

Public

STATE OF NEW YORK DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

PETER G. HICKOX, M.D.
CO-12-05-2705-A

COMMISSIONER'S
SUMMARY
ORDER

TO: Peter G. Hickox, M.D.
REDACTED

The undersigned, Nirav R. Shah, M.D., M.P.H., Commissioner of Health, pursuant to New York Public Health Law §230, upon the recommendation of a Committee on Professional Medical Conduct of the State Board for Professional Medical Conduct, has determined that the duly authorized professional disciplinary agency of another jurisdiction, the State of California, Medical Board of California, Department of Consumer Affairs, has made a finding substantially equivalent to a finding that the practice of medicine by **PETER G. HICKOX, M.D.**, Respondent, New York license number 164924, in that jurisdiction, constitutes an imminent danger to the health of its people, as is more fully set forth in the Order of Emergency Suspension of License, dated August 21, 2012, attached, hereto, as Appendix "A," and made a part, hereof.

It is, therefore:

ORDERED, pursuant to New York Public Health Law §230(12)(b), that effective immediately, **PETER G. HICKOX, M.D.**, shall not practice medicine in the State of New York or in any other jurisdiction where that practice is predicated on a valid New York State license to practice medicine.

ANY PRACTICE OF MEDICINE IN THE STATE OF NEW YORK IN VIOLATION OF THIS ORDER SHALL CONSTITUTE PROFESSIONAL MISCONDUCT WITHIN THE MEANING OF NEW YORK EDUCATION LAW §6530(29) AND MAY CONSTITUTE UNAUTHORIZED MEDICAL PRACTICE, A FELONY DEFINED BY NEW YORK EDUCATION LAW §6512.

This Order shall remain in effect until the final conclusion of a hearing which shall commence within thirty (30) days after the final conclusion of the disciplinary proceeding in California.

The hearing will be held pursuant to the provisions of New York Public Health Law §230, and New York State Administrative Procedure Act §§301-307 and 401. The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on a date and at a location to be set forth in a written Notice of Referral Proceeding to be provided to the Respondent after the final conclusion of the Florida proceeding. Said written Notice may be provided in person, by mail, or by other means. If Respondent wishes to be provided said written notice at an address other than that set forth above, Respondent shall so notify, in writing, both the attorney whose name is set forth in this Order, and the Director of the Office of Professional Medical Conduct, at the addresses set forth below.

RESPONDENT SHALL NOTIFY THE DIRECTOR OF THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT, NEW YORK STATE DEPARTMENT OF HEALTH, 150 Broadway, SUITE 355, ALBANY, NY 12204, VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED, OF THE FINAL CONCLUSION OF THE PROCEEDING IMMEDIATELY UPON SUCH CONCLUSION.

THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED AND/OR THAT YOU BE FINED OR SUBJECT TO OTHER SANCTIONS SET FORTH IN NEW YORK PUBLIC HEALTH LAW §230-a. YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATE: Albany, New York
Nov 8, 2012

REDACTED

NIRAV R. SHAH, M.D., M.P.H.
Commissioner of Health
New York State Department of Health

Inquires should be directed to:

Joel E. Ablove
Associate Counsel
Bureau of Professional Medical Conduct
Corning Tower – Room 2512
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Albany, New York 12237
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BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Interim
Suspension Order:

OAH No. 2012050575

LINDA K. WHITNEY, Executive Director
Medical Board of California

Petitioner,

vs

PETER G. HICKOX, M.D.

Respondent.

DECISION ON INTERIM SUSPENSION ORDER

A hearing in this matter convened before Marilyn A. Woollard, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), on August 9, 2012, in Sacramento, California.

Michelle L. Angus, Deputy Attorney General, represented complainant, Linda Whitney, Executive Director of the Medical Board of California (Board). Board Investigator Shane Wright was also present.

Timothy J. Aspinwall, Attorney at Law, represented Peter G. Hickox, M.D., respondent, who was present.

Oral and documentary evidence was received and the parties offered oral closing arguments. The record was then closed and the matter was submitted for decision on August 9, 2012.

FACTUAL FINDINGS

Procedural History

1. On February 5, 2003, the Board issued Physician's and Surgeon's Certificate Number G 86782 (certificate) to respondent.

2. *Petition for Ex Parte Interim Suspension Order.* On May 14, 2012, the Board filed its Petition for Ex Parte Interim Suspension Order (ISO/Petition) on OAH and notified respondent that it would seek an Ex Parte ISO suspending his certificate at a hearing to be held on May 15, 2012, pursuant to Government Code section 11529, subdivision (c).¹ In support of its request, petitioner submitted declarations under penalty of perjury from the following individuals: Jeffrey Smith; Elisabeth Susan Mindt; Parampal Gill, M.D.; Elvira Milano, M.D.; Shane Wright; Howard M. Slyter, M.D.; and Deputy Attorney General Michelle L. Angus.

The Petition alleged that respondent has engaged in unprofessional conduct under section 2234 and that his actions demonstrate addictive behavior, substantially impaired judgment, and a potential underlying mental or physical condition that compromises his ability to safely practice medicine within the meaning of section 822. The Petition further alleged that, absent an ISO, serious injury would result to the public before the case could be heard on notice. The Petition was based on the following alleged conduct: over a period of at least one year, respondent used intoxicating inhalants while watching pornography and masturbating in his private office while on duty and on-call for emergencies at the hospital. After being confronted about and admitting this behavior, respondent was asked to prepare a rehabilitation plan and to submit to a fitness evaluation, however, he failed to comply. On May 11, 2012, respondent refused to speak with Board Investigator Shane Wright.

