

Oregon Medical Board
BOARD ACTION REPORT
March 15, 2018

The information contained in this report summarizes new, interim, and final actions taken by the Oregon Medical Board between March 16, 2018, and March 15, 2018.

Scanned copies of Interim Stipulated Orders, Orders of Emergency Suspension, Stipulated Orders, Final Orders, Termination Orders, Modification Orders, Corrective Action Agreements and Voluntary Limitations are included at the end of this report in the order that they appear in the report. These orders are marked with an * asterisk. **Scanned copies of Consent Agreements are not posted, as they are not disciplinary action and impose no practice limitations.** Complaint and Notices of Proposed Disciplinary Action are not listed in this report, as they are not final actions by the Board. Both Orders, however, are public and are available upon request.

Printed copies of the Board Orders not provided with this report are available to the public. To obtain a printed copy of a Board Order not provided in this report, please complete the License Verification and Malpractice Report Request (<http://www.oregon.gov/OMB/ombforms1/request-licensee-info-verification.pdf>) found under the Forms link on the Board's web site. Submit it with the \$10.00 fee *per licensee* and mail to:

Oregon Medical Board
1500 SW 1st Ave, Ste 620
Portland, OR 97201

Copies of the Orders listed below are mailed to Oregon hospitals where the Licensee had self-reported that he/she has privileges.

Jimenez, Anna Maria, MD; MD21969; Hillsboro, OR

On March 15, 2018, Licensee entered into a Consent Agreement for Re-Entry to Practice with the Board. In this Agreement, Licensee agreed to practice under the supervision of a Board-approved mentor for three months, and submit 100 hours of Board-approved CME.

***Murphy, James Michael, MD; MD23891; Portland, OR**

On March 1, 2018, the Board issued a Final Order for unprofessional or dishonorable conduct; willfully or negligently divulging a professional secret without the written consent of the patient; fraud or misrepresentation in applying for a license or registration in this state; and willfully violating any Board rule. This Order revokes Licensee's Oregon medical license; assesses a \$10,000 civil penalty; and assesses the costs of the contested case hearing held in the matter.

***Soldevilla, Francisco Xavier, MD; MD14348; Tualatin, OR**

On March 1, 2018, Licensee entered into an Interim Stipulated Order to voluntarily cease the implantation of spinal cord stimulators pending the completion of the Board's investigation into his ability to safely and competently practice medicine.

If you have any questions regarding this service, please call the Board at (971) 673-2700 or toll-free within Oregon at (877) 254-6263.

**BEFORE THE
OREGON MEDICAL BOARD**

STATE OF OREGON

IN THE MATTER OF:)
)
 JAMES MICHAEL MURPHY, MD) **FINAL ORDER**
 LICENSE NO. MD23891)

HISTORY OF THE CASE

On August 10, 2015, the Oregon Medical Board (Board) issued a Complaint & Notice of Proposed Disciplinary Action (Notice) to James Michael Murphy, MD. The Notice proposed imposing up to the maximum range of potential sanctions identified in ORS 677.205(2), to include the revocation of Dr. Murphy's license, to impose a \$10,000 fine, and to assess the costs of the proceeding. On or about August 16, 2015, Licensee requested a hearing. The Board referred the matter to the Office of Administrative Hearings (OAH) on September 21, 2015. The OAH assigned the case to Senior Administrative Law Judge (ALJ) Bernadette Bignon.

ALJ Bignon convened a telephone prehearing conference on October 29, 2015. Attorney Thomas Cooney represented Licensee. Senior Assistant Attorney General Warren Foote represented the Board. ALJ Bignon scheduled the hearing for March 14 through 17, 2016.

On November 4, 2015, the Board filed a Motion for a Qualified Protective Order. Mr. Cooney responded to the Board's Motion for a Qualified Protective Order on November 13, 2015. On November 18, 2015, ALJ Bignon issued a Qualified Protective Order Limiting Use and Disclosure.

On January 15, 2016, the Board filed a Motion for Summary Determination (Board's Motion) with supporting documents marked as Attachments A through K. On February 10, 2016, Mr. Cooney filed a Response to the Board's Motion for Summary Determination (Response) with a supporting affidavit and Exhibit 1. In his Response, Mr. Cooney indicated that he would be withdrawing as attorney of record in this matter, but would remain available for any oral argument on the Board's Motion.

On February 12, 2016, Licensee filed a Motion for Summary Determination (Licensee's Motion). Between February 12 and 15, 2016, Licensee also filed supporting exhibits, a certificate of mailing, and an exhibit key.

Thereafter, the OAH assigned the matter to Senior ALJ Monica A. Whitaker for purposes of ruling on the Board's Motion and Licensee's Motion.

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1 On February 22, 2016, ALJ Whitaker convened a telephone conference for purposes of
2 hearing oral argument on the Board's Motion. Mr. Foote represented the Board. Mr. Cooney
3 represented Licensee. Licensee did not appear. As advised in his filings of February 10, 2016
4 on behalf of Licensee, Mr. Cooney's withdrawal from representing Licensee became effective at
5 the close of oral argument on February 22, 2016. Licensee proceeded *pro se*.
6

7 On February 23, 2016, in response to Licensee's Motion, the Board filed its Response to
8 Motion for Summary Determination (Board's Response). Also on February 23, 2016, Licensee
9 filed a request for oral argument. On February 24, 2016, ALJ Whitaker denied Dr. Murphy's
10 request. On February 25, 2016, ALJ Whitaker issued a Ruling on Board's Motion for Summary
11 Determination and Respondent's Motion for Summary Determination. ALJ Whitaker denied
12 both the Board's Motion for Summary Determination and Licensee's Motion for Summary
13 Determination. The matter remained scheduled for hearing on March 14 through March 17,
14 2016.
15

16 On February 26, 2016, the Board issued an Amended Complaint and Notice of Proposed
17 Disciplinary Action (Amended Notice). As with the original Notice, the Amended Notice
18 proposed imposing up to the maximum range of potential sanctions identified in ORS
19 677.205(2), to include the revocation of Dr. Murphy's license, to impose a \$10,000 fine, and to
20 assess the costs of the proceeding. The Amended Notice reiterated the allegations contained in
21 the original Notice, but added an allegation that Dr. Murphy had engaged in a pattern of
22 belligerent and obstructive behavior which, the Board alleged, amounted to unprofessional or
23 dishonorable conduct under ORS 677.190(1)(a).
24

25 On February 26, 2016, Dr. Murphy filed a request to postpone the hearing. The Board
26 also informed ALJ Bignon that it had received a copy of Dr. Murphy's request to postpone the
27 hearing. Although the Board did not object to the request, the Board requested a prehearing
28 conference to select new hearing dates.
29

30 On February 29, 2016, ALJ Bignon granted Dr. Murphy's request, unopposed by the
31 Board, to postpone the hearing. On March 2, 2016, ALJ Bignon held a prehearing conference by
32 telephone. Mr. Foote, accompanied by Eric Brown and Michelle Provinsal, represented the
33 Board. Dr. Murphy appeared and represented himself. The hearing was rescheduled to be held
34 July 12 through July 15, 2016 at the Board's offices in Portland.
35

36 On June 29, 2016, the Board issued a Second Amended Complaint and Notice of
37 Proposed Disciplinary Action (Second Amended Notice). The Second Amended Notice, as with
38 the Amended Notice, proposed imposing up to the maximum range of potential sanctions
39 identified in ORS 677.205(2), to include the revocation of Dr. Murphy's license, to impose a
40 \$10,000 fine, and to assess the costs of the proceeding. The Second Amended Notice removed
41 an allegation that Dr. Murphy had failed to provide fingerprints, as requested by the Board, and
42 some corrections and clarifications of citation to statutes and administrative rules.
43

44 A hearing was held July 12 through July 15, 2016 at the Board's offices in Portland,
45 Oregon. Dr. Murphy appeared without counsel and testified on his own behalf. The Board was
46 represented by Mr. Foote. Dr. Murphy presented testimony from William Powell, Colonel

1 Heidi Kjos, Colonel Thomas Patton, Roger Ludwig, MD, David Kim, MD, Karen Kwong, MD,
2 Patrick O'Leary, Steve Cullen, MD, Captain Taylor Vice, MD, Senior Master Sergeant Vaughn
3 Rains, Kathleen Haley (Board Executive Director), and Terry Lewis (Board investigator). The
4 Board presented testimony from Colonel Marshall Wilde, Kathryne Gilbert, Patient A, Laura
5 Mazzucco (Board Executive Support Specialist), Terry Lewis, Colonel Richard Wedan, Barry
6 Egner, MD, Technical Sergeant Rachel Albright, Joseph Thaler, MD, and John Sparks. The
7 record closed on September 7, 2016 following receipt of closing briefs from the parties.
8

9 On June 13, 2017, Presiding ALJ John Mann informed the parties that ALJ Bignon was
10 unexpectedly unavailable to complete the proposed order in this case. Presiding ALJ Mann
11 therefore informed the parties that he had reassigned the case to himself and would review the
12 record and issue a proposed order.
13

14 On June 21, 2016, Dr. Murphy, pursuant to ORS 183.645 and OAR 471-060-0005(3),
15 filed a request for a change in the administrative law judge assigned to the case with then-Chief
16 ALJ Gary Tyler. However, due to Chief ALJ Tyler's retirement and absence from the office
17 beginning June 23, 2017, Governor Brown appointed Presiding ALJ Mann to serve as Interim
18 Chief ALJ, pending the appointment of a permanent Chief ALJ. Given his new role, Interim
19 Chief ALJ Mann determined that it would be inappropriate for him to rule on the motion and
20 therefore delegated it to Presiding ALJ Donna Moursund Brann for a ruling. On June 28, 2017,
21 the Board, through Mr. Foote, submitted an objection to Dr. Murphy's request. Later on June 28,
22 2017, Dr. Murphy submitted a response to the objection.
23

24 On July 7, 2017, Presiding ALJ Brann issued a ruling denying Dr. Murphy's request to
25 reassign the case. Interim Chief ALJ Mann then took the matter under advisement, completed
26 his review of the record, and issued a proposed order on September 6, 2017 finding and
27 recommending:
28

29 (1) The Board did not prove the following allegations by a preponderance of the evidence:

- 30 • Conducting an unauthorized pap smear;
- 31 • Unprofessional or dishonorable conduct or willful violation of ORS chapter 677 by
- 32 failing to comply with a board request, for the incorrect information Dr. Murphy
- 33 provided on his license application;
- 34 • Violations of HIPAA;
- 35 • Impersonating a Board licensee.
- 36

37 (2) The Board did prove the following allegations by a preponderance of the evidence:

- 38 • Dr. Murphy violated ORS 677.190(8) by providing false information on his October 29,
- 39 2013 renewal application;
- 40 • Dr. Murphy violated ORS 677.190(1)(a), committing unprofessional and dishonorable
- 41 conduct by submitting a declaration to the Multnomah County Circuit Court, alleging the
- 42 United States National Guard Office of Complex Investigations (OCI) investigation
- 43 found the allegations against him unsubstantiated when, in fact, the OCI investigation
- 44 found they were substantiated;
- 45 • Dr. Murphy violated ORS 677.190(5) by willfully divulging a professional secret without
- 46 the patient's consent, by publicly divulging Patient A's private health information and

- 1 confidential medical records without Patient A's consent;
- 2 • Dr. Murphy also thereby violated ORS 677.190(1)(a), committing unprofessional and
 - 3 dishonorable conduct;
 - 4 • Dr. Murphy violated ORS 677.190(17) by refusing to comply with a Board investigator's
 - 5 request for documentation;
 - 6 • Dr. Murphy violated ORS 677.190(1)(a), committing unprofessional and dishonorable
 - 7 conduct by asking witnesses not to cooperate with the Board's investigation, to impede
 - 8 such investigation;
 - 9 • Dr. Murphy violated ORS 677.190(1)(a), as defined in ORS 677.188(4)(a), committing
 - 10 unprofessional and dishonorable conduct by belittling a patient, mocking his colleagues
 - 11 and Board staff, and making public comments (including to a reporter) that detracted
 - 12 from public trust in the medical community.
 - 13

14 (3) For the violations the Board proved by a preponderance of the evidence, the Board should
15 revoke Dr. Murphy's medical license, assess a civil penalty of \$10,000 against him, and assess
16 the costs of the proceeding against him.
17

18 Dr. Murphy timely filed written exceptions¹, was scheduled to present oral exceptions on
19 October 5, 2017, but ultimately did not appear to present oral exceptions, reporting that he had
20 developed a scheduling conflict. The Board has considered Dr. Murphy's exceptions, to the
21 extent they did not attempt to introduce new facts or evidence, or advance arguments on facts or
22 evidence not in the record, and finds they are without merit.
23

24 EX PARTE COMMUNICATIONS

25

26 Between July 11 and August 17, 2017, Dr. Murphy sent multiple unsolicited emails to
27 ALJ Mann that were not sent to Mr. Foote or to the Board. ALJ Mann did not read nor respond
28 to the emails and did not consider their content in reaching the decision in this case. However,
29 because the emails were clear attempts at ex parte communications, the emails have been made
30 part of the record and will be sent to the parties under separate cover².
31

32 ISSUES

33

34 1. Whether Dr. Murphy engaged in unprofessional conduct, in
35 violation of ORS 677.190(1)(a), as defined by ORS 677.188(4)(a), and/or conduct
36 that does or might constitute a danger to a patient and gross negligence, in
37 violation of ORS 677.190(13), by performing an unauthorized Pap smear on a
38 patient on November 19, 2011.
39

40 2. Whether Dr. Murphy provided false, misleading, and deceptive
41 information in connection with his October 29, 2013 application to renew his
42 medical license by stating that his highest level of education was an associate's
43

44 ¹ Dr. Murphy attempted to file additional exceptions multiple times after the window for filing exceptions had
45 closed on September 16, 2017, but the Board considered only the exceptions timely filed.

46 ² Although Dr. Murphy's ex parte communications were made part of the record, they were not made part of the
evidentiary record and were not, therefore, considered.

