

Oregon Medical Board
BOARD ACTION REPORT
August 15, 2012

The information contained in this report summarizes new, interim, and final actions taken by the Oregon Medical Board between July 16, 2012 and August 15, 2012.

Scanned copies of Interim Stipulated Orders, Orders of Emergency Suspension, Stipulated Orders, Final Orders, Termination Orders, Modification Orders and Voluntary Limitations are included at the end of this report in the order that they appear in the report. These orders are marked with an * asterisk. **Scanned copies of Corrective Action Agreements and Consent Agreement are not posted, as they are not disciplinary action and impose no practice limitations.** Complaint and Notices of Proposed Disciplinary Action are not listed in this report, as they are not final actions by the Board. Both Orders, however, are public and are available upon request.

Printed copies of the Board Orders not provided with this report are available to the public. To obtain a printed copy of a Board Order not provided in this report, please complete a Service Request Form (<http://egov.oregon.gov/BME/PDFforms/VerDispMalFillin.pdf>) found under the Licensee Information Request Form link on the Board's web site, submit it with the \$10.00 fee *per licensee* and mail to:

**Oregon Medical Board
1500 SW 1st Ave, Ste 620
Portland, OR 97201**

Copies of the Orders listed below are mailed to Oregon hospitals where the Licensee had self-reported that he/she has privileges.

***Bernardo, Peter Augusto, MD; MD17631; Salem, OR**

On 7/19/12, Licensee entered into an Interim Stipulated Order to voluntarily withdraw from the performance of laparoscopic colectomy procedures and discontinue use of the Visiport trocar, pending the completion of the Board's investigation into his/her ability to safely and competently practice in this specialty.

Chambers, Jennifer Rebecca, LAc; AC150173; Portland, OR

On July 31, 2012, the Board issued an Order Terminating Corrective Action Agreement. This Order terminates Licensee's December 12, 2010, Corrective Action Agreement.

***Hoppert, Jonathan Herman, MD; MD10937; Lake Grove, OR**

On August 2, 2012, Licensee entered into a Voluntary Limitation to limit his practice to Independent Medical Examinations.

***Mann, Thomas Weimar, MD; MD06385; Eugene, OR**

On July 31, 2012, the Board issued an Order of License Suspension to immediately suspend licensee's medical license due to his willfully violating a Board rule, specifically continuing medical competency (education).

***Misra, Sounak, MD; MD26161; Portland, OR**

On July 17, 2012, the Board issued an Order Terminating Interim Stipulated Order. This Order terminates Licensee's November 29, 2011, Interim Stipulated Order.

***Moore, Patrick James, MD; MD10765; Yreka, CA**

On August 2, 2012, Licensee entered into a Stipulated Order with the Board for unprofessional or dishonorable conduct. This Order retires Licensee's medical license while under investigation.

***Murphy, James Michael, MD; MD23891; Hood River, OR**

On July 17, 2012, the Board issued a Final Order for unprofessional or dishonorable conduct. This Order reprimands Licensee, assesses a \$5,000 civil penalty, and assesses the costs of the disciplinary action.

If you have any questions regarding this service, please call the Board at (971) 673-2700 or toll-free within Oregon at (877) 254-6263.

BEFORE THE
OREGON MEDICAL BOARD
STATE OF OREGON

In the Matter of
PETER AUGUSTO BERNARDO, MD
LICENSE NO. MD17631
} INTERIM STIPULATED ORDER
}

1.
1.

The Oregon Medical Board (Board) is the state agency responsible for licensing, regulating and disciplining certain health care providers, including physicians, in the state of Oregon. Peter Augusto Bernardo, MD (Licensee) holds an active license to practice medicine in the state of Oregon.

2.

Licensee is a board-certified general surgeon. The Board has opened an investigation regarding Licensee's surgical care that he provided to a patient. The Board believes it necessary that Licensee agree to immediately limit his practice so as to refrain from performing certain surgical procedures until the investigation is completed.

3.

In order to address the concerns of the Board, Licensee and the Board agree to enter into this Interim Stipulated Order, which provides that Licensee shall comply with all of the following conditions:

3.1 Licensee agrees to voluntarily and immediately refrain from performing any laparoscopic colectomy procedures.

3.2 Licensee agrees to voluntarily and immediately refrain from using the Visiport™ trocar for any procedure.

3.3 Licensee stipulates and agrees that this Order becomes immediately effective the date it is signed by the Licensee.

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This Order becomes effective the date it is signed by the Licensee.

IT IS SO STIPULATED THIS 19 day of July, 2012.

SIGNATURE REDACTED

PETER AUGUSTO BERNARDO, MD

IT IS SO ORDERED THIS 20th day of July, 2012.

State of Oregon
OREGON MEDICAL BOARD

SIGNATURE REDACTED

~~WILLIAM B. HALEY, JR.~~
EXECUTIVE DIRECTOR

JOSEPH THALER, MD
MEDICAL DIRECTOR

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5.

The Board therefore suspends Licensee's license to practice medicine effective immediately pursuant to ORS 677.205 for a minimum of 90 days. Licensee must notify the Board within 10 days as to how patients may access or obtain their medical records.

IT IS SO ORDERED this 31st day of July, 2012.

OREGON MEDICAL BOARD

SIGNATURE REDACTED

W. KENT WILLIAMSON, MD
Board Chair

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BEFORE THE
OREGON MEDICAL BOARD
STATE OF OREGON

In the Matter of)
SOUNAK MISRA, MD) ORDER TERMINATING
LICENSE NO. MD26161) INTERIM STIPULATED ORDER

1.

On November 29, 2011, Sounak Misra, MD, (Licensee) entered into an Interim Stipulated Order with the Oregon Medical Board (Board). In this Order, Licensee withdrew from practice pending the conclusion of the Board's investigation. On June 13, 2012, Licensee submitted a written request to terminate this Order.

2.

Having fully considered Licensee's request, the Board terminates the November 29, 2011 Interim Stipulated Order, effective the date this Order is signed by the Board Chair.