3. *Hearing on Ex Parte Petition.* On May 15, 2012, the hearing on the Ex Parte Petition convened before Presiding Administrative Law Judge Karen J. Brandt. Respondent's previous attorney, Albert M. Ellis, filed with OAH an "Ex Parte Hearing Brief," with two attachments: a pre-employment final toxicology report from Quest Diagnostics on a sample respondent provided February 29, 2012, showing negative results on substance abuse and narcotics panels; and a May 10, 2012 opinion letter to Mr. Ellis from Gary L. Cavanaugh, M.D., regarding his May 1, 2012 psychiatric fitness for duty evaluation of respondent.

4. *May 17, 2012 Order Granting Petition for ISO.* On May 17, 2012, ALJ Brandt granted the Petition and issued the Ex Parte Order (Order) immediately suspending respondent's certificate. In pertinent part, the Order provided that

¹ Unless otherwise indicated, all undesignated statutory references are to the Business and Professions Code.

respondent stipulated to, and the court ordered: (1) that respondent has engaged in acts constituting violations of the Medical Practices Act; (2) that permitting him to continue to engage in practice will endanger the public health, safety, and welfare, and (3) that serious injury would result before the matter can be heard on notice.

The Order further provided that: (1) respondent would submit to a complete psychiatric evaluation by a Board-appointed certified psychiatrist; (2) respondent did not waive his right to have a noticed hearing under Government Code section 11529, subdivision (d), and reserved the right to set the matter for further hearing; and (3) that petitioner "shall have fifteen days from the submission of the written psychiatric evaluation but no later than July 17, 2012, to file an accusation."

5 On July 17, 2012, complainant served the Accusation (OAH Case No. 2012070742) on respondent and alleged causes for discipline under section 2234, subdivisions (b) (gross negligence) and (c) (repeated negligent acts) based, *inter alia*, upon the facts set forth in the Petition for ISO.

6 On July 18, 2012, respondent's new counsel filed a request for a hearing on the ISO pursuant to Government Code section 11529, subdivision (d), with a Notice of Defense on the Accusation and request for hearing.

As reflected in the July 25, 2012 Trial Setting Order, the noticed hearing on the ISO Petition was scheduled for August 9, 2012, with the ISO to remain in full force pending issuance of ISO decision. The hearing on the Accusation was set for August 21 through 23, 2012.

On August 7, 2012, the following Stipulated Order was issued: respondent waived his right to a hearing on the Accusation. The matter was taken off calendar, on condition that respondent reserved the right to a hearing on the Accusation within 30 days of his request for a hearing following issuance of a decision on the ISO Petition.

7 *August 9, 2012 Noticed ISO Hearing.* At the Noticed ISO hearing, respondent offered the following documents in opposition to the Petition for ISO: respondent's curriculum vitae (CV); the August 8, 2012 Declaration of Gary L. Cavanaugh, M.D., with copies of his CV, his May 10, 2012 opinion letter, and the June 16, 2012 opinion letter of Randall Solomon, M.D., to Investigator Wright; the July 31, 2012 Affidavit of Randall L. Solomon, M.D., with report addressed to Ms. Wright dated July 23, 2012 [sic; dated June 16, 2012]; and numerous declarations in support of respondent's continuing practice. (See Factual Finding 33.)

Petitioner offered the Declaration of Charles D. Moore, M.D., a board-certified addiction medicine specialist, signed August 9, 2012. In pertinent part, Dr. Moore's declaration indicated that he had performed his own evaluation of respondent, and disagreed with the conclusions of Dr. Cavanaugh and Dr. Solomon

regarding whether respondent is impaired and whether respondent can safely practice medicine.

Respondent objected to the admission of Dr. Moore's declaration, as untimely for failure to comply with the notice requirements of Government Code section 11529, subdivision (b). Following argument and reconsideration, respondent's objection was sustained and Dr. Moore's declaration was excluded as untimely. The parties then made oral closing arguments and the matter was submitted for decision.

8. On August 9, 2012, after the hearing, petitioner filed a letter brief requesting reconsideration of the ruling excluding Dr. Moore's declaration as untimely. On August 14, 2012, respondent filed its written opposition to the motion for reconsideration.

By order dated August 15, 2012, incorporated here by reference, the request to receive and consider Dr. Moore's declaration was denied.

I. *Violation of Medical Practice Act or Inability to Practice Safely Due To a Mental or Physical Condition*

9. Respondent received his medical degree in 1981. After completing an internship and residency in obstetrics and gynecology, respondent completed a two-year fellowship in reproductive endocrinology and infertility. Respondent is board-certified in obstetrics and gynecology. In late 2002, respondent moved to California and obtained his California license in 2003.

10. Respondent worked with the Gill Obstetrics & Gynecology Medical Group, Inc. (Gill Group) from March 2003 through February 2012. Dr. Parumpal Gill is the President of the Gill Group, which has offices in Stockton and in Lodi, California. Respondent held hospital privileges at Lodi Memorial Hospital (Lodi Memorial) and at St. Joseph's Medical Center (St. Joseph's) in Stockton, California.

11. From February 2010 until his termination in February 2012, respondent worked in the Gill Group's Lodi office, which is across the parking lot from Lodi Memorial. During this time, respondent generally saw patients in the office Monday through Friday, unless he was in hospital attending deliveries or performing surgery or on vacation. Respondent was on-call for emergencies at the hospital on a rotational basis with the other doctors in the medical group. The on-call hours were from 7:00 a.m. one day until 7:00 a.m. the following day on weekdays, and from 7:00 a.m. Friday until 7:00 a.m. Monday on the weekends, including Saturday and Sunday.

12. In her May 9, 2012 Declaration, Dr. Gill indicated that: "[i]f the physician on-call is asked to come to the hospital for an emergency or consultation, the required response time is 15 to 20 minutes, depending upon the nature of the emergency."

13 The events that led to the filing of the Petition are described in the declarations of Jeffrey Smith, Elisabeth Susan Mindt, Dr. Gill, and Elvira Milano, M.D. Their declarations are paraphrased in relevant part below.

14 Jeffrey Smith is a janitor who has cleaned the Gill Group's Lodi office suites since February 1, 2011. He cleaned after the office closed at 5:00 p.m., and he would frequently clean on Saturday or Sunday instead of on Friday night.

