

HEARING CONDUCTED BY THE
TEXAS STATE OFFICE OF ADMINISTRATIVE HEARINGS
SOAH DOCKET NO. 503-_____
TEXAS MEDICAL LICENSE NO. E-8713

IN THE MATTER OF THE
COMPLAINT AGAINST

JOSEPH FRANCIS MCWHERTER, M.D.

BEFORE THE

TEXAS MEDICAL BOARD

COMPLAINT

TO THE HONORABLE TEXAS MEDICAL BOARD AND THE HONORABLE
ADMINISTRATIVE LAW JUDGE TO BE ASSIGNED:

COMES NOW, the Staff of the Texas Medical Board (the "Board"), and files this Complaint against Joseph Francis Mcwherter, M.D., ("Respondent"), based on Respondent's alleged violations of the Medical Practice Act ("the Act"), Title 3, Subtitle B, Texas Occupations Code, and would show the following:

I. INTRODUCTION

The filing of this Complaint and the relief requested are necessary to protect the health and public interest of the citizens of the State of Texas, as provided in Section 151.003 of the Act.

II. LEGAL AUTHORITY AND JURISDICTION

1. Respondent is a Texas Physician and holds Texas Medical License No. E-8713, that was originally issued on August 27, 1977. Respondent's license was in full force and effect at all times material and relevant to this Complaint.
2. Respondent received notice of the Informal Settlement Conference ("ISC") and appeared at the ISC, which was conducted in accordance with §2001.054(c), GOV'T CODE and §164.004 of the Act. All procedural rules were complied with, including but not limited to, Board Rules 182 and 187, as applicable.
3. No agreement to settle this matter has been reached by the parties.
4. All jurisdictional requirements have been satisfied.

III. FACTUAL ALLEGATIONS

Board Staff has received information and on that information believes that Respondent has violated the Act. Based on such information and belief, Board Staff alleges:

1. This Complaint addresses Respondent's care and treatment of patients A.P. and H.R.
2. Patient A.P.:
 - A. AP, age 45, was seen by the Respondent as a new patient on June 19, 2007 for alternative breast cancer treatment and a thyroid problem. A.P. had breast cancer treated in January of 2007.
 - B. A.P.'s weight, height and blood pressure were taken. The blood pressure was noted to be 170/100 mmHg. There are no notes to indicate that any further examination was performed.
 - C. Respondent ordered laboratory tests including; testosterone, DHEAS, E2, vitamin D, progesterone, TSH, and an iodine load test.
 - D. Respondent prescribed intestinal restore, Breast Secure, prometrium, and low dose naltrexone. Other treatments included yogurt, berries, protein, and pomegranate.
 - E. On August 24, 2007, there was a phone consult with the patient. There are no notes regarding what was discussed. Progesterone, magnesium, vitamin D3 and other medications that are not decipherable, were ordered.
 - F. A letter of dismissal to A.P. dated October 8, 2007, indicates the Respondent felt that the patient's future medical needs would best be met through providers closer to her area, as the patient was from out of state.
 - G. Respondent violated the standard of care in this patient for the following reasons:
 - i. Low dose Naltrexone was not indicated,
 - ii. He did not have and/or document a clearly defined treatment plan,
 - iii. He did not perform and/or document an appropriate physical examination.
3. Patient H.R.:
 - A. H.R. visited the Respondent on November 7, 2005, complaining of pelvic pain and having heavy vaginal bleeding. Respondent's progress note reflects that the patient did not want to have a vaginal examination that day. Respondent's assessment was

that there was marked endometriosis and the patient was to be set up for laparoscopy with possible presacral neurectomy and all indicated procedures. An abdominal sonogram of the pelvis was to be performed and lab work was ordered. There are no notes to indicate that a pelvic examination was performed. A Pap smear was recorded as having been performed when the patient was age 19, the result being unknown. The history indicated a previous laparoscopy in 2002.

- B. Respondent performed a laparoscopy for H.R. on December 30, 2005. There was extensive endometriosis, and laser destruction of endometriotic implants was done. Nodules on the left and right utero sacral ligaments were removed and sent for pathology. The diagnosis of endometriosis was confirmed pathologically.
- C. Subsequent to the surgery, the patient was seen multiple times in the office, with various complaints of pain and vaginal bleeding, and therapy was given in an attempt to suppress menstruation.
- D. On December 27, 2005, H.R. complained of an orange, bloody discharge with a bad odor. There are no notes to indicate that a pelvic examination was performed to address this issue.
- E. On January 4, 2006, H.R. was seen, and the notes indicate that her right ovary was very painful and hurt into her leg. Respondent discussed the use of hormone therapy for three to six months.
- F. On February 2, 2006, H.R. was still having issues of pain and bleeding. There are no notes to indicate that the patient was examined or that the symptoms were addressed.
- G. H.R. was seen on March 23, 2006, at 12 weeks follow-up from surgery. The notes indicate a menstrual period lasting 13 days every 28 days. There are no notes to indicate that the patient was examined.
- H. On June 6, 2009, H.R. was seen again, and Respondent's notes indicate she was having painful periods. She was being seen for pelvic pain but, again, there are no notes to indicate that an examination was performed.
- I. Respondent violated the standard of care in this patient because he did not perform and/or document an appropriate physical exam.

