

1 KAMALA D. HARRIS
Attorney General of California
2 E. A. JONES III
Supervising Deputy Attorney General
3 JOHN E. RITTMAYER
Deputy Attorney General
4 State Bar No. 67291
California Department of Justice
5 300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
6 Telephone: (213) 897-7485
Facsimile: (213) 897-9395
7 *Attorneys for Complainant*

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO August 7, 2015
BY: *J. H. [Signature]* ANALYST

8 **BEFORE THE**
9 **MEDICAL BOARD OF CALIFORNIA**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 06-2011-217261

13 **LANCE WYATT, M.D.**
14 **8631 W. Third Street, Ste. 1130**
Los Angeles, CA 90048
Physician's and Surgeon's Certificate No.
G79180

ACCUSATION

15 Respondent.

16
17 Complainant alleges:

18 **PARTIES**

19 1. Kimberly Kirchmeyer (complainant) brings this Accusation solely in her official
20 capacity as the Executive Director of the Medical Board of California, Department of Consumer
21 Affairs (Board).

22 2. On or about June 15, 1994, the Board issued Physician's and Surgeon's Certificate
23 Number G79180 to Lance Wyatt, M.D. (respondent). That certificate will expire on January 31,
24 2016 unless renewed.

25 **JURISDICTION**

26 3. This Accusation is brought before the Board under the authority of the following
27 laws. All section references are to the Business and Professions Code unless otherwise indicated.

28 4. Section 2004 of the Code states:

1 "The board shall have the responsibility for the following:

2 "(a) The enforcement of the disciplinary and criminal provisions of the Medical Practice
3 Act.

4 "(b) The administration and hearing of disciplinary actions.

5 "(c) Carrying out disciplinary actions appropriate to findings made by a panel or an
6 administrative law judge.

7 "(d) Suspending, revoking, or otherwise limiting certificates after the conclusion of
8 disciplinary actions.

9 "(e) Reviewing the quality of medical practice carried out by physician and surgeon
10 certificate holders under the jurisdiction of the board.

11 "..."

12 5. Section 2227 of the Code provides that a licensee who is found guilty under the
13 Medical Practice Act may have his or her license revoked, suspended for a period not to exceed
14 one year, placed on probation and required to pay the costs of probation monitoring, or such other
15 action taken in relation to discipline as the Board deems proper.

16 6. Section 2234 of the Code, states:

17 "The board shall take action against any licensee who is charged with unprofessional
18 conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not
19 limited to, the following:

20 "..."

21 "(b) Gross negligence.

22 "(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or
23 omissions. An initial negligent act or omission followed by a separate and distinct departure from
24 the applicable standard of care shall constitute repeated negligent acts.

25 "..."

26 7. Section 726 of the Code states in part:

27 "The commission of any act of sexual abuse, misconduct, or relations with a patient, client,
28 or customer constitutes unprofessional conduct and grounds for disciplinary action for any

1 person licensed under this division”

2 FIRST CAUSE FOR DISCIPLINE

3 (Gross Negligence)

4 8. Respondent is subject to disciplinary action under section 2234, subdivision (b), in
5 that he committed gross negligence in the care and treatment of two patients. The circumstances
6 are as follows:

7 9. Respondent performed bilateral breast augmentation with saline implants on K.M. on
8 April 25, 2011. She signed an authorization for release of medical photographs and slides, but
9 was advised that there would be no videotaping. She had an uneventful postoperative course
10 from a medical perspective.

11 10. On or about August 4, 2011, K.M. was directed to an exam room in respondent's
12 professional offices and respondent asked her to disrobe from the waist up. After disrobing her
13 upper body and putting on a robe, K.M. found a small video camera, actively recording, on the
14 countertop of the exam room. She reviewed the video briefly and concluded that she had been
15 surreptitiously recorded in the exam room by respondent. She took the camera and, after
16 dressing, left respondent's office.

17 11. On her previous appointment with respondent, K.M. had been advised to lower her
18 pants to her knees. K.M. felt that at the time that this was irrelevant to her breast surgery, but
19 trusted respondent because he was her doctor. She also became alarmed as she was changing
20 during that exam, when she heard clicking, which sounded like a camera, and turned to observe
21 respondent holding the camera inconspicuously behind her. She did not question these activities
22 and behavior at the time. Later, however, K.M. expressed anger, a sense of betrayal and
23 violation.

24 12. Respondent performed a bilateral breast augmentation surgery with saline prosthesis
25 on P.G. on July 18, 2011. Her postoperative course also was unremarkable.

26 13. On or about August 4, 2011, during an examination videotaped by respondent, he
27 asked P.G. to pull her pants down so he could take pictures and when she complied respondent
28 stated "No, lower." After she pulled her pants down lower respondent took numerous

1 photographs of her body in different positions. P.G. started to feel "something weird was going
2 on" because respondent would tell her to turn around and would take a long time looking at the
3 back side of her body. She also thought she could hear the sound of a camera taking photographs
4 as she faced away from respondent. At that time, P.G. thought that respondent just wanted better
5 view of her frame and how things were looking after the surgery. She states that she followed
6 respondent's directions because she trusted him as her doctor. P.G. was unaware of the fact that
7 respondent was videotaping the examination and did not give consent for videotaping. She
8 expressed a sense of devastation as a result of what transpired and expressed an overall loss of
9 trust in the medical field. She stated that she will forever replay the experience in the back of her
10 mind. In addition, during the examination respondent repeatedly touched and squeezed P.G.'s
11 breasts.

12 14. The standard of care for a plastic surgeon in the state of California is to use medical
13 photography to document the pertinent body parts of the patient during various stages of the
14 treatment course as deemed necessary for professional purposes by the doctor. Medical
15 photography and video recording are mainstays of documentation for the patient's medical record
16 and important in medical teaching and clinical research. These methods are part of the standard
17 curriculum of all plastic surgery postgraduate training programs and are an important part of the
18 Board Certification process maintained by the American Board of Plastic Surgery to assure
19 competency in the field. The standard of care requires the physician to inform the patient that
20 medical photography will be performed in the course of their treatment, the purposes for which
21 the photographic or video documentation will be used and frequently a written form is used to
22 document that consent has been obtained. The standard of care requires the physician to archive
23 the photographs accurately and in a manner that protects the patient's privacy and allows recovery
24 of the photos and video for later reference.

25 15. The surreptitious video recording of K.M. and P.G. represents an extreme departure
26 from the standard of care of a plastic surgeon in the State of California. While video recording
27 medical encounters such as surgery and physical examinations are a common practice and serve
28 an important purpose in patient care, medical teaching and research, there is no indication that the

1 video recordings made by respondent of these two patients in his office served any appropriate
2 professional purpose. The surreptitious video recording of the patients within the privacy of an
3 examination room without the knowledge of the patient and without any professional purpose
4 represents an extreme departure from the standard of care because it violates the patients'
5 reasonable expectation of privacy within the physician's office and undermines the patient's trust
6 in medical professionals.

7 16. Respondent violated the standard of care for a plastic surgeon in the State of
8 California by performing photography of a partially clothed patient in the examination room for
9 nonmedical purposes. Performing photography on a partially disrobed female patient in the
10 privacy of an examination room under the guise of medical treatment, but for clearly non-medical
11 purposes, represents an extreme departure from the standard of care. This is an extreme departure
12 from the standard of care because it violates the physician patient bond of trust in a profound
13 manner and undermines the patient's ability to trust her privacy and personal security to any other
14 physician in her future encounters with the medical profession.

15 SECOND CAUSE FOR DISCIPLINE

16 (Repeated Negligent Acts)

17 17. Respondent is subject to disciplinary action under section 2234, subdivision (c), in
18 that he committed repeated negligent acts in the care and treatment of two patients. The
19 circumstances are as follows:

20 18. Complainant repeats the allegations of the First Cause for Discipline as if set forth in
21 full.

22 THIRD CAUSE FOR DISCIPLINE

23 (Sexual Misconduct With a Patient)

24 19. Respondent is subject to disciplinary action under section 725 in that he committed
25 sexual misconduct with two patients. The circumstances are as follows:

26 20. Complainant repeats the allegations of paragraphs 9 through 13 and 15 and 16 as if
27 set forth in full.

28

1 21. Respondent's behavior constitutes sexual misconduct. This conclusion is based on the
2 rationale that instructing a patient to disrobe, touching, squeezing and observing a woman's
3 breasts and lowering a woman's pants, while appropriate for certain medical purposes or
4 activities, constitutes sexual misconduct when performed for non-professional purposes.

5 FOURTH CAUSE FOR DISCIPLINE

6 (Unprofessional Conduct)

7 22. Respondent is subject to disciplinary action under section 2234 in that he committed
8 unprofessional conduct with two patients. The circumstances are as follows:

9 23. Complainant repeats the allegations of paragraphs 9 through 21 as if set forth in full,

10 PRAYER

11 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
12 and that following the hearing, the Medical Board of California issue a decision:

- 13 1. Revoking or suspending Physician's and Surgeon's Certificate Number G79180,
14 issued to Lance Wyatt, M.D.;
- 15 2. Revoking, suspending or denying approval of Lance Wyatt, M.D.'s authority to
16 supervise physician assistants, pursuant to section 3527 of the Code;
- 17 3. Ordering Lance Wyatt, M.D., if placed on probation, to pay the Medical Board of
18 California the costs of probation monitoring and
- 19 4. Taking such other and further action as deemed necessary and proper.

20 DATED: August 7, 2014

21 
22 KIMBERLY KIRCHMEYER
23 Executive Director
24 Medical Board of California
25 Department of Consumer Affairs
26 State of California
27 Complainant

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BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation)
Against:)
)
)
LANCE EVERETT WYATT, M.D.)
)
Physician's and Surgeon's)
Certificate No. G79180)
)
Respondent)
_____)

Case No. 06-2011-217261

DECISION

The attached Corrected Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on July 1, 2016.

IT IS SO ORDERED June 2, 2016.

MEDICAL BOARD OF CALIFORNIA

By: Howard Krauss, M.D.
Howard Krauss, M.D., Chair
Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

LANCE EVERETT WYATT, M.D.,

Physician and Surgeon's Certificate No. G 79180,

Respondent.

Case No. 06-2011-217261

OAH No. 2014100008

CORRECTED PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), on August 10, 11, 12, 13, 14, 17, 18, 19, 20, and 21, 2015, and February 22 and 23, 2016, in Los Angeles, California. Complainant was represented by Christine Friar, Deputy Attorney General. Lance Wyatt, M.D. (Respondent) was present and was represented by Michael Khouri, Attorney at Law.

Oral, documentary, and physical evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on February 23, 2016.

A Proposed Decision was issued on March 24, 2016. On April 20, 2016, the Discipline Coordination Unit of the Medical Board of California (Board) made an application for changes to the Proposed Decision, pursuant to Government Code Section 11517, subdivision (c)(2)(C), and California Code of Regulations, title 1, section 1048. The application requested one change due to clerical error and another change due to privacy concerns as follows: (1) on page 8, at Factual Finding 17(b), patient's initials should be changed from "PB" to PG;" and (2) on page 30, at Factual Findings 57(a) through 57(d), the full name of the witness/employee should be changed to her initials in order to protect her privacy. The application was served on Complainant's counsel and Respondent's counsel. No opposition was filed. The Board's application was granted, and the requested changes were made and incorporated in this Corrected Proposed Decision.¹

¹ Given the privacy concerns raised by the Board regarding the witness/employee's identity in Factual Finding 57, an Amended Protective Order is issued concurrently with this Corrected Proposed Decision. That Amended Protective order adds Exhibit 22 to the documents placed under seal because that exhibit contains the full name of the witness/employee identified in Factual Finding 57. Exhibit 22 shall be placed under seal by the Board.

Amendment to Pleading.

At the administrative hearing, the Accusation was amended as follows: at page 5, paragraph 19, line 24, the number "725" was changed to "726 under the Code."

Sealing of Records

During the hearing of this matter, the ALJ was provided with Exhibits 5, 7-17, 19-21, 24-25, 27-28, 33-43, 45, G, H, M, GG, and KK containing patients' confidential medical and financial information which is protected from disclosure to the public. Redaction of the documents to obscure this information was not practicable and would not have provided adequate privacy protection. In order to protect patients' privacy and prevent the disclosure of confidential personal information, the ALJ on Complainant's motion and on her own motion (for Respondent's exhibits) issued an order placing the following exhibits under seal after their use in preparation of the Proposed Decision: Exhibits 5, 7-17, 19-21, 24-25, 27-28, 33-43, 45, G, H, M, GG, and KK. Those exhibits shall remain under seal and shall not be opened, except by order of the Board, by OAH, or by a reviewing court.

As indicated above, following the issuance of the Proposed Decision, the Board made an application, without objection, for changes to the Proposed Decision which included using only the initials of the witness/employee identified in Factual Finding 57, NM, in order in order to protect her privacy. Exhibit 22 contains NM's full name and was not included in the Protective Order issued with the Proposed Decision. In order to protect NM's privacy as envisioned by the Board, the ALJ on her own motion issued an Amended Protective Order adding Exhibit 22 to the exhibits placed under seal. Exhibit 22 shall remain under seal and shall not be opened, except by order of the Board, by OAH, or by a reviewing court.