Beginning in March or April 2011, while cleaning at the Gill Group offices, Mr. Smith heard a clinking noise while emptying respondent's private office trash can. He looked and saw one or two cans labeled "Maximum Impact, video head cleaner" and some small, empty brown glass vials labeled "nail polish remover." Over time, Mr. Smith continued to find "more and more empty cans of video head cleaner, of all different brands and sizes" in respondent's trash can, which "seemed odd" because there was no VCR player in respondent's office. He also "often saw lots of burnt wooden matches and foil with a burnt substance on it" in respondent's trash.

Mr. Smith would see respondent in the Gill Group offices as often as once a week and on the weekends. Respondent "told [Mr. Smith] that sometimes he came into the office on Saturdays and Sundays to see infertility patients because he did not have time to see them during the week." The Gill Group also posted the on-call schedule on the wall and Mr. Smith would see respondent's name on the roster.

15 Mr. Smith became suspicious that respondent was using drugs, after seeing him in the office on two different occasions on the same day. When he first saw respondent in the early afternoon, respondent's appearance was not unusual. When Mr. Smith returned to the office around 5:30 p.m. to clean, he noticed that "this time [respondent's] lips were razor red and swollen." Mr. Smith also noticed "a strong chemical odor" throughout the suite. Mr. Smith described several other occasions when he noticed strong chemical odors at the Gill Group office suite. The odors were stronger near respondent's office, and Mr. Smith later found empty video head cleaner cans in respondent's trash.

After this incident, Mr. Smith did some internet research and found that both the chemical ingredient in the video head cleaner "Maximum Impact" and the small brown glass vials, called "Jungle Juice," are inhaled to get high and/or for sexual arousal.

Mr. Smith described finding an increasing quantity of empty inhalant cans in respondent's office trash can, particularly on the weekends. One day in particular, after hearing clinking, Mr. Smith "opened the bag and counted between 10 to 15 empty cans." After seeing several mail boxes delivered to respondent's desk, Mr. Smith found a \$400 packing receipt for nail polish remover and many empty glass bottles in the trash. Mr. Smith "started to get concerned about the safety of

[respondent's] patients because the number of empty cans was increasing..." and he began to collect and save the cans and other items he found in respondent's trash.

Sometime before Thanksgiving 2011, Mr. Smith knocked on respondent's door while cleaning. At the same time, he heard a spraying sound. Respondent came out of his office in a rage and screaming, "I'm fucking sleeping!" Mr. Smith left the suite and, when he came back, he found several more empty spray cans in respondent's office trash. Mr. Smith decided he should tell someone about respondent's behavior.

16. Mr. Smith also cleaned the offices of Lodi Memorial's Chief of Medical Staff, Elvira Milano, M.D. Mr. Smith approached Dr. Milano and told her that he was very concerned for patient safety because he thought respondent might be using drugs. Mr. Smith informed Dr. Milano about his repeated discoveries of cans of Maximum Impact, bottles of Jungle Juice and other items in respondent's office wastebasket. Dr. Milano told Mr. Smith to discuss his concerns with Dr. Gill.

17. Mr. Smith then reported his observations and concerns about respondent's behavior to the Gill Group's Office Manager, Susan Mindt. He showed Ms. Mindt the empty cans he had collected from respondent's office and placed in his trunk. The following day, Ms. Mindt discussed the situation with the Gill Group's General Manager Lorraine Sage, and they decided to confront respondent. Ms. Mindt declared that:

[respondent] admitted that he used inhalants in his private office at work. [Respondent] said that it was a "gay thing" and nothing to worry about; he said that he only used the inhalants in the office before going home for the day. At the time, [respondent] denied using inhalants while on-call at the hospital. We accepted [respondent's] explanation because we had no reason not to. [Respondent] also stated that Mr. Smith was just being nosy by going through the trash and that he would solve that problem by taking out his own trash from that day forward.

Ms. Mindt did not report these developments to Dr. Gill.

18. For a while after he reported his concerns to Ms. Mindt, Mr. Smith noticed that when he went to clean respondent's office, the trash and trash can liner had already been removed. Mr. Smith believed respondent was still using inhalants because he "still saw [respondent] with red lips occasionally after hours and sometimes still smelled a chemical odor after hours."

In February 2012, Mr. Smith informed Dr. Milano that he was still finding cans and bottles of these substances in respondent's trash.

19. Among her duties as Lodi Memorial's Chief of Medical Staff, Dr. Milano oversees the Medical Staff Executive Committee, which has overall responsibility for peer review and quality assurance. After Mr. Smith reported his concerns about respondent's patients to Dr. Milano, she conducted her own research on Maximum Impact and Jungle Juice. From this research, Dr. Milano:

determined that these substances are inhalants that create a heightened sexual sensation, dissipate quickly, but can cause an impairment of cognitive and motor functions. Additionally, these substances have long-term effects on muscle tone, coordination, and cognitive functions. There are no routine tests for these drugs, but autopsy tissue from liver samples can show the toxic effects and metabolites.

Dr. Milano discussed the situation with Lodi Memorial's Chief Executive Officer Joseph Harrington. On February 3, 2012, Dr. Milano and Mr. Harrington met with Dr. Gill and told her about the continuing allegation that respondent was using inhalants in the office while on duty.

20. Later on February 3, 2012, Dr. Gill had a staff meeting to discuss Mr. Smith's allegations about respondent. Respondent was not present. Ms. Mindt confirmed that Mr. Smith had previously reported his concerns to her, advised that she and Ms. Sage had met with respondent about this complaint in late 2011, and that respondent had told her that his use of inhalants was nothing to worry about. Respondent was then called into the staff meeting. Ms. Mindt declared that:

respondent then joined the meeting and admitted that he inhaled substances in his private office and had been doing so for some time. [Respondent] further admitted to masturbating in his office. [Respondent] broke down crying and was apologetic about his behavior. He further admitted that his inhalant use was a problem and he needed help. [Respondent] said that he wanted to get counseling and the Gills said that they would help him with his rehabilitation in any way they could. I was surprised that [respondent] admitted that his inhalant use was a problem because he acted like it was nothing when Ms. Sage and I had met with him.

