STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE, Petitioner,	)	
vs.	)	Case No. 06-4638PL
MICHAEL FOX, M.D., Respondent.	)	

RECOMMENDED ORDER

Notice was provided and on April 6, 2007, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2006). The hearing proceeded by video-teleconferencing between sites in Tallahassee, Florida, and Jacksonville, Florida. The hearing was held before by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Jennifer L. Forshey, Esquire
Irving Levine, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Mary Bland Love, Esquire
Scott Pauzar, Esquire
Gobelman, Love, Gavin & Wasilenko
815 South Main Street, Suite 300
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

Should discipline be imposed against Respondent's license to practice medicine for violation of Section 458.331(1)(t), Florida Statutes (2003)?

PRELIMINARY STATEMENT

On September 25, 2006, in Case No. 2003-29108 before the Board of Medicine (the Board), the Department of Health (DOH) brought an Administrative Complaint against Respondent accusing him of a violation of the statute referred to in the Statement of the Issue. The Administrative Complaint was premised upon the following allegations:

* * *

> 5. On or about September 26, 2003, Patient T.D., a thirty-one year old female, presented to Respondent with a history of worsening pelvic pain, especially premenstrual, and abnormal menstrual bleeding. Respondent's clinical impression was pelvic pain, meno-metrorrhagia and endometriosis.
>
> 6. On or about October 6, 2003, Patient T.D. returned to Respondent at which time Respondent and Patient T.D. agreed that Patient T.D. would undergo a hysterectomy.
>
> 7. On or about October 22, 2003, Patient T.D. was seen by Respondent for a pre-operative examination. At that time, Respondent ordered pre-operative lab studies including a urine pregnancy test.

8. On or about October 27, 2003, Respondent performed a total abdominal hysterectomy on Patient T.D. During Patient T.D.'s hysterectomy, Respondent took a specimen which was sent to pathology for evaluation.

9. On or about October 29, 2003, a microscopic examination of the surgical specimen was performed and revealed that Patient T.D. was pregnant at the time Respondent performed the hysterectomy on Patient T.D.

10. Respondent did not ascertain the results of Patient T.D.'s pre-operative pregnancy test prior to performing the October 27, 2003, hysterectomy on Patient T.D.

As a consequence, Respondent is alleged to have violated Section 458.331(1)(t), Florida Statutes (2003), according to allegations which state:

* * *

12. Respondent violated Section 458.331(1)(t), Florida Statutes, in one or more of the following ways:

a) by failing to ascertain the results of Patient T.D.'s preoperative pregnancy test prior to performing a hysterectomy on Patient T.D.; and/or

b) by performing a hysterectomy on Patient T.D. when Patient T.D. was pregnant.

13. Based upon the foregoing, Respondent violated Section 458.331(1)(t), Florida Statutes (2003), by failing to practice medicine with the level care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances when Respondent failed to

> ascertain the results of Patient T.D.'s pre-operative pregnancy test prior to performing a hysterectomy on Patient T.D. and by performing a hysterectomy on Patient T.D. when Patient T.D. was pregnant.

Respondent was provided several options in addressing the Administrative Complaint. He chose the third option. That option was to dispute the allegations of fact contained in the Administrative Complaint. Through that option, as evidenced in the form provided him, Respondent asked that he be heard in accordance with Sections 120.569 and 120.57(1), Florida Statutes, by an administrative law judge to resolve the dispute. In particular, Respondent disputed paragraphs 10 through 13 in the Administrative Complaint, by signing the election of rights form sworn to before a notary public of the State of Florida on October 20, 2006. In addition, on October 31, 2006, Respondent filed an answer to the Administrative Complaint and a request for formal hearing. He continued to deny the allegations set forth in paragraphs 10 through 13.

On November 15, 2006, DOH forwarded the case to the Division of Administrative Hearings (DOAH) to assign an administrative law judge to conduct a hearing in accordance with Respondent's request for formal hearing. The assignment was made by Robert S. Cohen, Director and Chief Judge of DOAH in reference to DOAH Case No. 06-4638PL. The assignment was to the present administrative law judge.

After two continuances, the hearing took place on April 6, 2007.

Petitioner presented Jose Cortes, M.D., as its witness, together with Petitioner's Exhibits identified as A through G that were admitted as evidence. Respondent testified in his own behalf and presented Bryan Cowen, M.D., and Wyatt McNeill, M.D., as his witnesses. Respondent's Exhibits identified as A through J were admitted as evidence. Joint Exhibit identified as A was admitted as evidence. Petitioner presented Dr. Cortes as a rebuttal witness.

At the conclusion of Petitioner's case in chief, Respondent moved to dismiss the case based upon the evidence that had been presented. The motion to dismiss was denied for reasons explained in the hearing transcript.

Consistent with the Order of Prehearing Instructions, the parties filed a Joint Prehearing Stipulation. In that submission the parties have set out facts upon which they agree. The factual stipulations are reflected in the findings of fact to this Recommended Order.