4. The actions and/or inactions of Respondent as specified above violate one or more of the following provisions of the Medical Practice Act:

- a. Section 164.051(a)(1) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's commission of an act prohibited under Section 164.052 of the Act.
- b. Section 164.051(a)(6) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's failure to practice medicine in an acceptable professional manner consistent with public health and welfare.
- c. Section 164.051(a)(3) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's violation of a Board rule, specifically Board Rule 165.1, which requires the maintenance of adequate medical records.
- d. Section 164.052(a)(5) of the Act authorizes the Board to take disciplinary action against Respondent based upon Respondent's unprofessional or dishonorable conduct that is likely to deceive or defraud the public or injure the public.
- e. Sections 164.052(a)(5) and 164.053(a)(5) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent prescribing or administering a drug or treatment that is nontherapeutic in nature or nontherapeutic in the manner the drug or treatment is administered or prescribed.

IV. APPLICABLE STATUTES, RULES, AND AGENCY POLICY

The following statutes, rules, and agency policy are applicable to this matter:

1. Section 164.007(a) of the Act requires that the Board adopt procedures governing formal disposition of a contested case before the State Office of Administrative Hearings.
2. 22 TEX. ADMIN. CODE, Chapter 187 sets forth the procedures adopted by the Board under the requirement of Section 164.007(a) of the Act.
3. 1 TEX. ADMIN. CODE, CHAPTER 155 sets forth the rules of procedure adopted by SOAH for contested case proceedings.
4. 1 TEX. ADMIN. CODE, CHAPTER 155.507, requires the issuance of a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law.

5. Section 164.007(a) of the Act, Board Rule 187.37(d)(2) and, Board Rule 190 et. seq., provide the Board with the sole and exclusive authority to determine the charges on the merits, to impose sanctions for violation of the Act or a Board rule, and to issue a Final Order.

V. NOTICE TO RESPONDENT

IF YOU DO NOT FILE A WRITTEN ANSWER TO THIS NOTICE WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS WITHIN 20 DAYS AFTER THE DATE OF SERVICE, A DEFAULT JUDGMENT MAY BE ENTERED AGAINST YOU, WHICH MAY INCLUDE THE DENIAL OF LICENSURE OR ANY OR ALL OF THE REQUESTED SANCTIONS INCLUDING THE REVOCATION OF YOUR LICENSE. IF YOU FILE A WRITTEN ANSWER, BUT THEN FAIL TO ATTEND THE HEARING, A DEFAULT JUDGMENT MAY BE ENTERED AGAINST YOU, WHICH MAY INCLUDE THE DENIAL OF LICENSURE OR ANY OR ALL OF THE REQUESTED SANCTIONS INCLUDING THE REVOCATION OF YOUR LICENSE. A COPY OF ANY RESPONSE YOU FILE WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS SHALL ALSO BE PROVIDED TO THE HEARINGS COORDINATOR OF THE TEXAS MEDICAL BOARD.


IF YOU FAIL TO ATTEND THE HEARING, THE ADMINISTRATIVE LAW JUDGE MAY PROCEED WITH THE HEARING AND ALL THE FACTUAL ALLEGATIONS LISTED IN THIS NOTICE CAN BE DEEMED ADMITTED, AND THE RELIEF SOUGHT IN THIS NOTICE MIGHT BE GRANTED.

WHEREFORE, PREMISES CONSIDERED, Board Staff requests that an administrative law judge employed by the State Office of Administrative Hearings conduct a contested case hearing on the merits of the Complaint, and issue a Proposal for Decision ("PFD") containing Findings of Fact and Conclusions of Law necessary to support a determination that Respondent violated the Act as set forth in this Complaint.

Respectfully submitted,

TEXAS MEDICAL BOARD

By:


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THE STATE OF TEXAS

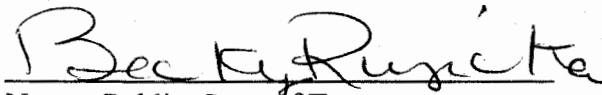
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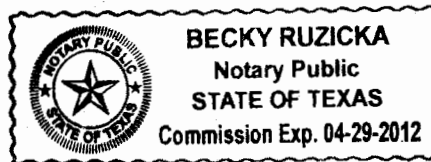
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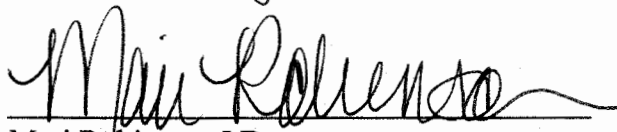
SUBSCRIBED AND SWORN to before me by the said Roger Calhoun on
August 12, 2009.


Notary Public, State of Texas



Notary without Bond

Filed with the Texas Medical Board on August 12, 2009.


Mari Robinson, J.D.
Executive Director
Texas Medical Board