

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 01-2440PL
)
RONALD MALAVE, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 28 through 30, and June 24 and 25, 2002, in Orlando, Florida, before Susan B. Kirkland, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kim M. Kluck, Esquire
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For Respondent: David P. Hill, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent violated Subsections 458.331(1)(j), 458.331(1)(t), and 458.331(1)(x), Florida Statutes, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On August 11, 2000, the Petitioner, Department of Health, Board of Medicine (Department), filed an Administrative Complaint against Respondent, Ronald Malave, M.D. (Dr. Malave), alleging that he violated Subsections 458.331(1)(j), 458.331(1)(t), and 458.331(1)(x), Florida Statutes.

On September 7, 2000, Dr. Malave filed a request for formal hearing. The request was forwarded to the Division of Administrative Hearings on June 19, 2001, for assignment to an administrative law judge.

The final hearing was scheduled for September 10 through 14, 2001. On September 4, 2001, Respondent requested a continuance, which was granted. The final hearing was rescheduled to commence on January 28, 2002.

The parties filed a Joint Pre-hearing Stipulation and stipulated that Dr. Malave at all material times was a licensed physician in the state of Florida, having been issued license number ME 0058695.

At the final hearing held on January 28 through 30, 2002, the Department called the following witnesses: Dr. Mary

Lidkea, patient J.P., Meghan Clement, John Eckerson, Michael Wickham, Linda Schwichtenberg, and Dr. Charles Mutter. Joint Exhibit 1 was entered into evidence. Petitioner's Exhibits 1 through 7, 8(a), 8(b), 8(d), 8(e), 8(f), 8(g)(1), 8(g)(2), (8)(g)(3), and 9 through 16 were admitted in evidence. The Volusia County Sheriff's Department maintained custody of Petitioner's Exhibit 8(c), a sealed envelope containing panties; Petitioner's Exhibit 8(e), a sealed package containing vials of blood; Petitioner's Exhibits 8(g)(1), 8(g)(2), and 8(g)(3), sealed packages containing panties; Petitioner's Exhibit 10, a sealed package received by Deputy Wickham from Ms. McConkie on February 2, 2000; and Petitioner's Exhibit 11, a sealed package labeled clothing received by Deputy Wickham from Ms. McConkie on February 2, 2000.

Respondent presented no witnesses and no exhibits at the final hearing on January 28 through 30, 2002.

At the final hearing, the parties agreed to file their proposed recommended orders within 20 days of the filing of the transcript. The four-volume Transcript was filed on March 8, 2002. A corrected copy of Volume IV and a corrected portion of Volume II were filed on March 26, 2002. On March 27, 2002, Respondent filed an Unopposed Motion for One Day Extension for Filing of Proposed Recommended Order. The

motion was granted. The parties timely filed their Proposed Recommended Orders.

On May 1, 2002, Respondent filed Respondent's Motion to Reopen Formal Hearing, representing that the criminal case against Respondent had been concluded. An Order Granting Motion to Reopen Formal Hearing was issued on May 10, 2002, allowing Respondent to testify in his own behalf.

On June 24, 2002, the final hearing was reconvened and Respondent testified in his own behalf. Respondent's Exhibits 3, 5, 8, and 14 were admitted. Respondent's Exhibits 1, 2, 4, 5A, 6, 7, 9 through 13, and 16 through 23 were not admitted, but were proffered. Respondent's Exhibit 15 was withdrawn.

The three-volume Transcript of the portion of the final hearing held on June 24 and 25, 2002, was filed on July 23, 2002. The parties timely filed their Proposed Recommended Orders, which have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating the practice of medicine pursuant to Section 20.43 and Chapters 456 and 458, Florida Statutes.

2. At all times material to these proceedings Dr. Malave was a licensed physician in the state of Florida, having been issued license number ME 0058695.