FACTUAL FINDINGS

Jurisdiction and Parties

1. On August 7, 2014, Kimberly Kirchmeyer (Complainant) filed the Accusation while acting in her official capacity as the Executive Director of the Board.
2. On August 28, 2014, Respondent filed a Notice of Defense requesting a hearing on the Accusation, and this matter ensued.
3. On June 15, 1994, the Board issued Physician's and Surgeon's Certificate Number G 79180, to Respondent. That certificate was schedule to expire on January 31, 2016. However, the Board retains jurisdiction over this matter pursuant to Business and Professions Code section 118, subdivision (b).

4(d). On August 10, 2011, the CCU received via facsimile from the Cerritos district office a completed Request to Initiate a New Case (Exhibit 44) which was signed by the supervising investigator at the time, Marianne Eckhoff. Exhibit 44 documented that a complaint against Respondent regarding an August 4, 2011 incident was made by the LAPD and was received on August 9, 2011. The complaint allegations pertained to patient KM² and detailed her August 4, 2011 visit to Respondent's office and her complaint to LAPD the same day. Exhibit 44 also noted, "On 8/8/2011, the patient made pretext phone call to doctor. . . ." (*Id.*)³ Upon receipt of Exhibit 44 on August 10, 2011, CCU opened an investigative case and issued a case number to the complaint.⁴

4(e). The evidence established that on August 9, 2011, the district office received a complaint from the LAPD, and thus obtained its first knowledge of the allegations pertaining to Respondent's treatment of KM which led to the filing of the Accusation. This receipt of the complaint and the investigators' knowledge of the allegations constituted "discovery" by the Board of "an act or omission alleged as the ground for disciplinary action." (See Legal Conclusion 1.) Therefore, the Accusation should have been filed within three years of this discovery, by August 9, 2014, at the latest.

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² Patients' initials are used in lieu of their full names in order to protect their privacy.

³ Exhibit 44 was admitted into evidence under the hearsay exception of Evidence Code section 1280 as a record of a public employee. Exhibit 44 is a record of an event (the investigator's receipt of the complaint against Respondent on August 9, 2011), made within the scope of a public employee's duty, at or around the time of the event, and the source of information and circumstances indicate the trustworthiness of the document. Specifically regarding the circumstances indicating the document's trustworthiness: Exhibit 44 referenced the August 8, 2011 pretext phone call, which would support the accuracy of the documented complaint date as August 9, 2011, and not earlier than August 8, 2011. Additionally, the totality of the evidence indicated that the district office immediately forwarded the complaint to CCU to obtain a case number in order to open the investigation; there is no evidence that the investigator had any reason to post-date the receipt of the complaint since the investigator could not have known that a statute of limitations issue would arise three years later.

⁴ On August 12, 2011, KM mailed a complaint to the Board which was received by CCU on August 15, 2011. A complaint investigation was opened for that complaint, and thereafter, the case was referred to the district office which was handling the initial LAPD complaint. The CCU periodically checks for redundant complaint investigations and the newer case is closed. Consequently, the investigation opened pursuant to KM's mail-in complaint was closed on September 2, 2011, as a redundant case file.

Respondent's Educational and Professional Background Facts

5. Respondent is a medical doctor licensed in California since 1992. He obtained his medical degree from the University of California, Los Angeles Medical School in 1992, and he began but did not complete a general surgery residency there. From 1999 through 2000, Respondent served as a White House Fellow. Respondent completed a plastic surgery residency at Harvard Medical School in 2003.

6. From 2003, Respondent has had his own practice, specializing in cosmetic surgery. Respondent's father is also a physician, and in 2003, Respondent opened a practice in his father's medical office near Cedars Sinai Medical Center (Cedars). Thereafter, he began practicing at a variety of offices and surgery centers in Los Angeles County, including Beverly Hills, San Dimas, Rancho Cucamonga and Encino. He no longer works at the Cedars office.

7. Toward the end of Respondent's plastic surgery residency, the focus turned to cosmetic surgery, and beauty became an element of his training. The residents took weekly art classes to emphasize the importance of symmetry and balance. At the administrative hearing, Respondent noted that the "art of plastic surgery is difficult to teach." He further noted that breast augmentation, in which he specializes, is about body contouring just as much as it is about breast enhancement, and that the surgeon should consider the relationship between the patient's breasts and her waist, hips and outer thighs. In consultation with the patient, Respondent addresses the patient's goals and discusses how the procedure can change her body contour.

8. During Respondent's plastic surgery residency he was instructed on the use of medical photography and the importance of photography to document his findings. No limitations were placed on the number of photographs residents could take, particularly with the advent of digital photography when the cost of film was no longer an issue and extraneous digital photographs could be deleted.

9. During Respondent's residency and subsequent clinical practice, the digital cameras he used contained memory cards where images (both still photographs and videos) are stored. During his residency and thereafter, Respondent did not recall hearing any prohibition on using the same camera/memory card for professional and personal purposes.

10. In July and August of 2011, Respondent used the same camera/memory card at his office for professional purposes and at home for personal purposes. After seeing patients in his office, Respondent would sometimes take the camera with him to photograph family events and return the camera to the clinic later.

11. During July and August of 2011, Respondent used a silver-toned Canon Power Shot 880IS digital camera in his practice (Exhibit 31). The camera saved photographs and videos taken by Respondent on its memory card (Exhibit 33).

Description and Operation of Respondent's Camera (Exhibit 31)

12(a). The following description of the camera and its operation (Factual Findings 12 through 14) were established by, among other evidence, the credible testimony of Canon camera expert James Rose and by examination of Exhibit 31.

12(b). In order to turn on the camera (Exhibit 31), the "on/off" button at the top of the camera must be depressed. The "on/off" button is triangular and measures approximately five millimeters by eight millimeters; it sits in a triangular cavity flush with the top of the camera but is tactile due to a curved top. The "on/off" button is located just to the side of a circular shutter button, which is approximately 10 millimeters wide, set in a 15-millimeter wide circular housing which is raised about two millimeters above the top of the camera.

12(c). When the camera is turned on, the camera lens cover will slide open and the one-inch wide lens will extend approximately 20 millimeters (about three quarters of an inch) out from the body of the camera which itself is about 20 millimeters wide. When the lens cover opens and lens extends, these gear movements make a mechanical sound which can be heard by the camera user. If the user is looking at the back of the camera, a screen/LCD panel will display the image seen through the lens. When the camera is turned off, the lens retracts to become flush with the camera, a blade-like lens cover slides over the lens, and the screen on the back of the camera goes black.

12(d). When the camera is turned on, in addition to the physical noise of the lens extending, the camera emits an electronic noise/beep indicating that the camera has been turned on. If the camera's mute function has been activated, the electronic noise will not sound, but there will still be a physical noise from the lens extending. Loud background noise could obstruct a user's ability to hear the sound of the lens extending.

12(e). The camera has two "still" photography options and one video option. The option can be selected, with the camera on or off, by a sliding switch at the top of the camera.

12(f). To take a still photograph, the camera must be in photograph mode. The user must depress the "on" switch, then partially depress the shutter button to focus the camera, then push the shutter button further down until the shutter sound occurs (like a "click"), and a still image appears on the back screen. Sometimes a red light is projected from the front of the camera when the camera is focusing. However, neither the activation of the red focus beam nor an image appearing in the back viewfinder screen is confirmation that a picture has been taken; the user must continue to completely depress the shutter button to complete taking the photograph. If the camera is in still photograph mode and is left on, it will automatically turn off and the lens will retract after about a minute to preserve the battery.

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12(g). To take video, the camera must be in video mode. The user must depress the “on” switch and then depress the two-stage shutter button completely down until the time indicator and red “record” indicator appear on the back screen. If the camera is in active video mode, it will continue recording until the shutter button is pressed to stop the video recording.

12(h). If the camera was in video mode, it is highly unlikely that someone could unknowingly start a video recording given the movements which must occur (the user depressing the “on” button, the lens extending with a mechanical noise, and the user completely depressing the two-stage shutter button).

13(a). Low angle photography is a technique wherein the photographer seeks to provide a different perspective than from a standard “straight on” angle. From a compositional standpoint, this technique accentuates the lower portion of the frame and makes the subject look taller.

13(b). Burst photography is the taking of photographs in rapid succession by depressing and holding down the shutter button. The purpose of burst photography is to capture movements in rapid succession in order to catch a specific moment (e.g. a tennis ball hitting a racquet). Burst photography is typically used if the subject is in motion and moving too quickly to take individual pictures each moving position. When the subject is not in motion, burst photography is not useful since there would be a large number of identical images. Additionally, one reason burst mode is not used for portrait photography is that the resolution/clarity of the photographs is reduced.

14. When a digital camera takes a photograph or video, it creates a file which is stored on a memory card and assigned a file name / serial number. The digital camera’s memory card can be removed and replaced. The user may delete an image from the camera by accessing the delete function; this eliminates the user’s ability to view the image on the camera. However, the image would still be accessible on the memory card. The images stored on the memory card can be downloaded to another device such as a computer or a flash drive, and the images can be deleted from the memory card. When an image is deleted, its serial number is also deleted, so there will be a gap in serial numbers on the memory card. There is no way to discern whether images stored on a memory card have been downloaded to another device.

Background re: Patients KM and PG – No Consent for Undisclosed Video Recording

15. There are two patients at issue in this case: KM and PG. Both underwent breast augmentation surgeries performed by Respondent; KM had surgery on April 25, 2011, and PG had surgery on July 18, 2011. The results of these patients’ surgeries were good and their postoperative courses from a clinical perspective were unremarkable, except for a minor issue of wound dehiscence with PG.

16(a). Prior to surgery, on April 6, 2011, KM went to one of the offices where Respondent worked, in Carson, California, to have her blood drawn for pre-operative laboratory analysis and to sign pre-operative documents. At the Carson office, KM was assisted by the consultant who worked at there.

16(b). KM signed several documents, including a two-page document entitled "Consent of Disclosure and Consent for Operation, Administration of Anesthetics, and for Diagnostic or Therapeutic Procedures," which discussed the circumstances surrounding the operation. (Exhibit 14, p. 17.) In the middle of the page, at paragraph 4, it stated, "I consent to the photographing, filming, or videotaping of the treatment or procedure for diagnostic, documentation or educational use." (*Id.*) KM also signed a seven-page document entitled "Informed Consent – Augmentation Mammoplasty." (Exhibit 14, pp. 21-27.) The last page was subtitled "CONSENT FOR SURGERY/PROCEDURE or TREATMENT," and contained nine paragraphs discussing the procedure to which KM was consenting and other circumstances surrounding the operation. In the middle of the page, at paragraph 5, it stated, "I consent to be photographed or televised before, during, and after the operation(s) or procedure(s) to be performed, including appropriate portions of my body, for medical, scientific or educational purposes, provided my identity is not revealed in the pictures." (Exhibit 14, p.27.)

16(c). KM also signed a document entitled, "Authorization for and Release of Medical Photographs/Slides/ and/or Videotapes," with the word "Videotapes" crossed out. (Exhibit 14, p. 37.) The form noted that "medical photographs/slides and videotapes may be taken before, during, or after a surgical procedure or treatment. Consent is required to take such images. Additionally, patients may consent to release of these medical photography/slides, and videotapes for a stated purpose." (*Id.*) The form had two enumerated paragraphs entitled "1. Consent to take Photographs/Videotapes," and "2. Consent for Release of Photographs/Slides/Videotapes," with the words "Videotapes" crossed out in both paragraphs. The consultant who assisted KM at the Carson office informed KM that photographs, but not videotapes, would be taken after surgery to document her progress. The consultant explained that they did not take videotapes, and the consultant crossed out the words "videotapes" in the three places on the form (as indicated above) during her explanation to KM. The form stated in the two enumerated paragraphs, "I hereby authorize Jason Hess, MD and or his/her associates or licensees to take and release pre-operative, intraoperative, and post-operative photographs . . ." (*Id.*) KM did not know Jason Hess, MD and was never treated by him. She did not read the entire form before signing it. She believed that her signature was required to receive medical treatment.

16(d). Neither Respondent nor any of his other consultants ever talked to KM about videotaping her surgery or any of her examinations. No other consent forms regarding photography/videography were signed by KM, and no other notes in the patient's records indicated any discussion of informed consent regarding videotaping.

16(e). Given the foregoing, KM never consented to the video recording of any of her examinations.

17(a). Prior to surgery, PG signed several documents, including a nine-page document entitled "Informed Consent – Augmentation Mammoplasty with Saline-filled Implants." (Exhibit 15, pp. 14-16 and 18-23.) The last page was subtitled "CONSENT FOR SURGERY/PROCEDURE or TREATMENT," and contained 12 paragraphs discussing the procedure to which PG was consenting and other circumstances surrounding the operation. In the middle of the page, at paragraph 5, it stated, "I consent to be photographed or televised before, during, and after the operation(s) or procedure(s) to be performed, including appropriate portions of my body, for medical, scientific or educational purposes, provided my identity is not revealed in the pictures." (Exhibit 15, p. 23.) PG also signed another form entitled "Consent for Photographs," which stated, "Your surgeon, Dr. Lance Wyatt has requested the ability to take photographs for the purpose of: The Medical Chart Only. If you have no objection to the use of photography during your surgery, please indicate by signing this document." (Exhibit 15, p. 28.) No other consent forms regarding for photography/videography were signed by P.G., and no other notes in the patient's records indicated any discussion of informed consent regarding videotaping.