On April 25, 2007, the hearing transcript was filed. Within the time allotted Petitioner and Respondent filed proposed recommended orders, which have been considered in preparing the Recommended Order.

FINDINGS OF FACT

Stipulated Facts

1. Petitioner is the state department charged with the regulation of the practice of medicine pursuant to Chapter 20.43, Florida Statutes; Chapter 456, Florida Statutes; and Chapter 458, Florida Statutes.

2. Respondent is Michael D. Fox, M.D.

3. Respondent is board certified in obstetrics and gynecology.

4. Respondent is a licensed medical doctor in the State of Florida having been issued license ME 66312.

5. Respondent's address is 3627 University Boulevard, South, Suite 200, Jacksonville, Florida 32216-4211.

6. At all times material to this complaint, Respondent provided professional services as an employee of North Florida Gynecologic Specialists in Jacksonville, Florida.

7. On or about September 26, 2003, Patient T.D. presented to Respondent with a history of worsening pelvic pain and abnormal menstrual bleeding.

8. On or about October 6, 2003, Respondent and Patient T.D. agreed that Patient T.D. would undergo a hysterectomy.

9. On or about October 22, 2003, during a pre-operative examination, Respondent ordered pre-operative lab studies, including a urine pregnancy test, for Patient T.D.

10. On or about October 27, 2003, Respondent performed a total abdominal hysterectomy on Patient T.D.

11. During Patient T.D.'s hysterectomy, Respondent took a specimen from Patient T.D., which was sent to pathology for evaluation.

12. On or about October 29, 2003, a microscopic examination of the surgical specimen was performed that revealed Patient T.D. was pregnant at the time Respondent performed the hysterectomy on Patient T.D.

13. Respondent did not ascertain the correct results of Patient T.D.'s pre-operative pregnancy test prior to performing the October 27, 2003, hysterectomy on Patient T.D.

Respondent's Care of Patient T.D.

14. Respondent attended medical school at the University of Alabama, Birmingham, Alabama. He did a four-year residency in obstetrics and gynecology (ob/gyn) in Jackson, Mississippi, and a two-year sub-specialty fellowship in reproductive endochrinology in Lexington, Kentucky. He is board-certified in reproductive endochrinology and ob/gyn. At present his specialty is reproductive endochrinology.

15. Respondent has experience in performing hysterectomies and the pre-operative evaluations associated with those surgeries. Respondent does 30 to 40 hysterectomies a year. That number represented his experience in 2003.

16. The principal reason for performing hysterectomies in his practice, is associated with sub-specialty interests, surgery for endometriosis and adenomyosis, a co-disease with endometriosis.

17. Respondent has privileges to practice in hospitals in the Jacksonville, Florida area. In particular, he has privileges at St. Vincent's, St. Luke's, Baptist, Baptist Beaches, Memorial and Shands hospitals. He performs surgeries in all those hospitals.

18. The hospitals where Respondent practices have computer systems that allow access to laboratory records and other forms of information associated with patient care. Although he has access to the computer systems in the facilities, his routine is to obtain laboratory information in the hospital setting from other persons involved in the patient care. He asks those persons to find out the information for him and report the finding(s). Respondent would have access to the patient hospital record, as well as a source for obtaining laboratory information. Respondent routinely looks at the patient hospital record in preparing for surgery.

19. Concerning Patient T.D., the subject of this proceeding, when seen by Respondent she was described as a young female, of child-bearing age who presented with chronic pain. She had pain with periods which Respondent found to be

characteristic of adenomyosis. She had pre-cycle pain approximately a week prior to her menses, another characteristic of adenomyosis. The patient had irregular bleeding that is an indication of adenomyosis. The patient was found to have an enlarged uterus, the primary source of her pain on the examination. This visit with Respondent, that formed the basis for his impression, took place on September 26, 2003.

20. On the initial visit Respondent also obtained a history consistent with endochrine disorder causing irregular cycles. In the patient's case, the cycles extended as much as 60 days in relation to her periods.

21. Based upon his initial impression, Respondent did not find evidence that Patient T.D. was pregnant. The patient told Respondent that she had no desire for fertility. At that time, she did not report having a partner, nor did she indicate that she was sexually active.

22. To further evaluate the Patient T.D.'s condition and complaints, Respondent ordered an ultrasound test. That study was performed on October 2, 2003, and a gynecological ultrasound report rendered. Based upon the report, Respondent held to the view that the report showed evidence of adenomyosis. There was a mild and moderate enlargement of the uterus, which Respondent found to be consistent with adenomyosis. The patient had had a prior pregnancy and delivery and Respondent found the depiction

on the ultrasound of a mild enlargement of the uterus consistent with the prior pregnancy and delivery.

23. On their next visit, Respondent discussed the choice of a hysterectomy or some other form of surgery that did not involve a hysterectomy, to treat the endometriosis and relieve her symptoms. That visit took place on October 6, 2003.