3. Patient J.P. first started treating with Dr. Malave in September 1994. She has suffered from various mental illnesses since her childhood. As a child, she was physically and sexually abused by her father and her uncles and began to experience episodes of "lost time" in which she would black out and be unable to recall events which had occurred. These occurrences of "lost time" continued into her adulthood.

4. Patient J.P. has also suffered from severe depression for the majority of her life. In November 1982, she attempted suicide two times and was hospitalized for those attempts, but did not receive any outpatient counseling for the depression following her release from the hospital.

5. In addition to experiencing "lost time" and being depressed, patient J.P. also was bulimic. In 1988, she met R.P. who was a postmaster at the post office where she worked in Imperial Beach, California. She was experiencing "lost time" during her delivery of mail. R.P. referred her to a mental health counselor for her depression and work-related stress. The counselor referred patient J.P. to a psychiatrist, who prescribed anti-depressants and anti-anxiety medications for her.

6. During the same period of time, patient J.P. received treatment for bulimia, including two weeks of inpatient treatment at the Alvarado Parkway Institute.

7. Patient J.P. married R.P. in 1989 and moved to Florida in 1990. During the first four years that patient J.P. lived in Florida, she was treated by several different physicians for depression and bulimia. In 1992, patient J.P. became the patient of Dr. Phillip Sinaicin, who also treated her for bulimia and depression. He tried different combinations of medications and electroconvulsive therapy, but the treatments were not working. Dr. Sinaicin referred patient J.P. to Dr. Malave, a psychiatrist, for a second opinion.

8. Patient J.P. saw Dr. Malave on September 4, 1994, for a second opinion evaluation. Dr. Malave diagnosed patient J.P. as suffering from Dissociative Identity Disorder (DID), formerly known as multiple personality disorder and as having schizoaffective features. Patient J.P. has multiple distinct personalities or voices, as patient J.P. refers to them. She has a core or birth personality, which appears as J.P. She has other personalities including the following: Bridget, who is sexually preoccupied; Vanessa, who appears with a street-smart vocabulary and manifests when she believes that she needs to take charge of a situation which patient J.P. is not handling very well; Monica, who is a mothering personality to Bridget; Elaine, who is the leader of the group of personalities; Delilah Servano, who is also known as the researcher; and the Brother, who is a street-smart male.

9. J.P., the core personality, is unable to recall and relate when an alter personality is manifesting itself. When another personality takes over, patient J.P. describes the experience as "losing time." The other personalities are sometimes aware of each other and of what happens to each other. The personality Elaine is aware of what all of the other personalities are doing.

10. While being treated by Dr. Malave, patient J.P. disclosed to him that she had been sexually abused by her father and her uncles when she was a child. Dr. Malave explored the sexual abuse by using mental regression exercises which were intended to help patient J.P. remember the abuse. Patient J.P. noticed that she was losing time during her sessions with Dr. Malave, and that it mostly occurred while they were doing the regression exercises.

11. During their treatment sessions, Dr. Malave emphasized to patient J.P. that it was important for her to trust him in order for her to get better. Patient J.P. did come to trust him and believed that as long as she continued to see him that she would be all right.

12. In 1995, patient J.P. began to notice that after some sessions with Dr. Malave when she had lost time that her underwear would be wet and sometimes her jaw would be sore and

cramped. On these occasions, Dr. Malave would not escort her out of his office as he normally did after a session.

13. On several occasions when patient J.P. had lost time during a session, she recalled coming back to herself as J.P., the core personality, while she and Dr. Malave were engaged in a sexual act. The first occasion occurred around Christmas in 1995. Patient J.P. lost time and came back to herself during a session and found herself kneeling in front of Dr. Malave performing oral sex on him in his office. She lost time shortly thereafter.

14. Patient J.P. recalled another occasion when she came back to herself during a session and found Dr. Malave sucking on her left breast and kissing her neck and face. Another time during a session, Dr. Malave asked patient J.P., while she was in her core personality state, if she were Bridget. Patient J.P. replied that she was. Dr. Malave went to his office door and locked it and then engaged patient J.P. in sex on his desk.

