain. (Pulcini testimony, Tr. II-170.)

45. Patient A was awake and alert. (Patient A and Fattore testimony, Tr. I-118, II-246.)

46. Ms. Pulcini could hear a muffled conversation between Dr. Fattore and Patient A. (Pulcini testimony, Tr. II-182.)

---

[5] Dr. Fattore agrees that he was in the hallway as Patient was wheeled by, but places the time after 11:00 a.m. (Fattore testimony, Tr. II-230, 233.)

47. About five minutes after Dr. Fattore entered the recovery room with Patient A, Ms. Pulcini needed to check Patient A's vital signs. (Pulcini testimony, Tr. II-171, 183.)

48. Ms. Pulcini announced: Doctor, I need to come in and check my patient. (Pulcini testimony, Tr. II-171.)

49. Dr. Fattore or Ms. Pulcini opened the curtain. (Pulcini testimony, Tr. II-171, 183.)

50. The curtain was opened within seconds of Ms. Pulcini's announcement that she needed to enter the recovery bay. (Pulcini testimony, Tr. II-183.)

51. Patient A was lying on her right side, facing Dr. Fattore. (Pulcini testimony, Tr. II-171.)

52. Patient A was covered by a sheet and blanket pulled above her breasts. (Pulcini testimony, Tr. II-181-82, 184.)

53. Ms. Pulcini's impression was that Patient A and Dr. Fattore were just talking. Nothing gave her a reason to be concerned. (Pulcini testimony, Tr. II-184.)

54. Dr. Fattore said goodbye and left. (Pulcini testimony, Tr. II-184-85.)

Dr. Fattore's interest in Patient A

55. Dr. Fattore's interest in Patient A was well beyond casual, friendly, and social.

56. Dr. Fattore's visit to Patient A in the recovery room had no medical purpose.

57. Dr. Fattore had no medical reason and no other innocent reason to close the curtain in the recovery room.

Patient A's reporting

58. When a nurse, whose last name is Mammone, called from Norwood Hospital on July 9, 2012, Patient A did not report her allegations about Dr. Fattore. (Patient A testimony, Tr. I-99.)

59. Patient A reported her allegation about Dr. Fattore to Steven Bander, a lawyer, on July 16, 2012. (Patient A testimony, Tr. I-96.)[6]

60. Mr. Bander advised Patient A to report her allegation to Dr. Perrotto. In response to Mr. Bander's advice, Patient A spoke to Dr. Perrotto on July 16, 2012, and Pam Bourqe, an official at Norwood Hospital, on July 17, 2012. (Patient A testimony, Tr. 99-100, Ex. C, p. 1.)

61. Patient A reported her allegation to the Board on September 26, 2012. (Ex. D.) Mr. Bander helped her fill out the report form after consulting with her. (Patient A testimony, Tr. I-97-98.)

62. Patient A reported her allegation to the Norwood Police Department on October 11, 2012. (Patient A testimony, Tr. I-104.)

Patient A's financial condition

63. Patient A filed for bankruptcy on July 20, 2012. (Patient A testimony, Tr. I-123, 124; Exs. K, L.)

64. Patient A, who was divorced, had long-standing child support problems with her former husband, which entailed going to the Probate and Family Court 13 times in the previous three-and-one-half years. (Patient A testimony, Tr. I-124-26.)

65. On July 9, 2012, Patient A's lawyer wrote to the Bristol County Probate and Family Court to advance her "ongoing" complaint for contempt of court against her former husband from April 2013, which was the next scheduled court date, to "the earliest possible date." (Ex. M.)

66. In the admitting room, where Ms. Bergman reviewed pre-procedure questions with her, Patient A was very friendly. She told Ms. Bergman that she was a dance teacher or had a

[6] I do not imply that this was the first time she reported her allegations to anyone. See Discussion, below.

dance studio, she was divorced, her husband had left her for a younger woman, and the next time around, she would be looking for sugar daddy. (Bergman testimony, Tr. II-267.)

67. In the procedure room, Patient A told Dr. Perrotto that she had several kids, and that she was looking for a sugar daddy, someone to pay her way in life. (Ex. C.)

68. On August 8, 2012, Mr. Bander, on behalf of Patient A, sent a claim letter to Dr. Fattore for her personal injuries. (Patient A testimony, Tr. I-100-01.) Patient A has not filed a civil complaint against Dr. Fattore. (Patient A testimony, Tr. I-98.)