24. On October 22, 2003, Respondent met the patient again. He reviewed the details of what he believed was the underlying disease and potential treatments in discussion with the patient. The patient indicated that she wanted to proceed with the hysterectomy. That choice having been made, the surgery was discussed between the patient and Respondent and the necessary paperwork was started to arrange for the surgery in the hospital.

25. When preparing for surgery Respondent ordered a pregnancy test to verify whether the patient was pregnant or not. The nature of the test was a urine pregnancy test under Respondent's preoperative orders given October 22, 2003. The specimen was collected on October 22, 2003, and received by Memorial Hospital (Memorial), Jacksonville, Florida, where the hysterectomy was to be performed. The test result was positive for pregnancy. The point in time that the result was revealed to Respondent will be discussed beyond this reference to the result.

26. On October 27, 2003, Respondent began his surgery cases at Memorial at 7:30 a.m.

27. On that date there was no indication in the patient record or chart maintained in his office practice that reflected information concerning the pregnancy test result, nor was that information found in the hospital chart related to Patient T.D. Absent the information, Respondent testified that he asked the circulating nurse at Memorial about the result of the pregnancy test. That was Tracy Lloyd, R.N. According to Respondent, the nurse went away to check the result and as Respondent describes "subsequently told me it was negative." No further effort was made by Respondent to confirm the oral report that Respondent says was made by the nurse. Respondent did not document the results of Patient T.D.'s pre-operative pregnancy test in the medical record. It was not his habit to write that type of a pre-operative note. Respondent testified that Ms. Lloyd told him about the pregnancy test results while in the holding area in the presence of the patient. Respondent commented that his question to the nurse would have been "What are the results of the pregnancy test?"[1/] Aside from the results of the pregnancy test, nothing in the patient's condition, known to Respondent, led him to believe that the patient was pregnant.

28. When the laparoscopic surgery commenced, Respondent did not perform an examination of the patient under anesthesia, given his recent examination of the patient in his office and the results of the ultrasound. Moreover, Respondent does not believe that such an examination under anesthesia would reveal anything other than the adenomyosis and the endometriosis which conformed to his preoperative diagnosis. On that subject, the later examination of the specimen on October 29, 2003, revealed that Patient T.D. had an early pregnancy, estimated as 4 to 5 weeks. In Respondent's opinion, in a 4-to 5-week pregnancy, the uterus would not normally achieve the size of a uterus that was reported on the ultrasound as mildly enlarged, not pregnant. Mildly enlarged refers to a 6 to 8 weeks' pregnancy.

29. Respondent expected to see an enlarged uterus because of the adenomyosis which could be anticipated to cause an inflammatory response in the wall of the uterus, softening the uterus and giving it an appearance that would be similar to an early pregnancy.

30. The rounded globular description of the findings during surgery were consistent with the expectations in addressing cases involving adenomyosis, according to Respondent.

31. Returning to the surgical specimen obtained in Patient T.D.'s case, it was examined through surgical pathology conducted by Robert E. Barnes, M.D. A report was rendered. The

report explains that in the examination of the specimen, the endometrium, "gestational endometrium with products of conception" were present. This was the finding related to Patient T.D.'s pregnancy.

32. Dr. Barnes, is a board-certified pathologist in anatomic and clinical pathology. He describes his findings pertaining to Patient T.D., the gestational endometrium with products of conception, as referring to an early embryo, the endometrium showing changes associated with pregnancy. In his opinion the pregnancy was between 10 and 16 days following conception.

33. When Dr. Barnes contacted Respondent on October 29, 2003, to advise of his findings in the pathology. It was a brief conversation and he does not recall the details.

34. After the revelation concerning the pathology, Respondent's office staff found the information concerning the results of the urine pregnancy test in the hospital chart retained in the computer at Memorial. This finding was made around November 4, 2003. In a section within the report on the pregnancy test it refers to the "Result" and underneath that, the word "POSITIVE" is entered referring to pregnancy.

35. When it was discovered that the hysterectomy had been performed while the Patient T.D. was pregnant, at her post-surgery scheduled office visit, a discussion was held with the

patient concerning the "checks and balances" in place to avoid the problem. That refers to the surgery at a time the patient was pregnant. Respondent talked to the patient about counseling, or something similar, given the outcome in the case.

36. As a result of the error, steps were taken within Memorial to address this circumstance. The Respondent and the Memorial Department of OB/GYN made changes, by requiring a pre-operative pregnancy test as protocol, that established a urine pregnancy test within 72 hours of surgery. That test would be performed by the nurses in the holding area. Respondent now orders a blood pregnancy test which is a more sensitive test to determine pregnancy.

Expert Opinion

37. Jose Cortes, M.D., is board-certified in ob/gyn, licensed to practice in Florida. He was recognized as a expert in ob/gyn for purposes of expressing his opinion about the care Respondent provided Patient T.D.

38. Dr. Cortes has done hysterectomies in his practice, as recent as June 2006. He was called upon to render an opinion concerning the care Respondent provided Patient T.D. involving her hysterectomy. He had access to material concerning her care involved with this case.