1 degree and that he could speak and understand Quechua sufficiently to
2 communicate for clinical purposes in violation of OAR 847-008-0058, ORS
3 677.190(8) and/or ORS 677.190(1)(a) and (17).
4

5 3. Whether Dr. Murphy acted in a manner contrary to recognized
6 standards of ethics of the medical profession, in violation of ORS 677.190(1)(a)
7 as defined by ORS 677.188(4)(a), by filing a false or misleading declaration in
8 connection with a proceeding in Multnomah County Circuit Court.
9

10 4. Whether Dr. Murphy, or individuals acting on his behalf, disclosed
11 private health information and confidential medical records of a patient in
12 violation of HIPAA privacy regulations (45 CFR 164.502), ORS 677.190(5)
13 and/or ORS 677.190(1)(a), as defined by ORS 677.188(4)(a).
14

15 5. Whether Dr. Murphy violated ORS 677.080(3) and ORS
16 677.190(10) by calling a nurse supervisor at Tuality Healthcare in 2015 while
17 representing himself by the name of "Dr. Hanson."
18

19 6. Whether Dr. Murphy violated ORS 677.190(17) and OAR 847-
20 001-0024(1) by failing to comply with a Board investigator's request for medical
21 records in connection with an investigation into Dr. Murphy's alleged prescribing
22 of controlled substances to two patients.
23

24 7. Whether Dr. Murphy violated ORS 677.190(1)(a) as defined by
25 ORS 677.188(4)(a) by asking individuals not to cooperate with the Board's
26 investigation thereby impeding that investigation.
27

28 8. Whether Dr. Murphy engaged in a pattern of belligerent and
29 obstructive behavior during the course of the Board's investigation and, if so,
30 whether that pattern of behavior constitutes unprofessional or dishonorable
31 conduct in violation of ORS 677.190(1)(a) as defined by ORS 677.188(4)(a).
32

33 9. If one or more violations are proven, whether the Board may
34 revoke Dr. Murphy's Oregon medical license, assess a \$10,000 civil penalty, and
35 assess the costs of the proceedings. ORS 677.205(1) and (2).
36

37 EVIDENTIARY RULINGS

38
39 The Board offered Exhibits A1 through A57, which were admitted into the record
40 without objection.
41

42 Dr. Murphy offered exhibits marked with letters A through W. Dr. Murphy's
43 Exhibits A1 through A4 therefore are marked similar to the Board's Exhibits. To avoid
44 confusion, those exhibits are now marked for the records as Exhibits L-A1 through L-A4.
45 The remainder of Dr. Murphy's Exhibits are marked using their original designations.
46

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1 Dr. Murphy's Exhibits L-A1 through L-A4, D1 through D5, E2, F1 through F3,
2 F5 (page 1 only), G1 through G3, H1 through H2, J2 through J5, K1, MC2 through MC6,
3 R1 through R6, S1, T, and W2, W3 and W5 were admitted into the record without
4 objection.

5
6 The Board's objections to Dr. Murphy's Exhibits B1 through B4, C1 through C6,
7 E1, F5 (page 2), J1, K2 through K5, L1, M1 through M4, MC1, P1, P2, and U2 were
8 sustained and the exhibits were not admitted into the record.

9
10 Dr. Murphy withdrew Exhibits E3, F4, G4, I1 through I4, N1, Q1, U1, V1
11 through V4, and W1.

12 FINDINGS OF FACT

- 13
14
15 (1) Dr. Murphy graduated medical school in 1996. He completed his anesthesiology
16 residency in 2002. Dr. Murphy also completed a year of family practice as a resident,
17 and two years of residency in general surgery. (Ex. A27 at 392)

18 2013 License Renewal Application

- 19
20
21 (2) Board licensees are required to submit a license renewal application every
22 two years. Initial and renewal applications may be submitted on-line. In October
23 2013, Laura Mazzucco, a Board Executive Support Specialist, was responsible for
24 reviewing renewal applications for completion. (Test. of Mazzucco, tr. at 194;
25 Ex. A36 at 1-4.)

- 26
27 (3) On October 29, 2013, Dr. Murphy submitted an on-line application for
28 renewal of his medical license. (Test. of Mazzucco, tr. at 194; Ex. A36a at 1-11.)
29 Dr. Murphy completed the question "Highest Level of Education" by selecting
30 "Associate Degree" from a drop-down menu. Dr. Murphy indicated that he was
31 not currently practicing medicine and that his future plans included "Leaving the
32 field (with intention to work in another field)." (Test. of Mazzucco, tr. at 194-
33 195, 204-206; Ex. A36a at 1, 4, 5.)

- 34
35 (4) Dr. Murphy earned an Associate of Science degree in nursing on January
36 17, 1990. (Ex. G3.)

- 37
38 (5) The renewal application also includes the following question: "Please
39 enter Language(s), other than English, in which you can communicate adequately
40 for clinical purposes." Underneath the question, Dr. Murphy entered "Quechua"
41 in a box for "Other Language 1." (Test. of Mazzucco at 195; Ex. A36a at 1.)
42 Immediately below the language selection tabs, applicants are informed that "The
43 Board may make language information available to those who are seeking
44 providers with specific language competencies." (Test. of Mazzucco, tr. at 196,
45 202, 204-205; Ex. A36b at 4.)

46 ///

1 (6) At the time he completed his renewal application, Dr. Murphy was not
2 fluent in Quechua. Dr. Murphy knew a few words in Quechua that he learned
3 from a computer language program that he used on a single flight to Ecuador and
4 from being around native speakers of the language while volunteering in Ecuador.
5 (Test. of Murphy, tr. at 1329-1335.)
6

7 (7) Ms. Mazzucco forwarded Dr. Murphy's renewal application to the
8 Board's investigations unit because his practice address needed to be verified and
9 because she believed other information in the renewal application was
10 questionable. (Test. of Mazzucco, tr. at 198.) Ms. Mazzucco did not have
11 authority to reject an application if the application was complete on its face. (Ex.
12 A36 at 3-4.)
13

14 (8) The Board initially placed Dr. Murphy's license in inactive status because
15 his renewal application indicated that he was not currently practicing medicine
16 and that he intended to leave the field. In addition, Dr. Murphy's renewal form
17 showed "zero" number of hospital and non-hospital hours and listed no other
18 activities related to his practice. (Test. of Mazzucco, tr. at 199, 206-207; Exs.
19 A36a at 4, A36c at 11.) His license was subsequently returned to active status
20 after he informed the Board that he was practicing medicine with the military.
21 (Ex. W3.)
22

23 (9) On August 27, 2015, Dr. Murphy sent an email to Ms. Mazzucco and
24 several other Board employees to address the answers he gave on his October 29,
25 2013 renewal application. In that email, Dr. Murphy wrote, in part:
26

27 a. Quechua is my primary spoken language when I am doing medical work in
28 the Andes – only I must have originally started out filing the renewal
29 when I was in Equator [*sic*] or Peru – can you make that correction or just
30 put an asterisk by my answer for me. English is the answer I believe is on
31 my initial application – I assumed that would be referenced if there were
32 any questions and you would have called me to clarify.

33 b. The highest 'grade/degree * * * that I graduated from was: college or an off
34 shore med school - but I don't really think that is totally accurate – I just
35 took about 12 years to complete the BA and MD – life got in the way and
36 I had to earn a living. So again - junior college is really where I stopped
37 collecting degrees and went to work full time and did the school / training
38 part time from that point forward[.]
39

40 (Test. of Mazzucco; Ex. A36c at 1-2.)
41

42 (10) Patient A is a female who at all times relevant to this decision was an active
43 member of the Oregon Air National Guard (ORANG). (Test. of Patient A, tr. at
44 137.)
45

46 ///

1 (11) On November 19, 2011, Patient A reported to the ORANG 142nd Medical
2 Group facility for a preventative health assessment (PHA). She was examined by
3 Dr. Murphy. (Test. of Patient A, tr. at 138; Ex. A4 at 2-3.) Dr. Murphy
4 completed a Chronological Record of Medical Care form documenting the
5 examination. (Ex. A1.) Under a section labeled "Provider Exam," Dr. Murphy
6 wrote "No medical issues." (*Id.* at 1.) The form contains no indication that a
7 gynecological examination was performed in connection with the PHA. (*Id.*)
8

9 (12) In early December 2013, Patient A attended an Air National Guard training
10 session in Tennessee. (Test. of Patient A, tr. at 141; Exs. A9 at 37, A27 at 124).
11 Technical Sergeant (TSgt.) Rachel Albright, from the 142nd Medical group, also
12 attended the training. Prior to the training, TSgt. Albright was casually
13 acquainted with Patient A from working on the base but they were not friends.
14 (Test. of Albright, tr. at 487-488; Exs. A9 at 9 and 31, A27 at 124, 200 and 202;
15 Test. of Patient A, tr. at 142.)
16

17 (13) One evening, while discussing people from work with Patient A, TSgt.
18 Albright mentioned Dr. Murphy's name among the flight surgeons with whom
19 she worked. Patient A immediately commented that Dr. Murphy was "weird."
20 (Test. of Albright, tr. at 489; Exs. A9 at 10, A27 at 207.) TSgt. Albright asked
21 Patient A why she would say that. (Test. of Albright, tr. at 489; Exs. A9 at 10,
22 A27 at 206.) Patient A told TSgt. Albright that she felt awkward and embarrassed
23 when Dr. Murphy asked her if she needed a chaperone when he performed a Pap
24 smear on her in connection with a PHA. (Test. of Albright, tr. at 489; Exs. A9 at
25 10, A27 at 206.)
26

27 (14) TSgt. Albright asked Patient A why she had a Pap smear on the base
28 because those were not done during PHAs. Patient A insisted that such
29 procedures were performed because she had one. (Test. of Albright, tr. at 489-
30 90.) TSgt. Albright showed Patient A Dr. Murphy's picture on Facebook to make
31 sure Patient A was not mistaken in identifying Dr. Murphy as the doctor who
32 performed her 2011 PHA. (Exs. A9 at 70, A27 at 203.) Patient A confirmed that
33 she was referring to the same person that TSgt. Albright showed her on Facebook.
34 (*Id.*)
35

36 (15) After hearing TSgt. Albright say that such exams were not done at the clinic,
37 Patient A appeared to be angry and upset. (Test. of Albright, tr. at 490, A27 at
38 207.) TSgt. Albright agreed to call the head medical technician at the base, to see
39 if Patient A's chart notes documented the Pap exam during the 2011 PHA. (Test.
40 of Albright, tr. at 490-491, test. of Patient A, tr. at 143-144; Ex. A9 at 38, 76.)
41

42 (16) TSgt. Albright called Master Sergeant (MSgt.) Brian Frederick, the head
43 medical technician at the 142nd Air Group facility, that same night and asked
44 whether or not PAP smears were done at the base medical clinic. MSgt. Frederick
45 told her that the clinic had not done them for a while. (Test. of Albright, tr. at
46 490-91; Exs. A9 at 76, A27 at 266-267.) TSgt. Albright explained that Patient A
said that she had been given a Pap smear during her five-year PHA and wanted

1 someone to look at her records to verify if it was documented. (Test. of Albright,
2 tr. at 490-491, test. of Patient A, tr. at 143-144; Ex. A9 at 38, 76.) MSgt.
3 Frederick told TSgt. Albright that he would look at Patient A's records, but later
4 realized he could not do so without Patient A's consent. (Ex. A27 at 267.)
5

6 (17) On December 7, 2013, TSgt. Albright sent a text to MSgt. Frederick stating
7 that Patient A was "freaking out" and needed to know what was in her medical
8 records. (Exs. A9 at 76, A27 at 267.) MSgt. Frederick told TSgt. Albright he
9 could not talk to her about the record but that he could talk directly to Patient A if
10 she completed and returned a signed release. MSgt. Frederick told her to have the
11 patient contact him the next day and he could send her the necessary release so
12 that he could talk to Patient A about her records. (Test. of Albright, tr. at 490-
13 491; Exs. A9 at 31, A27 at 208-209, 267-268.)
14

15 (18) The following morning, December 7, 2013, Patient A received, signed and
16 returned a release to allow MSgt. Frederick to look at her records. (Test. of
17 Patient A, tr. at 144; Ex. A4 at 5.) MSgt. Frederick reviewed Patient A's records
18 and verified that Dr. Murphy had performed a PHA on Patient A in November
19 2011, but there was no documentation of a Pap smear. (Exs. A9 at 76, A27 at
20 266-269.) MSgt. Frederick later spoke with Patient A on the phone and told her
21 what he had learned. MSgt. Frederick thought that Patient A was shocked by his
22 answer. MSgt. Frederick asked if she intended to pursue the matter. Patient A
23 replied with something like "Hell, yes, I don't want him to do this to anybody
24 else." (Ex. A27 at 270.) MSgt. Frederick informed Patient A that he had asked
25 about her intent because he needed to take her allegations to his commander. (*Id.*)
26

27 (19) MSgt. Frederick later reported the allegation to Colonel (Col.) Heidi Kjos,
28 the ORANG Medical Group Commander. (Test. of Kjos, tr. at 771-772.) Col.
29 Kjos called Patient A to discuss the allegation. Patient A, who sounded tearful on
30 the phone, told her that Dr. Murphy had conducted a Pap smear on her in
31 connection with a PHA "a couple years ago." (Test. of Kjos, tr. at 773-774.)
32 Patient A apologized for not coming forward sooner, but said that she did not
33 realize that it was unusual to get a Pap smear. When Col. Kjos asked if Dr.
34 Murphy had used a speculum, Patient A stated that she did not know "the tools"
35 but confirmed there had been penetration. (*Id.* at 774.) Col. Kjos asked Patient A
36 to put her allegation in writing and to send it to her via email. (Test. of Patient A,
37 tr. at 145; test. of Kjos, tr. at 775).
38

39 (20) On December 8, 2013 at 12:05 p.m., Patient A emailed a written statement
40 outlining her allegation. The statement included a description of a brief social
41 interaction that Patient A had with Dr. Murphy and other people from the base in
42 December 2010. (Ex. A9 at 37, 40.) With regard to the events of November 19,
43 2011, Patient A wrote:

44 I had an appointment at the clinic on drill weekend. I believe it was for my
45 5 year physical. Dr. Murphy was my provider. During the appointment, he
46 asked me when the last time I had a Pap smear. I told him it was before I

1 had my son, who was born [in] January 2009. He said that I needed one. I
2 felt uncomfortable since I knew him but said ok anyways. He then said
3 "You don't need a female in here, do you?" I remember the exact phrase
4 because of the way it made me feel. I felt obligated to say no, giv[en] the
5 fact that we had a social interaction almost a year prior. Also the way he
6 asked me made me feel that if I said yes, there was something wrong with
7 me.

8
9 He proceeded to do the pap. I was extremely uncomfortable and felt this
10 situation was odd. Afterwards, I told Tess Jaeger about it and she told me
11 she didn't think that our base does those. But I told her, yes they do, Maj.
12 Murphy just did one. She also thought it was weird that he was the one
13 doing it, considering the prior social interaction. I also told my husband
14 about it and told him how weird and uncomfortable it was because I knew
15 the[] doctor.

16
17 (Ex. A9 at 37.)

18
19 (21) Patient A remained visibly upset and emotional during the remainder of the
20 training. (Test. of Albright, tr. at 492; Ex. A9 at 72.)

21
22 (22) Following her conversation with Patient A, Col. Kjos called her supervisor,
23 Col. Richard Wedan³ and told him about Patient A's complaint. Afterward, Col.
24 Kjos and MSgt. Frederick met with Col. Wedan. (Test. of Kjos, tr. at 786; test of
25 Wedan, tr. at 368-360.) Because the nature of the complaint was out of the
26 ordinary, Wedan called in his leadership team and legal staff for the meeting with
27 Col. Kjos and MSgt. Frederick. (Test. of Wedan, tr. at 369-370, Ex. A27 at 336-
28 337.) MSgt. Frederick and Col. Kjos briefed the group on the situation. (Test. of
29 Wedan, tr. at 369-370; Ex. A27 at 336-337.)