21. Dr. Gill also described the February 3, 2012 staff meeting at which respondent was confronted with the concerns about his use of inhalants.

[Respondent] stated that he had been using spray video head cleaner and Jungle Juice, as well as Viagra without prescription, for at least three years. [Respondent] stated that he kept the inhalants in a locked cabinet in his office. [Respondent] admitted to use of the inhalants while on duty in the office and while on call at the hospital. [Respondent] also stated that in connection with his use of inhalants, he would masturbate in his office and watch pornography on his work computer.

To protect patient safety, Dr. Gill relieved respondent of his patient-care duties. She also removed respondent from the on-call schedule that weekend and advised that she would perform any of his scheduled surgeries. Dr. Gill informed respondent that he could not see patients at the office again until he gave her a rehabilitation plan. Respondent "apologized for his behavior and went to his office to clean out the inhalants."

Respondent was terminated from the Gill Group for admitted improper use of substances in the workplace. Dr. Gill reported this action to the hospitals where respondent held privileges and to the Board.

22. Shortly thereafter, respondent began to practice with the Sutter-Gould Medical Group, Department of Obstetrics & Gynecology, in Stockton, with hospital privileges at St. Joseph's.

23. On February 22, 2012, the Board received a complaint from Dr. Gill, advising that respondent had been terminated from the Gill Group as of February 3, 2012 "due to admitted substance abuse at the work place."

Board Investigator Wright was assigned to investigate the complaint. Ms. Wright contacted Medtox Clinical personnel to inquire whether biological fluid tests are available that will detect the chemical ingredients of Maximum Impact and/or Jungle Juice Platinum. She was advised that no tests are available to detect these substances.

24. On March 2, 2012, Dr. Milano and Dr. Felber, a Medical Executive Committee member, met with respondent. At this meeting, respondent admitted using inhalants "on a recreational basis." Respondent denied that he used any substances in the hospital or that his drug use ever endangered patients. Respondent was asked to submit to random drug screens and to undergo a fitness for duty evaluation. Respondent agreed, as long as these procedures were not done by someone in the local area.

Dr. Milano indicated that, after this meeting, she "became increasingly concerned when, in spite of my efforts to have [respondent] undergo a thorough evaluation, he neither did so nor responded to me. From the standpoint of proper patient care, I felt that such an evaluation was necessary to determine whether [respondent] was physically and mentally fit to provide services in his specialty at our hospital." The hospital asked respondent to see Dr. Reynolds, M.D., an addiction medicine specialist in San Jose, and it sent three letters to him to schedule the evaluation.

25. On April 26, 2012, Lodi Memorial began summary suspension proceedings against respondent. Dr. Milano indicated that respondent had not contacted Dr. Reynolds or been evaluated for fitness for duty. The Lodi Hospital Medical Executive Committee was meeting to further consider the suspension of respondent's privileges.

Dr. Milano declared that, "while to date, the peer review process has not revealed any quality of care issues" regarding respondent, "the potential for patient harm still exists, and I continue to be concerned about patient safety. [Respondent] admitted to Dr. Gill that he used these substances while on-call. Additionally, based upon my research of these substances, these substances can have short- and long-term effects on [respondent's] motor, cognitive and neurologic abilities."

26. Dr. Milano opined that respondent's conduct of watching pornography and masturbating in conjunction with using 'poppers' in his office while on-call constitutes unprofessional conduct.

Declaration and Opinion of Howard M. Slyter, M.D.

27. Dr. Slyter is a medical consultant for the Board and has been licensed to practice medicine in California since 1972. On May 14, 2012, Dr. Slyter signed a declaration in this matter, following his review of the declarations and other information filed in support of the petition.

Based on his review of this information, Dr. Slyter concluded that, over a period of time spanning at least from April 2011 through April 2012, respondent had engaged in unprofessional conduct in violation of the Medical Practices Act. The unprofessional conduct was demonstrated by respondent's ongoing use of "products called 'Jungle Juice Platinum' (isobutyl nitrite) and 'Maximum Impact' (ethyl chloride) in the work place, while on-call and while seeing infertility patients. These substances are inhaled and are used to get high and to enhance sexual arousal, pleasure, and performance. Further, these inhalants may cause an impairment of cognitive and motor functions."

Dr. Sylter also opined that "respondent's actions demonstrate addictive behavior, substantially impaired judgment, and a potential underlying mental or physical condition that is compromising his ability to safely and effectively practice medicine." Dr. Sylter explained that:

Physicians who use and abuse substances pose a danger to themselves, their patients, and those around them. A physician must have his complete faculties in order to properly treat patients, especially a physician who is on-call for delivering babies and other obstetric and gynecologic emergency surgeries or simply for rendering evaluation and offering advice. For these reasons, using substances while on-call, and providing medical care while under the influence of substances, endangers the safety of the patients and is unprofessional conduct in violation of Business & Professions Code section 2234.

28. Dr. Sylter also questioned whether respondent had the mental and physical fitness to practice medicine.

Additionally, Respondent's mental and physical fitness to practice medicine is unclear. Respondent has been approached three times to discuss his use of substances and Respondent acknowledged he had a problem and needed help. Dr. Gill advised Respondent to prepare a rehabilitation plan and Lodi Memorial Hospital asked Respondent to undergo a fitness for duty evaluation. Despite all of these, Respondent has failed to prepare a rehabilitation plan or submit to the fitness for duty evaluation. Moreover, respondent has repeatedly ingested commercial substances not meant for human consumption while on call. Additionally, while on call, respondent has engaged in watching pornography and masturbating. Respondent's inability to refrain from these activities while at the workplace and on-call is indicative of a potential underlying physical or mental condition that needs to be evaluated. Without serious treatment and a sustained period of documented sobriety, Respondent poses a danger to himself and his patients.