IT IS SO ORDERED THIS 17th day of July, 2012.

State of Oregon
OREGON MEDICAL BOARD

SIGNATURE REDACTED

W. KÉNT WILLIAMSON, MD
Board Chair

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BEFORE THE
OREGON MEDICAL BOARD
STATE OF OREGON

In the Matter of)
PATRICK JAMES MOORE, MD) STIPULATED ORDER
LICENSE NO, MD10765)

1.

The Oregon Medical Board (Board) is the state agency responsible for licensing, regulating and disciplining certain health care providers, including physicians, in the state of Oregon. Patrick James Moore, MD (Licensee) is a licensed physician in the State of Oregon.

2.

The Board received a report of substantial non-compliance from the Health Professionals' Services Program (HPSP) that resulted in the Board initiating an investigation.

3.

Licensee and the Board desire to settle this matter by the entry of this Stipulated Order. Licensee understands that he has the right to a contested case hearing under the Administrative Procedures Act (Chapter 183 Oregon Revised Statutes), and fully and finally waives the right to a contested case hearing and any appeal therefrom by the signing of and entry of this Order in the Board's records. Licensee stipulates and the Board finds that the conduct described in paragraph 2 violated ORS 677.190(1)(a) unprofessional or dishonorable conduct, as defined in ORS 677.188(4)(a).

4.

In order to address the concerns of the Board, Licensee and the Board agree to enter into this Stipulated Order subject to the following conditions:

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BEFORE THE
OREGON MEDICAL BOARD
STATE OF OREGON

IN THE MATTER OF:)
)
JAMES MICHAEL MURPHY, MD) FINAL ORDER
License No. MD23891)
)

HISTORY OF THE CASE

On July 7, 2011, the Oregon Medical Board (Board) issued a Complaint and Notice of Proposed Disciplinary Action (Complaint) to James Michael Murphy, M.D., (Dr. Murphy) proposing to take disciplinary action including the assessment of penalties and costs. On August 3, 2011, Dr. Murphy requested a hearing.

On August 8, 2011, the Board referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) John Mann to preside at hearing. On September 26, 2011, Senior ALJ Mann convened a prehearing conference to schedule the hearing date and deadline dates for submissions of witness lists and exhibits. On October 24, 2011, the OAH re-assigned the matter to ALJ Samantha Fair.

A hearing was held on December 21, 2011, in Portland, Oregon.¹ Dr. Murphy appeared with attorney Marc Blackman and testified. The Board appeared, represented by Senior Assistant Attorney General Warren Foote. The Board's investigator Terry Lewis was present but did not testify.

Testifying on behalf of the Board were Nathan Hildebrant, M.D.; Manny Berman, chief operating officer for Tuality Healthcare; and James Peck, M.D., and Medical Director for the Board. The Board also called Dr. Murphy as a witness. Testifying on behalf of Dr. Murphy were his spouse Cynthia Mills, D.V.M.; Portland Police Officer Patrick Johnson; and Christina Maddy. The record was left open for the receipt of the hearing transcript. The record closed on January 25, 2012 after receipt of the transcript.

On February 29, 2012, Dr. Murphy requested a continuance and a rehearing for additional evidence, advising that he had discharged Mr. Blackman. Because Mr. Blackman was not included as a recipient on Dr. Murphy's request,² ALJ Fair forwarded the requests to Mr. Blackman seeking confirmation of his status as the representative for Dr. Murphy. On March 2,

¹ At the inception of the hearing, Dr. Murphy raised an objection to the Complaint based upon ORS 183.415. His objection to the Complaint was overruled on the record and is not separately addressed in this Final Order. His subsequent motion to postpone the hearing was denied.

² Dr. Murphy provided copies of the correspondence to Mr. Foote.

1 2012, Mr. Blackman confirmed his ongoing representation of Dr. Murphy and withdrew the
2 requests for continuance and rescheduling. On March 4, 2012, Dr. Murphy renewed his requests
3 for a continuance and a rehearing for additional evidence, again advising that he had discharged
4 Mr. Blackman. Dr. Murphy provided copies of this correspondence to Mr. Blackman and Mr.
5 Foote. Dr. Murphy's request to continue the matter and schedule another hearing date to present
6 additional evidence was denied.
7

8 ISSUES

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- 10 1. Whether James Michael Murphy violated ORS 677.190(1)(a) on September 4, 2009
11 by consuming alcohol while on call as an anesthesiologist. ORS 677.188 and 677.190(1)(a).
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- 13 2. If the violation is proven, what is the appropriate sanction? ORS 677.205.
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15 EVIDENTIARY RULING

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17 The Board offered Exhibits A1 through A16. Exhibits A1, A4, A9 through A11, A13,
18 and A15 were admitted into the record without objection. The Board withdrew Exhibit A12
19 from its offered exhibits. Dr. Murphy's objections to Exhibit A3, A4 through A8, A14 and A16
20 for lack of relevance were overruled. Exhibits A3, A4 through A8, A14 and A16 were admitted
21 into the record. Dr. Murphy's objection to Exhibit A2 for lack of relevance was sustained.
22 Exhibit A2 was excluded from the record.
23

24 Exhibits R1 through R8, offered by Dr. Murphy, were admitted into the record without
25 objection.
26

27 FINDINGS OF FACT

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29 1. Dr. Murphy is a board certified anesthesiologist, first licensed by the Board on July
30 12, 2002. (Ex. A3 at 4, 7.)
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32 2. On June 21, 2008, Dr. Murphy signed a Full-Time Anesthesia Services Agreement
33 Including Cardiac Anesthesia (Agreement) with Tuality Healthcare (Tuality). Pursuant to this
34 Agreement, Dr. Murphy became a member of the medical staff of the Tuality Community
35 Hospital (Hospital) as a sole practitioner providing anesthesia services for the Hospital to ensure
36 full-time anesthesia coverage, 24 hours per day, 7 days per week, 365 days per year in
37 conjunction with the other anesthesiologists on the medical staff. (Ex. R1 at 1, 12.) The
38 Agreement specifically required Dr. Murphy to perform cardiac call coverage by providing
39 rotating cardiac call coverage, 24 hours per day, 7 days per week, in conjunction with two other
40 anesthesiologists. (*Id.* at 3.) The Agreement provided:
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42 Such services shall be provided in accordance with the terms of the
43 agreements between Hospitals and individual Providers, all applicable
44 policies of Hospitals, the Bylaws and Rules and Regulations of the
45 Medical Staff of Hospitals, the Anesthesia Manuals of Hospitals, The
46 Joint Commission, established practices and customs at Hospitals, the

1 requirements of Physician's professional societies, the community
2 standard of care, and all applicable statues and regulations.