30
31 (23) After the meeting, Wedan elected to refer the matter to the National Guard's
32 Office of Complex Investigations (OCI). The OCI was formed in response to
33 increased public scrutiny and dissatisfaction with military investigations in which
34 there were reports that findings adverse to the military had sometimes been
35 overturned by higher level command. (Test. of Wedan, tr. at 371-373; Ex. A29 at
36 338-339.)

37
38 (24) On December 8, 2013, Col. Kjos met with Dr. Murphy and informed him
39 that a patient had filed a complaint alleging that Dr. Murphy had performed a Pap
40 smear, an inappropriate medical examination, during a PHA, and that Dr. Murphy
41 had failed to document it in Patient A's chart. (Exs. A9 at 48, 64, A27 at 398-
42 399.)

43
44 (25) During the December 8, 2013 meeting, Col. Kjos gave Dr. Murphy a written
45 memorandum explaining that the ORANG was initiating a Command Directed

46
³ Col. Richard Wedan was, at that time, the 142nd Fighter Wing Commander, Oregon Air National Guard. (Test. of Wedan, tr. at 367.)

Investigation (CDI) into the allegations. (Exs. A5, A27 at 399.) In that memorandum, Col. Kjos informed Dr. Murphy that he was prohibited from performing unchaperoned physicals while the CDI was pending and that he was prohibited from retaliating against anyone who had made a complaint or who was involved in an investigation. The memorandum also advised Dr. Murphy not to discuss any matter related to the investigation or the underlying facts of the complaint with anyone other than his counsel. The memorandum also provided the name and telephone number of military defense counsel Major Michael Adams, who Dr. Murphy could contact once the CDI was formally initiated.⁴ (Ex. A5.)

(26) Dr. Murphy was angry about the allegation and denied having performed a Pap smear on Patient A as alleged. (Exs. A9 at 48, A27 at 399.)

(27) Patient A returned to the base immediately after training. TSgt. Albright returned several days later. (Ex. A27 at 155-56.) After TSgt. Albright returned to the base, Patient A asked if she would be willing to come with her to look at exam rooms to see if it would help her with the memory of what had happened. Patient A and TSgt. Albright entered a room and found gynecological equipment in a drawer under the exam table. The equipment looked old and dirty. Patient A told TSgt. Albright that Dr. Murphy had examined her in that room. (Test. of Albright; tr. at 493-495.) After discovering the equipment, Patient A asked that it be collected and taken for DNA testing. (Ex. A9 at 71.) The equipment was collected; however the lab that examined it found insufficient DNA for analysis. (Ex. A17 at 3.)

(28) The exam room where Patient A and TSgt. Albright found the equipment was normally used by Col. Kjos. On November 19, 2011, Col. Kjos was scheduled to see a patient at 11:00 a.m. Dr. Murphy was scheduled to examine Patient A at 10:30 a.m. (Ex. MC6.)

(29) On December 30, 2013, Dr. Murphy went to the Board offices and spoke with Board investigator Terry Lewis. Dr. Murphy told Mr. Lewis about Patient A's allegation and that the military was investigating the matter. (Ex. A6.) Dr. Murphy emailed Mr. Lewis and Eric Brown (another Board investigator) to notify them that the military's investigation would take longer than he expected. He also provided the Board investigators with the name and contact number of his military legal counsel, Col. Thomas Patton. (Ex. A8.)

(30) In early January 2014, Dr. Murphy met with Col. Wedan to discuss the investigation. Col. Wedan recalls that Dr. Murphy thought that the investigation should be conducted locally, rather than by OCI. Col. Wedan explained that he believed it was best to have it conducted by OCI to ensure that the investigation

⁴ At the time the memorandum was issued, Major Adams was in a defense counsel position with the ORANG, however Major Adams and Dr. Murphy did not form an attorney – client relationship. In fact, Major Adams immediately asked his supervisor to have someone else assigned to represent Dr. Murphy, as Major Adams had just finished training to be the victim rights coordinator for the region, and was subsequently assigned to Patient A.

1 was professional and unbiased. (Test. of Wedan; tr. at 378-79.) At one point in
2 the conversation, Col. Wedan recalled that Dr. Murphy said something to the
3 effect of "I just don't know why we will hang a guy out to dry for conducting a
4 procedure that he didn't know he wasn't supposed to do." (*Id.*; tr. at 379.) The
5 statement struck Col. Wedan as "odd;" he told three different people, including
6 his attorney, about the statement and made a note of it. (*Id.*)

7
8 (31) OCI staff conducted an investigation in Portland from February 6 through
9 12, 2014. The team collected documentary evidence and interviewed 10
10 witnesses, including Patient A and Dr. Murphy. (Ex. A9 at 4.)

11
12 (32) OCI investigators interviewed Patient A on February 7, 2014. Patient A told
13 investigators that during the November 19, 2011 PHA, Dr. Murphy asked her
14 when she had her last Pap smear. She stated that after she told him that it had
15 been over three years, he told her that one was due. Patient A told investigators
16 that Dr. Murphy took her to another exam rooms and asked her "[Y]ou don't need
17 a female in here, do you?" (Ex. A9 at 30.)

18
19 (33) Patient A told investigators that the Pap smear seemed to be a normal
20 procedure except that she did not feel any pain as she had in previous exams. She
21 told them that Dr. Murphy used instruments that were in the exam room and
22 inserted something inside her, but she could not remember if he inserted his
23 fingers or whether he wore gloves. She told the investigators that the exam lasted
24 approximately 10-15 minutes and she never received lab results following the
25 exam. (Ex. A9 at 30-31.)

26
27 (34) A summary of Patient A's interview also states:

28 A few months after the Pap smear, the victim was talking to her friend, SSgt
29 Tess Jaeger. She said to SSgt Jaeger, "I forgot to tell you. Guess who gave
30 me a Pap smear? Maj Murphy did." * * * SSgt Jaeger told her that Pap
31 smears are not performed at the base. The victim told her they were because
32 she had one by the reported perpetrator.

33
34 (Ex. A9 at 31.)

35
36 (35) OCI investigators interviewed Staff Sergeant (SSgt.) Jaeger on February 9,
37 2014. A summary of that interview states:

38
39 SSgt Jaeger became aware of the allegations four to five months ago when
40 she and the victim were driving to lunch. * * * For reasons SSgt Jaeger
41 cannot recall, the reported perpetrator's name was mentioned during their
42 conversation. (SSgt Jaeger supposes the reported perpetrator may have
43 called or dropped by the finance office earlier in the day.) The victim
44 believed it awkward that, before the reported perpetrator performed a Pap
45 smear on her during her five year physical health assessment (PHA), he
46 stated "You don't need a female in here do you?" The victim then explained
it was awkward because the way he "asked" the question made her feel as

1 though she could not ask for a chaperone without appearing to mistrust the
2 doctor. Therefore, she agreed to have the exam without a chaperone.

3
4 SSgt Jaeger was surprised and confused when she heard that a doctor on
5 base performed a Pap exam. She wondered why the victim would agree to
6 this exam since the medical clinic does not perform Pap exams. SSgt Jaeger
7 stated there would be no reason for a provider to perform a Pap exam
8 because AGR members have their own civilian healthcare providers "for
9 those exams."

10 SSgt Jaeger told the victim she did not believe the base medical clinic was
11 supposed to perform Pap exams. The victim seemed embarrassed, and the
12 two even made jokes about it. However, because neither were medical
13 professionals, they convinced themselves they did not know for sure. They
14 did both agree that the incident was "creepy," "awkward," and "gross"
15 particularly given the statement the doctor made about not having a
16 chaperone in the room.

17
18
19 (Ex. A9 at 66-67.)

20 (36) On April 6, 2014, Colonel Kjos prepared a memorandum documenting the
21 results of interviews with 25 women who had been examined by Dr. Murphy at
22 ORANG over the previous four years.⁵ All 25 women reported that they had not
23 received a pelvic exam or a Pap smear at the clinic in the last five years. (Ex. A9
24 at 93.)

25
26 (37) The OCI issued a report on August 21, 2014. In a cover letter
27 accompanying an executive summary of the report, Maj. Bayne C. Johnston,
28 Acting Chief of OCI wrote, in part:

29
30 **The investigative team determined the report of sexual assault is**
31 **substantiated based on a preponderance of the evidence.** This finding is
32 based upon the victim's credibility as demonstrated in the consistency of her
33 recitation of the sexual assault to others, her physical and emotional reaction
34 to the assault, her demeanor during her interview, the electronic
35 communications provided by the victim and witnesses, the statements of
36 witnesses as to their observations of the victim's behavior before and after
37 the victim learned she had been purposefully assaulted, and the absence of
38 any apparent reason for the victim to make a false allegation.

39
40 (Ex. A9 at 3; emphasis in original.)

41
42 (38) On September 6, 2014, Col. Marshall Wilde sent an email, accompanied by
43 a copy of the OCI investigation as an attachment, to Col. Patton and to Patient A's

44
45 ⁵ According to the memorandum, Dr. Murphy had examined a total of 30 women at ORANG during that period. Of
46 the five women who were not interviewed, one had been transferred to another state, another one was retired, and
 ORANG was not able to contact the remaining three. (Ex. A9 at 93.)

1 military attorney, Maj. Michael Adams (who represented Patient A in the OCI
2 investigation), to be reviewed with their respective clients. Col. Wilde's cover
3 email included a set of orders from Brigadier General (Brig. Gen.) Michael
4 Stencel, ORANG Commander, instructing Dr. Murphy and Patient A not to
5 discuss the report or the matters it contained with witnesses listed in the report,
6 except as required for preparation for any related disciplinary actions, for one year
7 or until further ordered. Brig. Gen. Stencel also ordered that the matters
8 contained in the report were for official use only (FOUO) and contained PII
9 (personally identifiable information), not to be disclosed except for official
10 purposes. (Ex. A15 at 1-2.)
11

12 (39) Later on September 6, 2014, Col. Patton, forwarded Col. Wilde's email to
13 Dr. Murphy. (Ex. A15; test. of Patton, tr. at 900.) In a message accompanying
14 the forwarded email, Col. Patton wrote, in part:

15 I just got off the phone with Col. Wilde. Bad news: he said they found
16 [Patient A's] accusation substantiated. He said they decided to believe her
17 because she didn't have a motive to lie. I'll hopefully have it by tomorrow
18 and I'll give you a call.
19

20 (Ex. A15 at 1; emphasis added.)
21

22 (40) Col. Patton received a copy of the report summary the following day. (Test.
23 of Patton, tr. at 901.) Dr. Murphy later called Col. Patton to discuss the report,
24 but specifically asked not to be provided a copy. (Test. of Patton, tr. at 860.) Col.
25 Patton told Dr. Murphy that the OCI had found against him. (Test. of Patton, tr.
26 at 902.) Dr. Murphy asked Col. Patton if OCI investigators had "substantiated"
27 the allegations with any evidence. (Test. of Patton, tr. at 861.) Col. Patton told
28 him that they had not. (Test. of Patton, tr. at 861.)
29

30 (41) On September 8, 2014, Dr. Murphy emailed Board investigators Eric Brown
31 and Terry Lewis to inform them that OCI had issued its report. In that email, Dr.
32 Murphy wrote (among other things):
33

34 My understanding is that the OCI, after 9 mo[nths] of investigation, because
35 they could not establish the patient's motive for the false allegation,
36 concluded their report on the complaint as 'substantiated'. I have no idea
37 why, because they could not establish a motive, they would therefore leap to
38 the conclusion that her complaint was 'substantiated'.
39

40 (Ex. A16; quotations marks in original.)
41

42 Defamation Lawsuit

43 (42) On June 10, 2014, Dr. Murphy, acting without an attorney, filed a lawsuit in
44 Multnomah County Circuit Court alleging that Patient A had defamed him by
45 bringing what he asserted was a false allegation that he had performed a Pap
46

1 smear on her in November 2011. The lawsuit sought \$300,000 in damages, plus
2 court costs and legal fees. (Ex. A12.)
3

4 (43) Sometime in June or July of 2014, Dr. Murphy contacted an Oregonian
5 Reporter, Maxine Bernstein, to see if she was interested in writing an article about
6 false allegations in the military. Dr. Murphy spoke to Ms. Bernstein by phone
7 approximately two or three times about the issue. (Test. of Murphy, tr. at 1318-
8 1320.)
9

10 (44) On September 14, 2014, Patient A's civilian defense attorney, Joel Shapiro,
11 filed a Special Motion to Strike Pursuant to ORS 31.150, a statute that permits a
12 court to dismiss a civil action that arises out of statements made in the context of
13 certain legislative, executive or judicial proceedings. (Ex. A14.)
14

15 (45) On October 3, 2014, Dr. Murphy filed Plaintiff's Response to Defendant's
16 Special Motion to Strike Pursuant to ORS 31.150. (Ex. A18.) Within the
17 response, Dr. Murphy wrote (among other things): "Since the complaint was filed,
18 a 10 month investigation ensued which determined that there was no evidence to
19 support the accusation." (*Id.* at 3.) He also wrote:

20 Plaintiff can show that an extensive ten month long investigation conducted
21 by the Washington DC based ORANG Office of Complex Investigations
22 found *no* evidence to support Defendant's claims and stated that
23 Defendant's claims were completely unsubstantiated.
24

25 (*Id.* at 4; emphasis in original.) Dr. Murphy signed the response directly under a paragraph that
26 stated:
27

28 I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE
29 TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND
30 IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT
31 TO PENALTY FOR PERJURY.
32

33 (*Id.* at 7.)
34

35 (46) Patient A's military counsel, Major Adams, asked Col. Wilde whether it
36 would be permissible to provide a copy of an 18 page OCI summary report to the
37 Multnomah County Circuit Court. Col. Wilde told Major Adams that because he
38 was not Major Adams' supervisor, he could not authorize the release. However,
39 he told him that he believed that releasing it to the court would be a permissible
40 use. (Test. of Wilde; tr. at 44-45 and 63-65.)
41

42 (47) Major Adams provided the 18 page OCI summary to the Multnomah County
43 Circuit Court to demonstrate that the report actually found Patient A's allegation
44 to be substantiated. The summary report, unlike the full 274 page OCI report, did
45 not include Patient A's protected health information. (Test. of Lewis; tr. at 255-
46 57.)