In summary, Dr. Sylter concluded that "permitting Respondent to continue practicing medicine endangers the health, safety, and welfare of the public" and that his license "should be suspended immediately before he causes serious injury to himself or others."

Declaration and Opinion of Gary L. Cavanaugh, M.D.

29. Dr. Cavanaugh is licensed in California and certified by the American Board of Psychiatry and Neurology. In addition to his private practice, Dr. Cavanaugh is a clinical associate in psychiatry at the University of California, Davis School of Medicine. Dr. Cavanaugh met with respondent on two occasions: May 1, 2012 and August 1, 2012.

30. *May 10, 2012 Opinion Letter.* On May 1, 2012, Dr. Cavanaugh performed a psychiatric fitness for duty evaluation on respondent. The results were memorialized in Dr. Cavanaugh's May 10, 2012 letter to respondent's former attorney, Albert Ellis. For the evaluation, Dr. Cavanaugh reviewed some limited background information;² clinically interviewed respondent; administered the Minnesota Multiphasic Personality Inventory - 2 (MMPI-2) to respondent; provided diagnostic impressions; and opined that respondent "is fully capable of delivering competent patient care and is therefore fit for duty."

When asked why the fitness for duty evaluation was requested, respondent told Dr. Cavanaugh that:

"They thought I was using drugs while at the hospital."
He said he acknowledged that he had taken Viagra when he was on call and when he was at the office and also used "poppers," a common term in the past for amyl nitrate and more often now referring to butyl nitrate. He stated, "I do it at night when I'm on call at the office, but not when I'm involved in patient care." He said it might occur after he has been called to the emergency room to see a patient and has completed his responsibilities and returned to the office to complete some paperwork, and it might also happen after he has done a delivery or C-section and is back in the office. He told me it would not be correct to say he was under the influence and added that the effects of amyl nitrate last at most a few minutes and the effects of Viagra perhaps half an hour.

As an explanation for his conduct, respondent told Dr. Cavanaugh that he had been "experiencing some sexual frustration because his spouse has hormonal problems and little interest in sex. He stressed several times that he has never used

² This information was contained in Mr. Ellis's April 23, 2012 letter, in the March 28, 2012 and April 20, 2012 letters to respondent from Dr. Milano; and the April 20, 2012 letter from Ross Campbell, of Bingham McCutchen LLP, detailing the request for a fitness for duty evaluation. These documents were not submitted in evidence.

the compounds when he was involved in patient care and never used them when doing surgery." He denied any side effects or impact on cognitive functioning.

Respondent expressed his belief that there was "a plot to destroy [his] credibility" by the Gill Group, because he was unhappy there and found a new job, which financially hurt the Gill Group as his new practice filled. Respondent expressed his belief that, for this reason, the Gill Group had initiated the demand for a fitness for duty evaluation for Lodi Memorial.

Respondent took the MMPI-2, which did not yield any specific diagnosis. Dr. Cavanaugh noted that respondent:

omitted a number of items, but not enough to invalidate the resulting profile. The profile had marginal validity because, "The client attempted to place himself in an overly positive light by minimizing faults and denying psychological problems." It suggests that such an individual is likely to have little awareness of his psychological conflicts or difficulties. He is likely to be rigid and inflexible in his approach to problems and may not be open to psychological self-examination.

Dr. Cavanaugh reviewed the missing items with respondent and found "nothing unusual or potentially pathologic in his responses." He opined that, even if these items had not been omitted, "it appears that it would have made little difference in the profile." Dr. Cavanaugh concluded that there was no evidence respondent had any major Axis I diagnosis (i.e., psychotic, mood, or anxiety disorders) on the Diagnostic and Statistical Manual-IV-TR (DSM-IV-TR). Further,

The occasional use of Viagra to achieve sustained erection is not in the category of abuse or dependence, since Viagra is not a controlled substance and it is being used for its intended medical purpose. The 'poppers,' which most likely consist of isobutyl nitrate, cannot be legally sold for the purpose of sexual enhancement, although their use is not clearly illegal. His use of the 'poppers' for sexual enhancement, however, does not follow the approved medical usage. (They may have previously been prescribed for treatment of angina.) Therefore, his use of 'poppers' (amyl nitrate/isobutyl nitrate) falls into the category of abuse of a substance, although the use is not clearly illegal (even though the sale for such purpose is illegal). His Axis I diagnosis would be other or unknown substance abuse. Even though his use is not clearly illegal, the use of amyl or

isobutyl nitrate, particularly in combination with Viagra, is medically inadvisable because both substances can decrease the blood pressure, at times unsafely, and there are warnings throughout medical literature regarding this circumstance. In addition, he presents in a fashion that reflects a moderate amount of defensiveness, obsessive thinking patterns, and what appears to be narcissistic trends in his personality structure.

Dr. Cavanaugh provided the following diagnostic impressions of respondent:

- Axis I: Other (or unknown) Substance Abuse (DMS-IV-TR 305.90), mild in degree.
- Axis II: Personality Disorder, Not Otherwise Specified, with Obsessive and Narcissistic Traits.
- Axis III: No physical diagnosis.

Dr. Cavanaugh indicated that he had seen no evidence that respondent's

use of Viagra and 'poppers' (amyl nitrate or possibly isobutyl nitrate) occurred during a time when he was providing patient care, either in person or by telephone. The effects of both these substances are transitory, the 'poppers' lasting perhaps a few minutes and Viagra perhaps in the neighborhood of 30 minutes. Thus, the information I have available does not suggest that his use of these substances impaired his patient care in any fashion. On the other hand, it goes without saying that medically, the use of both of these substances together is unwise and his judgment in using these substances in his office, even after hours and when not engaged in delivering care, is questionable.

In Dr. Cavanaugh's opinion respondent "is fully capable of delivering competent patient care and is therefore fit for duty."

