

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Board of Registration in Medicine,
Petitioner

v.

Docket No. RM-16-483

Dated: September 1, 2017

Arthur Pomerantz, M.D.,
Respondent

Appearance for Petitioner:

Gloria Brooks, Esquire
Complaint Counsel
Board of Registration in Medicine
200 Harvard Mill Square, Suite 330
Wakefield, MA 01880

Appearance for Respondent:

Curtis L.S. Carpenter, Esquire
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210

Administrative Magistrate:

Judithann Burke

CASE SUMMARY

The Respondent, who engaged in conduct which undermines the integrity of the medical profession and misconduct during an emergency surgical procedure on September 6, 2013, is subject to discipline by the Board of Registration in Medicine.

RECOMMENDED DECISION

Pursuant to G. L. c. 112 s. 5 and 61-62 and 243 CMR 1.03(5)(a)(3), the Petitioner, Board of Registration in Medicine (Board) issued on October 20, 2016 an order to show cause why the Respondent, Dr. Arthur Pomerantz, should not be disciplined. Specifically, the Board charged in its Statement of Allegations:

1. The Respondent was born in 1952. He has been licensed to practice medicine in Massachusetts under registration number 48644 since 1981 and specializes in surgery. He is certified by the American Board of Surgery. His Massachusetts license has been lapsed since March 30, 2015. The Respondent has a delinquent medical license in Florida.
2. On September 7, 2013, the Respondent was working as a locum tenens physician at Harrington Memorial Hospital.
3. On the evening of September 7, 2013, a 16-year-old male, Patient A, presented to the emergency room and was admitted with a diagnosis of appendicitis. The Respondent determined that Patient A needed emergency surgery.
4. The Respondent contacted the nursing supervisor to call the operating room team and the anesthesiologist. The Nursing Supervisor advised the Respondent that the surgeon was responsible for contacting the anesthesiologist per Harrington's process. The Respondent demanded that the Nursing Supervisor contact the anesthesiologist. The Nursing Supervisor also reported that while the Respondent was in the operating room trying to arrange the emergency surgery, he was throwing surgical tools and instruments around.
5. Prior to the beginning of the surgery, the Respondent did not properly perform the surgical scrub to his arms and hands. The Respondent entered the operating room with foam on his hands. When the Respondent was advised to complete the scrub per policy, he refused.
6. At the beginning of the procedure, the Respondent refused to allow a sponge count.

7. During the laparoscopic procedure, the Respondent had a difficult time visualizing the appendix with the camera.
8. While the Respondent was attempting to locate the appendix, he punctured a hole in his sterile glove. The scrub nurse instructed the Respondent several times to replace his punctured glove with a sterile glove. The Respondent refused. The glove had to be physically removed from the Respondent's hand.
9. The Respondent was not speaking clearly during the procedure which made it difficult for surgical staff to hear and understand his instructions.
10. The Respondent kept insisting that the patient was moving and telling the anesthesiologist to give the patient more anesthesia.
11. The operating room staff each stated that the patient was not moving.
12. The Respondent could not locate the appendix laparoscopically. Therefore, he shifted to an open procedure.
13. The Respondent failed to alert the team when he shifted to an open procedure. Therefore, the anesthesiologist and the rest of the team did not have a chance to prepare the patient for the shift.
14. The Respondent violated the sterile operation field more than one time during the surgery and refused to re-gown. Second, the Respondent grabbed instruments from the sterile field more than once instead of following protocol and asking the scrub tech to hand him the instruments. The Respondent also threw instruments onto the scrub tech's tray. Third, the Respondent struck the scrub tech with a needle, causing her to bleed. The scrub tech informed the Respondent immediately, "You stuck me." The Respondent continued to stitch the patient using the same needle that had drawn blood from the scrub

The record was left open for the filing by the parties of Proposed Findings of Fact and Conclusions of Law. The last of the submissions was received on June 5, 2017, thereby closing the record. The proceedings were stenographically recorded.