39. Dr. Cortes' impression of Respondent's medical treatment of the patient in the beginning, was that it was adequate and correct, with the proper evaluation performed and an appropriate decision made for surgery.

40. Dr. Cortes expressed the opinion that in performing a hysterectomy on a woman who is of child-bearing age, which Patient T.D. was, a physician should order a pre-operative pregnancy test.

41. In reviewing Patient T.D.'s records Dr. Cortes did not find a record documenting that the pregnancy test was ascertained by Respondent, referring to the test results. In his experience the results of the preoperative tests would be reflected in the patient's medical records as a matter of custom.

42. Respondent, according to Dr. Cortes, could have obtained the results of the pre-operative pregnancy test for Patient T.D. by a fax to his office, a copy obtained through a computer, laboratory printouts sent to Respondent's office, and a copy of the pre-operative laboratory results obtained by the hospital placed in its medical record.

43. Dr. Cortes stated the position that an experienced ob/gyn, and Respondent fits that category, could reasonably be expected to rely upon an oral report from a nurse as to the results of the pregnancy test, before entering the operating

room, in the area of the pre-operative alcove as the patient is being interviewed by the physician. Dr. Cortes goes on to explain that if the conversation with the nurse in the presence of the patient was in the operating room holding area, then the pregnancy test results would have to have been documented in the patient chart to find the oral report acceptable. Those test results as reported would have had to be entered by the physician in the patient chart to meet the standard of care upon the oral report.[2/]

44. Later on, Dr. Cortes in his testimony seems to subscribe to the view that an oral report by the nurse as to the pregnancy test results would meet the standard of care, assuming that the Respondent in this case was provided an oral report.

45. In the testimony at hearing, Dr. Cortes also said that obtaining an oral report or verbal report on test results, in an emergency situation, would meet the standard of care. By contrast, in elective surgery, such as that being performed on Patient T.D., it would be such that there was ample time to review a chart and laboratory studies before the patient was brought into the surgical suite.

46. Generally stated, Dr. Cortes accepts that physicians frequently rely upon oral information imparted by nurses in performing surgeries, be they elective or emergent, but without an oral report this concession is not important.

47. Regardless of the pre-conditions for Respondent to receive and rely on an oral report of the results of the pregnancy test, without an oral report, there being no other basis for Respondent's knowledge of the pregnancy test results, it was below standards to proceed with the hysterectomy. This view is taken from Dr. Cortes' testimony.

48. Dr. Cortes expressed the opinion that it was below the standard of care to not ascertain the results of the patient's pre-operative pregnancy test prior to performing a non-emergent hysterectomy, that is an elective hysterectomy. Dr. Cortes expressed the opinion that it was below the standard of care for Respondent to perform a hysterectomy on Patient T.D. while she was pregnant in an elective setting.

49. In addition to the results of the pregnancy test, Dr. Cortes believes that Respondent had other opportunities to detect the pregnancy, including an examination of the patient while she was under anesthesia during the surgery, and would have allowed a comparison of the results at the time of surgery against previous examinations that Respondent had performed on the patient.

50. In referring to the previous examinations compared to an examination under anesthesia, this included the results of the ultrasound performed on October 2, 2003. Dr. Cortes does agree that the underlying condition visualized under anesthesia

could be associated with prior pregnancy or the pre-operative diagnosis of adenomyosis.

51. Dr. Cortes believes that Respondent's medical records, in the context of what could have been found upon an examination under anesthesia during the surgery, could be consistent with a possible pregnancy. A change seen in the pelvic examination at surgery would create an opportunity to evaluate and raise in the Respondent's mind any doubt concerning pregnancy. A slight increase in the size of the uterus between September 26, 2003, and October 27, 2003, is what is being referred to, promoting clinical judgment about possible pregnancy.

52. Bryan Cowen, M.D. specializes in ob/gyn and reproductive endochrinology. He practices at the University of Mississippi in Jackson, Mississippi. He is a professor and chair in the Department of OB/GYN and has been for five years. He has been affiliated with the University of Mississippi for 24 years. He did his undergraduate work at the University of Colorado in Boulder, Colorado, and attended medical school in Denver, Colorado.

53. Dr. Cowen is licensed to practice medicine in Mississippi and is board-certified.

54. Dr. Cowen has performed a number of hysterectomies during his career.

55. Dr. Cowen is familiar with the standard of care applicable for physicians such as Respondent, in the evaluation of patients suspected of endometriosis and adenomyosis and the considerations for treatment by hysterectomy. He is also familiar with the standard of care in relation to pre-operative testing and the associated duties of physicians when ordering such tests.

56. In preparing to testify in this case, Dr. Cowen examined the Memorial medical records, Respondent's office records, and the depositions of Respondent, Dr. Freeman, Dr. Widrich, Dr. Barnes, and Dr. Cortes. With this information in mind, Dr. Cowen was able to provide an opinion concerning the standard of care in relation to the treatment provided by Respondent to Patient T.D. That opinion was that Respondent did not breach the standard of care in that he met due diligence in the process by the pre-operative laboratory-ordered, and pre-operative evaluation and assessment.