15. On a fourth occasion, patient J.P. came to herself and found herself lying on the floor in Dr. Malave's office and having sexual intercourse with him. Following that session, patient J.P. experienced vaginal soreness and noticed that her underwear was wet when she left his office. She decided to save the wet underwear and stored it under her bed.

16. Until June 1999, patient J.P. continued to save her wet underwear and place them under her bed after sessions with Dr. Malave when she suspected that sex may have occurred during the session. In June 1999, she placed the underwear in a safe deposit box along with a note explaining her relationship with Dr. Malave.

17. The last time that patient J.P. came back to herself while having sex with Dr. Malave was in August 1999. At that time she found herself having sex with Dr. Malave in his chair in his office.

18. Patient J.P.'s husband noticed that at times something was not right about patient J.P. following her sessions with Dr. Malave. Sometimes when patient J.P. exited Dr. Malave's office, her husband noticed that her hair was disheveled, her blouse was undone, her lipstick was smeared, and her skirt was wrinkled. When he asked patient J.P. what had happened, she told him that she had lost time during the session. Patient J.P.'s husband asked for an explanation from Dr. Malave, who told him that patient J.P. had changed personalities during the session and caused her appearance to become disheveled. Dr. Malave further advised that it was good that she was in session when it happened because patient J.P. would be safe with him.

19. Dr. Malave spoke with patient J.P.'s husband on numerous occasions concerning the diagnosis of DID. During one of their conversations, Dr. Malave told the husband that he had treated another woman with DID and that she had a sexually aggressive personality similar to patient J.P.'s personality Bridget. Dr. Malave advised the husband to keep patient J.P. away from men and to try to keep her at home because she just wanted to have sex.

20. In August 1999, patient J.P. contacted attorney Linda Schwichtenberg concerning her suspicions about Dr. Malave having sex with her during their treatment sessions. From August to October 1999, patient J.P. turned over a total of ten pairs of underwear to Ms. Schwichtenberg. Patient J.P. kept one pair of underwear in her safety deposit box for security reasons. Ms. Schwichtenberg sent the underwear in three separate submissions to Lab Corp, a forensic laboratory in North Carolina for DNA analysis. Ms. Schwichtenberg, on instructions from Lab Corp, took an oral swab from patient J.P. and sent that specimen to Lab Corp. From the time Ms. Schwichtenberg received the panties until she forwarded them to Lab Corp, the panties remained in a drawer in her office to which only she had access.

21. Lab Corp received the submissions and performed a presumptive test to determine whether seminal fluid was

present on the first three pair of panties that were submitted. A cutting was taken from one pair of ivory colored panties, the presumptive test revealed the presence of semen. Two black pairs were tested by rubbing filter paper on the panties. The presumptive tests for the two black pairs failed to reveal semen.

22. Lab Corp did a DNA analysis on the remaining seven pairs of panties.

23. DNA is the genetic blueprint of our lives and contains the codes for every physical characteristic and every chemical reaction which takes place in our bodies. With the exception of identical siblings, each person's DNA is unique. Nuclear DNA is inherited in equal portions from our mothers and fathers.

24. DNA is used in forensic cases to determine the identity of a DNA sample. Certain areas of the DNA molecule are different in the general population. These differences are used to develop a profile for a particular sample which is then compared to a profile of a known reference sample in order to determine whether the profiles are similar or different.

25. In cases where sexual misconduct is involved and where there may be two different sources of DNA (the victim and the suspect), a differential extraction is performed. The

purpose is to separate the DNA of the sperm source from the DNA of the non-sperm source so that a pure DNA profile for each will be obtained.