FINDINGS OF FACT

Based upon the testimony, the Admissions of the Respondent, exhibits and submissions of the parties, I hereby render the following findings of fact:

1. The Respondent, Arthur Pomerantz, M.D., was formerly licensed to practice medicine in Massachusetts under registration number 48644. He was certified by the American Board of Surgery. He is presently retired from the practice of medicine. (Admission.)
2. In September 2013, the Petitioner was hired as a locum tenens general surgeon at Harrington Memorial Hospital. (Russo Testimony & Admissions.)
3. On September 7, 2013, the Respondent was working as a *locum tenes* physician at Harrington Memorial Hospital. That evening, a 16-year-old male, Patient A, presented to the emergency department and was admitted with a diagnosis of appendicitis. The emergency department called the Respondent as the on-call surgeon to come in to perform an emergency appendectomy. (Exhibits 1, 3 & 4, Russo, Trudeau and Burrill Testimony.)
4. Harrington Hospital does not staff its surgery department on weekends. The nurse supervisor, Kerry Burrill, called in part of the surgical team to assist the Respondent with the surgery. She called in the Operating Room Nurse, the scrub tech and the recovery nurse. (Burrill Testimony.)

5. Harrington Hospital had a policy in September 2013, and still has a policy, that the surgeon is responsible for calling in another physician, if necessary, as well as the anesthesiologist. Physicians must speak directly to one another. However, in this case, Burrill dialed the anesthesiologist, Dr. Faust, and transferred the call to the Respondent. The latter had refused to make the call. (Russo & Burrill Testimony.)

6. Patient A was prepped and draped for surgery. Anesthesia was administered. (Trudeau & Burrill Testimony.)

7. The Respondent entered the operating room with his hands still dripping, which is unusual. Dry hands decrease the bacteria count on the surgeon's hands. At Harrington Hospital, the surgeon washed his/her hands and then used a special cleanser to scrub them. It took a few minutes for the hands to dry. If the surgeon performed a complete scrub, his/her hands would be wet upon entering the operating room. The scrub tech would then provide the surgeon with a special towel to dry the hands before putting on the gown and gloves. In this case, the Respondent entered the operating room and refused to dry his hands with a sterile towel. He eventually took it and dried his hands. (*Id.*)

8. Throughout the surgery, the Respondent was short and rude to the operating staff that was assisting with the surgery. (*Id.*)

9. The procedure began as a laparoscopic appendectomy. However, the Respondent was unable to visualize the appendix. Thus, he decided to convert the procedure from laparoscopic to an open procedure. A surgeon will usually announce the conversion to the team and provide the team with a few minutes to gather the supplies for the open procedure, i.e. a blade and sponges. (*Id.*)

10. During the surgery, the Respondent began to lose his surgical trousers. This occasionally occurs with surgeons. Generally, the surgeon will request that the circulating nurse to redo the pants so that he/she does not have to break the sterile field. Any area above the waist is considered sterile. In this case, the Respondent broke the sterile field by reaching under his gown and pulling up his own pants during the procedure. (*Id.*)

11. The surgeon should re-gown and re-glove after the sterile field is broken. In this case, the Respondent was gruff and gave the surgical tech a hard time before he finally agreed to change his gown and gloves. The surgical tech had to use "a little force" with the Respondent in order to keep him away from the patient until he changed into a sterile gown and gloves. (*Id.*)

12. During the surgery, the Respondent tore a hole in his sterile glove. The scrub tech informed the Respondent that his glove had a hole and that he should change it because sterile procedure was broken. The Respondent refused to re-glove until the anesthesiologist informed him that the sterile procedure had been breached. At that point, the Respondent stepped away from the patient and re-gloved. (*Id.*)

13. Harrington Hospital had a procedure for handling instruments in the operating room. The procedure is in effect at the present time as well. The surgeon will usually ask for an instrument, and the surgical tech will pass the instrument to the surgeon. This handoff is always made so that the surgeon can take the instrument in hand. For example, a pair of scissors would be held by the tip to enable the surgeon to grasp the handles in order to complete the procedure. A knife would be handed to the surgeon with the blade closed so that the surgeon could open it and begin the procedure. After use, the

surgeon should hand the instrument back to the tech so that he/she knows where the blade is placed. In this case, the Respondent grabbed instruments off of the table himself (from the sterile field), and he was not seen passing them back to the scrub nurse. (*Id.* & Russo Testimony.)

14. During the procedure on September 7, 2013, the Respondent poked the scrub tech with the needle that he was using to close up the patient. The scrub tech asked the Respondent to provide her with the needle because he had poked her with it. There was blood in the scrub tech's glove. (Russo Testimony.)