17(b). None of the consent forms set forth in Factual Finding 17(a) encompasses the covert videotaping of PG without her knowledge. The issues of whether PG knew that Respondent was videotaping her August 4, 2011 examination and whether she consented to that video recording are discussed in further detail at Factual Findings 36 through 56, below.

18. On August 4, 2011, both KM and PG were in Respondent's post-operative care.

19. This case revolves around two factual questions: (1) Did Respondent videotape PG's August 4, 2011, partially-nude examination with her knowledge and consent? and (2) Did Respondent's nonconsensual videotaping of KM in an examination room while she was partially-nude result from Respondent's inadvertently turning on the camera in video function? As discussed more fully below, the answer to both questions is "No."

KM's August 4, 2011 Discovery of Respondent's Video Taping of her Partially-Nude Body

20. On the afternoon of August 4, 2011, K.M. went to Respondent's office for a post-operative visit.

21. Factual Findings 22 through 24 below were established by the credible testimony of KM, as supplemented and corroborated by other evidence. Currently, KM is a full-time student working on her master's degree while employed part-time as a graduate research assistant. She presented as a sincere, well-spoken witness who was confident in her assertions and indignant about the violation of privacy she suffered. Despite Respondent's attempts to discredit her testimony (detailed below at Factual Finding 31), her credibility remained intact.

22. At her August 4, 2011 appointment, KM checked in with the receptionist, Erica, and went to the restroom, which was in the back portion of the office housing the examination rooms. On the way to the restroom, she saw Respondent, greeted him and then proceeded to the restroom. Respondent was in the hallway when she emerged, and Respondent walked her to the examination room and asked her to disrobe from the waist up and to put on an examination robe. KM removed her blouse and was not wearing a bra. Her breasts were exposed for a short time, after which she put on the examination gown. While waiting for Respondent to arrive, she began looking through items on the counter including various breast implant samples. As she worked her way across the counter, she noticed a Kleenex tissue box on the counter, with a camera (Exhibit 31) partially hidden behind the tissue and the lens of the camera telescoped out. The camera was sitting on a ledge just above the Kleenex box, with its lens facing outward into the examination room. Although she had not noticed the camera from the other side of the room where she had entered and disrobed, the extended lens had caught her attention as she moved closer. Given that the lens was extended and that she was familiar with this type of camera, KM had a "gut wrenching feeling" that it was on and became scared. She reached over, turned off the camera, then picked it up and turned it on, realizing that it had been in video recording mode. She looked at the display window on the back of the camera to determine what had been in the view of the camera. The video showed Respondent placing the camera in the examination room, Respondent bringing KM into the examination room and leaving her there, and then KM disrobing and being filmed topless. (A more detailed description of the video is set forth in Factual Finding 25.)

23. Respondent had not told KM he was going to video record the examination, and KM had no idea that she was being videotaped when she entered the examination room.

24. After watching the video, KM turned off the camera and called her boyfriend, but he did not answer. She put her shirt back on, leaning her body against the door because she was afraid that Respondent would enter the room and try to fight her for the camera. KM then placed the camera in her purse to keep as proof of Respondent's actions, and she walked out. On the way out of the office, she saw Erica and yelled at her to look at what Respondent was doing, showing her the camera. Erica told KM, "It's not like he has not seen you naked." KM felt Respondent had violated her as a patient. She then proceeded to the building security office and spoke to the security manager. She contacted the LAPD while at the security office, and LAPD officers met her there. She reported the incident to the police and told them that she had never consented to the videotaping and had no knowledge of it prior to discovering the camera. The camera (Exhibit 31) and its memory card (Exhibit 33) were taken by the LAPD as evidence.

The August 4, 2011 Video of KM

25. The August 4, 2011 video recording of KM (Exhibit 35) revealed the following:

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(a). At the beginning of the video, the camera is turned on and placed in video mode while facing down so that Respondent's shoe is in the frame. The frame of the now-videotaping camera moves from Respondent's shoe, up his right side to his chest, but never shows his face. The video shows him placing the camera on what is established by the evidence to be a small ledge. Respondent adjusts the camera for a couple of seconds, again keeping his face out of the frame, leaving the camera on the ledge with the lens facing outward, above what is later established by the evidence to be a Kleenex box. A tissue protruding from the top of the Kleenex box is visible across the bottom quarter of the video's frame, so that only the top three quarters of the view frame is clear for videotaping. The clear view in the frame includes a portion of the examination room and a portion of the counter. During the time Respondent is placing and adjusting the camera on the ledge, as established by the evidence, the one-inch diameter lens of the camera must have been telescoped out three quarters of an inch from the body of the camera. This would have been noticeable to a person handling the camera and placing it with the lens facing outward. The camera remains on the ledge, and Respondent turns and walks out the door of the examination room.

(b). Respondent can be heard speaking to an unknown female outside the examination room and then speaking to K.M., telling her, "Come on in, young lady. We are waiting on you." He directs her to the examination room where the camera is still recording. K.M. enters and tells him, "I've never been in this room before," and Respondent says, "You've never been in this room? You gotta be kidding." He directs her to put on a gown, and he remains outside the room, closing the door. The camera continues videotaping while KM places her purse on the counter, removes her blouse, and exposes her bare breasts, looking at herself in the mirror, before she puts on a robe.

(c). Picking up and looking at implant samples in a box on the counter, KM moves slowly to her right along the counter toward the camera, unaware that it is videotaping. She reaches above the camera to grab a book which is apparently stored somewhere above the camera, and begins perusing the book. At this point, KM looks up and discovers the camera, suspects that it is recording, picks up the camera, and turns it over to see what is in the display/viewfinder screen. The camera frame shows the top of the counter as K.M. looks through the viewfinder screen. The camera is then turned off.

Respondent's Filing of Police Report and Pretext Phone Calls with KM

26. On August 4, 2011, while KM was speaking to police, Respondent attempted to contact her on her cell phone. The police instructed her to allow the calls to go to voicemail, so she did not answer his calls. Respondent left voicemails for KM and asked her to return his calls.

27. Later in the day, after 5:00 p.m., on August 4, 2011, Respondent went to an LAPD station and filed a report alleging the theft of his camera by KM. In his report, Respondent identified himself as a medical doctor and KM as a patient who may have some "mental issues." (Exhibit 11, p. 18.)

28. After August 4, 2011, KM met with LAPD investigators and they informed her that Respondent was under the impression that she still had his camera because he had filed a police report that she had stolen it. They set up a pre-text call between KM and Respondent, but were unable to reach him while KM was at the police station. Instead, the investigators gave KM a recording device to take home.

29(a). KM called and left a message with Erica, and Respondent returned her call on August 8, 2011. They spoke on the phone in three separate conversations, in quick succession, all of which were tape recorded. Overall, in the conversations, KM was still audibly distraught over the discovery of the camera recording her partially-nude body. Respondent sounded indifferent and imperious throughout the conversations, threatening at one point, and unapologetic except for a couple of half-hearted apologies toward the end of their conversations.

29(b). Specifically, the recording of the phone calls (Exhibit 42) revealed the following conversations:

(1). *First Phone Call:* In the first phone conversation, KM informs Respondent that she found his camera recording her as she was undressing, that she has "seen the video over and over," and that she did not give him permission to record her. She angrily reminds him, "I trusted you as my doctor," and says that she needs him to tell her why he recorded her. Respondent does not express shock that there was a recording but listens to her impassively, admitting nothing. When KM asks, "Are you still there?" he responds disdainfully, "I am listening to you. I am being respectful and letting you finish talking, something you should have done when you were in the office." KM asks incredulously, "What did you want me to do? I found a camera recording me as I undressed. You really wanted me to stay there and confront you?" Respondent points out, "As it stands, you are making allegations against me." KM reminds him, "I have proof. I have your camera." Respondent retorts, "The only thing we know is that you walked out of my office with my camera . . . that has my personal and professional information on it . . . which means that at this point you have basically stolen something out of my office without my permission." KM notes, "Something that is evidence of what you did. . . . I caught you."

(2). Respondent informs KM, "Nobody is intentionally videotaping anybody in my office. . . . You have taken property out of my office that did not belong to you and there are laws and regulations [dealing with patient confidentiality and] . . . you are breaking those laws." (At this point, KM has only seen the video recording of herself and does not know that other images are in the camera.) Consequently, KM responds, "This does not have anything to do with medical issues. That does not give you the right to place a camera in a room where you know I am going to change . . . leave it recording me undressing and expecting to just come back and pick that up." Respondent repeats, "Nobody was intentionally videotaping anything about you." He notes that he had seen her unclothed many times and that "there is no intentional videotaping of anybody in my office."

(3). As the phone call continues, Respondent berates KM, saying, "If you were concerned, then like anybody else you should have asked me directly, but you didn't do that." He notes, "The bottom line is this. You are a 24-year-old girl. You've been my patient now since late April. I've done nothing but [take] the best care of you. . . . Now we are in a situation where you have taken personal property out of my office. That property contains information that has nothing to do with you. Nothing." Respondent informs KM that, "as a result, I had to file a police report." Respondent tells her, "Here is the deal. I did not want to file a police report on you. You are a 24-year-old girl with your future ahead of you." He then says slowly in a threatening manner, "I don't want to damage your future with a police record." Respondent continues, "I am asking you to return my property. If you return my property and you have not published photos or any material on the camera . . . I will stop the police report. I am only telling you what the police department has told me to do." (This last statement is untruthful since the police department did not instruct Respondent in this manner.) KM tells Respondent, "I don't know if you are trying to make me think that I did the wrong thing by taking the evidence. . . . I don't feel like I did something wrong and I'm sure the police wouldn't feel that way either if I went to them and told them what happened." KM informs Respondent that she is not going to return the camera, that he can pursue his police report, and that she did not care about what happened to her reputation. She states, "Press all the charges you want. I have the camera and I have the evidence. I'm sure they will want to see that. . . . I don't even know why you would want to risk your reputation, your medical career for something like that. . . . So do what you will and I'll do what I have to do." KM then hangs up.

(4). *Second Phone Call:* Respondent calls back after KM hangs up. She tells him that she hung up because "this isn't going anywhere, and I refuse to talk to you." Respondent asks if he can just finish his sentence, and she responds, "If it is not going to take another 10 minutes." At this point, Respondent becomes irate, telling KM, "That's rude. That's rude and disrespectful. I am trying to be as respectful of you possible." KM responds, "Then you shouldn't have recorded me getting undressed. If you wanted to be respectful you shouldn't have done that. . . . Why did you feel like you had to go and record me?" Respondent states, "It wasn't intentional." KM becomes more upset and incredulous and interrupts Respondent to question him about his statement that "it wasn't intentional." Respondent interjects, "I want to finish my sentence. Can I finish my sentence?" KM says, "I should not even be listening to you right now." Respondent cuts in, "You stole something out of my office . . . so let me just finish. . . . I've already heard you out. . . . Can you listen to me because you've not been respectful to me." KM replies, "Don't talk to me like I'm dumb. I'm listening." Respondent haughtily states, "Okay, then let me just finish then, and without interruption." Respondent begins again reciting KM's treatment history ("I operated on you in April . . ."), and KM again interrupts, telling him that she already knows about what happened in her treatment history but that she wanted to know "why the fuck you did what you did!" Respondent states that he does not want to talk to her if she is speaking like that, and KM asks him, "Why did you call me then?" She asserts, "You are afraid that I will take the camera to the police." Respondent berates her, "You have interrupted me, you've used profanity, you've made accusations, and you've hung up on me." KM points out, "You've done more than that to me."

(5). Respondent continues with his explanation and when KM tries to speak, he says, "I am not finished." She says, "I don't appreciate you bullying me." Respondent responds, "I am not bullying you. I don't appreciate being interrupted. I am just trying to finish my sentence." After another lengthy exchange, Respondent reiterated, "I did not intentionally video you in my office." KM asked if Respondent video recorded her before, and Respondent replied, "I have never recorded anybody before. I have never recorded you before and I had no intention of recording you." Respondent argues, "What am I going to see that I have not already seen before?" He reiterates several times throughout the remainder of the second conversation that he did not intentionally video record her. He admitted that "no patient should have any sort of pictures or video or any kind of media performed without their consent." After another exchange, Respondent states, "If you felt violated in my office, I apologize for this, but I can tell you that you've been to my office five other times and there's been no such wrongdoing. . . ." After some further argument, KM tells Respondent, "I don't think this conversation is going anywhere. . . . I don't like the way you talk to me, and I don't like what you did, and I refuse to continue this conversation." KM hangs up.