57. Speaking to the September 26, 2003, office visit, Dr. Cowen saw nothing on the physical examination to indicate to him that Patient T.D. was pregnant.

58. Concerning the ultrasound that was conducted on October 2, 2003, Dr. Cowen's opinion is that Respondent's assessment that Patient T.D. had adenomyosis based upon presentation, was confirmed by the ultrasound, the overall

impression being that the Patient T.D. was not pregnant at that time.

59. The further visit by the patient prior to the hysterectomy did not reveal anything in the history or physical examination that would suggest that Patient T.D. was pregnant, according to Dr. Cowen.

60. On October 22, 2003, the pregnancy test was ordered by Respondent. The arrangement of ordering the test, sending the patient for pre-operative evaluation and laboratory tests is a common practice in Dr. Cowen's experience.

61. In the instance where Respondent did not get a call from the pre-admission testing as to any abnormal results in the pregnancy test, and no report reflecting in the patient chart that the results were normal, Dr. Cowen commented on the need to check the laboratory results before taking the patient into the operating room. Based on Dr. Cowen's experience, there was no necessity to personally lay eyes on the test results to ascertain those results. He recognizes that his hospital may be different from Memorial in its expectations but he believes that Respondent followed Memorial's policy in accepting the report of a nurse as to the results of the pregnancy test. Dr. Cowen's opinion relies upon the factual predicate that Respondent was told by a nurse that the pregnancy test was negative, to the

extent that is not true, and it has not been found as a fact, his opinion is without foundation.

62. Further, Dr. Cowen believes that in the setting where surgery is being performed in other than an emergency, it is a sufficient practice to rely upon an oral report of a nurse concerning laboratory results, such as the outcome in the pregnancy test for Patient T.D. In his experience he has relied upon nurses to report both in an emergent and non-emergent settings. He goes on to describe how those reports come back to the medical records and the physician signs off, which did not occur in this case.

63. Dr. Cowen was asked to express his opinion about the value of an examination under anesthesia as an assist to understanding the underlying condition of the Patient T.D. Dr. Cowen does not believe that this would provide additional information. In his experience most physicians have abandoned examinations under anesthesia. If a better insight is needed an ultrasound is the best choice. To Dr. Cowen, an examination under anesthesia does not relate to standard of care, it is in relation to an individual practitioner's protocol. An ultrasound used in this case, a transvaginal ultrasound, may have shown the gestational sack at the time of the hysterectomy but proceeding on the basis that a negative pregnancy test had been established and other findings during the course of the

operation, as well as the preoperative record, would not indicate the necessity for an ultrasound in this case, at that time, the place in time where the hysterectomy was being performed.

64. Dr. Cowen did not find anything in the intra-operative findings that would suggest to Respondent that the Patient T.D. was pregnant.

65. Overall Dr. Cowen believes that Respondent met the standard of care in addressing the case of Patient T.D., who probably had polycystic ovarian disease, irregular cycles, was without a sexual partner by history, used condoms for contraception, had an ultrasound that confirmed a slightly enlarged uterus and had symptoms compatible with adenomyosis or endometriosis. Respondent discussed the treatment options, made an appropriate pre-operative evaluation, learned that the lab results for pregnancy were negative (an erroneous assumption), and therefore, he met the standard of care, according to Dr. Cowen.

66. Ultimately, Dr. Cowen believes that it is essential to determine whether a patient is pregnant prior to performing a non-emergent/elective hysterectomy, which was not done here.

67. Wyatt McNeill, M.D., testified. He is an ob/gyn practicing in Jacksonville, Florida, who in the past has had

privileges at Memorial. He has performed hysterectomies at that facility.

68. Dr. McNeill graduated from Florida State University. He graduated from the University of Miami Medical School. He is licensed in the state of Florida and is board-certified in ob/gyn.

69. Dr. McNeill is familiar with the standard of care in relation to preoperative laboratory work done before a hysterectomy.

70. Dr. McNeill is familiar with the standard of care applicable to Respondent in the evaluation of Patient T.D. for hysterectomy, knowing after the fact that the patient was found to be pregnant.

71. To familiarize himself with the facts of this case, Dr. McNeill examined the hospital records of Memorial, Respondent's office records, various depositions, to include that of Dr. Cortes and the anesthesiologist and pathologist, before providing testimony. He also examined the testimony of the nurses involved in the care before offering his opinions.

72. Concerning the patient history, objective and subjective evidence available, Dr. McNeill did not believe that there was anything to suggest that Patient T.D. was pregnant. In particular, Dr. McNeill comments on the history and physical

done by Respondent, counseling, laboratory evaluation, and the decision beyond that to proceed with the surgery.

73. Dr. McNeill found the ultrasound results consistent with a patient, who by history had a previous child and had the complaints expressed in the report concerning the September 26, 2003, visit with Respondent. Nothing in the ultrasound results compared to the findings in the operative report indicated to Dr. McNeill that the patient needed to be examined under anesthesia. The use of the examination under anesthesia is a training regimne for residents and students, in his experience. It has no utility beyond that application, in Dr. McNeill's opinion.