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4 (*Id.* at 2.)

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6 3. In April 2009, Tuality issued a six-page bylaw entitled Maintaining a Drug Free
7 Workplace. In the first paragraph of its bylaw, Tuality recognized it's responsibly to provide a
8 safe, healthy, and drug free environment and "communicates this to employees, volunteers,
9 medical staff, visitors, and contractors (including subcontractors)." The remainder of the bylaw,
10 which discussed the scope and procedures for the policy, only referenced employees. The bylaw
11 provided:

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13 The unauthorized use and/or possession of alcohol * * * is prohibited by
14 employees in the following circumstances: while on duty, while driving
15 as part of job responsibilities and/or company owned leased vehicles,
16 and/or while the employee is performing corporation business. Having
17 alcohol * * * in the employee's system in these circumstances is also
18 prohibited.

19
20 (Ex. R2 at 1.) Prior to September 4, 2009, Dr. Murphy signed a document acknowledging that
21 "Professional Staff Members (medical staff) shall abide by the Medical Staff Bylaws, Rules and
22 Regulations * * *." (Ex. A15 at 1, 14; Test. of Dr. Hildebrant, tr. at 179-180.) A copy of
23 Tuality's policies was available on the hospital's intranet. Tuality expected all physicians
24 providing healthcare at Tuality to not consume alcohol while on duty or on call. (Test. of Mr.
25 Berman, tr. at 89-90.)

26
27 4. Dr. Murphy was on cardiac call on September 4, 2009 and was scheduled for regular
28 and cardiac call on September 5, 2009. (Exs. A1 at 9; A3 at 5; Test. of Dr. Murphy, tr. at 41-42.)
29 Call duties entailed the anesthesiologist being available for phone consultations with hospital
30 staff or a surgeon, for scheduling surgeries, or to report to the hospital for acute surgical
31 emergencies. (Test. of Dr. Murphy, tr. at 42-43; test of Dr. Peck, tr. at 111-112; Test. of Dr.
32 Hildebrant, tr. at 174.) The expectation was for the on call anesthesiologist to respond to a call
33 and report to the hospital within 30 to 45 minutes. (Test. of Dr. Hildebrant, tr. at 149.) While on
34 cardiac call with Tuality, Dr. Murphy did not receive a call for an acute surgical emergency.
35 (Test. of Dr. Murphy, tr. at 42.)

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37 5. On September 4, 2009, Dr. Murphy went to dinner at a restaurant with his wife Dr.
38 Cynthia Mills (a veterinarian), and Dr. Michael Duran (an anesthesiologist and colleague)³ who
39 was then residing in Dr. Murphy's home. (Ex. A4 at 1; Test. of Dr. Murphy, tr. at 45.) While at
40 the restaurant, Dr. Murphy ordered and consumed one or two glasses of wine. (Exs. A1 at 7, A5
41 at 1, A6 at 5; Test. of Dr. Murphy, tr. at 47-49.) Dr. Murphy received a call from the Hospital
42 regarding a patient. Dr. Murphy called Dr. Hildebrant, another cardiac anesthesiologist who was
43 still at the Hospital, and asked him to check on the patient and place a catheter if needed. Dr.
44

45 ³ The Board adds to the Order that Dr. Cynthia Mills is a Veterinarian. (Tr. at 129.) Dr. Michael Duran is
46 an anesthesiologist who was in the same group as Dr. James Murphy and Dr. Nathan Hildebrandt that
provided cardiac anesthesia at Tuality Community Hospital. (Tr. at 37.)

1 Hildebrant agreed to check on the patient. (Exs. A1 at 6; A9 at 1; Test. of Dr. Hildebrant, tr. at
2 150.) Dr. Murphy did not ask for Dr. Hildebrant to do anything more than check on the patient
3 and place the catheter. He did not ask for the call register⁴ at the Hospital to be modified to
4 reflect that he was no longer on call. (Test. of Dr. Murphy, tr. at 64-66; Test. of Dr. Hildebrant,
5 tr. at 152.) Dr. Hildebrant never indicated that he would take over all of Dr. Murphy's call
6 duties. (Test. of Dr. Hildebrant, tr. at 153.) Following the call, Dr. Mills left the restaurant after
7 an argument with Dr. Duran. (Ex. A4 at 1; Test. of Dr. Murphy, tr. at 53.) After Dr. Mills left,
8 Dr. Murphy and Dr. Duran argued. When the argument escalated, they left the restaurant and
9 walked home. (Ex. A4 at 2; Test. of Dr. Murphy, tr. at 53-56.) During the walk home, Dr. Mills
10 telephoned Dr. Murphy indicating she did not want Dr. Duran in the house. Dr. Murphy
11 informed Dr. Duran that he could not enter the house and would need to immediately move out.
12 (Ex. A4 at 2; Test. of Dr. Murphy, tr. at 57.) Dr. Murphy and Dr. Duran engaged in a physical
13 altercation in front of the home. Dr. Murphy hit Dr. Duran several times and pinned him to the
14 ground. (Ex. A4 at 3; Test. of Dr. Murphy, tr. at 58-60.) During the confrontation, Dr. Murphy
15 and Dr. Hildebrant had a couple of phone calls, first for Dr. Hildebrant to advise Dr. Murphy of
16 the outcome with the earlier patient, and the second for Dr. Murphy to advise Dr. Hildebrant of
17 the confrontation. (Test. of Dr. Murphy, tr. at 58-60.) The police arrested Dr. Murphy for
18 harassment and strangulation at 11:34 p.m. and lodged him in jail.⁵ (Ex. A4 at 4.)
19