(6). *Third Phone Call:* Respondent calls KM back again, stating, "I am just going to try one more time." He tells KM, "I feel bad about this, and I feel bad about the way you feel, and I don't really know what to say to you. . . . It seems like you called me to vent. . . . The bottom line is . . . I have already heard you out and you have heard me out. . . ." At this point, KM interjects and sounds upset, "Get to the point!" Respondent states, "I am at the point. This is the point. I don't appreciate you talking to me this way, first of all." KM responds, "I don't appreciate what you did." Respondent haughtily replies, "I don't appreciate what you did. . . . I don't appreciate the way you are talking to me. . . ." KM wearily states, "Just tell me why you called." Respondent reiterates, "I feel bad for the way you feel. I feel bad for the way I feel. . . . If you felt violated, disrespected . . . it certainly was not my intention, and I apologize, but at the same time I feel the same way about what happened." After further discussion, KM states, "I am not going to give that camera to you because that's evidence. . . . If you already have that police report on your end, then I'll go ahead and take matters into my own hands then, and I'll go ahead and talk to whoever it is that I have to talk to, and I'll take that as evidence and we'll see where that takes us." Respondent again states, "I did not intentionally do what you are alleging I did." He warns her, "I don't want this to escalate. I don't want something to be on your record. . . ." KM notes, "Or on yours, right?" When Respondent begins another explanation, KM interrupts, "I already told you I am not going to return the camera. Why are you still on the phone? You already told me all this." Respondent states, "You know. You are so rude." KM replies, "I am, and I think I have a right to be rude." Respondent retorts, "No, you don't have a right to be rude. . . . I have every right to be rude as well. . . . You are disrespecting me." Respondent tells KM, "This has never happened to me before," and KM notes, "[Because] this is the first time you have gotten caught." Respondent again attempts to provide an explanation, but KM indicates that she is ending the call because she does not want to talk to him anymore.

30(a). Respondent's statements in the pretext phone calls that "nobody is intentionally videotaping anybody in my office," that "there is no intentional videotaping of anybody in my office," and that "I have never recorded anybody before," were not true because he had video recorded patient PG earlier on August 4, 2011. (See Factual Findings 36 through 56.) At the administrative hearing, Respondent testified that he did not qualify his statements to indicate that he meant that he had not recorded anyone "without consent" because he "thought what [he] was saying was clear," and because KM "did not ask for clarification." These explanations were insincere and not credible.

30(b). During his testimony, Respondent denied threatening KM with criminal theft prosecution to force her to return the camera to him. Respondent maintained that he had filed the police report because his camera had been "stolen" and its memory card contained confidential information about other patients. He testified that that he offered to "stop" the police report because he was interested in protecting patient confidentiality and having his camera returned. However, these assertions of concern for patient confidentiality were not convincing and are undermined by Respondent's reluctance to have KM to follow through on her intent to turn over the camera to police. When KM indicates that she has the camera and believes the police would want to see it, Respondent does not agree or encourage her to do so, but instead seeks to persuade or threaten her to return it to him directly. As KM accurately notes, Respondent is apparently afraid that she will take the camera to police. Respondent's assertions of concern for patient confidentiality were also contradicted by Respondent's later refraining from informing PG about the camera being taken with her images on it (see Factual Finding 49).

31(a). At the administrative hearing, Respondent attempted unsuccessfully to impeach KM's credibility.

31(b). For example, Respondent attempted to discredit KM's credibility by pointing to a statement she purportedly made to police on August 4, 2011 which differed slightly from her testimony. According to the police report, on August 4, 2011, KM noticed the camera on the countertop "placed upwards with the lens out." (Exhibit 11, p. 3.) There was no indication in the police report that these words were a direct quote, and in her testimony KM did not recall exactly what she had said to police.⁵ However, Km did recall that she was distraught when she spoke to police on August 4, 2011. KM did not know what the report meant by "upwards." Nevertheless, the evidence established that the camera was on a ledge above, or "upwards" from, the counter.

⁵ The police report contains some minor inaccuracies in its paraphrasing of KM's statements. For example, in KM's initial statement to Officers Smith and Aride on August 4, 2011, it was documented accurately that KM "stated she had plastic surgery performed on her breasts approximately (4) months prior." (Exhibit 11, p. 3.) However, the police report inaccurately documented in a later statement to Officer Vasquez on August 8, 2011, that KM "stated she was a patient of [Respondent] who performed plastic surgery on her breasts approximately 8 months ago." (*Id.* at p. 7.)

31(c). Respondent also tried to weaken KM's credibility with collateral evidence to disprove her testimony that, prior to August 4, 2011, she had not been in the examination room where the non-consensual videotaping occurred. Respondent testified that the examination room that KM was in on August 4, 2011 was called the "orange room" due to its orange-tinted walls, that it was the only room with orange walls, and that there were pictures of KM from May 2011 taken in a room with orange walls. Whether KM had been in that examination room before is inconsequential to determining whether her testimony is credible. KM's testimony is consistent with her statement to police on August 4, 2011, during which she indicated that she had never been in that room before. Her testimony is also consistent with the statement she made when walking into the examination room on August 4, 2011, as documented by the videotape itself (see Factual Finding 25). At the time she walked into the examination room, she had no reason to lie about whether she had been in that room before.⁶ Moreover, KM's purported failure to recall whether she had been in an examination room three months prior (which may have been rearranged such that it did not look familiar to her) does not discredit her relevant uncontested testimony that her videotaping was not consensual.

Respondent's December 20, 2011 Interview at Police Station

32. In December 2011, Respondent was contacted by LAPD Officer Joseph Vazquez who asked him to go to the LAPD Wilshire station for an interview. Respondent agreed. Up until that point, nobody from the LAPD or the Board had contacted him to discuss any ongoing investigation regarding KM's complaint, and he was unaware that KM had filed complaints with these entities.

33(a). On December 20, 2011, Respondent went to the LAPD Wilshire station and brought his attorney. The interview was summarized in an LAPD police report as set forth below.

33(b). During the interview, Respondent confirmed that KM was his patient and that he had performed breast augmentation on her. Respondent answered the officer's questions in an evasive manner as follows:

[The officer] asked [Respondent], "Are you aware of any issues [KM] may have had with you after the surgery was completed?"

[Respondent] responded, "Issues? There were medical issues. That's why I was seeing the patient (referring to [KM]). [The officer] then asked [Respondent], "Are you aware of any issues, not medical issues, but why she would make a complaint against you. A police report specifically." [Respondent] replied, "[KM] I saw five times after her

⁶ This prior statement, consistent with her testimony, was made before any purported motive for fabrication would have arisen. (Evid. Code, §§ 1236 and 791.)

surgical procedure before August 4th (2011). And she never mentioned to me that there were any type of issues or problems with anything that transpired while I was seeing her post-operatively. [Respondent's] attorney (Mr. Jackson) interrupts

(Exhibit 11, p. 10.)

33(c). The officer then informed Respondent that KM had filed a police report stating that Respondent had secretly videotaped her breast examination at his office using a digital camera. When the officer asked Respondent if he was aware that a camera had been discovered in his examination room, Respondent replied, "Yes Sir, I am!" That's why I filed the police report on the 4th of August." (Exhibit 11, p. 10.) When asked if he intended to videotape KM on August 4, 2011, Respondent stated, "There would be no reason to have any sort of videotaping of [KM] during that visit." (*Id.*) The officer asked "So there should be no video?" Respondent replied, "No! There should not be any video. I have no reason to videotape any patient." (*Id.*) Respondent did not qualify this response by saying "without her consent." This is similar to Respondent's unqualified remarks to KM during the tape recorded phone calls.

33(d). However, when the officer asked, "Would there be any other videotaping of any other patients in your office?", Respondent noted that, "at times video is used in the office, so yes there certainly would be videotaping of patients. You can go to my website and see video tapes of patients." (Exhibit 11, p. 11.) The officer then asked, "In what circumstance would there be videotaping?", Respondent circuitously replied, "If I didn't have any reason to video tape a patient then there would be no reason to video tape a patient." (*Id.*) On further inquiry by the officer, Respondent stated that demonstration of before and after results would be a reason to videotape a patient. The officer asked, "Is the patient aware of any videotaping as it is occurring?" Respondent replied, "Well absolutely. Patients should be aware of anything that's occurring if it's in my office." (*Id.*) When asked how the patients would be aware, Respondent stated, "Well I would imagine I would be letting the patient know just as I have in the past about any sort of photography or videotaping that might occur in the office." (*Id.*)

33(e). Respondent insisted, "I have no intentional reason to video tape [KM] in my office." (*Id.*)

34. At the administrative hearing, Respondent testified that he did not know why he was asked to come to the LAPD station on December 20, 2011, and that he assumed it was regarding his report of a stolen camera. This testimony was not credible for the following reasons: (1) Respondent had previously engaged in the pretext phone calls with KM, and he was aware of her intent to take the camera to the police; and (2) Respondent brought an attorney with him to the LAPD station, which is inconsistent with his claim that he thought the subject matter would be his report of a stolen camera.

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Respondent's Implausible Assertions of Inadvertent Video Recording

35(a). Respondent testified that he did not intentionally video record KM and that he never intentionally video recorded anyone without their consent. Respondent noted that he was not feeling well on August 4, 2011, and he insisted that, while the camera was in video mode from his prior intentional videotaping of PG, he inadvertently turned on the camera, and also inadvertently compressed the shutter button, and thus began videotaping KM unintentionally. Respondent's assertion of inadvertence is not credible for the following reasons:

(1). Even if camera was in video mode, it is highly unlikely that Respondent could have video recorded KM without knowing he did so, given that: he had to depress the "on" button; the lens extending would have made a mechanical noise; he had to completely depress the shutter button to begin video recording; and when he placed and adjusted the camera on the ledge, he would have noticed that the lens was extended. (See also Factual Finding 12(h).)

(2). Although Respondent notes that the KM video begins with his foot in the frame, this does not necessarily indicate that he inadvertently turned on the camera, only that he turned it on while holding it next to his body. This frame shot is similar to first frame shot in his intentional video recording of PG, where the initial view is of a file and his lab coat. (See Factual Finding 37(a).) Given the dexterity with which Respondent handled both the still camera and the video camera while photographing and videotaping PG (e.g. moving the video camera several times without bending to look in the viewfinder and placing PG directly in the frame even when she was reflected at an angle in the mirror – See Factual Finding 37),⁷ Respondent was apparently quite adept at handling cameras. The totality of the evidence indicates that Respondent was able to turn on the camera purposefully while holding it next to his body and thereafter set it up quickly.

(3). Although Respondent asserted that he was not feeling well on August 4, 2011, he did not appear ill in the 17 minute video of PG, taken earlier that day, wherein Respondent is energetic and chatting virtually non-stop with PG (see Factual Finding 37).

(4). Respondent's knowledge of his wrongdoing (i.e. lack of inadvertence) is denoted by his attempts to dissuade KM from turning in the camera to police during the pretext phone calls (see Factual Finding 29(b)) and his feigned ignorance of KM's assertions of wrongful videotaping when asked by the LAPD on December 20, 2011 (see Factual Finding 33).

⁷ According to the credible testimony of expert James Rose, Respondent's proficient angling of the video camera to center PG in the frame as reflected in the mirror was a difficult maneuver most likely done after much practice.

35(b). Given Respondent's familiarity and adeptness with handling his cameras, the totality of the evidence established that, on August 4, 2011, Respondent knowingly turned on the camera (Exhibit 31) to begin video recording KM and that he set the camera on the ledge knowing that the lens was extended and that the camera was videotaping the examination room while partially hidden behind a tissue.⁸

Discovery of PG Video on the Camera's Memory Card

36. Once Respondent's camera and memory card were booked into evidence on August 4, 2011, the LAPD reviewed the images contained therein. In addition to the KM video, police discovered a second video recording, taken the morning of August 4, 2011, depicting a patient first in her bra and then nude from the waist up during a medical examination. The officers were able to identify the patient as PG, because at the beginning of the video her name can be seen at the top of a medical file.

37. The August 4, 2011 video recording of PG (Exhibit 37) revealed the following:

(a). When the camera is turned on in video mode, a portion of the examination room counter is in the frame. Before PG appears, a medical file appears in front of the camera, and PG's name is seen on the file. When the file is pulled away, Respondent in a lab coat is standing in front of the camera, blocking it from PG's view and obscuring her from the frame of videotaping. As Respondent moves out of the frame to the left, he is holding the medical file in his left hand, just above the camera; the medical file appears at the top of the video frame. Respondent's his right hand appears to be reaching to move or manipulate something either above or behind camera, which is not within the camera's frame, and he then adjusts the camera very slightly with PG in the center of the frame. The camera is facing PG who is sitting in a chair. Respondent apparently did not look through the viewfinder/screen on the back of the camera to either start the video or to adjust it. Respondent is, all the while, making conversation with PG. PG can be heard saying, "You have to work," and he says, "We sure do." In the first portion of the video, PG is sitting on a chair with a gold frame and royal blue upholstery. She has her shirt off and is wearing only a bra and jeans. At about :04 seconds into the videotaping, PG appears to be looking up at Respondent's face as they converse and he stands at the counter. At about :05 seconds into the recording, PG appears to look directly at the camera. However, the evidence did not establish that PG was looking into the camera as opposed to looking in its direction or at

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⁸ Respondent argued capturing his own image in the video indicated his innocence since he was not stupid enough to reveal himself engaging in wrongdoing. However, given that it was his camera set up in his exam room, he likely believed he could not get caught.

something near it;⁹ at that point, Respondent was still standing at the counter with the file in his left hand and his right hand off frame.