Discussion

Before I discuss why I find neither Patient A nor Dr. Fattore credible, I discuss the bases of my credibility findings..

Patient A's account of what happened in the lobby and waiting area

Patient A testified as follows: After she entered Norwood Hospital, she stood by the lobby elevator and noticed a man wearing scrubs in the distance. She thought it might have been a Dr. Nannery, who had provided her with good medical care on April 24, 2012. After a brief look at the man in scrubs, she realized that it was not Dr. Nannery, and she pushed the up button to the elevator. On the endoscopy floor, she said goodbye to her daughter's friend, Sarah Colletti, who had driven her, and checked in at the receptionist area. (Patient A testimony, Tr. I-88.)

(On cross-examination, Patient A related a slightly different account: She had noticed a man in scrubs staring at her and wondering if it were Dr. Nannery. (Patient A testimony, Tr. I-104,.113.))

After checking in for her colonoscopy, she turned in the waiting area, and Dr. Fattore was right there. She was caught by surprise, and told Dr. Fattore that she did not know him. He said that he wanted to make sure that she knew where she needed to go. She thanked him, told him

that she was having a colonoscopy at 9:00, and said that she was set. She had not conversed with Dr. Fattore in the lobby or in the elevator. (Patient A testimony, Tr. I-88.)

Dr. Fattore introduced himself by name and as a boob doctor. He told Patient A that she was in great shape and asked what she did. She told him. He asked about her children. She said that she had six; he said that he had two. Dr. Fattore asked Patient A if she had been to Las Vegas. She answered that she had never been there, it was not her lifestyle to go there, she was not a partyer, she had never consumed alcohol, and she instead took care of her children. (Patient A testimony, Tr. I-89-90,109.)

Dr. Fattore told Patient A that he had gone to Las Vegas with his brother, discussed how women dressed there, and discussed a communal bath. He asked her about dating; she said that her last dating experience had not been good and that she was not dating. He asked if she liked women, as he touched her arm, and she said no. (Patient A testimony, Tr. I-90.)

Not only did Patient A's testimony about what happened in the lobby and in the waiting area differ from Dr. Fattore's testimony, whose testimony I discuss below, one, her direct-examination testimony differed slightly from her cross-examination testimony, and, two, her direct-examination testimony differed slightly from what she told the Board in her complaint (Ex. D) and apparently told a hospital official, Pam Bourque, on July 17, 2012 (Ex. C). Patient A told the Board that Dr. Fattore had been staring at her from about 15 feet away. (Ex. D.)

Patient A apparently told Ms. Bourque that while waiting for the elevator in the lobby, she noticed a doctor behind her left shoulder. She saw him looking at her, thought that she may have known him, because she knows a lot of doctors in Canton, and realized that she did not know him. (The reference to Canton went unexplained in the hearing.) It is unclear if Ms. Bourque entered her interview notes directly into the investigative report, or conveyed Patient

A's statement to a hospital investigator, Marissa Lydick-Kasolw, who compiled a report. (Ex. C, pp. 1-2.) Because Ms. Bourque did not testify, this statement is *potentially* hearsay. I find that Patient A did make a statement to Ms. Bourque along those lines and that it is inconsistent with her direct-examination testimony.

I am allowed to consider hearsay. *See* G.L. c. 30A, § 11(2), 108 CMR 102(10)(f) (referring to "reliable evidence"). Nonetheless, Patient A's statement to Ms. Bourque is not hearsay, because I do not accept Patient A's account of first spotting Dr. Fattore in the lobby to be the truth of the matter. *E.g.*, *Commonwealth v. Keizer*, 377 Mass. 264, 269 n. 4 (1979). I do not find the truth on this point, as I implicitly acknowledge by omitting it from my findings of fact.

Dr. Fattore's account of what happened in the lobby and waiting area

Dr. Fattore testified as follows: He was talking with a colleague, Dr. Mark Friedberg, when he saw a woman, who turned out to be Patient A, who appeared lost. She was with a younger woman, who appeared to be 16 or 18. He asked if she were looking for some place. She said endoscopy. He gave her directions and continued his conversation, finished his conversation, went up the elevator, went to discharge a patient, and saw Patient A standing near registration desk. She said with a smile that she had made it. She asked who he was, and he said: Dr. John Fattore, a plastic surgeon at the hospital. (Fattore testimony, Tr. II-214-17).