20 6. After Dr. Murphy was lodged in jail, Dr. Mills notified Dr. Hildebrant of Dr.
21 Murphy's arrest. (Ex. A1 at 9; Test. of Dr. Hildebrant, tr. at 155.) Dr. Hildebrant assumed Dr.
22 Murphy's call duties after his incarceration. (Ex. A3 at 5.)
23

24 7. On September 4, 2009, no one observed any alcohol on Dr. Murphy's breath nor did
25 he appear affected by the consumption of the wine. (Test. of Dr. Mills, tr. at 137; Test. of Dr.
26 Hildebrant, tr. at 168-169; Test. of Johnson, tr. at 186-187; Test. of Maddy, tr. at 193.) His
27 interactions during his phone calls with Dr. Hildebrant were normal, and he was calm and
28 appropriate. (Test. of Dr. Hildebrant, tr. at 156.)
29

30 8. Dr. Murphy resumed his call duties at 10 a.m. on September 5, 2009. Prior to Dr.
31 Murphy's resumption of call duties, Dr. Hildebrant responded to a surgical case on September 5,
32 2009. (Ex. A3 at 5.)
33

34 9. Dr. Murphy does not believe that having a glass of wine at dinner when on call is
35 atypical or forbidden. (Ex. A6 at 5.)
36

37 10. In October 2009, Tuality revised its Maintaining a Drug Free Workplace bylaw. The
38 revised bylaw provided:
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40 The unauthorized use and/or possession of alcohol * * * is prohibited by
41 employees, volunteers, medical staff, or contractors in the following
42 circumstances: while on duty or when placed on standby, while driving
43

44 ⁴ The call register is maintained by the Hospital and lists which physicians are on call. The Hospital's
45 staff checks the call register to determine which physician to contact for on call duties.
46

⁵ The charges were subsequently dismissed. (Ex. A5 at 2.)

1 as part of job responsibilities and/or company owned leased vehicles,
2 and/or while the employee is performing corporation business. Having
3 alcohol * * * in the employee's system in these circumstances is also
4 prohibited.

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6 (Ex. R3 at 1.)
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8 11. The American Medical Association (AMA) publishes policies including H-30.960,
9 titled "Physician Ingestion of Alcohol and Patient Care," (updated February 2011) which
10 provides:

11
12 Our AMA, believing that the possibility, or even the perception, of any
13 alcohol-induced impairment of patient care activities is inconsistent with
14 the professional image of the physician, (1) urges that physicians
15 engaging in patient care have no significant body content of alcohol and
16 (2) urges that all physicians, prior to being available for patient care,
17 refrain from ingesting an amount of alcohol that has the potential to
18 cause impairment of performance or create a "hangover" effect.
19

20 (Ex. R7 at 1.)
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22 12. The AMA publishes a Code of Medical Ethics including E-8.15, titled "Substance
23 Abuse" stating:

24
25 It is unethical for a physician to practice medicine while under the
26 influence of a controlled substance, alcohol, or other chemical agents
27 which impair the ability to practice medicine.
28

29 (Ex. A16 at 1.)
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31 13. On September 23, 2003, an article entitled *Should Physicians Be Allowed to Use*
32 *Alcohol While On Call?* was published in the Journal of Medical Ethics written by a professor of
33 philosophy and a professor of medicine. (Ex. A16 at 1, 5.) The authors found few discussions
34 on the issue of whether physicians could drink while they are on call. (*Id.* at 1.) The authors
35 conducted a survey (the Study) to determine physicians' actual practices and to determine if
36 there exists within the practice of medicine a standard governing drinking while on call. (*Id.*)
37 Seventy-three percent of responding physicians agreed and 27 percent disagreed with the
38 statement that doctors should not have even a single drink while on call. Twenty-four percent of
39 responding physicians reported having consumed alcohol while on call. Twenty-seven percent
40 of responding physicians think that some alcohol use is safe. (*Id.* at 2.) The authors further
41 found "there is no direct investigation of the way in which alcohol, at different blood levels,
42 impairs physicians." (*Id.* at 5.) However, the authors concluded that physicians should not drink
43 while on call because of "the role related obligations of physicians to put their own interests
44 second to their patients' interests and the need to practice medicine with sobriety." (*Id.*)
45 However, the authors concluded that they "must draw conclusions based on available evidence.
46 That available evidence shows that, pending further empirical evidence on the safety of alcohol

1 use while practicing medicine, it would be prudent and ethical for physicians not to consume
2 alcohol while on call.” (*Id.*) In the Study, the authors repeatedly made conclusions based upon
3 the influence of alcohol, as follows:

- 4 • There is zero tolerance for practicing while under the influence; (*Id.*)
- 5
- 6 • It would be equally unacceptable for college professors to teach or lawyers to conduct a
7 trial under the influence of alcohol; (*Id.*)
- 8
- 9 • Even if we do not think of [sobriety] as a virtue, the demand for practicing medicine
10 while not under the influence of alcohol would be a minimal standard; and (*Id.*)
- 11
- 12 • The practice of drinking while on call, despite its reasonableness on liberal principles,
13 would place physicians in situations in which they would be, contrary to professional
14 standards, treating patients under the influence of alcohol. (*Id.* at 4.)
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16 Additionally, the authors found that “physicians ought not to drink while on call but so far the
17 medical profession has left this decision up to the discretion of the individual physicians.” (*Id.* at
18 3.) Two additional articles published in the same time period reached similar conclusions. (Test.
19 of Peck, tr. at 119.)