(b). After initially adjusting the camera slightly and moving to the left, Respondent asks PG, "So what do you do? You're working aren't you?" PG says, "Yes, I work. Remember you were making fun of me. Of my Mango. . . . I'm a supervisor." Respondent jokes that, "They have mango at McDonald's. That's what I said," and PG smiles and agrees, "Yes, that is what you said." It is a retail store. It's clothing. . . . I'm a supervisor there." Respondent, says jokingly, "Oh, excuse me. . . . So you supervise everybody else?" When she says, "yes," Respondent then turns the conversation to PG's post-operative status. The discussion of PG's work at Mango took only about 40 seconds (from :03 seconds to :46 seconds) of the approximately 17-minute video.

(c). As the conversation turns to PG's post-operative status, Respondent asks how she is doing, noting that she is about three weeks post-surgery. PG mentions a muscle burning sensation on the right side of her torso, just under her arm, when she gets tired. They discuss some other post-operative issues, including lightly massaging her breasts with lotion as instructed and whether her Steri-strips were still on.

(d). At about 1:58 into the video, PG appears to look at the camera again. However, she seems to be focusing on Respondent who has apparently moved toward the camera, since his voice and another noise can be heard closer to the camera. It was not established that PG was looking directly at the camera at this point, rather than in the direction where it sat on the counter. It was also not proven that, if she was looking at the camera, she realized that it was videotaping her, as opposed to just sitting on the counter, since Respondent regularly had a camera in the examination room which he utilized to take photographs.

(e). After the discussion regarding her Steri-strips, PG rises from the chair and walks off-frame to the left as she is unhooking her front-opening bra and exposing her breasts. Respondent remains off-frame to the left, in front of PG, and apparently examines her breast incisions. Immediately thereafter, Respondent is standing next to the counter and talking with PG. Without bending to look through the viewfinder screen, Respondent turns the camera slightly to the right, at an angle which captures PG's image reflected in the mirror, centered in the camera's frame. At the time Respondent moves the camera, PG is looking down at her breasts. She finishes taking off her bra and is now bare-breasted wearing her jeans.

(f). Respondent is next seen sitting and writing on PG's chart. The sound of a pen clicking and then scribbling on paper can be heard. PG is standing hunched over, round

⁹ PG did not independently recall this or any of the other times when she appeared to be looking in the direction of the camera. She did not recall looking straight at the camera because she did not recognize it was there. Although she recalled the counter was there with objects on it, she did not recall specifically what was on the counter.

shouldered, and appears either cold or uncomfortable. At 5:21, Respondent has PG move to face the mirror directly so that both breasts are visible in the mirror. Respondent continues ceaselessly engaging PG in discussion about her condition. At one point, when he is giving her details about contacting the implant manufacturer, he stands up and holds the medical chart in his right hand at about chest level just above his left hand in which he is holding a black camera close to his chest/abdomen. The black camera, which was covered by the medical chart, appears to be turned on, as indicated by the image in the viewfinder/screen. Respondent presses the shutter several times with the front of the camera pointed toward PG, although it was not established that the shutter was depressed fully to take pictures at that point in time.

(g). Respondent questions PG about the burning pain and she points to her upper back behind breasts. He shows her how to stretch the area, and then tells her, "I'm going to lower these guys." Respondent unbuttons and unzips PG.'s jeans and pulls them down to her mid thighs. He moves off frame and can be heard clicking a pen. PG reaches down and pulls up her pants a couple of inches, and they remain resting on her upper thighs. Respondent places her in front of the brown examination room door and begins taking pictures of her. He takes front-view pictures, and while continually talking, he reaches down and pulls her pants down further to mid-thigh. Respondent then takes side-angle pictures at about 45 and 90 degrees on both sides while chatting about PG referring her friends for surgeries.

(h). Respondent then tells PG that his camera is "defaulting to ISO 800," and explains to her about film speed and the camera letting in too much light so that she is "whiting out." He faces her toward the door and moves the camera in a way which appears to indicate that he is taking pictures from behind her (as evidenced by the images appearing in the viewfinder/screen). However, it was not established that the shutter was depressed fully such that pictures were taken at that point in time. A few of the possible photographs taken at that time occur while Respondent is holding the camera right at PG's knee level or lower. Respondent is standing almost upright, slightly bending his knees, and is not looking directly through the viewfinder/screen as he moves the camera and depresses the shutter. However, he appears to glance down at the viewfinder very briefly a couple of times as he is moving the camera at the lower levels and depressing the shutter.

(i). Thereafter, Respondent has PG sit in the gold-framed, blue-upholstered chair. She asks him, "Pants up?" Respondent tells her, "Just leave them like this," and he takes several pictures of her while seated in the chair. During their ceaseless conversation, at about 12:57 into the video, Respondent says, "Hang on just a second," and he steps over to the counter and without bending to look through the view finder/screen, quickly turns the camera slightly to the left at an angle which now captures PG's image directly (not reflected in the mirror), centered in the camera's frame. His gloved hand covers the camera frame while he turns the camera, and PG is engaged in talking about herself in response to Respondent's questions.

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(j). At a later point in the examination, Respondent has PG stand up and face the mirror, and he begins explaining and demonstrating to PG how to massage her breasts to aide in her recovery. The view from the camera is of Respondent's lab coat and the right side of PG's torso. As PG is looking in the mirror practicing the massage technique on her breasts, at about 15:21 into the videotaping, Respondent turns the camera slightly to the right, without bending to through the view finder screen; the camera is now at an angle which captures PG's image reflected in the mirror, centered in the camera's frame.

(k). While PG is concentrating on massaging her breasts, Respondent moves behind her. While standing upright and engaging her in conversation, Respondent takes the black camera in his right hand and moves it to his waist and then to his side just next to his thigh; he appears to be depressing the shutter several times as the camera lens is pointed to PG's back side. On at least one of the occasions when he depresses the shutter, a small beam of light can be seen emitting from the camera. While moving the camera and depressing the shutter, Respondent does not look down at the camera viewfinder/screen. Respondent then moves to the counter, placing the camera in his pocket.

(l). While Respondent is at the counter, off-frame, PG remains standing and facing the mirror. Respondent can be heard muttering, "massage," and "lotion" as if stating out loud what he is apparently writing on a chart. Thereafter, Respondent gives PG two pieces of gauze dressing, and she sits down on the blue chair and focuses on placing the gauze pieces over her nipples and replacing her bra. While she is looking down at her breasts, at about 17:07 into the videotaping, Respondent quickly turns the camera slightly to the left, without bending to through the view finder/screen; the camera is now at an angle which captures PG's image directly (not reflected in the mirror), centered in the camera's frame. Respondent eventually tells PG that he wants to see her in two weeks. At the end of the examination, PG stands up, pulls up her pants, and Respondent steps in front of the camera and it is turned off.

38. At the administrative hearing, Respondent contended that PG was aware of the video recording, asserting that PG had looked at the video camera several times during the August 4, 2011 examination. As set forth above (Factual Finding 37) and as set forth below (Factual Findings 39 through 56), the evidence did not establish that PG looked directly the video camera or that she was aware that it was video recording.

PG's Lack of Knowledge and Consent to Video Recording August 4, 2011 Examination

39. At the administrative hearing Respondent contended that PG knew of and consented to the video recording of her August 4, 2011 examination. PG denied knowledge of and consent for Respondent to video record her during that examination. As discussed above (Factual Finding 17), the written consent forms signed by PG did not encompass the videotaping of PG without her knowledge. Consequently, consent could only have been given if PG knew that Respondent was video recording the August 4, 2011 examination and consented to that video recording.

40. Respondent is a highly-educated physician, and he presented as an articulate, self-assured witness, whose testimony was professional and polished. Similar to with his manner of speaking during the KM pretext phone calls, during his testimony Respondent spoke like someone who is accustomed to commanding attention and deference. Typically, such a demeanor would render him a persuasive witness. However, given that his credibility was weakened in various parts of his testimony, Respondent's self-serving assertion of PG's knowledge and consent to the video recording of her August 4, 2011 examination is given little weight.

41. PG is a high school graduate, without any post-secondary education. At the administrative hearing, PG appeared timid and unworldly, and her testimony had the tenor of a person who sought to answer quickly to conclude an embarrassing discussion of highly private matters. PG's guileless and unrehearsed demeanor made her a credible witness. PG's timidity and lack of sophistication apparently caused her to become confused and to sometimes wearily capitulate on factual details while she was under the rapid fire of cross examination. Although she was unable to recall some specific details from events approximately four years prior, she presented as a witness testifying truthfully after a passage of time, and her recounting of the material facts surrounding the 2011 events was credible and unassailable.

42(a). Respondent sought to impeach PG's credibility by attacking her recollection of details from events surrounding the August 4, 2011 examination. One detail involved a pre-operative visit in 2011. During PG's direct examination, PG provided background information regarding how she eventually underwent her July 18, 2011 surgery. PG confirmed that she met Respondent in about 2010, but was not ready to undergo surgery, and returned to see him a just prior to her surgery about a year later in 2011. PG was asked on direct examination if Respondent examined her on that pre-operative visit, and she said "no" and that all she remembered was that they discussed the procedure. However, on cross examination, she was referred to the transcript of her testimony from the criminal trial, wherein she was asked if Respondent examined her at a May 11, 2011 visit and she answered, "Yes." After reviewing the transcript, PG testified that she did not recall that pre-operative visit and that when she was asked on direct examination if there was a physical examination, she really did not know. When PG was cross-examined further and asked, "Did you lie again when you said that you did not know [you were being videotaped on August 4, 2011]?", PG testified that she did not lie. She later noted that she never admitted to lying about the pre-operative examination, but admitted only that she did not remember if Respondent examined her at one of her pre-operative visits.

42(b). Whether Respondent examined PG on a date just prior to her July 18, 2011 surgery is irrelevant to these proceedings and is inconsequential to determining whether PG's testimony is credible. Her failure to recall whether Respondent had examined her four years prior does not discredit her relevant and unwavering testimony that Respondent's videotaping of her August 4, 2011 examination was without her knowledge and without her consent.

43. Respondent also sought to discredit PG by pointing out a prior inconsistent statement she made to police regarding the number and dates of job "interviews" she had with Respondent. The evidence submitted to resolve this issue revealed an unclear timeline of PG's post-operative visits; PG had no independent recollection of the post-operative visit dates, and Respondent's patient records for PG were inaccurate. The following findings (Factual Findings 44 through 54) are the events and PG's statements as established by the evidence.

44. PG underwent breast augmentation surgery on Monday, July 18, 2011. Her first follow-up appointment was July 25, 2011, and her next follow-up examinations were on July 29, 2011, and August 4, 2011.

45. At some point during one of the follow-up examinations, PG was approached by Respondent's employee, Erica, about a job position as a receptionist at Respondent's practice. PG was interested in that job position.

46(a). According to the August 4, 2011 follow-up note, PG was to return for a follow-up examination in two weeks. This would have been August 18, 2011. PG's medical records from Respondent contain an examination note with the computer-printed date of August 18, 2011, which was produced by Respondent only after a September 25, 2015 intra-hearing order by the ALJ.

46(b). Although Respondent had the August 18, 2011 examination note in his possession, he did not produce it until ordered to do so by the ALJ. During the administrative hearing, Respondent's expert, Gary Tearston, M.D., testified that he knew Respondent had examined PG at a visit after August 4, 2011, because Dr. Tearston had seen PG's medical records for that date. Although Respondent certified that he had produced to the Board all of P.G.'s medical records, which were admitted into evidence (Exhibit 15), these purportedly complete records did not contain any written post-operative medical records for P.G. In addition to the written records, Respondent also produced a CD containing copies of photographs taken of P.G. at pre-operative and post-operative visits. Included in the photographs were pictures of the top portion of single-page, written chart notes for P.G.'s post-operative visits dated July 29 and August 4, 2011 (Exhibit 17). Exhibit 17 contained no photographs of any post-operative chart notes after August 4, 2011. Since the post-operative records for P.G. served as part of the bases for Dr. Tearston's opinions, the ALJ ordered Respondent to produce documentary copies of all of his post-operative records and chart notes for patient P.G. Respondent produced Exhibit KK, which included chart notes from July 25, July 29, August 4, and August 18, 2011. Respondent testified that he did not provide Dr. Tearston with any records he had not produced to the Board and that he had not located the documents in Exhibit KK until his attorney informed him that the ALJ had ordered production of PG's documentary post-operative records at the end of September 2015. Respondent's testimony was not credible given Dr. Tearston's testimony that he had reviewed PG's post-August 4, 2011 medical records and given that Respondent had taken photographs of the other chart notes (July 29 and August 4, 2011) and included those photographs in Exhibit 17.