1 (48) Dr. Murphy and Mr. Shapiro appeared before the Honorable Judith H.
2 Matarazzo on October 10, 2014 to present oral argument on Mr. Shapiro's motion
3 to Strike. At the conclusion of the hearing, Judge Matarazzo told the parties that
4 she was inclined to grant the motion and asked Mr. Shapiro to prepare an order
5 for her signature and to provide a copy to Dr. Murphy before he submitted it to
6 her. (Ex. A19 at 20-21.)
7

8 (49) On October 17, 2014, Dr. Murphy emailed Col. Wilde to express his
9 concern that Maj. Adams had released the OCI report to the Multnomah County
10 Circuit Court. Dr. Murphy stated that he had been advised to have the court
11 record sealed "to protect my professional reputation." (Ex. A13 at 15.) Dr.
12 Murphy asked Col. Wilde whether ORANG would support a motion to have the
13 record sealed. Dr. Murphy asserted that he would be filing a complaint against
14 Maj. Adams and accused him of acting unethically. (*Id.*) In addition, Dr. Murphy
15 criticized Col. Kjos as wanting to "ride the political wave and make [Dr. Murphy]
16 into a villain." (*Id.* at 16.) Dr. Murphy also wrote that "unlike Kjos, I was not
17 given a princess pass in life." (*Id.*)
18

19 Administrative Discharge Proceedings

20 (50) By letter dated October 23, 2014, Brig. Gen. Stencel notified Dr. Murphy
21 that he recommended that Dr. Murphy be discharged from ORANG for his
22 "pattern of misconduct, professional dereliction, and substandard performance of
23 duty[.]" (Ex. A27, Recorder's Ex. 2.) Brig. Gen. Stencel alleged that Dr. Murphy
24 knew or should have known to refrain from conducting the Pap smear on Patient
25 A, and that he negligently failed to do so; that he negligently failed to document
26 the Pap smear; that Dr. Murphy knowingly gave a false statement to OCI
27 investigators when he denied performing the Pap smear; and that he made a false
28 unsworn declaration in a court proceeding claiming that a military investigation
29 had concluded that Patient A's allegation was unsubstantiated. (Ex. A27,
30 Recorder's Ex.2 at 1-2.)
31

32 (51) The Notification Letter also advised Dr. Murphy of his right to an
33 administrative hearing to contest the discharge and his right to counsel. On
34 December 5, 2014, Dr. Murphy requested a hearing. (Ex. A27, Recorder's Ex.3.)
35

36 (52) On October 25, 2014, at 7:47 p.m., Dr. Murphy emailed the Oregon
37 National Guard Adjutant General (TAG) to request a copy of the OCI report. (Ex.
38 A13 at 20.) Dr. Murphy stated that the report "apparently was ordered by the
39 TAG office and approved for public release." (Ex. A13 at 20.) Dr. Murphy also
40 asserted that he had not seen the entire report, but had only seen a "biased, edited
41 version provided by a Maj. Michael Adams, which he placed in the public record
42 of Multnomah County." (*Id.*)
43

44 (53) On October 25, 2014, at 7:47 p.m., Dr. Murphy emailed Chief Master
45 Sergeant Eddings to express a number of concerns. Dr. Murphy wrote, in part:
46

1 [H]ey chief – funny that OCI did not talk to you? the clinic chief? funny that
2 they asked Albright the bulk of their questions about PHAs. Albright who
3 probably knows the least about medical personal [sic] (not a medic or nurse)
4 and the physical exam process.

5 That investigator should be shot – he is worthless.

6 * * * * *

7
8
9 So do you really think that it would even be imaginable – all the exam beds
10 have stirrups – why change rooms? Crazy story – did she hide the
11 instruments in the

12
13 wrong room? * * * I will bet that Kjos was in the room that they ‘found’ the
14 instruments that day – Kjos thinks she is going to make General off of this.

15 * * * * *

16
17 I should have been more like [name deleted] – make it all about me.
18 ‘What an’ suck up’ [sic] piece of shit.

19
20 How come you are not speaking up??? Did you tell Wedan how crazy this
21 is? I know you are an honorable person – I am surprised by your silence.

22
23 I may lose my job on Monday – it is a government (military) contract and
24 I think they found out about the investigation. I will probably never work
25 as a doc again – no matter what happens.

26
27 Tell Jim, I am getting my guns and heading out to Eastern Oregon with
28 him – civilization sucks.

29
30 What happened to honor??

31
32 I am going to take all these assholes down – one way or the other.

33
34 (Ex. A13 at 19-20.)

35
36 (54) On October 30, 2014 Dr. Murphy emailed a number of people at ORANG
37 along with Board investigator Eric Brown. In the email, Dr. Murphy again
38 questioned the release of the OCI report and stated that Maj. Adams had released
39 it “to the public record (presumably to the media as well[.]” (Ex. A13 at 21.) He
40 also wrote that he would be reporting Col. Kjos to the Board for failure to report
41 the alleged incident between Dr. Murphy and Patient A, along with allegations
42 that Col. Kjos unlawfully prescribed medication for financial gain, and had
43 performed unnecessary medical examinations. Dr. Murphy also asserted that
44 Brig. Gen. Stencel was under investigation for allegedly abusing his authority to
45 pressure Dr. Murphy and medical clinic command to hire a nurse. Because of this
46 alleged investigation, Dr. Murphy asserted that Brig. Gen. Stencel should be
removed from participation in any disciplinary actions against him. (*Id.*)

1 (55) On October 31, 2014, Dr. Murphy submitted to Judge Matarazzo a Motion
2 to Vacate Proposed Order, Alternatively Amend the Findings and provide
3 Corrections to the record prior to the Order Granting Defendant's Special Motion
4 to Strike (Motion to Vacate). (Ex. A21.) Dr. Murphy's submission sought to
5 correct the record with regard to some statements he had included in his response
6 to Mr. Shapiro's Special Motion to Strike. Among those corrections, Dr. Murphy
7 wrote:

8
9 (56) The plaintiff also unintentionally stated that the OCI did not 'substantiate'
10 the defendant's allegation of sexual assault when in fact the report did come to
11 that conclusion. However, the report failed to 'substantiate' any evidence to
12 support the allegation and even noted the absurdity of the alleged contact.

13
14 (*Id.* at 3.)

15
16 (57) On November 1, 2014, Dr. Murphy sent an email to Col. Wilde and others
17 at ORANG with a copy also sent to Mr. Brown. (Ex. A13 at 23-24.) In that
18 email, Dr. Murphy stated that he would be filing a bar complaint against Col.
19 Wilde for failure to report the alleged incident between Dr. Murphy and Patient
20 A, and a bar complaint against Maj. Michael Wetzle (his military attorney at that
21 time⁶) for alleged failure to communicate with Dr. Murphy and for alleged "ex
22 parte contacts with opposing parties." (*Id.* at 23.) As result of these complaints,
23 Dr. Murphy asked that Col. Wilde recuse himself from further involvement in the
24 case and stated that Maj. Wetzle was "fired as my defense counsel." (*Id.* at 24.)

25
26 (58) On November 3, 2014, Dr. Murphy emailed Col. Wilde and several other
27 members of the military. (Ex. A13 at 27.) Dr. Murphy wrote, in part:

28 I hope you are all proud of yourself [*sic*]. This has psych case written all over it.
29 How many psych meds has she been on? All her gyn dates are messed up? Her
30 screwed up relationship with her husband. I love the fact that they sent her back
31 to the pharmacy to dispose of the valium and Percocet because she was pregnant
32 and did not know it. What happen[ed] to that pregnancy was it the one in 2008.
33 Did she stick the instruments (that she put in the drawer) inside her vagina before
34 she 'found' them – is that the DNA test you are sending to my mil?⁷

35
36 (Ex. A13 at 27.) Dr. Murphy concluded the email with "The cops will get it from you, they are
37 coming, so are the bar investigators." (*Id.* at 28.)

38
39 (59) On or around November 4, 2014, Maj. Adams emailed Board investigator
40 Terry Lewis a copy of Dr. Murphy's October 31, 2014 Motion to Vacate. Maj.
41 Adams noted that Dr. Murphy had corrected his previous mischaracterization of
42 the OCI report and now conceded that OCI had found Patient A's allegations to

43
44
45 ⁶ Col. Patton resigned as Dr. Murphy's defense counsel at the end of the OCI investigation. (Test. of Patton, tr. at
46 870.)

⁷ The term "mil" likely refers to a .mil email address extension used by members of the armed forces.

1 be substantiated. Maj. Adams opined that Dr. Murphy did so because he had
2 received the notification letter from Brig. Gen. Stencel which included an
3 allegation that Dr. Murphy had misled the court. (Ex. A13 at 29.)
4

5 (60) On November 9, 2014, Dr. Murphy emailed Col. Wilde to address, among
6 other things, his intention to pursue “any and all means to exonerate [his]
7 professional reputation.” (Ex. A13 at 34.) Dr. Murphy also informed Col. Wilde
8 that he had “provided the court with a copy of the report” and that it was “now
9 part of the public record alongside Maj. Adams’s edited version.” (*Id.*)
10

11 (61) On November 12, 2014, Col. Wedan issued a Debarment Letter to Dr.
12 Murphy, denying him access to Portland Air National Guard Base. The letter was
13 sent, via certified mail, to Dr. Murphy’s home in Oregon. Col. Wedan issued the
14 letter after he was shown Dr. Murphy’s October 25, 2014 email in which Dr.
15 Murphy stated that an investigator should be shot, called another physician a
16 “piece of shit,” and wrote that he would “take all these assholes down –one way
17 or the other.” (Ex. A13 at 70.)
18

19 (62) On November 19, 2014, Dr. Murphy sent a lengthy email to Col. Wilde to
20 discuss the status of his legal action and to express several points of disagreement
21 with the OCI report. (Ex. A13 at 36-39.) He complained about Maj. Adams’
22 conduct in connection with his legal action and asked Col. Wilde to have him
23 removed from the case for misconduct. He wrote that Maj. Adams had acted
24 inappropriately by submitting what Dr. Murphy claimed was an edited version of
25 the report and told Col. Wilde that he planned “to submit the entire report to the
26 court as an addendum to [his] motion in pursuit of fairness and justice.” (*Id.* at
27 37.)
28

29 (63) Also on November 19, 2014, Dr. Murphy emailed Judge Matarazzo’s
30 judicial assistant, Tiffany Fox, to discuss scheduling a hearing on his Motion to
31 Vacate. (Ex. A13 at 51-52.) In that email, Dr. Murphy told Ms. Fox that he
32 would like to submit the entire OCI report, and not “the edited version that
33 Michael (Maj.) Adams submitted.” (*Id.* at 51.) Mr. Shapiro responded to the
34 email and told Ms. Fox that he had no objection to Dr. Murphy submitting the
35 report. In addition, Mr. Shapiro clarified that the portion of the report that he had
36 submitted earlier was “excerpted, rather than edited.” (*Id.* at 50.) Dr. Murphy
37 later filed the full report with the Court. (Test. of Murphy, tr. at 1323.) That full
38 report included Patient A’s National Guard medical records and other personal
39 information. (Ex. A44 at 1.)
40

41 (64) The full OCI report submitted by Dr. Murphy, and the summary report
42 provided by Mr. Adams, was reviewed in-camera in Judge Matarazzo’s chambers.
43 They were not made part of the court record and were not available to the public.
44 The exhibits, medical records, and transcripts associated with the case were
45 destroyed by the court in June 2015 per an order signed by the Presiding Judge.
46 (Ex. A58.)
///

1 (65) On November 24, 2014, Dr. Murphy emailed Col. Patton, Col. Wilde, Maj.
2 Adams, and others at ORANG to inform them that the Board had opened an
3 investigation. Dr. Murphy asked that ORANG fully cooperate with the Board and
4 to provide any requested documents concerning his military service and the
5 military's ongoing investigative process. The email also noted that the OCI report
6 showed that Patient A had taken two anti-depressants in the past. (Ex. A13 at 40-
7 41.)
8

9 (66) In an email to Mr. Lewis dated November 28, 2014 Dr. Murphy provided
10 information related to his civil action against Patient A. (Ex. A44 at 4-6.) In the
11 email, Dr. Murphy wrote that he filed suit against Patient A with the goal of
12 "having [her] recant her false allegation or risk financial consequences." (*Id.* at
13 6.) He also confirmed that he had provided a full copy of the OCI report to the
14 court which, he asserted, was "now part of a public record." (*Id.*)
15

16 (67) Also in the November 28, 2014 email, Dr. Murphy wrote, regarding
17 physician chaperone policies: "[F]rom past experience, I know that the OMB
18 places a greater value on policies (even policies that don't apply) than physician
19 training and judgment." (*Id.* at 4.)
20

21 (68) On November 29, 2014, Dr. Murphy emailed Col. Wilde, Col. Patton and
22 Linda Beuckens of ORANG with various observations about his upcoming
23 discharge proceeding and the Board's investigation. Dr. Murphy also copied Ms.
24 Bernstein (Oregonian reporter) on the email. (Ex. A13 at 56-57.) Among his
25 observations, Dr. Murphy wrote that Maj. Adams might be "unethically involving
26 himself in something that does not concern him – the OMB investigation." (*Id.* at
27 57.) He also wrote:

28
29 By the way did BG Stencel have time to review the responses in my other
30 pending litigation to see if there was anything else from the civil courts or small
31 claims court that he wanted to add to his conclusions regarding my [dereliction]
32 of duty?

33
34 Only hope the State [Inspector General] or the Oregonian are taking note of how
35 due process and justice is served in the ORANG.

36
37 Just out of curiosity, are you getting help for the emotionally distraught SSgt?
38 Contact Dr. Kjos – she is a physician, I think.

39 * * * * *

40
41 If the OMB starts calling my jobs with this allegation – I will immediately be
42 terminated. Maj. Adams will really get to know me at that point.