20
21 14. The Brief Addiction Science Information Source (BASIS) provides an online forum
22 for the exchange of information related to addiction and access to scientific developments and
23 resources in the field. It is published by a Harvard Medical School teaching affiliate. On
24 January 12, 2005, it published an article entitled *Care for a Drink, Doctor?* that reviewed the
25 Study. It found the Study had limitations based upon a narrow geographic pool of participants
26 and that the degree of participation varied based upon gender and medical specialties. It opined:

27
28 Results of surveys of sensitive issues, such as drinking, tend to be biased
29 because people without problems are often more likely to report these
30 issues than people with problems. * * * A larger sample size * * * is
31 necessary to more accurately represent physician attitudes toward
32 alcohol consumption.

33
34 (Ex. R8 at 1-2.) It concluded, “Though common sense might suggest that a physician should
35 never be under the influence of alcohol while on call, this study revealed * * * that one fourth of
36 the physicians surveyed reported drinking on call.” (*Id.*)

37
38 15. Dr. Peck is a Board certified general and vascular surgeon. He has held such
39 certifications for more than 30 years, working in multiple Oregon hospitals. He has been the
40 medical director for the Board for the past two years, helping it in the evaluation of complaints of
41 physicians that come before the Board. (Test. of Dr. Peck, tr. at 109-110.) Based upon his
42 experience in these hospitals, there is an expectation that it is a drug and alcohol free work place
43 when operating personnel are in the operating room. (*Id.* at 115.) The standard would be to
44 replace a member of the surgical team if alcohol was smelled on the member’s breath or the
45 member had consumed alcohol before entering the operating room. (*Id.* at 114, 122-123.)
46 During his career, Dr. Peck has been called in to replace surgical team members on three

1 occasions because of concerns about alcohol usage: once because of the belligerence of the
2 surgeon and nurses feeling that a patient was not safe; second, nurses expressed concerns about
3 alcohol consumption of an anesthesiologist; and third, when Dr. Peck knew a resident was
4 intoxicated. (*Id.* at 123.) Dr. Peck believes it is ethically and morally correct to abstain from
5 alcohol when on call at a hospital. (*Id.* at 116.) He agrees with the statement that “it would be
6 prudent and ethical for physicians not to consume alcohol while on call” because it would be the
7 safest approach considering the complexity of surgical interventions and anesthesia care. (*Id.* at
8 117.) Dr. Peck “think[s] that’s [no consumption of alcohol standard] what we [community]
9 follow.” (*Id.* at 119.) Dr. Peck opined, “if it was your family or your daughter, would you want
10 an anesthesiologist that had drunk alcohol? In my opinion, no. And so that’s how I kind of base
11 my opinion.” (*Id.* at 123-124.) Dr. Peck believes that moral and ethical obligations are part of
12 the standards of the medical community. (*Id.* at 124.)
13

14 16. Dr. Hildebrant is a Board certified anesthesiologist, practicing medicine since 2003.
15 He has been the Medical Director of Anesthesiology at the Hospital since 2008. (Test. of Dr.
16 Hildebrant, tr. at 145-146.) He had an expectation that anesthesiologists whether on duty or on
17 call with the Hospital would abstain from the consumption of alcohol because of Tuality’s
18 policy. He believes that there are general ethical obligations of an anesthesiologist including an
19 ethical obligation to abstain from alcohol. (*Id.* at 157.) He believes there is a general consensus
20 to abstain from alcohol. This belief is based upon recent questions he asked of his colleagues,
21 who responded that they would abstain from alcohol consumption when on call, as well as his
22 experience over the years while in homes or at parties with doctors and hearing them turn down
23 offers of alcohol with the response, “I’m on call.” (*Id.* at 175-176.) The only published standard
24 of which Dr. Hildebrant was familiar was the AMA’s Code of Medical Ethics E-8.15 and its
25 prohibition on impairment of function rather than consumption of alcohol. (*Id.* at 171.)
26

27 17. The American Board of Anesthesiologists has not published any policies on the
28 consumption of alcohol by anesthesiologists. (Test. of Dr. Peck, tr. at 121; Test. of Dr.
29 Hildebrant, tr. at 171.) The Board and the Oregon Medical Association have not adopted any
30 policies or rules regarding the consumption of alcohol while on call. (Test. of Dr. Peck, tr. at
31 126-127.) Dr. Peck has not seen any published standard indicating there is a complete
32 prohibition on alcohol consumption during call duties. (*Id.* at 125.) Multiple surveys have
33 reported that patients expect that their surgeon and anesthesiologist will not consume alcohol.
34 (*Id.*)
35

36 18. Dr. Murphy is a flight surgeon for the National Guard.⁶ When on active duty as a
37 flight surgeon, the aircrew rules prohibit the consumption of alcohol within eight hours of
38 boarding an airplane and prohibit blood alcohol levels of 0.04 percent or more. (Test. of Dr.
39 Murphy, tr. at 61.)
40

41 CONCLUSIONS OF LAW

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43 1. In the proposed order, the ALJ concluded that Dr. Murphy did not violate ORS
44 677.190(1)(a) on September 4, 2009 by consuming alcohol while on call as an anesthesiologist.
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46 ⁶ Dr. Murphy is not currently on active duty.

1 The Board disagrees, and finds that Dr. Murphy did engage in unprofessional or dishonorable
2 conduct in violation of ORS 677.190(1)(a), as defined by ORS 677.188(4)(a) by consuming
3 alcohol in violation of Tuality's policy while on cardiac anesthesia call.
4

5 2. Because the Board concludes that Dr. Murphy violated ORS 677.190(1)(a), as defined
6 by ORS 677.188(4)(a), the Board will also impose disciplinary sanctions.
7

8 OPINION 9

10 Pursuant to ORS 677.190, the Board may take disciplinary action against a physician's
11 license to practice for a variety of reasons. In this case, the Board contends that Dr. Murphy
12 should be subject to discipline based on alleged unprofessional or dishonorable conduct. The
13 Board has the burden to prove these allegations by a preponderance of the evidence. ORS
14 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case
15 rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general
16 rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or
17 position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying
18 a different standard, the standard of proof in an administrative hearing is preponderance of the
19 evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that
20 the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*,
21 303 Or 390, 402 (1987).
22