26. Lab Corp determined that the DNA profile from the oral swab submitted by patient J.P. could not be excluded as being the source of the non-sperm DNA in all of the panties except one in which a non-sperm fraction was not obtained. The profile developed for the sperm fraction is the same profile developed on the seven pairs of panties on which sperm was detected. In other words, only one sperm donor was detected. Lab Corp did not have a reference specimen from Dr. Malave to make a comparison of the sperm DNA found in the panties.

27. It is possible to transfer the DNA of the sperm fraction from one article of clothing to another. The transference could be done by rubbing the two articles of clothing together or by wetting the article containing the sperm and rubbing it against the other article of clothing. Based on the credible testimony of Meghan Clement, an expert in DNA identification and analysis and in forensic science, the concentrations of DNA in the sperm fraction were too high to have resulted from the sperm having been transferred from another article of clothing to patient J.P.'s panties.

28. On January 6, 2000, Ms. Schwichtenberg received the panties from Lab Corp. She gave some of the panties to Investigator John Eckerson of the Volusia County Sheriff's Office. On January 20, 2000, Dr. Malave gave a blood sample to the sheriff's office. Investigator Eckerson sent three pairs of patient J.P.'s panties and Dr. Malave's blood sample to the Florida Department of Law Enforcement (FDLE) laboratory for DNA analysis in January 2000.

29. FDLE personnel made a staincard from Dr. Malave's blood sample. The FDLE testing revealed that there was the possible presence of semen on one of the pairs of panties and no indications of semen present on the other two pairs sent in January 2000. A crime laboratory analyst for FDLE packaged a cutting of the panties containing semen for a later DNA analysis.

30. On February 3, 2000, patient J.P. went to the Rape Crisis Center in Daytona Beach, Florida, where a blood sample was taken from her by a registered nurse. The nurse turned the blood sample over to Deputy Wichman, who also took custody of a pair of panties from patient J.P. Deputy Wichman transported the blood sample and the pair of panties to the sheriff's office, where he placed them in an evidence locker. Patient J.P.'s blood sample was sent to the FDLE laboratory, where a staincard was prepared.

31. On June 20, 2000, Investigator Eckerson took custody of the remaining pairs of panties from Ms. Schwichtenberg. Those panties were sent to FDLE for testing. The presence of semen containing spermatozoa was found on four of the pairs of panties submitted in June. A crime laboratory analyst for FDLE prepared cuttings of the four pairs of panties and sent them to another crime laboratory analyst at FDLE for DNA analysis.

32. Timothy Petree, a crime laboratory analyst in the DNA section of the FDLE laboratory, performed a DNA analysis on the blood samples from Dr. Malave and patient J.P. and the five pairs of panties in which semen was found. He first performed a differential extraction of the cuttings which enabled him to separate the sperm cell DNA from any epithelial or skin cell DNA. The next steps include determining how much human DNA was present, setting up the PCR reaction which makes copies of the target DNA segments, and then performing a DNA analysis to determine which DNA fragments were present in the samples.

33. Mr. Petree developed a DNA profile for each of the blood samples and the sperm cells on each of the underwear cuttings. The DNA profile developed from the sperm cells on all five of the underwear cuttings were the same, meaning that there was one sperm donor. The sperm cell DNA profile was

compared to the DNA profile developed from Dr. Malave's blood sample. The sperm cell DNA profile matched Dr. Malave's DNA profile at all 14 DNA locations that were compared. The frequency of occurrence of that profile in different populations is as follows: one in 19 quadrillion Caucasians, one in 290 quadrillion African Americans, and one in 13 quadrillion Hispanics. Based on the evidence presented, the sperm found in patient J.P.'s panties came from Dr. Malave.

34. Dr. Malave testified that between January and June 1999, he lost approximately 63 pounds. He further testified that as his underwear would become too large that he would use them to clean up after sexual activity with his wife and discard the underwear in the garbage. It would appear that Respondent's testimony on this subject would be for the inference that somehow the semen that may have been present in his underwear in the garbage was transferred to patient J.P.'s panties, thereby explaining how his semen was found on her underwear. Such an inference is not credible, particularly given the testimony of Meghan Clement that the concentration of sperm present on some of patient J.P.'s panties was too concentrated to have been transferred from another article of clothing.