43
44 (*Id.*)

45
46 ///

1 (69) On December 15, 2014, Dr. Murphy emailed Col. Wilde and several other
2 ORANG personnel in which he reported that he had just learned “via forwarded
3 email” that he had been restricted from the Portland Air National Guard base.
4 (Ex. A13 at 66.) In the email, Dr. Murphy asked for the names of people who felt
5 threatened by him and asked whether he should stay out of the city of Portland or
6 perhaps out of the entire state of Oregon. (*Id.*) Dr. Murphy also requested
7 various documents and information from Col. Wilde as “part of a discovery
8 process.” (*Id.* at 67.) Among his requests, Dr. Murphy asked for Patient A’s
9 medication lists along with the names of the providers who prescribed her “psych
10 meds.” (*Id.*) He also asked for a copy of an alleged investigation of a relationship
11 between Patient A and another married officer who Dr. Murphy identified by
12 name. (*Id.*)
13

14 (70) On December 21, 2014, Dr. Murphy emailed Col. Wilde, with copies to Col.
15 Beuckens, Col. Patton, Captain Joni Carlisle,⁸ Maj. Adams, and Maj. Kyle
16 Abraham. Dr. Murphy reported that his Motion to Vacate had been denied
17 resulting in the dismissal of the case. However, Dr. Murphy wrote that he
18 intended to refile the case the following week. He also stated that he intended to
19 file a lawsuit, a bar complaint, and a complaint with the inspector general against
20 Maj. Adams. (Ex. A13 at 79.)
21

22 (71) Also on December 21, 2014, Dr. Murphy emailed Col. Wilde, Col.
23 Beuckens, and Ms. Bernstein, and copied several other military personnel. (Ex.
24 A13 at 88-89.) In the email, Dr. Murphy asserted that either Patient A or her
25 attorney had told a reporter (Ms. Bernstein) that Patient A had requested that
26 civilian law enforcement investigate her allegation. Dr. Murphy noted that this
27 was inconsistent with a letter previously issued by the Adjutant General. Dr.
28 Murphy wrote “Who is lying here? * * * I assume the Oregonian will be seeking
29 an answer to this question. I will also request that the Governor’s office
30 investigate [the Adjutant General] to determine the true nature of the alleged
31 victim’s request regarding notification of local law enforcement.” (*Id.* at 89.) In
32 addition, Dr. Murphy wrote that he intended to depose the Adjutant General when
33 he refiled his lawsuit against Patient A. He wrote that he suspected that the
34 deposition would demonstrate that Patient A “was again perjuring herself and
35 misleading the press” but that he doubted that ORANG would take any action
36 against her for her “criminal actions.” (*Id.*)
37

38 (72) On December 24, 2014, Dr. Murphy emailed Mr. Shapiro and Ms.
39 Bernstein, with a copy to Col. Wilde. Dr. Murphy asked Mr. Shapiro whether
40 Patient A had previously requested a law enforcement investigation. Dr. Murphy
41 wrote that he intended to refile his lawsuit and that he would seek disciplinary
42 actions by the court against Mr. Shapiro and Maj. Adams if he determined that
43 they had concealed a law enforcement investigation. (Ex. A13 at 83-84.)
44
45

46 ⁸ On November 4, 2014, Col. Wilde appointed Captain Carlisle as Dr. Murphy’s military counsel effective January 15, 2015. (Ex. A13 at 27.)

1 (73) On December 30, 2014, Maj. Adams emailed Board investigator Lewis to
2 outline the various complaints and actions that Dr. Murphy had taken since
3 Patient A made her allegations. Maj. Adams listed the following:
4

- 5 • Inspector General complaints either filed or threatened against Col. Kjos,
6 Col. Wedan, Brig. Gen. Stencel, and Maj. Adams.
- 7 • Threatened congressional complaints and suggesting that the Adjutant
8 General be removed by the Governor.
- 9 • Filed a civil action against Patient A and misled the court about the outcome
10 of the OCI investigation.
- 11 • Attempted to file the entire OCI report with the Multnomah County Court so
12 that it would become part of the public record. The report contained many of
13 Patient A's personal medical records.
14

15 (Ex. A13 at 104.) Maj. Adams then opined:
16

17 [Dr. Murphy] acts like a bully on the playground to coerce others to take the
18 actions he desires. He keeps cc'ing Maxine Bernstein the Oregonian
19 Reporter. Again, everyone else's fault, while taking no responsibility. * * *
20 With this much stress, I am not sure how he can be that stable. I think it is
21 only a matter of time before he implodes.
22

23 (*Id.*)

24 (74) Maj. Adams attached a document from Dr. Murphy to his December 30,
25 2014 email. In that document, Dr. Murphy accused Maj. Adams and Patient A of
26 fraud and extortion. He also wrote "Your fraudulent behavior should result in
27 disciplinary actions by the Court and the Oregon Bar. (Ex. A13 at 106.)
28

29 (75) On February 5, 2015, Dr. Murphy sent an email to Dr. Joseph Thaler (the
30 Board's Medical Director) and Dr. Lisa Snyder.⁹ (Ex. A44 at 11.) In that email,
31 Dr. Murphy wrote that he had submitted a comment to the Oregonlive.com
32 website commenting on Patient A's allegations. Dr. Murphy wrote that he
33 submitted the comment because "this accusation is apparently being tried in the
34 court of public opinion." (*Id.*) The comment read, in part:
35

36 I am very familiar with this case which was unethically made part of the
37 public record by the accuser's [military attorney]. The article failed to
38 mention the following –
39

40 the accuser has been on psych medication for over 10 years without
41 disclosing it to the military (no wonder the military has so many of these
42 friendly fire/active shooter incidents.)
43

44 the accuser previously received a breast and gyn exam from a male flight
45 surgeon at that same clinic in the past, flight surgeons are general medical
46

⁹ It is unclear from the record who Dr. Snyder is or what her role was in this case.

1 officers and as such are qualified to do physical exams (including gyn and
2 rectal exams)

3
4 the physician has never been a complaint of inappropriate contact or
5 relations with patients in almost 30 yrs of working as a healthcare worker

6 * * * * *

7
8 the gyn instruments were 'found' in a female physician's exam room (not
9 Murphy's exam room) and all the exam rooms are configured with the same
10 stirrups on the exam table.

11
12 the accuser was previously involved in an affair with a married officer, she
13 sent a flirtatious email to Murphy which he ignored, weeks later she came
14 up with this alleged gyn exam stating it occurred years earlier – which she
15 had never noted in her medical history (in fact she sought out a gyn exam in
16 2013 even though she would not have been due, if she truly believed that
17 she had received one in 2011.)

18
19 (*Id.* at 11-12.)

20
21 (76) On February 6, 2015, Judge Matarazzo issued a General Judgement of
22 Dismissal, dismissing Dr. Murphy's defamation action and awarding costs and
23 attorney fees to Patient A. (Ex. A23.)

24
25 Phone Call to Tuality Hospital

26
27 (77) On a Saturday in February 2015, Dr. Murphy called Tuality Hospital in an
28 attempt to reach Kathryn Gilbert, R.N. (Test. of Gilbert, tr. at 125-126.) The
29 switchboard referred the call to John Sparks, the administrative nurse supervisor
30 on duty at that time. (Test. of Sparks, tr. at 554-555.) The switchboard operator
31 forwarded the call to Mr. Sparks because the caller, who identified himself as a
32 physician, was very insistent. However, the operator did not recognize the name
33 the caller provided. (*Id.*)

34
35 (78) When Sparks answered the phone, the caller identified himself as a doctor
36 on staff, and used the name that Sparks recalled as "Hansen," "Hamson," or
37 something similar. The caller wanted Ms. Gilbert's phone number, but Mr.
38 Sparks would not provide it. Due to the caller's insistence that he was trying to
39 reach Gilbert about an urgent medical matter, Sparks took the caller's phone
40 number and then called or paged Ms. Gilbert, who was not then on duty. (Test. of
41 Sparks, tr. at 555-557, 559.)

42
43 (79) Ms. Gilbert was at a gym when she received the page from Mr. Sparks. She
44 called Mr. Sparks who told her that a "Dr. Hanson" was trying to reach her
45 regarding a "cath lab order set" for a patient. (Test. of Gilbert, tr. at 125-126; Ex.
46 A37 at 1.) Sparks gave her the telephone number the caller had provided. Gilbert

///

1 did not recognize the name Sparks had relayed but recalled that she worked with a
2 Dr. Hamdon and thought that he might be the caller. (Test. of Gilbert, tr. at 126.)
3
4

- 5 (80) When Ms. Gilbert called the number provided by Mr. Sparks, her cell phone
6 identified the number as that of Dr. Murphy. Dr. Murphy formerly worked with
7 Ms. Gilbert at Tuality Hospital and Ms. Gilbert had socialized with Dr. Murphy
8 and his wife on occasion. When Dr. Murphy answered the telephone, Ms. Gilbert
9 recognized his voice. Ms. Gilbert asked Dr. Murphy why he told the hospital he
10 was someone else but does not recall his answer. Dr. Murphy did not discuss any
11 medical issues, but engaged in some small talk and also told Ms. Gilbert about
12 some difficulty he was having with someone in the National Guard who had
13 alleged that he had sexually assaulted her. (Test. of Gilbert, tr. at 126-129; Ex.
14 A37 at 1-2.)
15

16 Public Disclosure of Confidential Information

- 17 (81) On March 17, 2015, Dr. Murphy filed an 11 page document with the
18 Multnomah County Circuit Court that was titled "Settlement Offer – Murphy v.
19 [Patient A]." (*Id.* at 14-25.) The settlement offer contained Dr. Murphy's
20 extensive discussion of Dr. Murphy's view of the facts of his dispute with Patient
21 A, including a detailed account of Patient A's allegations regarding the alleged
22 Pap smear. The document also includes a section labeled "THE
23 **DEFENDANT'S HISTORICAL LACK OF HONESTY-CONCEALING**
24 **PSYCHOLOGICAL PROBLEMS FROM THE MILITARY.**" (*Id.* at 19;
25 emphasis in original.) Dr. Murphy wrote in the document that Patient A failed to
26 notify the military of a psychological issue and her past use of anti-depressant
27 medications. The document also contains a detailed account of Patient A's self-
28 reported online health assessments, including discussions of past Pap smears, a C-
29 section, a list of psychiatric medications, and an assertion that Patient A used a
30 psychiatric medication while she was pregnant. (*Id.* at 22.) The settlement offer
31 was included in the official court record and was available to members of the
32 public through the court's electronic information system, OJIN. (Test. of Lewis;
33 tr. at 621.)
34

- 35 (82) Also on March 17, 2015, Dr. Murphy sent an email to multiple people,
36 including Mr. Shapiro, Ms. Bernstein, several members of the military, and
37 several others. (Ex. A44 at 27.) The email included the 11 page settlement
38 agreement as an attachment and had the subject line "Public Record – filed with
39 Circuit Court – Settlement Offer in 15CV02439." (*Id.*) At the end of the email,
40 Dr. Murphy asked the recipients to "Please forward this settlement offer to any
41 interested party, ask them to contact the Oregon State Military Office or the
42 Governor's office to put an end to this non-sense." (*Id.*)
43

- 44 (83) On March 18, 2015, Dr. Murphy sent an email to his military attorney,
45 Captain Carlisle, and another military attorney, Col. Monique DeSpain. He also
46 copied Board investigators Lewis and Brown, Board Medical Director Dr. Thaler,

1 several members of the military, and Ms. Bernstein. (Ex. A24.) In the email, Dr.
2 Murphy stated that he wished to separate from ORANG and asked Captain
3 Carlisle to send him the appropriate paperwork. He asserted that he wanted to
4 focus his effort on litigating claims against the Board, including harassment and
5 retaliation. He accused the Board of "intentionally delaying" its investigation.
6 (*Id.* at 1.) Dr. Murphy further wrote:

7
8 I suspect the delay is a direct result of the inept but malicious investigative
9 and legal staff at OMB/DOJ, who did not have the courage or integrity to
10 respond with an explanation.

11
12 By removing the separation hearing, it will provide one less excuse for the
13 investigator's continued harassment and retaliation. The OMB investigative
14 staff are a group of non-professionals who lead physicians like Joe Thaler
15 around by the nose, making the OMB's entire process almost as absurd as
16 that report produced by the OCI.

17
18 Obviously, this has been a frustrating process, when a mentally deranged
19 patient with an absurd complaint manages to convert a routine established
20 complaint process into a 1 ½ year circus. The main clowns being Heidi
21 Kjos and Monique DeSpain – who made a patient['s] complaint into
22 something it wasn't, just to bring attention to themselves as female activists
23 (politically popular). And of course OMB's Terry Lewis is always
24 interested in undermining physicians in order to justify his existence (bad
25 idea for a morbidly obese male with no doubt some underlying pathology
26 that will require medical assistance someday soon).

27 (*Id.* at 2.)

28
29 (84) On April 11, 2015, Dr. Murphy sent an email to MSgt. Frederick, Chief
30 Master Sergeant Michelle Marshall (both of ORANG leadership), and to Board
31 Investigators Lewis and Brown. In that email, Dr. Murphy wrote:

32
33
34 I was contacted by a patient who I saw in the medical clinic sometime
35 back. The patient told me that they had been contacted regarding my care.
36 I formally request that if any of my patients (any patients) are contacted by
37 the investigators from the Oregon Medical Board that they do NOT
38 cooperate. [T]he OMB has no investigative authority outside of license
39 holders. If there is a question regarding patient care, the investigator can
40 contact me. This is a significant infringement on patient confidentiality.
41 This of course applies to any and all medical records as well.

42
43 (Ex. A25; emphasis in original.)

44
45
46 ///

Administrative Discharge Hearing

(85) The Oregon Military Department's Administrative Discharge Board held a hearing on Dr. Murphy's appeal of the recommended discharge from May 7 through 9, 2015 in Portland, Oregon. Legal Advisor Col. William D. Bunch presided at the hearing. The Board was comprised of three voting members, all of whom were colonels in the Air National Guard. Dr. Murphy participated in the hearing and was represented by his military counsel, Captain Carlisle. Both Dr. Murphy and Patient A, among others, testified at the hearing. (Ex. A27.)

(86) At the conclusion of the hearing, the Administrative Discharge Board found against Dr. Murphy on all charges. Specifically, the Board concluded:

- Dr. Murphy was derelict in the performance of his duties by negligently failing to refrain from conducting a genital exam or Pap smear on Patient A;
- Dr. Murphy was derelict in the performance of his duties by failing to document the genital exam or Pap smear on a Patient A;
- Dr. Murphy knowingly made a false statement to an OCI investigator by asserting that he did not perform a Pap smear or similar procedure on Patient A; and
- Dr. Murphy knowingly made a false statement in an unsworn declaration that claimed that a military investigation had found Patient A's allegation to be unsubstantiated.

(Ex. A27, Ex. 1¹⁰.) As a result of these findings, the Administrative Discharge Board recommended that Dr. Murphy be separated from the National Guard with an other than honorable conditions discharge. (*Id.*)

Board Request for Records

(87) On May 12, 2015, Mr. Lewis sent Dr. Murphy a request for information, pursuant to the Board's authority under ORS 677.320, asking Dr. Murphy to provide the following:

A complete copy of the medical record[s] for your care and treatment for patients [B] and [C]. Please include all information regarding your prescribing for these patients in 2013-2014.

(Ex. A29.) Dr. Murphy did not provide the requested medical records to the Board. (Test. of Lewis, tr. at 1264-65.)

(88) A subcommittee of the Board's Investigative Committee interviewed Dr. Murphy on June 4, 2015. (Ex. A31 at 4.) The Board's Medical Director, Dr.

¹⁰ Ex. A27 is a transcript of Dr. Murphy's Administrative Discharge Board hearing. The information in Finding of Fact 86 is derived from Exhibit 1 from that hearing.

1 Thaler, Board Investigator Lewis, and Mr. Foote were also present for the
2 interview. (*Id.*)

3
4 (89) Dr. Murphy had copies of documents at the interview that he believed the
5 subcommittee might ask about, including medical records of Patients B and C.
6 Dr. Murphy did not tell anyone that he had the medical records with him, nor did
7 he offer them to the subcommittee. (Test. of Murphy, tr. at 1269-1271; test. of
8 Lewis, tr. at 1264-1265.)