74. Dr. McNeill believes that an oral report of the results of the pregnancy test meets the standard of care. As with others, Dr. McNeill assumes that Respondent was told the test results, which is not found. There was no further duty by Respondent to investigate those results having been told. In Dr. McNeill's opinion, the test results are either positive or negative, they are highly accurate. A negative test result means that the patient is not pregnant. No further duty is established beyond that realization, according to Dr. McNeill.

75. In summary, there is no disagreement among the experts that Respondent is expected to ascertain the results of the preoperative pregnancy test before performing the hysterectomy

and it would be inappropriate to perform the hysterectomy without those results. Respondent does not disagree with that perception.

76. Conceptually, having considered the testimony of Respondent and the experts, it would be acceptable to proceed on an oral report, if one had been made, a report that the pregnancy test was negative.[3/]

77. Otherwise, the physical examination of the patient prior to surgery, the results of the ultrasound, and the observations intra-operatively made by Respondent did not indicate that the patient was pregnant. There was no necessity to make an examination under anesthesia. Even if made, it would not necessarily lead to the conclusion that the patient was pregnant, taking into account other information known by Respondent.

Mitigation/Aggravation

78. The outcome here was that the patient underwent a hysterectomy when she was pregnant, an adverse result.

79. There is no indication that Respondent has ever been disciplined in Florida or other jurisdictions while practicing medicine.

CONCLUSIONS OF LAW

80. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding in accordance with Sections 120.569, 120.57(1) and 456.073(5), Florida Statutes (2006).

81. Respondent is a licensed physician in Florida. He was issued the license by the Department. The license number is ME 66312.

82. Through the Administrative Complaint, Respondent has been accused of the failure to practice medicine with the level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The manner of the alleged violation is that Respondent fell below the standard:

> a. by failing to ascertain the results of Patient T.D.'s pre-operative pregnancy test prior to performing a hysterectomy on Patient T.D. and; and/or
>
> b. by performing a hysterectomies on Patient T.D. when Patient T.D. was pregnant.

83. As a consequence, Respondent is alleged to have violated Section 458.331(1)(t), Florida Statutes (2003), which states in pertinent part:

> (1) The following acts constitute grounds for . . . disciplinary action, as specified in s. 456.072(2):
>
> * * *
>
> (t) . . . 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. . . . As used in this paragraph, . . . '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,' shall not be construed so as to require more than one instance, event, or act. Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph. A recommended order by an administrative law judge or a final order of the board finding a violation under this paragraph shall specify whether the licensee was found to have committed . . . 'failure to practice medicine with that level of care, skill, and treatment which is recognized as being acceptable under similar conditions and circumstances,' . . . and any publication by the board must so specify.

84. This hearing has been held recognizing the procedural expectations set forth in Section 456.073(5), Florida Statutes (2006), which states:

> (5) A formal hearing before an administrative law judge from the Division of Administrative Hearings shall be held pursuant to chapter 120 if there are any disputed issues of material fact. The determination of whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care, is a conclusion of law to be determined by the board, or department when there is no board, and is not a finding of fact to be determined by an administrative law judge. The administrative law judge shall issue a recommended order pursuant to chapter 120.
> . . .

85. In accordance with Section 458.331(1)(t), Florida Statutes (2003), in this Recommended Order it must be specified whether Respondent failed to practice medicine with that level of care, skill and treatment which is recognized as being acceptable under similar conditions and circumstances. Ultimately, the Board in its Final Order determines whether Respondent violated Section 458.331(1)(t), Florida Statutes (2003), as to the issue of pursuit of a reasonable standard of care, a legal conclusion. § 456.073(5), Fla. Stat. (2006). But not before findings of fact have been made concerning Respondent's alleged "failure to practice medicine with that level of care, skill and treatment which is recognized as being acceptable under similar conditions and circumstances," to include the underlying facts that relate to patient care and the opinion of experts on standard of care.

86. This is a disciplinary case, and for that reason Petitioner bears the burden of proof. That proof must be sufficient to sustain the allegations in the Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The term clear and convincing evidence is explained in the case In re:

Davey, 645 So. 2d 398 (Fla. 1994), quoting, with approval from Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

87. Given the penal nature of this case, Section 458.331(1)(t), Florida Statutes (2003), has been strictly constructed. Any ambiguity favors the Respondent. See State v. Pattishall, 99 Fla. 296 and 126 So. 147 (Fla. 1930), and Lester v. Department of Professional and Occupational Regulation, State Board of Medical Examiners, 348 So. 2d 923 (Fla. 1st DCA 1977).