31. *Dr. Cavanaugh's August 1, 2012 Examination and August 8, 2012 Declaration:* Dr. Cavanaugh did not prepare a written report regarding his August 1, 2012 examination of respondent. In his August 8, 2012 Declaration, Dr. Cavanaugh declared that, in conjunction with this evaluation, he had "reviewed the Petition for Interim Suspension and supporting documents" in this case, and that his opinion about respondent's fitness to practice medicine as described in his "letter dated May 10, 2010 [sic] . . . remains unchanged today." Dr. Cavanaugh also stated that he had

reviewed Dr. Solomon's June 16, 2012 letter and "agree[s] with the substance of the letter and the conclusions stated on pages 8 and 9..."

Declaration and Opinion of Randall Solomon, M.D.

32. Dr. Solomon is a Diplomate of the American Board of Psychiatry and Neurology. On June 13, 2012, he evaluated respondent at the Board's request. In preparing for his June 16, 2012, report to Board Investigator Wright, Dr. Solomon reviewed the petition, the Order, the supporting declarations as well as the Board's investigative report. He spent 90 minutes interviewing respondent. He did not administer any psychological tests.

In his interview, respondent discussed problems he had with the Gill Group, which led him to begin looking for a new job in October 2011. Respondent reported that he was contacted by Sutter-Gould in December 2011 and began to work with this practice in early February 2012, the same day Dr. Gill confronted him with the accusations.

Respondent relayed his personal history with his spouse of 15 years. His husband suffered multiple life setbacks approximately five years ago (loss of parent, business work, etc.). The couple's sex life declined rapidly due to his spouse's resultant low hormone level. About two years ago, respondent began watching pornography and masturbating to satisfy his own sexual urges. He also began using Maximum Impact and Jungle Juice to ejaculate faster. Because he was embarrassed to do this at home, respondent thought that the on-call room was a safe and private place to do this. Respondent told Dr. Solomon that "this is the extent of his use of the drug—only when masturbating—and that he never used it otherwise. He did not develop any tolerance for the drug nor did he have withdrawals. The drug, he says, did not interfere with his cognition or functioning in any way other than as an aid when masturbating."

In discussing his substance use history, respondent denied that he had ever had any problems with alcohol, marijuana or other drugs. There was no family history of substance abuse. He tried some Viagra which he purchased on the Internet. Respondent told Dr. Solomon that he "has had no use of poppers since 2/3/12 after he was accused by Dr. Gill. Additionally he has not used Viagra further."

Dr. Solomon described the substances respondent used as follows:

Both ethyl chloride and amyl nitrate are compounds that are sold under the generic term "Poppers."... The nitrate compounds are vasodilators: they relax the smooth muscle cells in blood vessels and lower blood pressure. There is a corresponding rise in heart rate to compensate and the feeling is felt to be pleasurable and to lead to

increase sexual pleasure. It has a rapid onset of effects and lasts only a couple of minute before the effects wear off. Viagra, another compound that [respondent] used, also can cause some coronary artery dilation and can potentiate, or increase, the hypotensive effects of nitrites. Nitrites are contraindicated for 24 hours after the use of Viagra to prevent a hypotensive crisis, or a dangerous drop in blood pressure. [Respondent] subjected himself to this risk, but did not experience this complication.

Regarding "ethyl chloride"

Short-term exposure to the inhaled [ethyl chloride] fumes may cause drowsiness, unconsciousness and irregular heart beat. In large enough amounts, death has been known to occur. Treatment of toxic exposure consists of moving the affected person to fresh air.

Based upon this interview, Dr. Solomon diagnosed respondent as follows:

Axis I:	Alkyl nitrate misuse Ethyl Chloride Abuse
Axis II:	no diagnosis
Axis III:	shoulder injury
Axis IV:	stress around Medical Board investigation
Axis V:	92

Explaining his Axis I diagnostic rationale, Dr. Solomon looked first to whether respondent had a sexual addiction, which would fall within the DSM-IV-TR as an Impulse-Control Disorder Not Otherwise Specified. While the conduct of watching pornography and masturbating while at work and on-call "suggests this problem," Dr. Solomon concluded that it was not an appropriate diagnosis because respondent "provides a rationale for his behavior that does not include a difficulty with controlling his impulses. He says that this was a planned activity." Unquestionably, respondent demonstrated an "extreme lack of judgment" by engaging in this behavior, but Dr. Solomon "did not believe that we can call this behavior part of a clinical condition that may respond to treatment."

Dr. Solomon next inquired whether respondent could be said to have a substance abuse problem by his use of amyl nitrate (Jungle Juice) and/or ethyl chloride (Maximum Impact). He noted that amyl nitrate is a vasodilator that "is quickly absorbed and quickly metabolized." It "causes dilation of the blood vessels, a drop in blood pressure and, many feel, an increase in sexual pleasure." It can also "cause euphoria and dizziness, the latter as a direct consequence of the vasodilation." Dr. Solomon noted that "[a]ll of these effects are short-lived." It is not common for

users to develop a tolerance to amyl nitrate, and there was nothing to suggest that respondent had done so. For these reasons, Dr. Solomon concluded that respondent could only be diagnosed with "misuse" of amyl nitrate.

In Dr. Solomon's opinion, respondent engaged in "substance abuse" involving the products containing ethyl chloride.

The use of the ethyl chloride compound is more disturbing. It can lead to neurotoxicity and can have more serious effects. Though short-acting, the consequences here could have been significant. Because [respondent] was using this substance at work repeatedly, and because of the higher risk for harm, the behavior falls under the description of being, or potentially being, physically hazardous. I feel that this is a more dangerous substance and therefore would qualify for the designation of Substance Abuse.

Despite this diagnosis, Dr. Solomon did not see evidence of more serious dependency issues, such as "tolerance, withdrawal, more use than was intended, unsuccessful efforts to cut down, excessive time taken to obtain the substance, other important activities given up due to the substance abuse, or continued use despite knowledge of a problem."