23 ORS 677.190 provides, in part:
24

25 The Oregon Medical Board may refuse to grant, or may suspend or
26 revoke a license to practice for any of the following reasons:
27

28 (1)(a) Unprofessional or dishonorable conduct[.]
29

30 ORS 677.188 provides, in part:
31

32 As used in ORS 677.190, unless the context requires otherwise:
33

34 * * * * *

35
36 (4) "Unprofessional or dishonorable conduct" means conduct
37 unbecoming a person licensed to practice medicine or podiatry, or
38 detrimental to the best interests of the public, and includes:
39

40 (a) Any conduct or practice contrary to recognized standards of ethics of
41 the medical or podiatric profession or any conduct or practice which
42 does or might constitute a danger to the health or safety of a patient or
43 the public or any conduct, practice or condition which does or might
44 adversely affect a physician's or podiatric physician and surgeon's ability
45 safely and skillfully to practice medicine or podiatry[.]
46

1 The Board alleged that Dr. Murphy engaged in unprofessional or dishonorable conduct
2 when he violated Tuality's policy by consuming alcohol while on call; or alternatively, that he
3 engaged in unprofessional or dishonorable conduct by his consumption of alcohol while on call.
4

5 *Violation of Tuality's Policy*
6

7 During the hearing, Dr. Murphy contended that Tuality's bylaw prohibiting the
8 possession of alcohol and having alcohol in his system did not apply to him because it only
9 applied to employees, not medical staff, and that the prohibition did not include on call duties.
10 However, the ALJ did not find his testimony persuasive that he was unaware of the bylaw or its
11 applicability to him or its applicability to on call duties.
12

13 Even finding that Dr. Murphy understood that the bylaw was applicable to him when
14 performing duties pursuant to the Agreement with Tuality, the question becomes whether his
15 violation of a provision of the Agreement with Tuality constitutes unprofessional or dishonorable
16 conduct as defined by ORS 677.188(4)(a). The ALJ concluded that it does not. The ALJ stated
17 that a distinction must be drawn between a physician's violation of a contract and the underlying
18 conduct, here consumption of alcohol while on call. A physician's violation of a contract with a
19 business entity to perform services is not "conduct unbecoming * * * or detrimental to the best
20 interests of the public * * * contrary to recognized standards * * * or might constitute a danger to
21 the health or safety of a patient * * * or might adversely affect a physician's * * * ability * * * to
22 practice medicine." ORS 677.188(4). A physician's violation of the Agreement is simply the
23 violation of a civil contract between the physician and the business entity, not a violation of ORS
24 677.190(1)(a). The Board disagrees with this analysis. The Board finds that the Tuality
25 Community Hospital policy on a Drug Free Work Place is a reflection of the community
26 standard of ethics. Furthermore, this policy is consistent with the testimony of both Dr. Peck and
27 Dr. Hildebrandt that a physician has an ethical duty to abstain from the consumption of alcohol
28 while on call at a hospital, and that this policy is consistent with the other hospitals in the
29 community.
30

31 The ALJ also addressed the question whether the underlying conduct, consumption of
32 alcohol while on call, is conduct in violation of ORS 677.190(1)(a).
33

34 *Consumption of Alcohol While On Call*
35

36 During the hearing, Dr. Murphy asserted that Dr. Hildebrandt took over all of his call
37 duties when he first phoned Dr. Hildebrandt to check on the hospitalized patient. However, the
38 ALJ found the evidence overwhelming that no such assignment of his call duties occurred. The
39 only discussions between Dr. Murphy and Dr. Hildebrandt concerned the specific patient and,
40 subsequently, the confrontation between Dr. Murphy and Dr. Duran. Dr. Hildebrandt did not
41 assume Dr. Murphy's call duties until after Dr. Mills phoned him to report Dr. Murphy's arrest.
42 Therefore, the evidence unequivocally established that Dr. Murphy consumed alcohol while on
43 cardiac call for the Hospital.
44

45 Dr. Murphy contended that the evidence failed to establish that any alcohol in his system
46 would not have dissipated by the time he reported to the Hospital if called for an acute surgical

1 emergency. Although he may be correct that the alcohol would have dissipated by the time of
2 his potential arrival at the Hospital, he still had alcohol in his system when on call. Call duties
3 include consultations for medical staff, such as the consultations he held with Dr. Hildebrant on
4 the evening of September 4, 2009 when he had consumed alcohol. Because call duties include
5 phone consultations on medical matters, the ALJ found the evidence regarding potential
6 dissipation if called to report for an acute surgical emergency irrelevant for the determination of
7 whether consumption of alcohol while on call is a violation of ORS 677.190(1)(a).
8

9 The ALJ stated that a distinction must be drawn between the mere consumption of
10 alcohol and impairment caused by the consumption of alcohol. None of the witnesses to Dr.
11 Murphy's conduct on September 4, 2009 noted any odor of alcohol on Dr. Murphy or observed
12 any signs that he was affected by the consumption of alcohol. Therefore, there is no evidence
13 that he was impaired by the consumption of the wine at the restaurant. Impairment caused by the
14 consumption of alcohol clearly would constitute a danger to the health or safety of a patient or
15 the public or adversely affect a physician's ability to safely and skillfully practice medicine.
16 However, the ALJ opined that the mere consumption of alcohol does not.
17

18 The question remains whether there is a recognized standard of ethics within the medical
19 profession that absolutely prohibits the consumption of alcohol while on call.
20