88. As referred to previously, the disciplinary response that may be imposed should Respondent be found in violation of Section 458.331(1)(t), Florida Statutes (2003), is set forth in Section 456.072(2), Florida Statutes (2003), which states:

> (2) When the board . . . finds any person guilty . . . of any grounds set forth in the applicable practice act, . . . it may enter an order imposing one or more of the following penalties:
>
> * * *
>
> (b) Suspension or permanent revocation of a license.
>
> (c) Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary

for the protection of the public health, safety, and welfare.

(d) Imposition of an administrative fine not to exceed $10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of $10,000 per count or offense.

(e) Issuance of a reprimand or letter of concern.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

(h) Imposition of an administrative fine in accordance with s. 381.0261 for violations regarding patient rights.

(i) Refund of fees billed and collected from the patient or a third party on behalf of the patient.

(j) Requirement that the practitioner undergo remedial education.

In determining what action is appropriate, the board, . . . must first consider what sanctions are necessary to protect the public or to compensate the patient. Only after those sanctions have been imposed may the disciplining authority consider and include in the order requirements designed to rehabilitate the practitioner. All costs

> associated with compliance with orders issued under this subsection are the obligation of the practitioner.

89. Clear and convincing evidence was presented to show that Respondent 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. When Respondent failed to ascertain the results of Patient T.D.'s pre-operative pregnancy test and then proceeded to perform the hysterectomy, this was below the standard of care.

90. Florida Administrative Code Rule 64B8-8.001 sets forth disciplinary guidelines for a licensed violation associated with Section 458.331(1)(t), Florida Statutes (2003). For a first offense the suggested range of punishment is from a one-year probation to revocation and an administrative fine from $1,000.00 to $10,000.

91. Florida Administrative Code Rule 64B8-8.001(3) addresses aggravating and mitigating circumstances in determining an appropriate punishment where it states:

> (3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:

(a) Exposure of patient or the public to injury or potential injury, physical or otherwise: none, slight, severe, or death;
(b) Legal status at the time of the offense: no restraints, or legal constraints;

(c) The number of counts or separate offenses established;

(d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;

(e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;

(f) Pecuniary benefit or self-gain inuring to the applicant or licensee;

(g) The involvement in any violation of Section 458.331, F.S., of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure.

(h) Any other relevant mitigating factors.

Patient T.D. was injured by the Respondent's choice in providing treatment. There were no legal restraints or constraints placed on Respondent at the time of the violation. The violation concerns a single count and a significant failure in judgment. No indication was given that Respondent has committed this same offense at any other time. Respondent has no disciplinary history. Respondent has not experienced pecuniary benefit or self-gain as a result of the violation. None of the violations

concern themselves with the provision of controlled substances by the Respondent.

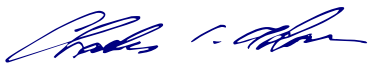
RECOMMENDATION

Based upon the findings of facts found and the conclusions, it is

RECOMMENDED:

That a final order be entered finding Respondent in violation of Section 458.331(1)(t), Florida Statutes (2003), and imposing an administrative fine of $10,000.00, requiring Respondent to take a course on Risk Management for physicians, and issuing a letter of reprimand.

DONE AND ENTERED this 22nd day of June, 2007, in Tallahassee, Leon County, Florida.



CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2007.

ENDNOTES

1/ Recollection of the doctors and nurses on duty at Memorial at the time this patient was being cared for at the hospital:

Tracy Lloyd, R.N., became a registered nurse in 1988 and was licensed in Florida in 1999. She worked in the perinatal operating room at Memorial when Patient T.D. had her hysterectomy.

On October 27, 2003, Ms. Lloyd was the circulating nurse. She helped get the operating room ready before surgery, including the sterile supplies. She went to the holding area and interviewed patients before taking them back to the operating room where she assisted them onto the operating table(s), and assisted the anesthesiologist with induction. She was responsible for filling out operating room paperwork.

Ms. Lloyd has no recollection of being involved in the treatment of Patient T.D. on the date in question. According to the chart for Patient T.D. and upon Ms. Lloyd's recollection she reviewed all of the documents in the chart including the pre-op holding record. The documents in the chart would include lab results. If any lab results were missing, the practice was for Ms. Lloyd to go to the holding room nurse and let her know that the labs were not in the chart and to wait until they were printed out. She has no recollection of that approach in Patient T.D.'s case. When asked if she had any discussion with Respondent about lab results in the patient's case, she replied "I do not remember."

Ms. Lloyd said that she did not remember informing Respondent that Patient T.D. was not pregnant or providing any information on that subject to Dr. Jason Brian Widrich, the anesthesiologist in the case.

The occasion upon which Ms. Lloyd vaguely recalls finding out about Patient T.D.'s pregnancy, was sometime after the conclusion of the hysterectomy surgery, when told by her supervisor that the results of the pathology showed the products of conception. After being told about the results of the pathology, Ms. Lloyd had no conversation(s) with Respondent and Dr. Widrich on the subject.

Ms. Lloyd was in attendance during the hysterectomy surgery performed on Patient T.D. by Respondent.