46(c). Respondent testified that the August 18, 2011 date was incorrect, and that the follow-up actually occurred on August 21, 2011. Respondent's testimony regarding this error was not contradicted, and no post-operative photographs of PG for any August 18, 2011 examination were produced by Respondent to indicate that an examination occurred on that date. However, Respondent's testimony denying any August 18, 2011 visit is viewed with suspicion given Respondent's lack of credibility in other areas of his testimony and the lack of any notation next to the "8/18/11" date to indicate that it was incorrect. Consequently, it is unclear from the evidence whether an August 18, 2011 follow-up examination occurred.

47. On a Sunday, most likely August 21, 2011, Respondent interviewed PG for an employment position in his practice. The date of this interview was established by Respondent's testimony.¹⁰ PG was fully clothed during that interview. The employment interview was videotaped with PG's consent; Respondent informed PG prior to the clothed interview that he would be video recording the interview, and she gave verbal consent. Respondent conducted a follow-up examination of PG on the same day and took additional post-operative photographs of her just after the interview.

48. The video recording of PG's clothed and consented employment interview shows the following: Respondent is seated across from PG holding in his hands above his lap what appears to be a green medical file (similar to the one he was holding in the August 4, 2011 video). PG is sitting in the same blue chair as she did in the August 4, 2011 video of her examination. The camera recording the August 21, 2011 interview is apparently placed on the same counter as the one where the camera was placed during the August 4, 2011 video. At approximately 3:19 into the August 21, 2011 video, it appears that Respondent is holding a black camera in his right hand just under the chart which he is also holding with his right hand.

49. Respondent never informed PG at any time (including during the August 21, 2011 visit) that the camera containing the August 4, 2011 video of PG's examination had been taken from his office by KM.

50. On Friday, August 26, 2011, LAPD Officer Pech was assigned to investigate the case which had been opened pursuant to KM's complaint. Officer Pech reviewed the video of PG and identified PG as the patient in the video.

51. In early September of 2011, Officer Pech contacted PG at her place of employment. When he asked if she had recently had surgery performed by Respondent, she responded very hesitantly "Yes." When the officer asked if she was aware of and had

¹⁰ The video recording of the fully-clothed and consented interview was turned over to the Board by Respondent in an electronic folder entitled August 11, 2011. However, Respondent testified that the videotape of the PG's clothed interview and subsequent post-operative photographs were taken on August 21, 2011.

consented to Respondent video recording her, PG thought of the video recording of the clothed interview. She replied, "Yes, he recorded me for an interview." The officer informed her that the video had nothing to do with an interview, but that she was topless in the video recording. PG was shocked. Officer Pech asked her to come into the LAPD station for an interview, and she agreed to meet with him on September 6, 2011.

52. At the time Officer Pech contacted PG at her place of employment, Respondent had already offered PG a job at his practice, and she had given notice to her employer that she was leaving her position.

53(a). On September 6, 2011, PG was interviewed by Officers Pech and Vasquez. They each drafted reports regarding the interview, which were included in a consolidated police investigative report (Exhibit 11).¹¹

53(b). According to Officer Pech's report:

During one of her follow up exams, [PG] was approached by [Respondent's] staff and asked if she would like a job in the office. [PG] met with [Respondent] regarding the job position he had at his office. He asked her if he could videotape the interview and she agreed. On August 28, 2011, [PG] arrived at [Respondent's] office for a follow-up exam and a second interview for employment. [Respondent] conducted the interview and offered [PG] a job with his office. [PG] advised us that she was to start her employment with [Respondent's] office September 12, 2011.

Officer Vasquez asked [PG] how she felt knowing there was video taken of her during her exam with [Respondent] without her knowledge and she (teary eyed and her voice beginning to crack) stated, "Devastated, he never told me, he never asked me."

(Exhibit 11, p. 15.)

53(c). According to Officer Vasquez's report, "[PG] was unaware of the fact that Respondent was videotaping the [August 4] examination, nor did she give consent." (*Id.* at p. 9.)

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¹¹ Exhibit 11 was admitted pursuant to *Lake v. Reed* (1997) 16 Cal.4th 448 (officer's observations admitted into evidence; all other statements admitted as administrative hearsay, unless a hearsay exception applied, e.g. admissions). In this case, the officers' observations and Respondent's admissions were admitted. PG's statements regarding the number of interviews she had with Respondent were also admitted since they were inconsistent with her testimony in this proceeding. (Evid. Code, § 1235.) All other statements were admitted as administrative hearsay.

54(a). On June 11, 2012, PG was interviewed during the pendency of the criminal case against Respondent. The June 11, 2012 interview took place at the City Attorney's office, and Board Investigator Jaime Sandoval and Deputy City Attorney (DCA) Richard Kraft were present. The evidence did not establish whether the participants had a copy of Exhibit 11 for reference at that interview. Following the June 11, 2012 interview, a one page of type-written narrative was generated (Exhibit GG) by DCA Kraft.¹² The evidence did not establish which information or documents DCA Kraft used to prepare Exhibit GG.

54(b). Exhibit GG was admitted as administrative hearsay to supplement or explain other direct evidence.¹³ Exhibit GG noted an "office interview" and a "follow up interview at office on a Sunday." This appears similar to the police report's (Exhibit 11's) indication that Respondent videotaped a job interview with PG's consent and that she returned to his office on August 28, 2011 (a Sunday) for a second interview.¹⁴

¹² At the administrative hearing, Investigator Sandoval testified credibly that Exhibit GG was prepared by DCA Kraft, not Investigator Sandoval. DCA Kraft told Investigator Sandoval that he was going to type a report of the interview, and he showed Exhibit GG to Investigator Sandoval at a later time. Respondent attempted to establish that Exhibit GG was prepared by Investigator Sandoval, pointing to Investigator Sandoval's testimony at the criminal trial: Investigator Sandoval was asked, "And you prepared a report in connection with your [June 11, 2012] interview with [PG]?" He stated that was "correct." (Exhibit HH, p. 70, lines 1-3.) He was also asked, "And that interview was part of your first report, true?" He replied "Yes." (*Id.* at lines 4-6.) At the administrative hearing, Investigator Sandoval explained that he "introduced" the report for DCA Kraft, but that he (Investigator Sandoval) did not type Exhibit GG. The evidence established that Exhibit GG was not prepared by Investigator Sandoval.

¹³ At the administrative hearing, Respondent sought to have Exhibit GG admitted as evidence of PG's prior inconsistent statement pursuant to Evidence Code section 1235. However, Exhibit GG involved two layers of hearsay: the typewritten document prepared by DCA Kraft and the purported statements of PG contained therein. In addressing the first layer of hearsay, Respondent sought to have the typewritten document admitted as direct evidence pursuant to several hearsay exceptions set forth in Evidence Code sections 1280, 1250 and 1251. As set forth more fully on the record, Complainant's hearsay objections were sustained because Exhibit GG did not fall within any of the proffered hearsay exceptions. At the conclusion of the administrative hearing, Respondent filed Motion re: Evidentiary Status of Exhibit GG, seeking again to have Exhibit GG admitted for all purposes as a PG's prior inconsistent statement under Evidence Code section 1235. That motion is denied: Exhibit GG is admitted as administrative hearsay.

¹⁴ The evidence did not establish whether DCA Kraft had Exhibit 11 in his possession and whether he referred to it during the June 11, 2012 meeting and/or when preparing Exhibit GG.

55(a). Throughout the administrative hearing, Respondent attempted to establish that the two interviews referenced in the police report included an interview on August 4, 2011. According to Respondent, the August 4, 2011 video tape was the first "interview" and the later, fully-clothed interview was the second interview.

55(b). Respondent testified that on August 4, 2011, after he had a discussion with PG about her job opportunities, he told her that he would like to video record the interview and she agreed. Regarding whether he had asked PG if her examination could be videotaped, Respondent stated, "I don't think I worded it 'job interview' or 'exam.' I just said, 'I will keep this on video,' and she agreed." Respondent testified that he did not videotape the part of the conversation discussing consent because at that time he believed that PG had already signed a consent for photography and video. Respondent further testified that PG's second job interview was on August 21, 2011, during which she was fully clothed. He asked for her consent prior to that video recording and she said, "Yes."

55(c). Respondent's expert, Dr. Tearston, also characterized the August 4, 2011 video as an interview. In his testimony and in his expert report, Dr. Tearston refers several times to PG's "formal interview" for employment, which is the interview where PG is fully clothed. Dr. Tearston confirmed in his testimony that he had viewed both the August 4, 2011 video and the "formal interview" videos, and he asserted his belief that the August 4, 2011 video was the "first interview," and that the second was the "formal interview." However, when asked how he knew there was an interview on August 4, 2011, Dr. Tearston pointed out that at the beginning of the video, Respondent "began by talking to [PG] about her employment and then they began the exam." He then clarified that the second videotaped interview was "100 percent job interview," and "the first one, [he would] not call it a job interview." Dr. Tearston acknowledged that the August 4, 2011 conversation was not a formal job interview, but part of a discussion prior to beginning a medical examination. He admitted that it is not his practice to interview partially-clothed applicants for employment.

55(d). Respondent's second expert, Brian Evans, MD, also characterized the August 4, 2011 as an interview. However, he admitted that he would not conduct a job interview of a partially nude applicant. After watching the August 4, 2011 video, he admitted that he was "not certain" if the "series of questions where [Respondent] is asking [PG] about her job . . . constitutes a job interview."

55(e). Respondent's assertion that the August 4, 2011 video recording was a job interview is not credible. The 40 seconds of pleasant "chatting" about PG's job at Mango cannot reasonably be viewed as a job interview, nor is it believable that any professional would have conducted an interview of a partially-clothed applicant. Additionally, although this is not a subject requiring medical expert testimony, Drs. Tearston and Evans confirmed that it was not their practice to interview job candidates while the candidates were partially-clothed. Employers typically do not conduct interviews of job candidates for a receptionist/front office position when the candidates are clothed only in a bra and then topless with their underwear exposed. Moreover, the totality of the evidence (including the

police report and the testimony of PG) established that only one interview of PG was video recorded and that it was the August 21, 2011 video recorded interview.

56(a). At the administrative hearing, PG underwent extensive questioning about whether there were two "interviews" and whether the August 4, 2011 videotape was the first "interview." PG credibly denied that the August 4, 2011 video was a job interview and denied that she consented to being video recorded on August 4, 2011.

56(b). PG credibly testified about the following events and facts: Nobody from Respondent's office ever talked to PG about her examinations being video recorded, and nobody ever asked to record her examinations. It was never her intent to have her examinations videotaped and she would not have agreed to it. She has seen the videotape of her August 4, 2011 examination and recalls that visit. Nobody ever told her that she was going to be video recorded on that date, and she had no knowledge the camera was on the counter videotaping her on August 4, 2011. She first learned that the August 4, 2011 examination had been video recorded when she received the telephone call from the LAPD while at her place of employment. PG never consented to being video recorded on August 4, 2011.

56(c). PG recalls only one job interview on a Sunday following the August 4, 2011 examination but before the LAPD contacted her. PG recalled that Respondent also conducted a follow-up examination on the same Sunday as the job interview. At the Sunday interview, PG recalled that she was fully clothed and the video was recorded with her consent. Just prior to the interview, Respondent asked to record it, stating that he had other candidates and wanted to remember what PG said.

56(d). At the Sunday interview and examination, Respondent never mentioned to PG that his camera with a video of her partially nude had been removed from his office. That is information she would have wanted to know. She realizes now that Respondent had offered her a job after his camera with a video recording of her topless had been taken from his office.¹⁵ PG never began working for Respondent because after the police contacted her, she "did not want anything to do with him."

¹⁵ Given the timing of the August 21 job interview after Respondent's discovery of the removal of his camera from his office, and given his failure to notify PG of the removal of the camera containing her partially-nude images, Respondent's motive is suspect for duplicating the setting of the unconsented examination video to create the fully-clothed consented video and similarly conducting a follow up examination on that day as well. It is likely that Respondent staged the fully-clothed interview to mirror the covertly-recorded video of PG's partially-nude examination to create confusion regarding her consent. Indeed, when the police officer contacted PG, she initially told the officer that she had consented to being videotaped until he explained that the video was of her topless.

56(e). PG insisted that there was only one job interview. PG disputed Officer Pech's notation of a "second interview," insisting that there was never a "second" interview and that she did not tell him that. PG testified that "there was only one interview that [she] agreed to." PG recalled telling Officer Pech that she did not consent to Respondent video recording her at any point during her examination and that the "only one [she] agreed to was the interview when [she was] fully clothed." PG also insisted that she told DCA Kraft and Investigator Sandoval that her only interview was scheduled for a Sunday, and Respondent asked to record the interview so he could remember what she was saying. PG denied telling DCA Kraft and Investigator Sandoval that there were two interviews or that the Sunday interview was the second interview, because she recalls that she "only consented to one." PG never told DCA Kraft and Investigator Sandoval that she had a job interview prior to that Sunday and that a prior interview was recorded by Respondent with her consent.