9
10 (90) At the conclusion of the interview, when Dr. Murphy asked if he should
11 continue to provide any additional evidence to Mr. Lewis, Mr. Foote replied
12 "Well, he's your point of contact if you have anything further * * * [because]
13 these things will be considered by the Board so if there's something you want to
14 submit, go through him." (Ex. A31 at 39.) Other than an affidavit of Col. Patton,
15 Dr. Murphy did not offer, or attempt to offer, any other documents to the
16 subcommittee or to Mr. Lewis before leaving the interview. (Test. of Murphy; tr.
17 at 1265; Ex. A31 at 37-39.)

18
19 (91) Prior to submitting exhibits in preparation for the current contested case
20 hearing, Dr. Murphy failed to produce the documents requested by the Board in
21 Mr. Lewis's May 30, 2015 letter. (Test. of Murphy, tr. at 1263; Exs. MC2,
22 MC3, MC4, and MC5.)

23 E-Mail Communication with the Board

24
25 (92) On August 15, 2015, Dr. Murphy sent an email to Mr. Lewis, Mr. Brown,
26 and Mr. Foote. (Ex. A34.) In that email Dr. Murphy wrote, in part:

27
28 Mr. Lewis,

29
30 When do you imagine that you folks might finish fabricating these
31 unsupported violations? How long does it take to 'finalize' BS?

32
33 As you are obviously aware, I am currently in litigation regarding the
34 medical board's last illegal and unethical action and I want to make sure the
35 court is aware of the OMB's latest attempt at retaliation.

36
37 So Terry, if you are going to 'get me back' or 'teach me a lesson' (try to
38 intimidate me), you need to stop stuffing your face, put down your comic
39 books and use your crayons to come up with something in writing – pronto.
40 Oh hey – thanks again for lying to me about having to report a patient's
41 complaint in 10 days, [etc.] * * * [Patient A's] allegation is false and she is
42 going to go to jail for making it. This is pathetic, I try to help people and
43 ///.
44 ///.
45 ///.
46 ///.

1 make a difference every[]day and all you folks can do is make up non sense
2 [sic] to justify your own existence. And of course you retaliate against
3 anyone who calls you out on your Emperor's clothing.
4

5 Dr. Thaler and the other physicians involved in this – shame on you.
6

7 * * * * *

8 oh yea – good morning Mr. Lewis – the great and powerful Oz has spoken.
9

10 (Id. at 1.)
11

12 (93) On August 22, 2015, Dr. Murphy emailed Kevin Danielson, an attorney in
13 the United States Attorney's Office in Oregon, and Mr. Foote. (Ex. A35.) Dr.
14 Murphy informed Mr. Danielson that he "gave up on [his] civil suit" against
15 Patient A because "[s]he does not have any money and your office and the federal
16 court system made it too cost prohibitive and complicated to continue." (Id.) In
17 addition, Dr. Murphy informed Mr. Danielson of the Board's investigation,
18 writing "Now the board (mostly a morbidly obese investigator with a high school
19 diploma and a chip on his shoulder) is mounting some kind of vendetta." (Id.)
20 He also wrote:
21

22 The Board is now going beyond the so called "casting a wide net" approach
23 and is actually posting complete nonsense on their website. The OMB
24 (maybe other medical boards as well) functions via blatant intimidation of
25 licensed providers, because the board does not feel that they have to answer
26 to anyone who works under the banner of 'public safety'.
27

28 Currently I am pursuing litigation against the State for damages from a
29 previous false claim by the OMB (supported by a[n] Oregon State Court of
30 Appeals ruling). But clearly there is **collusion between the State AG office**
31 **in their efforts to "persuade me to drop it" and the OMB (Kathy Haley)**
32 who is aware of or is encouraging their investigator Terry Lewis to simply
33 fabricate issues like he did previously.
34

35 I think it is unethical, maybe illegal. I believe it would take a federal
36 prosecutor to make that determination. What are your thoughts? I have
37 copied Ms. Haley and Mr. Foote in order to be transparent. I am not an
38 attorney (although I have enrolled in an on-line JD course), so I really don't
39 know.
40

41 (Id.; emphasis in original.)
42

43 (94) In an August 27, 2015 email to Ms. Mazzucco, Dr. Murphy responded to
44 some questions about his 2013 license renewal application. (Ex. A36c.) In that
45 email, Dr. Murphy wrote, in part:
46

///

1 Now in the summer of 2015, one of the board members (a chiropractor – a
2 non MD with the usual low self esteem of going to a ‘medical’ school in a
3 shopping center) is questioning some of the answers on my renewal
4 application from way back then as part of a medical board vendetta.
5

6 * * * * *

7
8 It is tough to give the ‘right answers’ when you are working class and not
9 some silver spoon “Doctor or Lawyer” who has never done real work and
10 had some fancy graduation from a frat house. The Board does not
11 understand working during the day, then doing the school thing only when
12 time and money allowed.
13

14 * * * The medical board has no idea about how the building they are sitting
15 in – was built, where the food that Terry Lewis stuffs his face with comes
16 from, or how even the garbage is handled, [etc.].
17

18 (*Id.* at 1-2)

19 Ethical Standards of the Medical Profession

20
21 (95) Joseph Thaler, MD, is board certified in internal medicine. He practiced
22 internal medicine for 29 years. He was a member of the Board from 1999 to
23 2006, and was the Board chair in 2005. He has been the Board’s Medical
24 Director since 2012. (Ex. A52.)
25

26 (96) In his role as Medical Director, Dr. Thaler often reviews records from Board
27 licensees to determine if the licensees are meeting standards of care and standards
28 of ethics that apply to the medical profession. In making such determinations, Dr.
29 Thaler, and the Board, will look to the American Medical Association (AMA)
30 Code of Medical Ethics for guidance. The Board also relies on other sources
31 including professional literature. (Test. of Thaler, tr. at 515-516.)
32

33 (97) The AMA has published formal ethical opinions which pertain to the
34 professional and ethical obligations of physicians. AMA Opinion 8.02 is titled
35 “Ethical Guidelines for Physicians in Administrative or Other Non-clinical
36 Roles.” (Ex. A33 at 1.) The opinion provides, in part:
37

38 Throughout their formal education and their practice of medicine, physicians
39 profess and are therefore held to standards of medical ethics and professionalism
40 such as those expressed in the AMA Code of Medical Ethics. Complying with
41 these standards enables physicians to earn the trust of their patients and the general
42 public. This trust is essential to successful healing relationships and, therefore, to
43 the practice of medicine.
44

45 ///

46 ///

1 The ethical obligations of physicians are not suspended when a physician assumes a
2 position that does not directly involve patient care. Rather, these obligations are
3 binding on physicians in non-clinical roles to the extent that they rely on their
4 medical training, experience, or perspective. When physicians make decisions in
5 non-clinical roles, they should strive to protect the health of individuals and
6 communities.

7
8 (Id.)

9 (98) AMA Opinion 9.07 is titled "Medical Testimony." (Ex. A33 at 3.) The
10 opinion provides, in part:
11

12 As citizens and as professionals with specialized knowledge and experience,
13 physicians have an obligation to assist in the administration of justice.
14

15 When a legal claim pertains to a patient the physician has treated, the
16 physician must hold the patient's medical interests paramount, including the
17 confidentiality of the patient's health information, unless the physician is
18 authorized or legally compelled to disclose the information.
19

20 Physicians who serve as fact witnesses must deliver honest testimony. This
21 requires that they engage in continuous self-examination to ensure that their
22 testimony represents the facts of the case.
23

24 * * * * *

25 Organized medicine, including state and specialty societies and medical
26 licensing boards can help maintain high standards for medical witnesses by
27 assessing claims of false or misleading testimony and issuing disciplinary
28 sanctions as appropriate.
29

30
31 (Id.)

32 (99) AMA Opinion 5.05 is titled "Confidentiality." (Ex. A39.) The opinion
33 provides, in part:
34

35 The information disclosed to a physician by a patient should be held in
36 confidence. The patient should feel free to make a full disclosure of
37 information to the physician in order that the physician may most
38 effectively provide needed services. The patient should be able to make
39 this disclosure with the knowledge that the physician will respect the
40 confidential nature of the communication. The physician should not
41 reveal confidential information without the express consent of the patient,
42 subject to certain exceptions which are justified because of overriding
43 considerations.
44

45 When a patient threatens physical harm to another person or to him or
46 herself and there is a reasonable probability that the patient may carry out

1 the threat, the physician should take reasonable precautions for the
2 protection of the intended victim[.] * * *

3
4 When the disclosure of confidential information is required by law or
5 court order, physicians generally should notify the patient. Physicians
6 should disclose the minimal information required by law, advocate for the
7 protection of confidential information and, if appropriate, seek a change in
8 the law. * * *

9
10 (*Id.*)

11
12 (100) AMA Opinion 5.04 is titled "Communications Media: Standards of
13 Professional Responsibility." (Ex. A38.) The opinion provides, in part:

14 Physicians are ethically and legally required to protect the personal privacy
15 and other legal rights of patients. When information concerning a specific
16 patient is requested by the media, the physician must obtain the consent of
17 the patient or an authorized representative before releasing such
18 information. The physician may release only the authorized information or
19 that which is public knowledge. The patient-physician relationship and its
20 confidential nature must be maintained.

21
22 * * * * *

23
24 Certain news that is part of the public record, such as deaths, may be made
25 available without the consent of the patient or authorized representative. *
26 * *

27
28 (*Id.*)

29
30 (101) AMA Opinion 10.0.15 is titled "The Patient-Physician Relationship." (Ex.
31 A45.) The opinion provides, in part:

32
33 The practice of medicine, and its embodiment in the clinical encounter between
34 a patient and a physician, is fundamentally a moral activity that arises from the
35 imperative to care for patients and to alleviate suffering.

36
37 A patient-physician relationship exists when a physician serves a patient's
38 medical needs, generally by mutual consent between physician and patient (or
39 surrogate). In some instances the agreement is implied, such as in emergency
40 care or when physicians provide services at the request of the treating
41 physician. * * * Nevertheless, the physician's obligations to the patient
42 remain intact. The relationship between patient and physician is based on trust
43 and gives rise to physicians' ethical obligations to place patients' welfare
44 above their own self-interest and above obligations to other groups, and to
45 advocate for their patient's welfare.

46
///

1 (Id.) Within the patient-physician relationship, a physician is ethically required to use
2 sound medical judgment, holding the best interests of the patient as paramount. (Id.)
3

4 (102) Barry Egener, MD, is board certified in internal medicine and has been
5 practicing medicine for over 34 years. At the time of the hearing in this case, Dr.
6 Egener was the Medical Director for both the Foundation for Medical Excellence
7 and its subdivision, the Northwest Center for Physician-Patient Communication.
8 He was also a member of the faculty in internal medicine for Legacy Health
9 Systems. (Test. of Egener, tr. at 422-23; Ex. A51 at 1.) In addition, he was a
10 faculty member of the American Academy on Physician and Patient, and a
11 clinical assistant professor in public health at the Oregon Health Sciences
12 University (OHSU). (Ex. A51 at 2.) Dr. Egener has authored numerous journal
13 articles on the topics of professionalism and physician-patient communication.
14 (Test. of Egener, tr. at 423-24; Ex. A51 at 4.) Dr. Egener believes that the essence
15 of professionalism is for the professional (including physicians) to execute a
16 fiduciary responsibility to the more vulnerable party. In Dr. Egener's view, in all
17 professional relationships patients or clients rely on the unique expertise of the
18 professional to make judgments about the patient or client's best interest. It is this
19 imbalance of expertise that gives rise to the fiduciary responsibility. Dr. Egener
20 has identified three separate domains of physician professionalism: 1) the
21 relationship between the physician and the patient; 2) the relationship between the
22 physician and other members of a healthcare team; and 3) the relationship
23 between the profession of medicine and society as a whole. (Test. of Egener, tr.
24 at 425-26 and 430.)
25

26 (103) *Medical Professionalism in the New Millennium: A Physician's Charter* (the
27 Charter), published by the American Board of Internal Medicine in 2004, is a
28 well-respected document that has been cited in at least 600 published articles.
29 (Test. of Egener, tr. at 427; Ex. A49.) The preamble to the Charter states, in part:
30

31 **Professionalism is the basis of medicine's contract with society.** It demands
32 placing the interests of patients above those of the physician, setting and
33 maintaining standards of competence and integrity, and providing expert advice to
34 society on matters of health. The principles and responsibilities of medical
35 professionalism must be clearly understood by both the profession and society.
36 Essential to this contract is public trust in physicians, which depends on the
37 integrity of both individual physicians and the whole profession.
38

39 (Ex. A49 at 1; emphasis in original.) Among the principles enumerated in the Charter are a
40 commitment to patient confidentiality, a commitment to maintaining trust by managing conflicts
41 of interest, and a commitment to professional responsibilities. (Id. at 1-2.) As part of the
42 commitment to professional responsibilities, the Charter states:
43

44 As members of a profession, physicians are expected to work collaboratively to
45 maximize patient care, be respectful of one another, and participate in the process
46 of self regulation, including remediation and discipline of members who have
failed to meet professional standards. * * * These obligations include engaging in

1 internal assessment and accepting external scrutiny of all aspects of their
2 professional performance.
3 (*Id.* at 2.)