Ordinarily, when Ms. Lloyd worked in the operating room she would interview the patient, using the preoperative assessment checklist and assess the preoperative anesthesia questionnaire for the anesthesiologist, verbally verify the nature of the procedure with the patient and the consent. Ms. Lloyd would review the lab work in the chart. If a positive pregnancy test was found, her practice would be to communicate that finding with to surgeon as well as the anesthesiologist. On this occasion she has no recollection or record of having done that.

Michelle Davis Singleton, R.N., became a registered nurse in 1994. On October 27, 2003, she was responsible for pre-op paperwork at Memorial and did the paperwork for Patient T.D. She also worked in the recovery room on that shift. The hospital's patient chart for Patient T.D. refers to a urine pregnancy test, CBC and a chest x-ray. Nurse Singleton signed this form as part of the pre-op orders. It was her responsibility to check to see that those orders were completed by looking in the computer. She has no independent recollection of what may have been done in Patient T.D.'s case.

Normally nurse Singleton would print out the results of a laboratory test, such as the urine test and put them in the patient chart. Sometimes it would be necessary to call the lab to obtain the results when the results were not yet in the computer.

By marking "other: HCG" in a box on Patient T.D.'s chart at Memorial, Ms. Singleton was indicating that the pregnancy test had been completed but she does not recall whether she obtained the results of that test.

Nurse Singleton has no recollection of communicating with Respondent concerning Patient T.D. on October 27, 2003. Specifically, she has no recollection of telling Respondent that Patient T.D. was either pregnant or not pregnant on that date, nor does she recall telling Dr. Widrich whether the patient was pregnant or not pregnant on that date.

Another nurse that cared for Patient T.D. on the date at issue, was Debra N. Floyd, R.N. The patient was turned over for care from nurse Singleton to nurse Floyd on October 27, 2003. It would have been normal practice for Nurse Singleton to tell Nurse Floyd the results of the pregnancy test, be it a negative or positive result. Nurse Singleton is not certain whether she told Nurse Floyd the results of the pregnancy test on October 27, 2003, in relation to Patient T.D.

Nurse Singleton recognizes that if the pregnancy test had been positive, she would have typically communicated with the Respondent because it would indicate a "red flag." A report concerning the outcome of the pregnancy test would not have been made without looking at the lab results. Nurse Singleton does not believe that she would have been mistaken about positive results being perceived as negative results in the pregnancy test.

Debra N. Floyd, R.N. was licensed in 1983. On October 27, 2003, Nurse Floyd was also involved with pre-op care for the patient. Nurse Floyd has no recollection of any results of a pregnancy test for Patient T.D. that may have been in the chart at Memorial. Generally stated, Nurse Floyd has no recollection of whether the patient was pregnant on the date that she saw Patient T.D. Nurse Floyd is uncertain concerning whether she saw the Respondent on October 27, 2003 prior to the surgery on Patient T.D.

Normal protocol would require nurse Floyd to look at an electronic record to determine the lab results if they were missing in the patient's chart.

Nurse Floyd found out that Patient T.D. was pregnant a couple of weeks after the surgery.

Again, Jason Brian Widrich, M.D., was the anesthesiologist during Patient T.D.'s surgery. Respondent and Dr. Widrich did not speak concerning whether Patient T.D. was pregnant or not before surgery. Dr. Widrich did not overhear a nurse tell Respondent about the results of the urine pregnancy test related to Patient T.D. Dr. Widrich did not find out that Patient T.D. had been pregnant at the time of the hysterectomy until a few weeks later. In performing his duties, Dr. Widrich did not review Respondent's orders in Patient T.D.'s case. Dr. Widrich acted independently in making determinations about anesthesia management for the patient.

Michael L. Freeman, M.D., is a board-certified obstetrician and gynecologist involved with Patient T.D.'s care during the dates pertinent to the case. He saw Patient T.D. on October 2, 2003, and assisted in the hysterectomy. Dr. Freeman does not believe that he had any discussion with Respondent about Patient T.D.'s care prior to the surgery. When in the operating room, there was no discussion between Respondent and Dr. Freeman concerning the urine pregnancy test.

Having considered Respondent's testimony and that of the other witnesses involved in the patient care, Respondent's testimony that he was told that the pregnancy test was negative is rejected. It is not found credible.

2/ This latter reference to the need for the physician to document is outside the allegations in the Administrative Complaint.

3/ Petitioner made a prima facie showing that those test results were not known by Respondent before proceeding with the hysterectomy, the hypothetical presented to Dr. Cortes, Petitioner's witness, to the effect that the test results were known before proceeding to surgery notwithstanding. Respondent failed to establish in his defense that he knew the result before performing the hysterectomy.

COPIES FURNISHED:

Jennifer L. Forshey, Esquire
Irving Levine, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Mary Bland Love, Esquire
Scott Pauzar, Esquire
Gobelman, Love, Gavin & Wasilenko
815 South Main Street, Suite 300
Jacksonville, Florida 32207

Larry McPherson, Executive Director
Board of Medicine
Department of Health
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701

Josefina M. Tamayo, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

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.