56(f). Given PG's testimony that that "there was only one interview that [she] agreed to" and that she "only consented to one," it appears that PG meant that there was only one consensual video recorded interview. It is unclear from the evidence whether there was another non-recorded "interview"/job discussion or whether the police report (which had other inaccuracies) was incorrect about a "second" interview.

56(g). Respondent sought to discredit PG's testimony (and bolster his assertion that the August 4, 2011 video was an "interview) by pointing to PG's stated belief that the consented job interview was videotaped by a camera in Respondent's hands. (Respondent asserted that the Sunday interview video shows no camera in his hands, but that the August 4, 2011 depicts him with a camera in his hands.) PG admitted telling DCA Kraft and Investigator Sandoval that she knew the Sunday interview was being recorded and that she thought it was being done by the camera in Respondent's hand. However, she clarified that she did not know that Respondent was recording her on August 4, 2011, so when she was referring to her belief that she was being recorded by the camera in Respondent's hand, she was referring to her later Sunday interview, not August 4, 2011.¹⁶ PG was never shown the fully-clothed interview video during her testimony to verify her assertion. However, the video recording of the fully-clothed interview shows Respondent holding a camera in his hand. Consequently, there was no evidence to either discredit PG's assertion that during her fully-clothed job interview she believed he was video recording using the camera in his hand or to discount her lack of awareness of another camera recording the video instead.

56(h). Given the passage of four years since the events, the lack of accurate medical records during testimony to refresh her recollection of dates, the failure to use the fully-clothed interview video to refresh her recollection, and Respondent's attempts to promote PG's uncertainty, any confusion by PG during her testimony regarding the number of interviews and on what dates they occurred is reasonable and does not diminish her credibility. Due to this absence of evidence and crafted confusion in the mind of PG,

¹⁶ It is also not likely PG was referring to the August 4, 2011 visit since she could see that Respondent had the camera in his lab coat pocket for a large part of that visit.

Respondent sought to bolster his assertion that the videotaping of the August 4, 2011 was the consented videotaped interview. However, PG's failure to recall the number of interviews does not discredit her recollection that she never consented to Respondent video recording her bare-breasted and in her underwear during her August 4, 2011 medical examination. Consent to appear partially-nude in a video recording of a medical examination is not an event typically confused with an agreement to videotape a fully clothed job interview. Regardless of whether there was one or two "interviews," the evidence established that there was only one interview that was video recorded with PG's knowledge and consent: the fully-clothed interview on about August 21, 2011.

56(i). Respondent's conduct lends support to and substantiates the finding that PG lacked of knowledge of and did not consent to the August 4, 2011 video. On August 4, 2011, Respondent engaged PG in continuous conversation and distracted her attention from his surreptitious, non-consensual video recording as he deftly manipulated his camera. Additionally, Respondent's knowledge of his wrongdoing is indicated by his failure to inform PG that his camera with a video of her partially-nude body had been removed from his office.

56(j). The totality of the evidence (including PG's credible testimony; her consistent statements to police that she did not consent to Respondent's videotaping of her August 4, 2011 examination; and Respondent's actions) established that PG was unaware Respondent was video recording her August 4, 2011 examination, and PG did not give consent for that August 4, 2011 video recording.

Incident with NM

57(a). Complainant offered the testimony of NM to establish Respondent's specific practice and/or to prove his intent or absence of mistake in taking nonconsensual low-angle photographs of women similar to PG's August 4, 2011 examination. However, Complainant failed to prove that Respondent had taken any photograph of NM.

57(b). In February 2010, NM worked as a receptionist at the Beverly Hills surgical center for one week. She worked only one day with Respondent. On that occasion, NM was standing at a desk, leaning forward, but not fully bent over, writing on a piece of paper. She was wearing a dress which was approximately three inches above her knees. When she was done writing and as she turned around, she saw Respondent standing not far behind her. He was standing upright and holding a camera lower than his waist and below the level of her dress, pointing upwards. NM saw a light appear on the camera. Without saying anything, Respondent put the camera in his lab coat pocket and quickly walked away to his office. NM was shaken because she believed Respondent had taken a picture up her dress. She later asked one of her coworkers to accompany her to confront Respondent, and when they did, Respondent denied taking the picture.

57(c). At the administrative hearing, NM admitted that she did not know if the light on Respondent's camera meant a picture was taken. She did not hear any click indicating a

photo was taken, and did not recall if the lens was extended from the body of the camera. NM admitted that she did not really know if a photograph had been taken, but "felt it was," based on the light she saw and Respondent's "manners and gestures."

57(d). Although NM was a credible witness, her testimony did not establish that Respondent had taken a photograph under her dress.

Additional Images Found on Memory Card

58(a). Complainant offered evidence of additional images found on the camera's memory card (Exhibit 33) to establish Respondent's specific pattern and/or to prove his motive in taking the nonconsensual videos of patients KM and PG.

58(b). LAPD Detective Diane McNair with the Commercial Crimes Division, Computer Crime Unit, is responsible for completing forensic examinations of digital media. Her credible testimony and images recovered from the camera's memory card established the following:

(1). During the LAPD investigation of Respondent, Detective McNair's role in involved her uncovering what was on the camera's memory card (Exhibit 33). Detective McNair reviewed all of the information recovered on the memory card including deleted and non-deleted images.

(2). When using a camera with memory card, the user can record an image and "hit delete," which erases that image from viewing on the camera. Additionally, the user can delete images from the memory card by hitting delete, but the images are still not completely eliminated. The user may elect to delete the memory card's images directly from camera or may remove the memory card and place it into a device which loads the images onto a computer, and the user may thereafter delete the images from the memory card while it is connected to the computer or other device. Performing a forensic examination using special software, law enforcement experts can still retrieve what was deleted from the memory card. Once images are deleted from a memory card they cannot be retrieved for viewing by the user without special software¹⁷

(3). In addition to the non-deleted videos of KM and PG, the memory card (Exhibit 33) contained a large number of deleted images taken by a Canon Power Shot SD 4000 IS. The images recovered from the memory card included a great number of photographs of PG, some in a blue and gold chair on July 29, 2011. Detective McNair also recovered hundreds of photographs and four videos of a woman dressed in a bra, thigh-high "fishnet" stockings, and underwear. Respondent also appears in the four deleted videos. At that time, Detective

¹⁷ The user is able to purchase software for non-law enforcement use which allows retrieval of deleted images from a memory card. However, the evidence did not establish that Respondent possessed such software.

McNair believed that this woman was another potential victim, but discovered later that the images were of Respondent's wife. Seventy percent of the deleted images recovered on the memory card were those of Respondent's wife and the remainder was of PG, except for one photograph of the backside of an unidentified, fully-clothed woman walking down a hallway on August 3, 2011.

(4). The deleted images (both photos and videos) on the memory card had been created between July 29, 2011 and August 3, 2011, but last accessed and deleted on August 4, 2011. The evidence did not establish whether these deleted images had been uploaded onto computer or other device prior to their deletion.

58(c). A portion of one of the recovered videos of Respondent's wife, recorded August 3, 2011 (Exhibit 41; first 25 seconds) indicates a sexual intent for taking that video.¹⁸ As the video begins, Respondent's wife is standing in her bra, underwear and thigh-high stockings as Respondent is off-frame speaking and adjusting the camera. He walks into the frame and is seen masturbating.

58(d). Although Respondent had previously taken and deleted intimate photos and videos of his wife using the memory card that was later used to record the videos of KM and PG, the prior existence of his wife's intimate images on the memory card does not in itself automatically render any subsequent images on that memory card to be intimate or sexual.

Standard of Care

59(a). Complainant offered the testimony of Joel Aronowitz, M.D., to establish the standard of care for the treatment of patients KM and PG. Dr. Aronowitz is licensed to practice medicine in California. He obtained his medical degree from Baylor College of Medicine, in Houston, Texas in 1982. He has been a board certified plastic surgeon since 1990 and has been a Clinical Associate Professor at the University of Southern California, Keck School of Medicine since 1995. Dr. Aronowitz has a cosmetic and reconstructive plastic surgery private practice in Los Angeles, and serves as the Medical Director of Tower Wound Care Center in two Los Angeles locations.

59(b). Respondent offered the testimony of Gary Tearston, M.D. to establish the standard of care for the treatment of KM and PG. Dr. Tearston is licensed to practice medicine in California. He obtained his medical degree from the University of Pennsylvania

¹⁸ To avoid an undue intrusion of privacy, the ALJ admitted only the minimal amount of evidence necessary to verify what Detective McNair recovered from the memory card and to allow Complainant to establish Respondent's purported pattern and/or motive. Of the three videos and hundreds of still photographs of Respondent's wife recovered on the memory card, only one video (Exhibit 41) and only one still photograph (Exhibit 25) were offered into evidence by Complainant. The ALJ did not admit Exhibit 25 and only admitted the first 25 seconds of Exhibit 41.

in 1967, and has been board certified in plastic surgery since 1974. He practices plastic surgery in Los Angeles.

59(c). Respondent also offered the testimony of Brian Evans, M.D., to establish the standard of care for the treatment of KM and PG. Dr. Evans is licensed to practice medicine in California. He obtained his medical degree from Case Western Reserve School of Medicine, in Cleveland, Ohio in 1992. Dr. Evans is board certified in plastic surgery and has been a Clinical Professor at Sherman Oaks Hospital, Grossman Burn Center since 2001.

59(d). All of these physicians were equally qualified to testify as experts in this matter. Any additional weight given to one expert's testimony over the other's was based on the content of their testimonies and bases for their opinions, as set forth more fully below.

60. Dr. Evans knows Respondent personally and has socialized with Respondent's family in the past. During several portions of his testimony, Dr. Evans appeared very nervous and tentative. He referred to facts which were contrary to, or not established by, the evidence. For example, in describing the August 4, 2011 video, Dr. Evans noted that PG expressed concern that if she gained weight it would affect her breasts, when in fact Respondent had brought up PG's weight and its effect on her breasts. Dr. Evans also noted that during the August 4, 2011 examination, Respondent talked about the "various asymmetries" when Respondent did not do so. Most significantly, Dr. Evans became very confused and evasive during cross examination when asked, as experts are, to assume facts and then state an opinion. For example, when asked to assume that a photograph of a partially-disrobed patient for non-medical purposes was taken intentionally and to opine whether that was a simple or extreme departure, he stated that he was unable to answer the "compound question" with the words "intention" and "assumption." When he was later asked to assume that Respondent had taken a photograph of a patient with a camera held under a medical chart and to opine whether that would be a standard photo taken during a medical examination, Dr. Evans stated that he was "not sure [Respondent] is taking a photo," and that he had "difficulty answering that," noting that he was asked to assume a fact that he did not agree was true. He continued, "I am just confused. . . . I cannot answer that because I cannot follow your hypothesis or assumption." Given the foregoing, Dr. Evans' opinions were given less weight than those of Drs. Aronowitz and Tearston.

61. Drs. Tearston and Evans both testified that they believed the video recording of KM was inadvertent and that PG consented to the video recording of her August 4, 2011 examination. Dr. Aronowitz was also asked about these factual issues on cross-examination. Such expert testimonies were not required to prove or disprove the asserted/disputed facts and therefore these testimonies are not discussed herein.¹⁹

¹⁹ "The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know which way the wind blows.' . . . The California courts, although in harmony, express the rule somewhat less colorfully and hold expert testimony is not required where a question is 'resolvable by common knowledge.' [Citations]." (*Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 163, footnote omitted.)

62. Dr. Tearston opined Respondent committed no departures from the standard of care in videotaping KM or PG. Dr. Tearston rendered these opinions based on his assumptions that PG consented to the August 4, 2011 video recording and that KM was video recorded inadvertently. However, these assumptions were not borne out by the evidence and have been disproven. Since Dr. Tearston's opinions set forth above are based on faulty assumptions, they are erroneous and are given no weight.²⁰

63. Dr. Aronowitz credibly testified and established the following:

(a). A physician must obtain a patient's consent to take a video recording of her. In order to obtain consent, the physician must have a discussion with the patient about what the physician is doing and the purpose of the video, and patient consent should be given and documented in a signed consent form.

(b). It is below the standard of care to video record or photograph a person's image without their knowledge and permission. This would be an abuse of the doctor-patient relationship which is based on trust. If a patient is video recorded without her knowledge while disrobed, this is below the standard of care.²¹

(c). Using photography/videography in an examination room for non-medical purposes is an extreme departure from the standard of care.

(d). Surreptitiously creating a video recording of a patient in an examination room, without the patient's consent, for non-medical purposes is an extreme departure from the standard of care.

(e). The surreptitious video recording of KM and PG without their knowledge or consent, for non-medical purposes, in each instance constituted an extreme departure from the standard of care.

64. Specifically regarding photographs taken during the August 4, 2011 examination, only nine photographs from that date were produced by Respondent as part of PG's medical file. During the August 4, 2011 video recording, Respondent appeared to be depressing the shutter while holding the camera behind PG at low angles, and the evidence

²⁰ An expert's opinion is no better than the facts on which it is based and, "where the facts underlying the expert's opinion are proved to be false or nonexistent, not only is the expert's opinion destroyed but the falsity permeates his entire testimony; it tends to prove his untruthfulness as a witness." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923-924.)