4
5 (104) In an article titled "Toward a Normative Definition of Medical
6 Professionalism," published in the journal *Academic Medicine* in June 2000,
7 Herbert M. Zwick, MD, noted that medical professionalism is comprised of the
8 following sets of behaviors:

- 9
10 • *Physicians subordinate their own needs to the interests of others. * * **
11 • *Physicians adhere to high ethical and moral standards. * * **
12 • *Physicians respond to societal needs, and their behaviors reflect a social*
13 *contract with communities served. * * **
14 • *Physicians evince core humanistic values, including honesty and integrity,*
15 *caring for others, and trustworthiness. * * **
16 • *Physicians exercise accountability for themselves and for their colleagues.*
17 ** * **
18 • *Physicians demonstrate a continuing commitment to excellence.*
19 • *Physicians exhibit a commitment to scholarship and to advancing their*
20 *field. * * **
21 • *Physicians deal with levels of complexity and uncertainty. * * **
22 • *Physicians reflect upon their actions and decisions.*
23

24 (*Id.* at 3-4; italics in original.)
25

26 (105) Dr. Egener reviewed numerous emails from Dr. Murphy directed toward
27 colleagues, members of the military, attorneys, the Board, and others. In Dr.
28 Egener's view, Dr. Murphy's October 25, 2014 email to Chief Master Sergeant
29 Eddings (Ex. A13) (in which he wrote that an investigator should be shot, implied
30 that Dr. Kjos was using Patient A's allegation to try to secure a promotion,
31 referred to another person as a "piece of shit," stated that he was taking guns and
32 going out to eastern Oregon, and that he was going to "take all these assholes
33 down,") was "denigrating, [showed a] lack of respect [and had] some element of
34 arrogance." (Test. of Egener, tr. at 434.) Dr. Egener believed that this email
35 demonstrated unprofessional behavior. In particular, Dr. Egener believed that the
36 comments in the email undermined collegiality that is necessary to the smooth
37 functioning of a health care team. (*Id.*)
38

39
40 (106) Dr. Egener also reviewed Dr. Murphy's March 18, 2015 email (Ex. A24),
41 sent to numerous recipients including members of the military, members and
42 employees of the Board, and a reporter, in which Dr. Murphy referred to Patient
43 A as "mentally deranged," referred to a Board Investigator as "morbidly obese"
44 with "an underlying pathology," and referred to two colleagues as "female
45 activists" who were "trying to bring attention to themselves." (Test. of Egener, tr.
46 at 435.) Dr. Egener viewed this email as unprofessional in the way that it referred

1 to Patient A, by undermining the role of the Board and the credibility of the
2 medical profession, and by undermining his relationship with his colleagues. Dr.
3 Egener also believed that the email demonstrated arrogance which, he opined,
4 detracted from Dr. Murphy's ability to be professional. (*Id.* at 436-39.)
5

6 7 CONCLUSIONS OF LAW

8
9 The Board adopts ALJ Mann's conclusions of law, his supporting opinion except as
10 noted in the Board's discussion of one of Dr. Murphy's violations of ORS 677.190(1)(a),
11 dishonorable and unprofessional conduct, and ALJ Mann's recommendation that Dr. Murphy's
12 license be revoked, Dr. Murphy be assessed a civil penalty of \$10,000, and Dr. Murphy be
13 assessed the cost of these proceedings
14

15 1. The evidence did not establish that Dr. Murphy performed an
16 unauthorized Pap smear on a patient on November 19, 2011 in violation of ORS
17 677.190(1)(a), as defined by ORS 677.188(4)(a), and/or conduct that does or
18 might constitute a danger to a patient and gross negligence, in violation of ORS
19 677.190(13).
20

21 2. Dr. Murphy provided false, misleading, and deceptive information
22 in connection with his October 29, 2013 application to renew his medical license
23 by stating that his highest level of education was an associate's degree and that he
24 could speak and understand Quechua sufficiently to communicate for clinical
25 purposes in violation of ORS 677.190(8). Dr. Murphy did not violate OAR 847-
26 008-0058 because the rule was not in effect at the time that he submitted his
27 application. The record did not establish that Dr. Murphy's false answers on his
28 October 29, 2013 renewal application violated ORS 677.190(1)(a) and (17).
29

30 3. Dr. Murphy acted in a manner contrary to recognized standards of
31 ethics of the medical profession, in violation of ORS 677.190(1)(a) as defined by
32 ORS 677.188(4)(a), by filing a false or misleading declaration in connection with
33 a proceeding in Multnomah County Circuit Court.
34

35 4. Dr. Murphy disclosed private health information and confidential
36 medical records of a patient in violation of ORS 677.190(1)(a) and (5), as defined
37 by ORS 677.188(4)(a). The record did not establish that Dr. Murphy violated
38 HIPAA privacy regulations (45 CFR 164.502).
39

40 5. Dr. Murphy did not violate ORS 677.080(3) and ORS 677.190(10)
41 by calling a nurse supervisor at Tuality Healthcare in 2015 while representing
42 himself by the name of "Dr. Hanson."
43

44 6. Dr. Murphy violated ORS 677.190(17) and OAR 847-001-0024(1)
45 by failing to comply with a Board investigator's request for medical records in
46 ///

1 connection with an investigation into Dr. Murphy's alleged prescribing of
2 controlled substances to two patients.

3
4 7. Dr. Murphy violated ORS 677.190(1)(a) as defined by ORS
5 677.188(4)(a) by asking individuals not to cooperate with the Board's
6 investigation thereby impeding that investigation.

7
8 8. Dr. Murphy engaged in a pattern of belligerent and obstructive
9 behavior during the course of the Board's investigation and that pattern of
10 behavior constitutes unprofessional or dishonorable conduct in violation of ORS
11 677.190(1)(a) as defined by ORS 677.188(4)(a).

12
13 9. The Board may revoke Dr. Murphy's Oregon medical license,
14 assess a \$10,000 civil penalty, and assess the costs of the proceedings.

15
16 **OPINION**

17
18 The Board alleges that Dr. Murphy committed several violations of the Medical
19 Practices Act, for which the Board has proposed revocation of his medical license, a \$10,000
20 civil penalty, and assessment of the costs of the disciplinary proceeding. The Board has the
21 burden of establishing by a preponderance of the evidence that the violations alleged in the
22 Second Amended Notice occurred and that the proposed sanctions are appropriate. ORS
23 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case
24 rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general
25 rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or
26 position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying
27 a different standard, the standard of proof in an administrative hearing is preponderance of the
28 evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that
29 the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*,
30 303 Or 390, 402 (1987).

31
32 Pursuant to ORS 677.265, the Board is vested with the authority to regulate the practice
33 of medicine in Oregon. ORS 677.190 authorizes the Board to discipline an Oregon physician for
34 any of several delineated reasons. The Board has proposed disciplining Dr. Murphy under the
35 following provisions of ORS 677.190:

36
37 The Oregon Medical Board may refuse to grant, or may suspend or revoke a
38 license to practice for any of the following reasons:

39
40 (1)(a) Unprofessional or dishonorable conduct.

41
42 * * * * *

43
44 (5) Willfully or negligently divulging a professional secret without the
45 written consent of the patient.

46
///

1 * * * * *

2
3 (8) Fraud or misrepresentation in applying for or procuring a license to
4 practice in this state, or in connection with applying for or procuring
5 registration.
6

7 * * * * *

8
9 (10) Impersonating another licensee licensed under this chapter or
10 permitting or allowing any person to use the license.
11

12 * * * * *

13
14 (17) Willfully violating any provision of this chapter or any rule adopted by
15 the board, board order, or failing to comply with a board request pursuant to
16 ORS 677.320.
17

18 In addition, ORS 677.188(4)(a) defines “unprofessional or dishonorable conduct” for
19 purposes of ORS 677.190(1)(a). ORS 677.188(4)(a) provides:
20

21 (4) “Unprofessional or dishonorable conduct” means conduct unbecoming a
22 person licensed to practice medicine or podiatry, or detrimental to the best
23 interests of the public, and includes:
24

25 (a) Any conduct or practice contrary to recognized standards of ethics of the
26 medical or podiatric profession or any conduct or practice which does or
27 might constitute a danger to the health or safety of a patient or the public or
28 any conduct, practice or condition which does or might adversely affect a
29 physician’s ability safely and skillfully to practice medicine or podiatry[.]
30

31 1. Unauthorized Pap Smear
32

33 The central issue in dispute in this case is whether Dr. Murphy performed a Pap smear on
34 Patient A during a five-year preventative health assessment (PHA) in November 2011. While
35 there is no dispute that Dr. Murphy conducted a PHA on Patient A, Dr. Murphy vehemently
36 denies Patient A’s allegation that he performed a Pap smear.
37

38 Recently, the Oregon Court of Appeals has reiterated that “credibility depends not only
39 on demeanor but also on such factors as inherent probability, or improbability of the testimony,
40 the possible internal inconsistencies, the fact that it is or is not corroborated, that it is
41 contradicted by other testimony or evidence and finally that human experience demonstrates it is
42 logically incredible.” *Osuna-Bonilla v. Teacher Standards and Practices Comm.*, 282 Or App
43 260, 268-269 (2016), *citing with approval Preferred Funding, Inc. v. Jackson*, 185 Or App 693,
44 699 (2003).
45
46

///

1 With regard to the allegations in this case, there is nothing inherently probable or
2 improbable with either Patient A's allegation, nor with Dr. Murphy's denial. Nor is there
3 anything about the allegation or the denial that is logically incredible. Furthermore, both Patient
4 A and Dr. Murphy have been relatively consistent in their accounts of the events of November
5 19, 2011. The only contemporaneous evidence of the PHA is the medical record prepared by Dr.
6 Murphy. That record contains no indication that a Pap smear was performed. The absence of
7 such a record is consistent with Dr. Murphy's denial. However, it is also consistent with the
8 Board's allegation that the procedure was unauthorized because it is unlikely that Dr. Murphy
9 would have documented a procedure that he knew was improper.

10 The following evidence is consistent with Dr. Murphy's denial:
11

- 12 • Dr. Murphy denies any memory of the PHA. He has not offered a
13 competing version of events to try to rebut Patient A's allegations. This
14 would be expected if, as he asserts, nothing out of the ordinary occurred
15 during the PHA.
- 16 • There is no evidence that Dr. Murphy has ever engaged in, or been
17 accused of, similar conduct in the past.
- 18 • The incident was alleged to have occurred in an exam room that Dr.
19 Murphy normally did not use, but that was often used by another
20 physician who also performed PHAs that day.
- 21 • The National Guard interviewed 25 of the 30 women that Dr. Murphy had
22 examined over a four year period. None of them reported that Dr. Murphy
23 had performed a pelvic exam or a Pap smear on them.

24 The following evidence, however, is consistent with Patient A's allegations:
25

- 26 • Patient A told TSgt. Albright that Dr. Murphy performed a Pap smear. At
27 the time she relayed this information, Patient A contends that she did not
28 believe that the procedure was unauthorized. Patient A appeared to be
29 shocked to learn that Pap smears were not performed at the ORANG base.
- 30 • Patient A appeared visibly upset when she learned that there was no record
31 of the procedure.
- 32 • Patient A identified the exam room in which she asserts the procedure
33 occurred. She and Albright discovered gynecological examination
34 equipment in that room.
- 35 • Patient A insisted that the equipment be seized by authorities for DNA
36 testing; a request which she would be unlikely to make if she did not
37 believe that the equipment had been used to examine her.
- 38 • SSgt. Jaeger and Patient A recall a conversation, sometime prior to
39 December 2013, in which Patient A disclosed that Dr. Murphy had
40 performed a Pap smear on Patient A during a PHA.

1 However, there are some aspects of the above evidence that casts doubt on its reliability.
2 First, it is unclear from the record whether Patient A immediately and correctly identified the
3 room in which the procedure allegedly took place. Patient A did not search the exam rooms with
4 TSgt. Albright until TSgt. Albright returned from training, several days after Patient A returned.
5 While it is true that Patient A and TSgt. Albright found gynecological equipment in an
6 examination room, it was not the room normally used by Dr. Murphy when he performed PHAs.

7
8 Second, at the hearing in this case Patient A testified that Dr. Murphy spent
9 approximately five to ten minutes in an exam room for an initial examination. She testified that
10 he told her that they would need to go to separate exam room only after determining that she
11 needed a Pap smear. However, in a written report to Col. Kjos on December 8, 2013, Patient A
12 did not mention having changed rooms. TSgt. Albright testified in the administrative discharge
13 proceeding that Patient A told her that Dr. Murphy first took her into one room and then said
14 "Oh no, let's go in this one." Ex. A27 at 244. At the Board's hearing in this case, TSgt. Albright
15 testified that Patient A identified the exam room where the alleged Pap smear took place, and
16 remembered passing by a couple of different rooms before getting to the room where the exam
17 allegedly took place. At no time did TSgt. Albright testify that Patient A mentioned having
18 changed rooms. Indeed, despite TSgt. Albright's role in assisting Patient A to locate the exam
19 room, nothing in the record suggests that Patient A ever told TSgt. Albright that she had changed
20 exam rooms.

21
22 In addition, if Dr. Murphy had intended to perform a Pap smear on Patient A that day,
23 and knew that the tools were in another exam room, it is not clear why he would not have simply
24 taken her to that room initially, or perhaps moved the tools into his own exam room. Col. Kjos,
25 who normally used the exam room where the gynecological equipment was found was also
26 conducting PHAs that day, and was scheduled to see a patient at 11:00 a.m., close in time to Dr.
27 Murphy's examination of Patient A. It is unlikely that Dr. Murphy, if he had intended to perform
28 an unauthorized Pap smear, would have moved to this exam room which he would have known
29 would significantly increase his chances of being caught.

30
31 While it is true that Patient A found gynecological equipment in an exam room, several
32 witnesses testified that they were not surprised that such equipment was there. The base was
33 previously used by the Air Force Reserves and many of the rooms contained equipment that may
34 have been used at that time. TSgt. Albright testified that the equipment looked as though it had
35 not been used in some time. There is also no direct evidence that Dr. Murphy knew that the
36 equipment was in that room. Nor is there any direct evidence that the equipment was in the
37 room in November 2011, two years before it was located by Patient A and TSgt. Albright.

38
39 Finally, Patient A gave contradictory accounts of when she told her friend, SSgt. Jaeger,
40 about the Pap smear. In a December 8, 2013 written report to Col. Kjos, Patient A wrote that she
41 told SSgt. Jaeger about the exam shortly afterwards. When SSgt. Jaeger told her that she did not
42 think that Pap smears were performed on base, Patient A wrote that she told her "yes they do,
43 Maj. Murphy just did one." Emphasis added. Patient A later testified that she told SSgt. Jaeger
44 about the Pap smear a few months afterward, not immediately. SSgt. Jaeger gave yet another
45 account, placing the conversation four or five months prior to February 2014, near in time when
46 Patient A disclosed the information to TSgt. Albright. SSgt. Jaeger's testimony regarding the

1 alleged conversation was more detailed, including a description of the location and circumstance
2 of the exchange. If SSgt. Jaeger's time estimate is accurate, then the conversation would have
3 taken place in September or October of 2013, two to three months prior to Patient A's
4 conversation with TSgt. Albright. Both SSgt. Jaeger and Patient A assert that SSgt. Jaeger told
5 Patient A that she did not believe that Pap smears were performed on base. To the extent that
6 SSgt. Jaeger's timing is accurate, it casts additional doubt on the reliability of Patient A's
7 assertion that she was surprised when TSgt. Albright confirmed that Pap smears were not
8 performed on base.

9
10 In short, the record contains evidence that supports both Patient A's allegation and Dr.
11 Murphy's denial. However, given the unreliability of some of the evidence, and the long passage
12 of time between the alleged incident and the report, the record simply does not demonstrate by a
13 preponderance of the evidence that Dr. Murphy performed an unauthorized Pap smear as alleged
14 in the Board's notice.

15
16 In finding that Patient A's allegation was substantiated, the OCI placed great weight on
17 Patient A's lack of any apparent motive to fabricate the incident. Oregon law recognizes
18 consideration of a witness's motive in determining credibility. ORS 44.370 provides, in part:

19
20 A witness is presumed to speak the truth. This presumption, however, may be
21 overcome by the manner in which the witness testifies, by the character of the
22 testimony of the witness, or by evidence affecting the character or motives of the
23 witness, or by contradictory evidence[.]