21 In her proposed order, the ALJ observed that Tuality has a bylaw prohibiting the
22 possession of alcohol or having any alcohol in one's system. Tuality is a business entity, not the
23 medical profession, and has business reasons for implementation of its bylaws rather
24 implementation based upon standards within the medical profession. Both Dr. Peck and Dr.
25 Hildebrant, experienced certified physicians in the community, believe that there is an
26 expectation that a physician should not consume alcohol while on call. However, in the opinion
27 of the ALJ, both physicians' expectations appeared more a personal belief rather than reflecting a
28 standard of the medical profession. Dr. Peck expressed his belief that such an expectation
29 existed because of concerns regarding the adverse effects of alcohol on providing care and
30 insuring the safety of patients, which is an impairment issue. Ultimately, he opined that he
31 thought that the medical community followed the standard of no consumption of alcohol and that
32 he personally would not want an anesthesiologist that had consumed alcohol. The ALJ stated
33 that Dr. Hildebrant confirmed his belief on the ethical obligation to abstain from the
34 consumption of alcohol was based on recent questions he asked a few colleagues, who confirmed
35 they would not consume alcohol when on call, as well as his memory of doctors in the past
36 turning down offers of alcoholic beverages because they were on call. The Board notes that Dr.
37 Hildebrandt's opinion went beyond asking a few colleagues and his own anecdotal recollections,
38 but reflected his years of training and practice in the community. He testified that there is a
39 strong general consensus among anesthesiologists and doctors in general that any
40 anesthesiologist should abstain from consuming alcohol while on duty or on call. (Tr. at 157.)
41 Ultimately, the ALJ observed that both physicians acknowledged that there was no published
42 standard by any professional medical association or board prohibiting the consumption of
43 alcohol. The only published standard is the AMA's standard that prohibits impairment of
44 function, not the consumption of alcohol.
45

46 ///

1 Finally, the ALJ noted that the Board included as an exhibit the September 23, 2003
2 Journal of Medical Ethics's article and its Study as evidence of the standard of the medical
3 profession. However, the Study demonstrates that 27 percent of physicians disagreed with the
4 statement that a physician should not even have one alcoholic beverage while on call. That
5 significant percentage, at least one in four physicians, does not support a finding that it is a
6 recognized standard in the medical profession that consumption of alcohol while on call is
7 prohibited. The Board finds the contrary statistic to be more compelling—that nearly 3 out of 4
8 physicians believe that physicians should not consume alcohol while on call. The Board also
9 notes that this article concluded that: "available evidence shows that, pending further empirical
10 evidence on the safety of alcohol use while practicing medicine, it would be prudent and ethical
11 for physicians not to consume alcohol while on call." (Exhibit A16 at 5.) Responding to that
12 quote, Dr. Peck stated: "I think that's the safest approach, especially considering the complexity
13 of surgical interventions and anesthesia care, which the safest approach is to consume no
14 alcohol." (Tr. at 117.)
15

16 Additionally, the ALJ stated that similar to Dr. Peck's conclusions, the authors of the
17 Journal of Medical Ethics frequently focused on concerns regarding impairment, not just the
18 mere consumption of alcohol, to support their conclusion that it would be prudent for physicians
19 not to consume alcohol while on call. The Board does not accept that characterization of Dr.
20 Peck's testimony. Dr. Peck focused on the need to protect patient safety, and testified it is the
21 ethical obligation of physicians to abstain from alcohol while on call. (Tr. at 116.) The ALJ
22 concluded that ultimately, the authors of the Journal of Medical Ethics article concluded that
23 based upon the study that the medical profession has left the decision on whether to consume
24 alcohol while on call to the discretion of the individual physician. According to the ALJ, that
25 conclusion supports the determination that there is no recognized standard of the medical
26 profession prohibiting the consumption of alcohol while on call.
27

28 The Board does not accept the analysis or conclusion of the ALJ. The testimony of Dr.
29 Peck reflects the perspective of a well-recognized and respected board-certified general and
30 vascular surgeon who has practiced medicine for more than 30 years, with hospital privileges at
31 both Oregon Health and Science University and Providence St. Vincent Medical Center, as well
32 as courtesy privileges at Legacy Good Samaritan Medical Center and Tuality. Dr. Peck testified
33 that he is familiar with the community standard--which is to have drug and alcohol free work
34 force in the operating room. (Tr. at 115). Dr. Peck concluded that physicians have an ethical
35 obligation to abstain from consuming alcohol while on call at a hospital. Dr. Hildebrandt
36 provided the perspective of a board-certified anesthesiologist and medical director of an
37 anesthesia group, with privileges at both Tuality Community Hospital and Good Samaritan
38 Medical Center. Dr. Hildebrandt testified that he was familiar with the ethical standards that
39 apply to anesthesiologists who work in operating rooms and that there is a strong consensus that
40 anesthesiologists have an ethical obligation to abstain from alcohol when they are on duty or on
41 call. This is consistent with Tuality's policy. (Tr. at 157.) The Board agrees with and endorses
42 the viewpoint of these experienced and well-credentialed practitioners.
43

44 The Oregon Medical Board is charged with the duty to exercise general supervision over
45 the practice of medicine in this state, ORS 677.265, and to protect the public from the practice of
46 medicine by unauthorized or unqualified persons and from unprofessional conduct by persons

1 licensed to practice, ORS 677.015. The Board is persuaded by the testimony of both Dr. Peck
2 and Dr. Hildebrandt that it is the ethical standard in the state of Oregon that physicians that are
3 on call for a hospital where they are expected to timely report and provide direct patient care
4 must comply with hospital policy that requires a drug and alcohol free work place. To do
5 otherwise would subordinate the safety of the patients of Oregon to the personal desires of
6 individual physicians.
7

8 The AMA's policy and ethical statement on substance abuse addresses the issue of
9 impairment that applies to a wide spectrum of practitioners and settings. In short, it is a minimal
10 standard. The issue before the Board in this case is much narrower, and applies to a category of
11 cases where the risk of harm to patients is heightened—whether it is unethical conduct for
12 physicians to consume alcohol while on call at a hospital (and specifically in this case, an
13 anesthesiologist who was on cardiac call). Alcohol is a substance that causes impairment of
14 cognitive and physical function. The magnitude of the risk of harm to the public is great, the
15 personal benefit to physicians is relatively low, and the ability of the physician consuming an
16 intoxicating substance to self-assess their level of impairment is inherently suspect. The most
17 fundamental ethical tenant of the medical profession is, "First, do no harm." The Board agrees
18 with Dr. Peck that when a physician is on call at a hospital, the interest of the patient comes first,
19 (Tr. 112.)
20