She asked if he did breast augmentation surgery. He said yes. She asked how much it would cost. He answered: $6,000 to $7,000. She said she would like to have it performed some day, but she had six children, she was a single mother, her husband had left her, her finances were tight, and she could not afford $6,000 to $7,000. (Fattore testimony, Tr. II-219-20.)

They continued conversing. She said she ran a dance studio. He mentioned that his daughter had taken dance lessons. They conversed about Dr. Nannery, their respective children, and then their summer plans. He told her that his son was going to go to a summer camp for three weeks, his daughter was taking a two-week course, his family was going to Nantucket for vacations during the summer, and it was going to Nantucket later that day for a friend's birthday. He told her that he and wife had a twenty-fifth anniversary coming up, and wanted to take a trip to celebrate it. (Fattore testimony, Tr. II-220-221.)

He told Patient A that he had gone to Las Vegas with his brother and sister. While there, he had not actually gone to communal baths. (Fattore testimony, Tr. II-221-222.) He did not discuss with Patient A scantily clad women, going to communal baths, or being up early in the morning in Las Vegas. (Fattore testimony, Tr. II-224.) He did not do the following: refer to himself as a boob doctor, ask if she were dating, ask if she were attracted to other women, or touch her on the arm or elsewhere during this conversation. (Fattore testimony, Tr. II-223-24.)

The conversation ended when the check-in nurse called Patient A. Patient A and Dr. Fattore said goodbye and that it had been nice to meet each other. Patient A said: If you are around later, stop in and check in on me. (Fattore testimony, Tr. II-223.)

(Ms. Colletti, who accompanied Patient A to the hospital, and Dr. Friedberg, with whom Dr. Fattore said he was conversing in the lobby, were not called as witnesses, and could not help corroborate what happened in the lobby. I am not implying that Ms. Colletti or Dr. Friedberg should have been called as witnesses. Their testimony would have been collateral, and the parties probably could not foresee that I would focus on what happened in the lobby by the elevators to try to determine what happened in the recovery room.)

Patient A being called into the procedure room

Dr. Fattore and Patient A both testified that their conversation ended when the check-in nurse called Patient A into the procedure. (Patient A, Fattore testimony, Tr. I-90, Tr. II-223.) So did the check-in nurse, Ms. Bergman. (Bergman testimony, Tr. II-263.)

Patient A further testified that she saw Kate, a nurse whom she knew from her visit to the hospital on April 24, 2012, turn the corner. She said: Hi, Kate, did you get my thank-you cookies and note? Kate answered yes, and told Patient A that it was time to come in. (Patient A testimony, Tr. I-90.) [7]

The problems with Patient A's testimony on this point are that Kathleen Bergman, who goes by "Kate," did not know Patient A before that date, she had not received cookies or a card from Patient A, and Patient A did not say this. No one else in the endoscopy unit goes by "Kate." (Bergman testimony, Tr. II-264-65.)

Dr. Fattore did not testify about Patient A's supposed comments to Kate. Although he was not asked specifically about them, the absence of his testimony on this point is minor corroboration that Patient A did not make these comments.

Whether Patient A was uncomfortable with Dr. Fattore's conversation

Patient A testified that she was uncomfortable with Dr. Fattore introducing himself as a boob doctor, describing Las Vegas, and asking if she liked women, but she did not move away, or complain to anyone, including security. (Patient A testimony, Tr. I-108, 109, 111.) Although Dr. Fattore supposedly told Patient A that she was in great shape, asked if she were dating, and touched her arm, those things did not make her walk away from him. (Patient A testimony, Tr. I-110.) When the check-in nurse ended the conversation, one, Patient A did not complain to her,

[7] Patient A testified to April 24 (Tr. I-88) and August 24. (Tr. I-90.) I assume that she meant to testify both times to April 24, 2012.

and, two, Patient A did not look uncomfortable to the nurse. (Patient A and Bergman testimony, Tr. I-111, Tr. II-263.) Patient A did not report that the conversation was uncomfortable to any other nurse or to Dr. Perrotto. (Patient A testimony, Tr. I-112.)

Patient A saying that she was looking for a sugar daddy

While Ms. Bergman reviewed pre-procedure questions with Patient A, the patient was very friendly. She told Ms. Bergman that she was a dance teacher or had a dance studio, she was divorced, her husband had left her for a younger woman, and the next time around, she would be looking for sugar daddy. (Bergman testimony, Tr. II-267.)