35. The relationship between a physician and a patient is a sacred trust. The doctor's duties to the patient are to

do no harm to the patient and to practice with the greatest diligence to serve the patient's best interest. In this private and confidential relationship, the psychiatrist explores the patient's problems by discussing very intimate thoughts and feelings.

36. Given the level of emotional intimacy in the patient-psychiatrist relationship, the patient sometimes develops sexual feelings toward the psychiatrist, and the psychiatrist sometimes develops sexual feelings toward the patient. These reactions are known as transference and counter-transference, respectively. The psychiatrist has the obligation to recognize the physical and verbal signs of transference in the therapeutic relationship and make sure that the strict sexual boundaries in the relationship are not violated. The personality known as Bridget and Dr. Malave developed sexual feelings toward one another, and it was the responsibility of Dr. Malave to ensure that those feelings did not result in sexual relations between them.

37. Sexual relations between the psychiatrist and the patient are forbidden. Sex within the patient-psychiatrist relationship is very destructive in the therapeutic process and can result in the patient experiencing feelings of guilt, mistrust, and low-self esteem--all of which are counter-therapeutic.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Sections 120.569 and 120.57, Florida Statutes.

39. The Department has alleged that Dr. Malave violated Subsections 458.331(1)(j), (t), and (x), Florida Statutes, which provide:

(1) The following acts shall constitute grounds for which disciplinary actions specified in subsection (2) may be taken:

* * *

(j) Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activities with his or her physician.

* * *

(t) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

* * *

(x) Violating any provision of this chapter, a rule of the board or department, or a lawful order of the board or department previously entered in a disciplinary hearing or failing to comply with a lawfully issued subpoena of the department.

40. The Department alleged that Dr. Malave violated Subsection 458.331(1)(x), Florida Statutes, by violating Section 458.329, Florida Statutes, and Rule 64B8-9.008,

Florida Administrative Code. Section 458.329, Florida Statutes, provides:

The physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of medicine means violation of the physician-patient relationship through which the physician uses said relationship to induce, or attempt to induce the patient to engage, or to engage or attempt to engage the patient in sexual activity outside the scope of the practice or the scope of the generally accepted examination or treatment of the patient. Sexual misconduct in the practice of medicine is prohibited.

41. Rule 64B8-9.008, Florida Administrative Code, provides:

(1) Sexual contact with a patient is sexual misconduct and is a violation of Sections 458.329 and 458.331(1)(j), Florida Statutes.

(2) For purposes of this rule, sexual misconduct between a physician and a patient includes, but it is not limited to:

(a) Sexual behavior or involvement with a patient including verbal or physical behavior which

1. may reasonably be interpreted as romantic involvement with a patient regardless of whether such involvement occurs in the professional setting or outside of it;

2. may reasonably be interpreted as intended for the sexual arousal or gratification of the physician, patient, or any third party; or

3. may reasonably be interpreted by the patient as being sexual.

42. The Department has the burden to establish by clear and convincing evidence the violations set forth in the

Administrative Complaint. Department of Banking and Finance v Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

43. The Department has established by clear and convincing evidence that Dr. Malave had sexual intercourse with patient J.P. during the course of his treatment of her and that Dr. Malave used his influence within the physician-patient relationship to engage patient J.P. in having sexual relations with him for his own gratification. The Department has established by clear and convincing evidence that Dr. Malave failed to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances by having a sexual relationship with patient J.P.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered finding that Ronald Malave, M.D., violated Subsections 458.331(1)(j), (t), and (x), Florida Statutes, revoking his license to practice medicine, and assessing the costs of the investigation and prosecution of the case against him.

DONE AND ENTERED this 21st day of August, 2002, in
Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of August, 2002.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.