21 The Board finds it notable that in the course of the contested case hearing, Dr. Murphy
22 did not produce one physician to testify that they consumed alcohol while on call at a hospital, or
23 thought that it was appropriate to do so. Even the article submitted by Dr. Murphy discussing an
24 anonymous survey of physicians revealed that "most doctors find drinking unacceptable while on
25 call." Exhibit R8. Finally, the Board is concerned with the judgment of a physician who is
26 willing to violate hospital policy in order to consume alcohol.
27

28 The evidence was established, by both a preponderance of evidence and by clear and
29 convincing evidence, that Dr. Murphy consumed alcohol while on call in violation of Tuality's
30 policy, and that this conduct violated recognized standards of ethics. The Board also finds that
31 consuming alcohol while on cardiac call places the physician at risk of impaired function, and as
32 such, constitutes conduct "which does or might adversely affect a physician's...ability to safely
33 and skillfully to practice medicine..." ORS 677.190(4)(a). The Board concludes that Dr.
34 Murphy engaged in unprofessional or dishonorable conduct and has grounds to sanction Dr.
35 Murphy.
36

37 Dr. Murphy is reprimanded for violating hospital policy, which has a direct bearing on
38 patient safety, and his ethical duty to abstain from consuming alcohol while on cardiac call at
39 Tuality Community Hospital. In so doing, Dr. Murphy subordinated the best interests of his
40 patients to his own personal desires. Dr. Murphy should also pay a civil penalty of \$5,000 for
41 the exercise of this poor judgment and pay for the costs of the disciplinary proceedings.
42

43 EXCEPTIONS

44

45 Dr. Murphy provided written exceptions to the ALJ's proposed order, and appeared
46 before the Board on July 12, 2012, to present oral argument. In his written exceptions, Dr.

1 Murphy stated that he fully agreed and supported the ALJ's proposed order while reasserting his
2 contention raised at the hearing that: "he was appearing on a complaint for a violation of a
3 hospital policy, not a general ethics violation." The ALJ addressed his objection at the hearing
4 and denied his motion for postponement. The Board agrees with the ALJ's conclusion. The
5 Complaint and Notice of Disciplinary Action put Dr. Murphy on notice when it stated in
6 paragraph 3.2 the following: "At the time of the above described incident, Tuality Community
7 Hospital had a policy regarding a Drug Free Work Place that prohibited drinking while on call.
8 Licensee's consumption of alcohol while on call constitutes unprofessional or dishonorable
9 conduct."

10
11 Dr. Murphy also tried to present facts not in evidence by asserting that Dr. Hildebrandt
12 and Dr. Peck "have personal and business ties to Tuality Hospital, which is currently pursuing a
13 civil suit against me." He also attached a letter from a physician at OHSU and made other
14 assertions of fact that were not presented at hearing. The Board will not consider new
15 information in its deliberations. Dr. Murphy had the opportunity to present exhibits and
16 testimony at the hearing. The record is closed.

17
18 On April 30, 2012, the Board issued an Amended Proposed Final Order. Licensee
19 submitted exceptions to this proposed order in a document dated May 21, 2012. In these
20 exceptions, Licensee makes a number of objections to the Board's Amended Proposed Final
21 Order. The Board has reviewed these exceptions, and finds them all to lack merit. The Board
22 will address some of these exceptions, as follows.

23
24 Licensee contends that not all call duties are equal. Licensee acknowledges that he was
25 on cardiac call the night of September 4 and was to be on cardiac call and regular call on
26 September 5th, starting at 7 AM. In making his submittal, Licensee attempts to submit letters that
27 were not submitted at hearing. The hearing record is closed. Board will not consider the letters
28 that Licensee refers to in his exceptions. The Board rejects Licensee's contention that it is
29 acceptable to consume alcohol while on cardiac call at a hospital. The Board is convinced by the
30 unequivocal testimony of Dr. Hildebrant that Licensee did not ask him to assume his on call
31 duties, and that he did not do so. (Tr. at 152). Neither was he asked to "cover" for Licensee. (Tr.
32 at 153).

33
34 In his exceptions, Licensee states that he "denies consuming alcohol while on call when
35 there is no one else covering the call in his stead." The Board has found that Dr. Hildebrant did
36 not agree to "cover" his call. Licensee's argument is not supported by the facts of this case.

37
38 Licensee takes issue with the testimony of Dr. Hildebrant and Dr. Peck in terms of their
39 understanding of the community standard in regard to abstaining from alcohol while on call. The
40 Board has applied its own knowledge of the practice of medicine and community standards as it
41 has carefully considered the exhibits that address this issue as well as the testimony of the
42 witnesses, and finds the testimony of Dr. Hildebrant and Dr. Peck to be persuasive. The Board
43 stands on its conclusion that Licensee engaged in unprofessional or dishonorable conduct when
44 he consumed alcohol while on cardiac anesthesia call.

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FINAL ORDER

The Oregon Medical Board issues the following order:

James Michael Murphy violated ORS 677.190(1)(a), unprofessional or dishonorable conduct, as defined by ORS 677.188(4)(a), as alleged in the July 7, 2011 Complaint and Notice of Proposed Disciplinary Action.

The Board, therefore, imposes the following sanctions:

1. Dr. Murphy is reprimanded.
2. Dr. Murphy must pay a civil penalty of \$5,000 within 60 days from the date of this Final Order is signed by the Board Chair; and
3. Dr. Murphy is assessed the costs of this disciplinary action. Costs shall be due within 90 days from the date the Board issues its Bill of Costs.

DATED this 17th day of July, 2012.

OREGON MEDICAL BOARD

SIGNATURE REDACTED

W. KENT WILLIAMSON, MD
Board Chair

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APPEAL

If you wish to appeal the final order, you must file a petition for review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* ORS 183.480 et seq.