STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 11-1600PL
ROGER L. GORDON, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on August 24, 2011. The hearing, which was webcast over the Internet using streaming media technology, took place at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Robert A. Milne, Esquire
Elana J. Jones, Esquire
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For Respondent: Monica L. Felder-Rodriguez, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a plastic surgeon, committed medical malpractice in connection with a breast augmentation procedure; and if so, whether Petitioner should impose discipline on Respondent's medical license within the applicable penalty guidelines or take some other action.

RELIMINARY STATEMENT

In or around November 2006, Petitioner Department of Health issued a two-count Administrative Complaint against Respondent Roger L. Gordon, M.D. The Department alleged that Dr. Gordon had committed medical malpractice in connection with a breast augmentation procedure performed on patient "D.V.", and that he had failed to maintain medical records justifying the course of D.V.'s treatment. Dr. Gordon denied the charges and timely requested a formal hearing. The Department referred the matter to the Division of Administrative Hearings ("DOAH"), where it proceeded as Case No. 07-0644PL. DOAH's file in Case No. 07-0644PL was closed on April 30, 2007, on the Department's Motion to Relinquish Jurisdiction, in which the parties reported that they had reached an agreement to settle the dispute.

On March 30, 2011, under a Motion to Re-Open Case, the Department referred the matter back to DOAH following the Board of Medicine's rejection of the agreement between the Department

and Dr. Gordon. The undersigned was assigned to preside in the matter, which was placed on the docket as Case No. 11-1600PL.

The final hearing took place as scheduled on August 24, 2011. Both parties were represented by counsel. At the outset, the undersigned granted both (a) the Department's uncontested motion to take official recognition of the pertinent disciplinary guidelines and (b) the Department's Motion to Amend Administrative Complaint, which Dr. Gordon opposed. In accordance with the latter ruling, the Department's Amended Administrative Complaint was deemed filed as of August 17, 2011.

Also as a preliminary matter, the Department urged the undersigned to admit into evidence the medical records relating to D.V.'s treatment at the Florida Center for Cosmetic Surgery[1] (the "FCCS records"), on two principal grounds. First, the Department argued, on the authority of Sheppard v. Florida State Board of Dentistry, 369 So. 2d 629, 631 (Fla. 1st DCA 1979), that because the FCCS records are of the sort required by law to be kept and made available for inspection by regulatory authorities, they therefore are not protected by the Fifth Amendment in a penal proceeding such as this. This argument was rejected, in short because Dr. Gordon did not invoke his right to remain silent as the basis for excluding the FCCS records; he objected to them on the basis of the hearsay rule.

Second, the Department contended that because Dr. Gordon failed to invoke the Fifth Amendment as a basis to quash the subpoena by which the Department obtained the FCCS records, he waived the privilege against self-incrimination and therefore should be compelled to give testimony regarding the facts necessary to establish the business-records exception. The undersigned rejected this argument because the Department was unable to cite any law in support of the proposition that Dr. Gordon's failure to seek invalidation of the subpoena necessarily resulted in the evisceration of his right to remain silent at the final hearing. The proposition is unsupportable in any event because the subpoena was not addressed to Dr. Gordon personally but rather commanded the records custodian of the South Florida Center for Cosmetic Surgery to produce the medical records at issue. See Respondent's Motion in Limine to Exclude Records (filed July 14, 2011), Exhibit A. Dr. Gordon himself, in his individual capacity, did not have "standing to assert the fifth amendment right on a subpoena which was not addressed to him personally." State v. Wellington Precious Metals, Inc., 510 So. 2d 902, 905-06 (Fla. 1987). That being the case, Dr. Gordon did not waive his right against self-incrimination by declining to object to the subpoena, which would have been a futile act given his lack of standing to do so.[2]

The Department's witnesses were Donna Howell, an employee of the Department; and Cynthia Lee Toot, an advanced registered nurse practitioner. The Department's Exhibit A (a composite exhibit comprising D.V.'s medical records from Holy Cross Hospital in Fort Lauderdale) was admitted into evidence at hearing, and the record was held open to allow the Department to submit the deposition of D.V., which was subsequently received and is hereby admitted.

Dr. Gordon did not present a case.

On September 8, 2011, the Department filed a Motion to Relinquish Jurisdiction. As a result of that motion, the undersigned ruled that jurisdiction over the Amended Administrative Complaint (but not the pending Motion for Attorney Fees[3]) would be relinquished without delay or additional input from the parties; proposed recommended orders thus were unnecessary.

FINDINGS OF FACT[4]

1. At all times relevant to this case, Respondent Roger L. Gordon, M.D., was licensed to practice medicine in the state of Florida, having been issued license number ME 82538. Dr. Gordon is certified in Plastic Surgery by the American Board of Plastic Surgery.