15. Harrington Hospital had a protocol for a needle stick in September 2013 and still has the same protocol. Once the needle stick occurs, the needle is immediately taken off of the sterile field so that it does not get re-used or injure the patient or anyone else. In this case, the Respondent continued to suture the patient with the contaminated needle after he was informed that he had punctured the scrub tech. The scrub tech asked the Respondent more than once to give her the contaminated needle. Finally, Dr. Faust, the anesthesiologist, intervened and the Respondent gave the needle to the scrub tech. (Trudeau Testimony.)

16. The needle in question that was used to close the incision is a curved, small gauge needle. The Respondent could not have struck the scrub tech directly as her hand was three or four inches away from his hand. (Russo Testimony.)

17. The general practice in 2013 was, and still is, that, as the surgeon is closing the skin, the scrub tech and the circulating nurse perform a surgical count to make sure that no retained surgical items have been left inside of the patient. In this case, the Respondent did not allow the scrub tech and the circulating nurse to perform the count at

the appropriate time. They had to perform the count after the surgery was completed. (Trudeau Testimony.)

18. Immediately following the surgery on Patient A on September 7, 2013, the circulating nurse and the scrub tech informed the nurse supervisor that the latter had been struck with a needle during Patient A's surgery. Per Harrington Hospital protocol, the nurse supervisor sent the scrub tech to the emergency room for appropriate treatment. After being stuck with a needle, an individual must have blood drawn in order to check for diseases such as HIV. In this case, since the Respondent had also stuck Patient A with the contaminated needle, the nurse supervisor also had to obtain consent from the family of minor child Patient A in order to test him for blood borne disease, including HIV. Both individuals were negative for any disease. (Russo & Burrill Testimony.)

19. The nurse supervisor went to the emergency room where she encountered the anesthesiologist who was involved in Patient A's procedure, Dr. Faust. Dr. Faust informed her that he would no longer work with the Respondent. Accordingly, any emergency cases that came in for the evening would need to be transferred to another facility. (Burrill Testimony.)

20. The administrator-on-call was notified of the incident. The Respondent was terminated and barred from the Harrington Hospital premises. A plan was put in place to cover the Respondent's patients through the end of that weekend. (Russo Testimony.)

21. The Board of Registration in Medicine was notified of the incident. (*Id.*)

CONCLUSION AND RECOMMENDED DECISION

After a careful review of all of the evidence in this case, I have concluded that the Board has met its burden of proof with respect to the allegations that the Respondent engaged in conduct that places into "question the physician's 'competence to practice medicine," including gross misconduct in the practice of medicine. As the BRM has successfully demonstrated, numerous instances of disruptive behavior during one surgical procedure constitutes misconduct and/or gross misconduct in the practice of medicine. As such, the provisions of G.L. c. 112, § 5(c) as well as those set forth in 243 CMR 1.03(5)(a)(3) are applicable in this case.

A clear preponderance of the evidence supports the Board's contentions that there were numerous instances of disruptive behavior during the single surgical procedure on September 6, 2013. The Respondent did not call in the anesthesiologist himself. He did not complete an appropriate scrub prior to beginning Patient A's surgery, he broke the sterile field on at least two occasions, and he struck the scrub tech with a contaminated needle. He then continued to use the needle to finish the suturing of Patient A. *See In the Matter of Tim Baisch, M.D.* Board of Registration in Medicine Adjudicatory Case No. 20122-019 (Consent Order, June 20, 2012).

The Respondent failed to adhere to the surgical protocols of the Harrington Hospital. He failed to follow protocols related to sterile techniques. He is subject to discipline by the Board pursuant to *Raymond v. Board of Registration in Medicine*, 387 Mass. 708 (1982), *Levy v. Board of Registration in Medicine*, 378 Mass. 519 (1979), and, *Sugarman v. Board of Registration in Medicine*, 422 Mass. 338 (1996).

Accordingly, I recommend to the Board that it impose appropriate sanctions upon the Respondent for his statutory, regulatory and policy violations as well as the misconduct inherent in his unprofessional behavior during the appendectomy on Patient A on September 7, 2017.

Division of Administrative Law Appeals,

A handwritten signature in cursive script that reads "Judithann Burke".

BY: Judithann Burke
Administrative Magistrate

DATED: September 1, 2017