In summary, Dr. Solomon noted that respondent's behavior was "shocking." However, the clinical question is whether respondent "has some sort of addiction, whether to pornography or the chemicals or to sex." If so, the type of treatment to be recommended would be considered. Dr. Solomon found

no evidence of compulsions or of a problem with impulse control around the substances or around the sexual behavior. In fact, [respondent] has changed his behavior and stopped using the substances completely. He denies cravings, a reasonable assertion since these substances are not known [sic] for causing cravings or addictive behavior. His descriptions of his current behavior are therefore seen as credible. I do not see any further clinical gain to be made by recommending substance dependence treatment at this time.

In response to specific questions posed by the Board, Dr. Solomon concluded that (1) respondent is not a danger to himself, his patients or to the public; (2) respondent's ability to practice medicine is not impaired due to a mental or physical

illness affecting competency, and (3) respondent does not require psychotherapy or substance abuse treatment in order to practice medicine safely.

33. *Letters of Support:* In opposition to the Petition, respondent offered numerous letters of recommendation and in support of allowing respondent to continue to practice.³ Letters from physicians characterized respondent as an excellent doctor and a talented surgeon who provides knowledgeable and compassionate care to his patients. Respondent is considered to be an asset to the community, particularly to women and couples with infertility issues. Following respondent's suspension, Dr. Sackschewsky reviewed his patient charts to ensure they were transitioned to other providers. Based on this review, Dr. Sackschewsky found that each of respondent's patients had been "well cared for with appropriate interventions." Dr. Wisner expressed concern that respondent had been inappropriately targeted as an openly gay physician in a conservative area. None of these doctors were aware of any quality of care issues, or had observed any impaired behavior in respondent.

The letters from respondent's patients uniformly offered great praise for his knowledge, skills and caring treatment, coupled with a profound sense of loss at the news of his suspension. Many patients detailed how respondent was able to successfully diagnose and treat them after they had been unsuccessfully treated by other doctors. Most expressed a wish to return to his care.

These letters place respondent in the broader context of his professional capacity and worth. While the authors state that they are familiar with the circumstances surrounding the issuance of the suspension order, however, there is no indication that they are fully apprised of the circumstances. Their letters are therefore given less weight.

34. Respondent did not submit a declaration under penalty of perjury challenging the accuracy of any of his admissions as reported in the declarations of Ms. Mindt and Dr. Milano, or disputing any of the other factual assertions contained in the declarations in support of the petition.

³ Letter signed under penalty of perjury were received from respondent's professional colleagues (I. Christopher Hudlin, Jr. M.D.; Carol L. Nakashima, M.D.; Leslie Sackschewsky, M.D.; Gary R. Wisner, M.D.), and from his patients (Sofia A. Cahue-Villanueva, Janine Belluomini, Nicole A. Mutw, Jessica M. Toles, Michelle Smith, Michele Hansen, Rosa Castillo-Cuellar, Dawn O'Byrne, Rhiannon Viramontes, Sue E. Crawford, Monarch Tea, Teri Frame-Tankersley, Stephanie Hernandez, Dana L. Baker, Rachel Sukurski, Jamie Ward, Cecilia Garavaglia, Windy Reis, Libby Alford-Smith, Mindy Maiwald, Cynthia M. Marsh, Loretta A. Baker, and Elizabeth J. Lawson).

Discussion

35. As outlined in Factual Findings 12 through 27, the evidence persuasively demonstrates that respondent has violated the Medical Practice Act and engaged in unprofessional conduct within the meaning of 2234, subdivisions (b) and (c), by engaging in the described conduct over an extended period of time while he was on-call and in need of his full faculties to address potential emergencies or patient inquiries. This evidence, which includes respondent's admissions, establishes that there is a reasonable probability that petitioner will prevail at the hearing on the accusation.

36. It was not established that respondent treated infertility patients during the weekends while under the influence of amyl nitrate (or possibly isobutyl nitrate) and/or ethyl chloride.

37. It was not established that respondent's ability to practice medicine safely is impaired because he is mentally or physically ill affecting competency, within the meaning of section 822.

38. The record as a whole persuasively establishes that respondent's conduct constitutes a danger to himself and to the public, and that there is a likelihood of injury to the public that outweighs the likelihood of injury to respondent, if his license is not suspended or restricted pending a full hearing on the accusation.

It is undisputed that respondent is a highly respected physician who has helped countless patients and that quality of care is not at issue. The order suspending respondent's license has been in effect for over three months. There is no evidence that, during this time, respondent has sought out treatment or engaged in regular counseling to address these issues. Two psychiatrists have evaluated respondent and concluded that he does not pose a danger to himself or to the public and that he can safely practice.

The opinions of Dr. Cavanaugh and Dr. Solomon on these points are unpersuasive for the following reasons. Dr. Cavanaugh diagnosed respondent with "Other (or unknown) Substance Abuse ... mild in degree." At the time of his May 10, 2012 report, Dr. Cavanaugh did not have full information available to him about either the substances respondent was using or the frequency with which he was using them. The only substances discussed in Dr. Cavanaugh's report were Viagra and amyl or isobutyl nitrate. There was no mention of what Dr. Solomon characterized as the more serious substance, ethyl chloride. Dr. Cavanaugh was not aware that, by his own admission, respondent had engaged in this behavior for a period of three years and believed he "needed help." The marginally valid MMPI-2 results, while revealing no psychopathology, indicated that respondent "attempted to place himself in an overly positive light by minimizing faults and denying psychological problems," and is "likely to have little awareness of his psychological conflicts or difficulties."