2. Petitioner Department of Health (the "Department") has regulatory jurisdiction over licensed physicians such as Dr. Gordon.

3. On November 24, 2004, D.V. appeared as scheduled at the South Florida Center for Cosmetic Surgery for an augmentation mammoplasty and full pattern mastopexy.

4. According to her medical records, D.V. tolerated the procedures well, and was discharged home at around 11:45 a.m.

5. Later that day, D.V. returned to the South Florida Center for Cosmetic Surgery with complaints of pain and swelling of the right breast. Dr. Gordon diagnosed hematoma (accumulation of blood) of the right breast. He noted that the condition required evacuation and placement of a drain.

6. Because D.V. had eaten after her original discharge, the evacuation procedure was performed under local anesthetic. Dr. Gordon warned D.V. that a more extensive exploration surgery under general anesthesia might be required in the future. He did not obtain an anesthesia consult prior to evacuating the hematoma.

7. Dr. Gordon did not identify any active bleeding during the evacuation procedure. D.V. was again discharged home after the hematoma had been evacuated.

8. D.V. reported that, after returning home, she experienced two episodes of fainting. The records of Holy Cross

Hospital reflect that D.V. was admitted to the emergency room following the fainting spells.

9. Upon admission, D.V.'s hemacrit was 22.5, indicating significant anemia. Two units of blood were administered to D.V. in anticipation of a re-exploration of the right breast under general anesthetic.

10. On or about November 25, 2004, at Holy Cross Hospital, D.V. underwent surgical exploration of the right breast and removal of the right breast implant. She tolerated the procedures well and was discharged with instructions to follow up with Dr. Gordon on November 26, 2004.

11. D.V. had no further complications and returned for right breast re-augmentation on or about January 21, 2005, with no known complications.

CONCLUSIONS OF LAW

12. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes (2010).

13. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Florida Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Dr. Gordon by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec.

& Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

14. The Department charged Dr. Gordon under section 458.331, Florida Statutes (2004), which provided in pertinent part as follows:

> (1) The following acts shall constitute grounds for . . . disciplinary action[:]
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> * * *
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> (m) Failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.
>
> * * *
>
> (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. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. [Section 766.102(1) stated that the "prevailing professional standard of care for a given

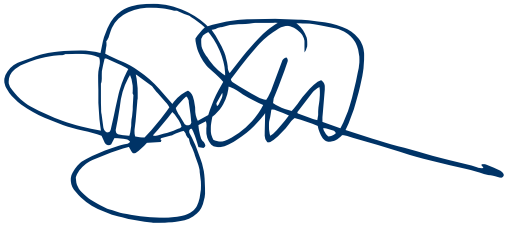
> health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."] . . . A recommended order by an administrative law judge or a final order of the board finding a violation under this paragraph shall specify whether the licensee was found to have committed "gross malpractice," "repeated malpractice," or "failure to practice medicine with that level of care, skill, and treatment which is recognized as being acceptable under similar conditions and circumstances," or any combination thereof, and any publication by the board must so specify.

15. The evidence is insufficient to support any findings or conclusions of guilt under the foregoing subsections with regard to Dr. Gordon's treatment of D.V.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order finding Dr. Gordon not guilty of the charges set forth in the Amended Administrative Complaint.

DONE AND ENTERED this 20th day of September, 2011, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of September, 2011.

ENDNOTES

[1]/ This facility is now known, and frequently referred to, as the South Florida Center for Cosmetic Surgery.

[2]/ Even if the subpoena had been addressed to Dr. Gordon personally (and there is nothing in the record to suggest that it was), his compliance therewith would not necessarily have resulted in such a blanket waiver of his right to remain silent that the undersigned could have ordered him peremptorily to take the stand and answer the Department's questions, as the Department wished. The proper procedure, rather, would have been for the Department to call Dr. Gordon as a witness and commence examining him, in which event Dr. Gordon would have been required to object on Fifth Amendment grounds to each question that he believed would elicit incriminating testimony from him. Hargis v. Fla. Real Estate Comm'n, 174 So. 2d 419, 422 (Fla. 2d DCA 1965). At that point, the undersigned could have determined whether to compel an answer or sustain the objection. Fischer v. E.F. Hutton & Co., 463 So. 289, 291 (Fla. 2d DCA 1984). As it happened, the Department never attempted to

put Dr. Gordon on the witness stand to test the boundaries of his right to remain silent, and thus the undersigned was not called upon to decide which particular questions Dr. Gordon could be required to answer——and which he might be privileged to ignore.

[3]/ The undersigned has final order authority over the Motion for Attorney Fees. § 57.105(5), Fla. Stat.

[4]/ These findings of fact are derived from matters whose truth Dr. Gordon admitted in his March 29, 2007, response to Petitioner's First Request for Admissions.

COPIES FURNISHED:

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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.