²¹ Drs. Evans and Tearston agreed that taking photographs of a partially-disrobed patient in an examination room for a non-medical purpose without the patient's consent is a departure from the standard of care.

suggested that he had taken photographs at those angles. However, it was not established by clear and convincing evidence that photographs were actually taken with PG in those positions nor was the actual number of photographs taken of PG that day established by clear and convincing evidence. Consequently, although Dr. Aronowitz opined that “the vast majority of the still photography” from that August 4, 2011 examination was done without a medical purpose, he was relying on the apparent photographs taken, as viewed by the video recording, and not the photographs produced with PG’s chart. Dr. Aronowitz agreed that those photographs produced from PG’s medical chart appeared to be medically appropriate and by themselves were not a deviation from the standard of care or sexual misconduct.²²

65(a). Dr. Aronowitz opined that PG’s August 4, 2011 examination depicted in the video recording was below the standard of care and constituted sexual misconduct.²³ Dr. Aronowitz explained that because the examination is “to a large degree performed to create the video recording and photographs, it is no longer a physical examination but rather a pretext for” the photography and videography. Consequently, the disrobing and touching of PG represents a form of sexual misconduct which is a departure from the standard of care.

65(b). In looking at the examination in isolation, Drs. Tearson and Evans testified that Respondent’s touching of PG complied with the standard of care. Dr. Aronowitz acknowledged that, absent the video recording and photography, the examination itself (disrobing and touching) could very conceivably be for a medical purpose. However, in light of the surreptitious video recording, the encounter is not just a medical examination, but an opportunity to record a partially-clothed patient with both videography and still photography, which is a non-medical purpose. Consequently, the sexual misconduct is the examination (disrobing and touching) which is video recorded. Dr. Aronowitz concluded that the presence of the video recording, made intentionally and without patient consent, converts what is otherwise an appropriate post-operative examination and medical experience into something that is not medical and therefore sexual.

65(c). Although the video recording itself is clearly for non-medical purposes, Dr. Aronowitz does not opine, nor does the Accusation allege, that the surreptitious, nonconsensual videotaping of PG partially-disrobed, in itself, constitutes sexual misconduct. Additionally, the evidence established that, absent the improper videotaping, the examination (i.e. the disrobing and the touching of PG’s breasts) by itself would have been an appropriate post-operative visit. Moreover, the improper video recording itself does not ipso facto render the entirety of the examination improper. However, the examination takes on a different level in light of the video recording. Consequently, when the examination is surreptitiously

²² Dr. Tearston and Dr. Evans also opined that the photographs taken by Respondent complied with the standard of care.

²³ Dr. Aronowitz acknowledged that his expert opinion regarding sexual misconduct was based on Respondent’s treatment of PG and did not include Respondent’s intentional and surreptitious video recording of KM.

video recorded (presumably for later viewing), the disrobing and touching of PG take on dual, co-existing purposes, one proper and one improper and sexual. Although Dr. Aronowitz adequately explains this dichotomy of purpose, there is no need for an expert to explain that what would have been an appropriate occurrence (the disrobing and touching of PG's breasts) mutates into an inappropriate, sexual act via the lens of the covert nonconsensual video recording.

66. To refute that his actions toward PG were sexual (and to refute that he had video recorded KM intentionally), Respondent repeatedly noted that he has seen numerous unclothed female patients in his career and that his interest in them is clinical rather than sexual. Respondent denied any sexual intent for the video recording of PG. However, given the totality of the evidence and Respondent's lack of credibility in several other portions of his testimony, Respondent's assertion is not credible. Moreover, Respondent's clinical interest in other patients does not refute the sexual nature of his actions toward PG. Unlike typical clinical situations, PG's partially-nude status and Respondent's touching of her breasts took on a sexual tenor given the furtive nature by which Respondent was simultaneously obtaining the video recorded images of her nudity and his touching.

Disciplinary Considerations

Effect on Patients

67. As pointed out by Dr. Aronowitz, Respondent violated the physician-patient bond of trust when he exploited KM and PG, which can affect patients' confidence in physicians and restrict their future medical treatment. Both KM and PG are now reluctant to seek treatment from physicians. Although Respondent had noted on August 4, 2011 (as seen in the video recording) that PG would have scarring due to the dehiscence of her wounds and that he would correct the scarring, PG never returned to Respondent or sought treatment from other physicians for scar-revision surgery. PG testified credibly that she would rather have the scars than to visit another physician.

Lack of Diagnosed Sexual Disorder

68(a). Mark. A. Kalish, M.D., testified on Respondent's behalf to assist in determining the level of discipline in the event discipline is imposed.²⁴ Dr. Kalish is licensed to practice medicine in California and specializes in psychiatry.

68(b). Dr. Kalish conducted a psychiatric evaluation of Respondent. Based on his evaluation, which included Respondent's history, Dr. Kalish opined that there was no evidence that Respondent suffers from any psychosexual disorder. This opinion was based on his assumption that the video recording of KM was inadvertent and the video recording of

²⁴ Dr. Kalish's testimony was admitted only as a form of character evidence and not to disprove any of the allegations in the Accusation.

PG was consensual. However, assuming that both video recordings were done intentionally, without proper consent, and for Respondent's sexual gratification, Dr. Kalish did not believe there was sufficient basis to conclude to a reasonable degree of medical probability that Respondent suffers from a psychosexual disorder. He noted that two instances of video recording on the same day do not constitute a sufficient pattern of deviant sexual behavior that would rise to a clinical diagnosis. Dr. Kalish pointed out that the evaluating psychiatrist would need to see a more consistent and pronounced history and pattern of such behavior over time which causes disruption to the individual's life. The elements necessary to diagnose a psychosexual disorder include a pattern of harmful sexual conduct which negatively impact the individual's relationships or functioning.

Assertions of Rehabilitation

69. Respondent testified that, as a result of the criminal case and these proceedings, he has made changes in his practice. He now uses separate memory cards for professional and other purposes. Respondent made the change because he "wanted to make sure that [he] could not be found [again] in this situation . . . where allegations [were] made with no basis."

70(a). Until the criminal court restrictions on his practice were lifted in June 2013, Respondent abided by the practice restrictions. He saw female patients only with chaperones and he did not personally use a camera for any purposes; chaperones took any medical photography. Since the restrictions were lifted, Respondent testified that he has continued using chaperones "most of the time" during examinations and for taking photographs. He does not use a chaperone if none is available or if the patient is fully clothed.

70(b). Respondent's assertion that he has continued using chaperones "most of the time" during examinations was contrary to the testimony of Alexander Sorokurs, M.D., the owner of the surgical center where Respondent works. Dr. Sorokurs testified that once the criminal case had concluded, Respondent "does not have chaperones now with him for several years."

Character Testimony

71. Respondent has the support of Gene Ramos, a friend since childhood, and Dr. Sorokurs, who both testified on Respondent's behalf. Neither Mr. Ramos nor Dr. Sorokurs had reviewed the Accusation in this case, although both had knowledge of the criminal matter. Both Mr. Ramos and Dr. Sorokurs believe that Respondent is honest and respectful of females. Neither has observed Respondent conduct a post-operative examination or photograph a patient.

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LEGAL CONCLUSIONS

Statute of Limitations

1(a). Business and Professions Code section 2230.5, subdivision (a) provides, in pertinent part:

[A]ny accusation filed against a licensee pursuant to Section 11503 of the Government Code shall be filed within three years after the board, or a division thereof, discovers the act or omission alleged as the ground for disciplinary action, or within seven years after the act or omission alleged as the ground for disciplinary action occurs, whichever occurs first.

1(b). California Code of Regulations, title 16, section 1356.2 provides, in pertinent part:

(a) For purposes of Section 2230.5 of the code, the word "discovers" means, with respect to each act or omission alleged as the ground for disciplinary action:

(1) the date the board received a complaint or report describing the act or omission.

(2) the date, subsequent to the original complaint or report, on which the board became aware of any additional acts or omissions alleged as the ground for disciplinary action against the same individual.

(b) For purposes of this section:

(1) "Complaint" means a written complaint from the public or a written complaint generated by board staff that names a particular physician.

(2) "Report" means any written report required under the code to be filed with the board, but does not include a notice filed under Code of Civil Procedure Section 364.1.

1(c). Business and Professions Code section 2230.5 does not define "discovery." Instead, through California Code of Regulations, title 16, section 1356.2, the Board defines "discovers" as the date it "received a complaint or report describing the act or omission," and defines "complaint" as either a "written complaint from the public or a written complaint generated by board staff that names a particular physician."

1(d). Business and Professions Code section 2230.5 requires the Board or one of its divisions to discover the acts or omissions alleged as the grounds for disciplinary action in

order to begin the running of the statute of limitations. Additionally, neither Business and Professions Code section 2230.5 nor California Code of Regulations, title 16, section 1356.2 precludes Board investigators from “receiving” complaints on behalf of the Board, as part of a division of the Board, thus, “discover[ing] the act or omission alleged as the ground for disciplinary action.” Furthermore, neither the statute nor the regulation requires “uniformity” in the method of receipt, nor do they mandate that a complaint be stamped “received” by the Board’s CCU in order to be deemed “received” for statute of limitations purposes. To require such machinations for an act to be deemed “discovered” appears contrary to the legislative intent of Business and Professions Code section 2230.5, which expressly requires use of the date that “occurs first” as the date of discovery.

1(e). In this case, the Board discovered the act or omission alleged as the ground for disciplinary action on August 9, 2011. (Factual Finding 4.) Therefore, the Accusation should have been filed within three years of this discovery, by August 9, 2014, at the latest. The Accusation was filed on August 7, 2014. The statute of limitations has been met.

First Cause for Discipline – Gross Negligence

2. Cause exists to revoke or suspend Respondent’s physician’s and surgeon’s certificate, pursuant to Business and Professions Code section 2234, subdivision (b), in that Respondent committed gross negligence in his care of patients KM and PG, as set forth in Factual Findings 5 through 65.

Second Cause for Discipline – Repeated Negligent Acts

3. Cause exists to revoke or suspend Respondent’s physician’s and surgeon’s certificate, pursuant to Business and Professions Code section 2234, subdivision (c), in that Respondent committed repeated negligent acts in his care of patients KM and PG, as set forth in Factual Findings 5 through 65.

Third Cause for Discipline – Sexual Misconduct

4. Cause exists to revoke or suspend Respondent’s physician’s and surgeon’s certificate, pursuant to Business and Professions Code section 726, in that Respondent committed sexual misconduct with patient PG, as set forth in Factual Findings 5 through 65.

Fourth Cause for Discipline – Unprofessional Conduct

5(a). Cause exists to revoke or suspend Respondent’s physician’s and surgeon’s certificate, pursuant to Business and Professions Code section 2234, on the grounds that Respondent engaged in unprofessional conduct, as set forth in Factual Findings 5 through 65, and Legal Conclusions 2, 3, 4, and 5(b).

5(b). “In order to be subject to discipline for unprofessional conduct, [a physician] must have demonstrated an unfitness to practice medicine by conduct which breaches the

rules or ethical code of his profession, or conduct which is unbecoming to a member in good standing of that profession.” (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 578.)

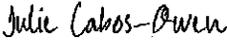
Analysis re: Level of Discipline

6. Respondent’s gross negligence, repeated negligent acts, unprofessional conduct, and sexual misconduct all arise from his intentional and inexcusable breach of his female patients’ trust by surreptitiously video recording them partially nude without their consent. Thereafter, Respondent continued his efforts to deceive and manipulate them in order to disguise his wrongdoing. Instead of demonstrating compassion or expressing remorse, Respondent has chosen to deny all wrongdoing and characterize himself as the victim, with no concern for the actual victims.²⁵ Respondent failed to demonstrate that he is willing and able to be rehabilitated, which bodes poorly for his compliance with any probationary terms. Given the foregoing, the public health, safety and welfare cannot be protected by any discipline short of revocation.

ORDER

Physician’s and Surgeon’s Certificate Number G79180, issued to Respondent Lance Wyatt, is hereby revoked.

DATED: May 4, 2016

DocuSigned by:

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JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings

²⁵ This lack of sympathy for KM and PG carried over into Respondent’s closing argument where Respondent’s counsel argued: “[Complainant has] the gall to say that PG and KM are the victims!” and “Instead of trying to create sympathy for KM, [we should] ask ‘who should we be sympathetic for?’ The one who used profanity or [Respondent], the one whose reputation has been ruined by the Medical Board?”

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition for Penalty)
Relief of:)
)
)
)
LANCE EVERETT WYATT, M.D.)
)
Physician's and Surgeon's)
Certificate No. G79180)
)
Petitioner)
)
_____)

Case No. 06-2011-217261

ORDER DENYING PETITION FOR RECONSIDERATION

The Petition filed by Michael J. Khouri, Esq., attorney for LANCE EVERETT WYATT, M.D., for the reconsideration of the decision in the above-entitled matter, having been read and considered by the Medical Board of California, is hereby denied.

This Decision remains effective at 5:00 p.m. on **July 1, 2016**.

IT IS SO ORDERED June 29, 2016.



Howard Krauss, M.D., Chair
Panel B