During the one time that Dr. Perrotto saw Patient A, which was in the procedure room (Patient A testimony, Tr. I-112), she told him that she had several kids, and that she was looking for someone to pay her way in life, a sugar daddy. (Ex. C.) Neither Dr. Perrotto nor the investigator to whom he conveyed this comment (Ex. C) testified. Nonetheless, I find this account credible, especially because it parallels Ms. Bergman's live testimony.

Patient A denied saying anything about a sugar daddy to Ms. Bergman. (Patient A testimony, Tr. I-112.) She said that *Dr. Perrotto* had said that Patient A needed to find a sugar daddy. (Patient A testimony, Tr. I-112.)

Evidence on this point affects Patient A's credibility in a few ways. One, Patient A told Ms. Bergman that she was looking for a sugar daddy (Bergman testimony, Tr. II-267), but denied doing so. (Patient A testimony, Tr. I-112.) Two, Patient A told Dr. Perrotto that she was looking for a sugar daddy (Ex. C), but attributed the comment to Dr. Perrotto. (Patient A testimony, Tr. I-112.) Three, I take the references to a sugar daddy to mean a wealthy man who could support her, and therefore an indication of a financial incentive to testify untruthfully against Dr. Fattore.

Whether the recovery bay's curtain was open or closed

Although Ms. Bergman testified that the curtain to Patient A's recovery bay was open (Bergman testimony, Tr: II-272), Ms. Pulcini's testimony that the curtain was closed was more extensive and detailed. (Pulcini testimony, Tr. II-170, 171, 183.) Dr. Fattore's answer to the hospital investigator about the curtain – that it was a "non-issue" (Ex. C, p. 4) – I take as slight confirmation that the curtain was closed.

Patient A's account of what happened in the recovery room

Patient A testified as follows: She was lying in her bed, in one bay, with the curtain closed. She opened her eyes and Dr. Fattore was standing over her and looking down at her. He said: Let me see. Patient A was confused and wondered whether Dr. Fattore was filling in for Dr. Perrotto. As Dr. Fattore said, Let me see, he lifted her johnny, put his hands on her breasts, and twisted her nipples. (Patient A testimony, Tr. I-91.)

Patient A was confused and in shock. Dr. Fattore told her to roll over. Again, she wondered if Dr. Fattore was filling in for Dr. Perrotto, and whether Dr. Fattore needed to see her buttocks as part of the post-colonoscopy procedure. (Patient A testimony, Tr. I-91.)

She heard a nurse outside the curtain saying that she needed to check the IV. Then Dr. Fattore walked out. (Patient A testimony, Tr. I-93.)

Dr. Fattore's account of what happened before and in the recovery room

Dr. Fattore testified as follows: He saw patients in his office between 8:00 and 11:00 a.m. and was not in the endoscopy unit during that time. After finishing seeing his patients, he left his office and went to the doctors' lounge in the hospital to change into new scrubs. He remembered that Patient A had asked him to check in on her and he decided that it would be a nice thing to do.

At the endoscopy unit, he asked a nurse if Patient A were done. She said no. So he went to the nurses' station and discussed his potential colonoscopy with a nurse. He saw Patient A wheeled on a stretcher in the hallway. She said: Hi, Dr. Fattore.

The nurses transporting Patient A asked Dr. Fattore if he wanted to talk to her. He said: No, check her into recovery and I'll say hi to her.

He went to the recovery room, said hi, and stood on the right side of stretcher. She said hi, he asked how it went, and she said that she was relieved that it was over, that it wasn't that bad. She said that she had some abdominal cramps and some rib pain. He said he was going to have a colonoscopy some day.

He did not touch her breasts and nipples. He did not ask her to roll over and expose her buttocks. (Fattore testimony, Tr. II- 227-37.)

Reporting

Patient testified that at some point after July 6, 2013, Patient A's daughter asked her what was wrong, because Patient A was upset and had not been sleeping. Patient A told her daughter her allegation about Dr. Fattore. (Patient A testimony, Tr. I-95.)

Patient A further testified that at some point (which may have been the same day that Patient A talked with her daughter), Patient A told her friend Wendy about her allegations against Dr. Fattore, who referred her to Mr. Bander. (Patient A testimony,Tr. I-95.)

In her statement to the Board, Patient A did not mention reporting to her daughter or friend. She stated that about a week after July 6, 2013, she reported the allegation to her primary care physician. (Ex. D.) She did not testify about this report.