Dr. Cavanaugh's characterization of respondent's substance abuse as "mild in degree" is rendered less reliable and persuasive because these facts were not known to or considered by him in his report.⁴

Dr. Solomon's examination involved no psychological testing. There is no indication that Dr. Solomon reviewed the MMPI-2 administered by Dr. Cavanaugh. This is disconcerting because Dr. Solomon's opinion that respondent is safe to practice is premised on his belief in respondent's assertion that he ceased this behavior immediately on February 3, 2012 after being confronted by Dr. Gill. For example, Dr. Solomon wrote: "Once this [behavior] was discovered, it has caused serious professional problems for [respondent]. Once the activity was discovered, it stopped immediately, and there is nothing to suggest that it has begun anew."

In his report, Dr. Solomon indicated that he reviewed the petition and the supporting declarations. Nevertheless, he overlooked or failed to address the facts that respondent: (1) was confronted with his behavior by Ms. Mindt before Thanksgiving 2011 – possibly as early as September or October 2011; (2) minimized the extent of his behavior and denied that it occurred while he was on-call; and (3) continued to engage in this highly risky behavior while on-call for another four to five months. In discussing addiction, Dr. Solomon explained that addictions are "primarily a problem of behavioral control, of being unable to control problematic or dangerous impulses." In doing so, Dr. Solomon distinguished "problem" behavior from "dangerous" behavior, which is "the continued use of the substance despite the problems it causes and the dangers involved... that is the hallmark of addictive behavior." Dr. Solomon concluded that respondent has substance "abuse" related to ethyl chloride, but not substance "dependence," which is frequently associated with the compulsion to use. He stated "for [respondent] we do not see a series of problems related to repeated use, nor do we see the continuing use despite significant problems." This assertion wholly ignores respondent's admission that his three years of inhalant use was "a problem and he needed help." The credibility of respondent's assertion that he simply stopped this behavior as of February 3, 2012 is substantially diminished by his willingness to continue to engage in risky behavior while on-call after being confronted about it by Ms. Mindt, and by his lack of insight and minimization of problems seen on the MMPI-2. Thus, the fundamental premise of Dr. Solomon's conclusion that respondent is fully safe to practice (as well as Dr. Cavanaugh's support of this conclusion) is seriously flawed.

⁴ In this regard, it is noteworthy that Dr. Cavanaugh reviewed a letter from respondent's former attorney, Mr. Ellis. While that letter is not in evidence, Mr. Ellis' May 15, 2012 Ex Parte Hearing Brief inaccurately characterizes respondent's use of inhalants as limited to a single incident.

39 Respondent presented no evidence regarding the injury he is likely to suffer if his certificate remains fully suspended; however, it is reasonable to assume that respondent will suffer financial injury from the continued loss of the ability to practice. This financial injury does not outweigh the potential injury to the public if an order suspending or restricting respondent's certificate is not issued. (Factual Findings 27-28.) Further, the hearing on the accusation will be scheduled expeditiously and ameliorate the length of time respondent is likely to suffer financial harm.

40 The remaining question is whether a continued full suspension of licensure is necessary to protect the public. On balance, it is determined that the potential harm and likelihood of injury to the public can be adequately protected by issuing an order placing restrictions on respondent's certificate pending a full hearing and decision on the charges in the accusation. As more fully set forth below, pending such a hearing, respondent will be prohibited from performing surgeries or deliveries, and from working on-call after normal office hours. Respondent's practice will be restricted to office visits (obstetrics, gynecology, infertility) during normal working hours.

LEGAL CONCLUSIONS

1 Government Code section 1529, subdivision (a), provides in pertinent part:

The administrative law judge of the Medical Quality Hearing Panel ... may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision or procedures, or other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act . . . and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety or welfare.

2 Government Code section 1529, subdivision (e), further provides that the administrative law judge shall grant the interim order where, in the exercise of discretion, the administrative law judge concludes that:

(1) There is a reasonable probability that the petitioner will prevail in the underlying action.

- (2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

In order to obtain an interim order under Government Code section 11529, petitioner need only prove its case by a preponderance of the evidence.

3. As set forth in the Factual Findings and Legal Conclusions as a whole and particularly Factual Finding 35, petitioner has established that respondent has engaged in acts or omissions constituting a violation of the Medical Practice Act. There is also a reasonable probability that petitioner will prevail in the underlying action.

4. Petitioner must also establish that permitting respondent to continue to engage in the practice of medicine will endanger the public health, safety or welfare. Further, an interim order of suspension will not be granted unless the likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to respondent in issuing the order. When a governmental entity seeks to enjoin a statutory violation, evidence that it is reasonably probable that the agency will prevail on the merits gives rise to a rebuttable presumption that the potential harm to the public outweighs the potential harm to the respondent. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72 - 73.)

As set forth in the Factual Findings and Legal Conclusions as a whole and particularly Factual Findings 38 and 39, petitioner has met this burden. As set forth in Factual Finding 40, an order restricting respondent's license to the conditions set forth below will ensure that the public will be protected from the likelihood of injury until such time as a decision is issued following a full evidentiary hearing on the accusation.

ORDER

The Petition for Interim Suspension Order of Physician's and Surgeon's Certificate Number G 86782 issued to respondent Peter G. Hickox, M.D., is GRANTED in part and DENIED in part.

1. A complete suspension of respondent's license is not ordered.
2. Pursuant to Government Code section 11529, subdivision (a), the following restrictions are placed on respondent's license, pending a formal hearing and decision on accusation:
 - A. Respondent is prohibited from practicing surgery or from performing deliveries.

- B. Respondent is prohibited from working on-call after normal office hours.
- C. Respondent's practice is restricted to treating patients during office visits (obstetrics, gynecology, infertility) scheduled during normal working hours.
- D. Respondent is prohibited from engaging in solo practice.
- E. Within three (3) working days of the date of this Decision, respondent shall provide his employer with a copy of this Decision.
- F. Within five (5) working days of the date of this Decision, respondent shall provide, or cause to be provided, to petitioner, verification from his employer that the employer has received and reviewed this Decision.

DATED August 21, 2012

REDACTED

~~MARILYN A. WOOLLARD~~
Administrative Law Judge
Office of Administrative Hearings