Dr. Fattore's credibility

Dr. Fattore was not credible. He damaged his credibility in three ways. He insisted that he was not on the endoscopy unit between 8:00 and 11:00 a.m. on July 6, 2012 (Fattore testimony, Tr. II-227), despite the consistent testimony of impartial witnesses, namely nurses at the hospital, who were corroborated by medical records, that he was there at least until 8:30 a.m. and that he returned throughout the morning.

Dr. Fattore further damaged his credibility by having his officer manager testify that he was in his office seeing patients between 8:00 and 11:00 a.m. – when she herself left at 10:00 a.m. (Jaquith testimony, Tr. II-199-200.)

Dr. Fattore was eager to cover his tracks and fudge time, and people generally do not do that for innocent behavior. *See Commonwealth v. Ortiz*, 466 Mass. 475, 488 (2013)(criminal defendant's denial of having been at a certain location could indicate consciousness of guilt).

Finally, Dr. Fattore closed the curtain to Patient A's bay. There was no reason to do so if his intent was to have a friendly, social, non-medical, and non-confidential conversation. To the contrary, if he intended to have a friendly, social, non-medical, and non-confidential conversation with a recumbent patient, who was not *his* patient and wearing a johnny, the appropriate decision would have been to keep the curtain partially open.

However, Dr. Fattore's lack of credibility does not by itself prove by a preponderance of the evidence Patient A's and the Board's allegations against him.

Patient A and medication

Medication affected Patient A's ability to perceive and her memory – for part of the morning of July 6, 2012. In the procedure room, after the colonoscopy – which had nothing to do with her breasts – Patient A said, "I still have my breasts." (Bailey testimony, Tr. I-78.) And

although Patient A said, "Hi, Dr. Fattore" as she was wheeled past him in the hallway (Bailey and Fattore testimony; Tr. I-63, II-233), she does not remember saying it. (Patient A testimony, Tr. I-115.)

In his closing statement, Dr. Fattore's lawyer offered what he conceded were alternative explanations for Patient A's allegations about Dr. Fattore in the recovery room; one explanation was that she was under the effects of anesthesia. (Tr. II-288.) Although I do not find as fact Patient A's allegations against Dr. Fattore in the recovery room, one reason is *not* because she received medication that morning. Both Patient A and Dr. Fattore reported that she was alert and awake *in the recovery room*. (Patient A and Fattore testimony, Tr. I-118, II-246.)

A theme of Dr. Fattore's cross-examination of nurses was that throughout the morning of July 6, 2012, nurses were reaching down Patient A's johnny and past her breasts, attaching patches, and attaching and detaching monitors. (Seeley and Bailey testimony, Tr. I-42-44, 74.) However, there was no evidence about whether Versed and Fentanyl could change the perception and memory of a patient so that she could misperceive and/or misremember nurses reaching past her breasts as, once the medications had worn off, a person touching her breasts or twisting her nipples. There was no evidence about whether Versed and Fentanyl could so distort a patient's ability to perceive and remember as to account for Patient A's allegations against Dr. Fattore.

Patient A's credibility

Three factors leave Patient A's credibility open to doubt, without necessarily making her not credible: her financial condition and her wish for a sugar daddy, her retention of a personal injury lawyer, and her delay in reporting her allegations against Dr. Fattore.

Nonetheless, a person with financial problems can be victimized sexually. And a sexual victim can delay reporting her legitimate victimization. As the Supreme Judicial Court said in *Herridge v. Board of Registration in Medicine*, 420 Mass. 154, 161 n. 6 (1995):

> The patient's three-year delay in reporting the alleged misconduct does not, in our view, bear on her credibility to any great degree. See *Palmer v. Board of Registration in Medicine*, [415 Mass. 121, 123 (1993)] (rejecting challenge to credibility based, in part, on ten-year delay in reporting physician's sexual misconduct).

Id. at 161 n.6.

There was no evidence about why Patient A delayed reporting her allegations against Dr. Fattore. There was no evidence about why Patient A contacted a personal injury lawyer before contacting Dr. Perrotto, the hospital, the police, or the Board. In the absence of such evidence, I can only note that Patient A certainly had a right to contact a personal injury lawyer, especially if she had been sexually victimized, and I can only speculate that contacting a lawyer is, for some lay people, the best first response after a discussion with a relative and friend.

Nonetheless, Patient A was not credible for three major and two minor reasons. She testified about a conversation with Ms. Bergman that, one, did not happen; two, referred to her sending a note and cookies to Ms. Bergman, which did not happen; and three, presupposed having met Ms. Bergman before, which did not happen.

Patient A denied having a conversation with Ms. Bergman about a sugar daddy, which did happen; denied having a conversation with Dr. Perrotto about a sugar daddy, which did happen; and attributed the sugar daddy comment to Dr. Perrotto.

Patient A testified that her conversation with Dr. Fattore in the waiting area made her uncomfortable, but she did not end it. In fact, it went long enough for Dr. Fattore, by Patient A's testimony, to cover several topics. In addition, Patient A improbably told the following things to

a person who made her uncomfortable: She had six children; had never been to Las Vegas; was not a partyer; had never consumed alcohol; her last dating experience had not been good; she was not dating; and she did not like dating women. (Patient A testimony, Tr. I-89-90.) Furthermore, the conversation did not look uncomfortable to the nurse who ended it. (Bergman testimony, Tr. II-263.)

As for the minor reasons that Patient A was not credible, one, her accounts of what happened in the lobby were inconsistent.

Two, after Ms. Pulcini announced that she needed to check Patient A's vital signs, there was no delay in opening the curtain to the recovery room. Ms. Pulcini observed Patient A and Dr. Fattore conversing; nothing about the scene caused her concern. If Patient A's allegations against Dr. Fattore were accurate, then after touching her breasts and viewing her buttocks, she turned to face him again and had her breasts covered again with a sheet and blanket. It is possible that Dr. Fattore touched her breasts and viewed her buttocks, Patient A turned to face him again, and her breasts were covered. If so, Ms. Pulcini's testimony does not support or undermine Patient A's account. But Ms. Pulcini's testimony does slightly support Dr. Fattore's account.

Conclusion and Order

"[N]either party was credible...." *Siebert v. Dermigny*, 875 N.Y.S.2d 68, 69 (N.Y.A.D. 1 Dept. 2009). "[B]oth parties had credibility problems." *Higgins v. Loveland*, 2004 WL 1753137, 2 (Mich. Ct. App. 2004). "[T]the testimony was so equivocal and contradictory that it falls well short of clearly preponderating in either direction." *Id.*

However, the Board of Registration in Medicine has the burden of proving by a preponderance of the evidence that Dr. Fattore touched Patient A's breasts and viewed her buttocks in the recovery room. *See Fisch v. Board of Registration in Medicine*, 437 Mass. 128,

131 (2002). (The Board's final decision, in turn, is reviewable under the substantial evidence standard. G. L. c. 30A, § 1(6); *Duggan v. Board of Registration in Nursing*, 456 Mass. 666, 674 (2010).)

The Board has not met its burden. That Dr. Fattore, a non-credible witness, has denied doing what Patient A, another non-credible witness, contends he did is not affirmative evidence, let alone a preponderance of the evidence, of his acts in the recovery room.

Based on the foregoing, I recommend that the Board *not* find that Dr. Fattore:

• engaged in gross misconduct in the practice of medicine, practiced medicine fraudulently, beyond its authorized scope, or with gross incompetence or gross negligence, or repeated negligence (Statement of Allegations, Legal Basis A; G.L. c. 112, § 5, 243 CMR 1.03(5)(a) 3;);

• practiced medicine deceitfully or engaged in conduct that has the capacity to deceive or defraud (Legal Basis B; 243 CMR 1.03(5)(a) 10); or

• engaged in misconduct in the practice of medicine. (Legal Basis C; 243 CMR 1.03(5)(a) 18).

I recommend that the Board not discipline Dr. Fattore for allegedly touching Patient A's breasts and viewing her buttocks in the recovery room.

However, I do recommend that the Board find Dr. Fattore engaged in conduct that undermines the public confidence in the integrity of the medical profession. (Legal Basis D; *Levy v. Board of Registration in Medicine*, 378 Mass. 519 (1978); *Raymond v. Board of Registration in Medicine*, 387 Mass. 708 (1982).) I recommend that the Board discipline Dr. Fattore for using his scrubs, hospital identification, familiarity with the hospital, and familiarity with the nurses to

end up in Patient A's recovery bay, with the curtain closed, for no medical purpose when his interest in her was keen and well beyond casual, friendly, and social.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Kenneth Bresler
Administrative Magistrate

Dated: DEC 11 2013