24
25 Emphasis added. In this case, Dr. Murphy has a clear motive to deny that he performed an
26 unauthorized Pap smear; an allegation that has led to disciplinary actions in the military and now
27 threatens the loss of his medical license. In contrast, the record does not contain any evidence
28 that Patient A had any motive to fabricate her allegation. Nevertheless, the absence of evidence
29 of such a motive is insufficient to overcome the unresolved conflicts in the evidence offered in
30 support of the allegation.

31
32 The Board asserts that Patient A's conduct after TSgt. Albright informed her that Pap
33 smears were not performed on base lends additional weight to her allegations. It is true that
34 several witnesses testified that Patient A had a strong emotional reaction to learning that the Pap
35 smear was unauthorized. However, Dr. Murphy's behavior after the allegation was made is also
36 consistent with his denial. He has consistently, aggressively, and often inappropriately, denied
37 Patient A's allegation. He claims not to remember what happened on November 19, 2011 and
38 thus offered no counter-explanation for what occurred that day. This is consistent with his
39 assertion that nothing noteworthy occurred during the PHA. To the extent that the behavior of
40 Patient A and Dr. Murphy bears on the reliability of Patient A's accusation, the evidence of such
41 behavior does not provide a basis for concluding that Dr. Murphy performed an unauthorized
42 Pap smear.

43
44 Col. Wedan testified that, during a conversation in January 2014, Dr. Murphy told him
45 something to the effect that he could not believe that the military would "hang a guy out to dry
46 for conducting a procedure that he didn't know he wasn't supposed to do." However, other than
this single statement, Dr. Murphy has consistently denied performing a Pap smear. He has never

1 asserted that he performed the procedure under the mistaken belief that it was authorized.
2 Despite the implicit admission entailed in Dr. Murphy's alleged statement, there is no indication
3 in the record that Col. Wedan followed up on this question or asked for any clarification. Col.
4 Wedan did not appear to recall the exact words that Dr. Murphy used, or the context in which
5 the statement was made. Without that context, and given the absence of any similar statements,
6 it is not appropriate to rely on that single statement to infer that Dr. Murphy was admitting to
7 having performed the Pap smear.

8
9 Given the nature of this allegation, and the long passage of time between the November
10 2011 PHA and the December 2013 report, it is impossible to establish what occurred with any
11 reasonable degree of reliability. The evaluation of evidence in this record should not be
12 interpreted as a definitive finding of what occurred. Nor should it be interpreted as casting
13 aspersions on Patient A's credibility. There are only two witnesses to what occurred during the
14 PHA in November 2011, and their testimony is in direct conflict. Dr. Murphy has consistently
15 denied having performed a Pap smear on Patient A. The Board has simply not provided
16 sufficient evidence to overcome that denial.

17 2. Providing false, misleading, and deceptive information to the Board

18
19 The evidence is undisputed that Dr. Murphy submitted a renewal application to the Board
20 that listed his highest level of education was an associate's degree. It is also undisputed that in
21 that same application Dr. Murphy indicated that he could communicate in the Quechua language
22 adequately for clinical purposes. Both statements were false.

23
24 In an August 27, 2015 email to the Board, Dr. Murphy, who holds an MD, did not
25 contend that he listed associate degree as an error or an oversight. Rather, he contended that he
26 was referring to an associate degree in nursing that he earned prior to becoming a physician. It is
27 unclear in the record precisely why Dr. Murphy chose to deliberately omit his highest
28 educational degree, and the one most clearly relevant to his renewal application. Dr. Murphy, as
29 a licensed physician, was likely aware that the Board already knew of his educational
30 background from his previous applications.

31
32 The evidence also established that, at the time he answered the question, Dr. Murphy was
33 not fluent in Quechua. Nor could he communicate in that language adequately for clinical
34 purposes. His sole education in the language, according to Dr. Murphy, came from listening to a
35 computer language program during a flight to Ecuador and from interacting with local residents
36 of Ecuador. He admitted that he was not fluent in the language; however, he testified that his
37 Quechua language skills, when he was in Ecuador, were sufficient to allow him to say things like
38 "open your mouth" and "take a deep breath." Dr. Murphy believed that this was sufficient for
39 his purposes as an anesthesiologist.

40
41 Despite his belief, however, Dr. Murphy's response was, at the very least, misleading.
42 The renewal application asked for languages in which he could communicate for clinical
43 purposes. It also indicated that the Board might provide information about language available to
44 those seeking providers with specific language competencies. Dr. Murphy's rudimentary
45 Quechua language skills, picked up from listening to a computer language program on a single
46 flight and augmented by sporadic communication with local residents, could not reasonably be

///

1 considered sufficient for clinical purposes. Nor would it be reasonable for the Board to represent
2 to others that Dr. Murphy was a provider with a "specific language competenc[y]" in Quechua.

3
4 The Board alleged that Dr. Murphy's false answers violated ORS 677.190(8)
5 which allows the Board to discipline a licensee based upon:

6 Fraud or misrepresentation in applying for or procuring a license to practice in
7 this state, or in connection with applying for or procuring registration.

8
9 The evidence established that Dr. Murphy's answers with regard to his education and his
10 language proficiency were false, misleading, and deceptive. The Board has therefore
11 demonstrated that Dr. Murphy violated ORS 677.190(8).

12
13 In addition, however, the Board alleged that Dr. Murphy's conduct violated OAR
14 847-008-0058(1) which provides:

15 Omissions or false, misleading or deceptive statements or information on any
16 Board application, affidavit or registration is a violation of ORS 677.190(8) and is
17 grounds for a \$195 fine for the first violation, a \$250 fine for the second violation,
18 and a \$500 fine for the third or subsequent violation. The applicant or licensee
19 may be subject to further disciplinary action by the Board.

20
21 However, the Board may not rely upon OAR 847-008-0058 in imposing discipline in this
22 case because the rule was first adopted effective October 8, 2014, nearly one year after Dr.
23 Murphy submitted the application.

24
25 The Board also asserted that Dr. Murphy's conduct violated ORS 677.190(1)(a) and (17).
26 ORS 677.190(1)(a) prohibits "Unprofessional or dishonorable conduct." ORS 677.190(17)
27 prohibits "Willfully violating any provision of this chapter or any rule adopted by the board,
28 board order, or failing to comply with a board request pursuant to ORS 677.320." While the
29 Board demonstrated that information Dr. Murphy provided on the renewal application was false
30 and misleading, the Board did not specifically articulate how those answers constituted
31 unprofessional or dishonorable conduct. Nor did the Board provide evidence that Dr. Murphy's
32 misrepresentations were willful violations.

33
34 Nevertheless, the record demonstrated that Dr. Murphy violated ORS 677.190(8) by
35 providing false information on his October 29, 2013 renewal application. The Board may
36 therefore impose discipline on that basis.

37
38 3. Filing a False or Misleading Declaration in Multnomah County Circuit Court.

39 In June of 2014, Dr. Murphy filed a lawsuit against Patient A alleging defamation.
40 Patient A's attorney subsequently filed a motion seeking to have the lawsuit dismissed. On
41 October 3, 2014, in a response to the motion, Dr. Murphy filed a declaration in which he
42 asserted, among other things:

43 Plaintiff [Dr. Murphy] can show that an extensive, ten month long investigation
44 conducted by the Washington DC based ORANG Office of Complex
45
46

///

1 Investigations found *no* evidence to support Defendant's [Patient A's] claims and
2 stated that Defendant's claims were completely unsubstantiated.

3
4 (Ex. A18 at 4.)
5

6 That statement was false. In fact, the OCI concluded that the allegation was
7 "substantiated based upon a preponderance of the evidence." (Ex. A9 at 3) Dr. Murphy does not
8 dispute the language of the report, but he contends that he used the word "unsubstantiated" in a
9 different sense than was used in the report. Dr. Murphy asserts that what he was trying to
10 convey to the court was that the investigation found no evidence to "substantiate" the request. In
11 this regard, he appears to assert that he meant to use the word "substantiate" as synonymous with
12 "corroborate." Given what he was trying to convey, Dr. Murphy asserts that his statement was
13 not false nor was it an attempt to mislead the court.
14

15 The difficulty with that position is that Dr. Murphy consciously chose to use the word
16 "unsubstantiated," a word that directly contradicted the actual word used in the report in bold
17 type. Dr. Murphy contends that he did not actually read the report prior to this filing, but instead
18 relied on his attorney's characterization of the report. However, in a September 2014 email to
19 Dr. Murphy disclosing the results of the report, Dr. Murphy's attorney wrote that OCI found the
20 allegation to be "substantiated." Dr. Murphy was aware of that conclusion, and actually reported
21 to the Board's investigator on September 8, 2014 that OCI had concluded that the allegation was
22 substantiated. Given the use of the term "substantiated" in the OCI report, by Dr. Murphy's
23 attorney, and by Dr. Murphy himself, it is simply implausible that Dr. Murphy believed that the
24 term "unsubstantiated" had a different meaning or that it was at all consistent with the actual
25 findings of the report.
26

27 It is true that Dr. Murphy later informed the court that his earlier statement was false,
28 writing that he had "unintentionally stated that the OCI did not 'substantiate' the defendant's
29 allegation of sexual assault when in fact the report did come to that conclusion." Ex. A21 at 3.
30 However, he did not make that correction until after he was informed that the National Guard
31 had instituted discharge proceedings against him based, in part, on his false statement to the
32 court.
33

34 Even if he did mean to use the term "substantiated" in a more limited sense, however, the
35 unambiguous impression left by his court filing is that OCI found the allegation to be baseless
36 and that he had been cleared by investigators after "an extensive, ten month long, investigation."
37 (Ex. A18 at 4.) Indeed, Dr. Murphy went further than to state that the allegations were, in fact,
38 unsubstantiated in a narrow sense. He actually wrote that OCI "stated" that the allegations were
39 unsubstantiated. However, the report stated precisely the opposite. Dr. Murphy's statement to
40 the court was false and misleading.
41

42 The Board asserts that Dr. Murphy's misrepresentation to the court constituted
43 unprofessional or dishonorable conduct in violation of ORS 677.190(1)(a). ORS 677.180(4)(a)
44 defines "unprofessional or dishonorable conduct," in part as "[a]ny conduct or practice contrary
45 to recognized standards of ethics of the medical * * * profession." In its Second Amended
46 ///

1 Notice, the Board asserted that Dr. Murphy's conduct violated (among other standards) AMA
2 ethics opinion 9.07 which provides, in pertinent part:

3
4 In various legal and administrative proceedings, medical evidence is critical. As
5 citizens and as professionals with specialized knowledge and experience,
6 physicians have an obligation to assist in the administration of justice.

7
8 * * * * *

9
10 Physicians who serve as fact witnesses must deliver honest testimony. This
11 requires that they engage in continuous self-examination to ensure that their
12 testimony represents the facts of the case. * * *

13
14 * * * * *

15
16 Organized Medicine, including state and specialty societies, and medical licensing
17 boards can help maintain high standards for medical witnesses by assessing the
18 claims of false or misleading testimony and issuing disciplinary sanctions as
19 appropriate.

20
21 Exhibit A33 at 3.

22
23 Dr. Murphy submitted a document to the court that included a false and misleading
24 statement concerning the OCI report. Dr. Murphy signed that document under penalty of perjury
25 and acknowledged to the court that the statement was intended for use as evidence. His conduct
26 was contrary to the standards of the medical profession as demonstrated by AMA ethics opinion
27 9.07. The Board has therefore established that his conduct constituted unprofessional and
28 dishonorable conduct in violation of ORS 677.190(1)(a).

29
30 4. Disclosing Private Health Information and Confidential Medical Records

31
32 The Board alleged that Dr. Murphy disclosed private health information and confidential
33 medical records pertaining to Patient A, to the media and to other individuals, without Patient
34 A's consent. Dr. Murphy does not deny that he disclosed Patient A's medical information,
35 including disclosing it to an Oregonian reporter. Rather, he contends that the information was
36 not confidential because it became a matter of public record after the OCI report (which included
37 Patient A's medical records) was filed with the Multnomah County Circuit Court.

38
39 However, Dr. Murphy had no reasonable basis to believe that the full report, including
40 Patient A's medical information, was a matter of public record. Patient A's military attorney,
41 Major Adams, provided an 18 page summary of the OCI report to the court in order to counter
42 Dr. Murphy's false assertion that OCI had concluded Patient A's allegation was unsubstantiated.
43 That summary did not include Patient A's medical records. In response, Dr. Murphy filed the
44 entire report – which included summaries of witness interviews, Patient A's National Guard
45 medical records, and significantly more information about Patient A's allegations. Both reports
46 were reviewed by the court in camera and were never made available to the public. Had Dr.

1 Murphy inquired with the court he would have learned that neither the OCI report summary, nor
2 the full report, were matters of public record.
3

4 Dr. Murphy's disclosures went well beyond releasing a report to the court. He disclosed
5 information about Patient A's medical records and purported use of medication to multiple
6 parties (including an Oregonian reporter) in the form of a "settlement offer." In that document,
7 Dr. Murphy alleges that Patient A concealed mental-health issues from the military, lists multiple
8 prescription medications taken by Patient A, discloses Patient A's self-reported history of Pap
9 smears, and discloses Patient A's prior pregnancy. Not only did he send the settlement offer to
10 multiple different people, but he also urged them to forward it to "any interested party." Ex. A44
11 at 27.
12

13 The Board alleged that Dr. Murphy's conduct constituted a willful or negligent
14 divulgence of a professional secret without the written consent of the patient, in violation of ORS
15 677.190(5); an unpermitted use and disclosure of protected health information in violation of
16 HIPPA (Health Insurance Portability and Accountability Act) privacy regulations, 45 CFR §
17 164.502; and revealing a patient's confidential communications or information without the
18 consent of the patient, in violation of the American Medical Association (AMA) Ethical Opinion
19 10.01. The Board also determined the conduct was contrary to recognized standards of ethics
20 and conduct that does or might constitute a danger to the patient in violation of ORS
21 677.190(1)(a), as defined by ORS 677.188(4)(a).
22

23 A physician's obligation to maintain the confidentiality of a patient's medical
24 information is well established in law. ORS 677.190(5) prohibits a licensee from "Willfully or
25 negligently divulging a professional secret without the written consent of the patient." In
26 *Humphers v. First Interstate Bank*, 298 Or 706, 720-721, (1985) the Oregon Supreme Court
27 noted "A physician's duty to keep medical and related information about a patient in confidence
28 is beyond question. It is imposed by statute. ORS 677.190(5) provides for disqualifying or
29 otherwise disciplining a physician for 'willfully or negligently divulging a professional secret.' *
30 * * The actionable wrong is the breach of duty in a confidential relationship[.]"
31

32 That obligation not to disclose a patient's confidential information is also a recognized
33 ethical principal as noted in AMA Opinion 5.05. The opinion states, in part, that a physician
34 "should not reveal confidential information without the express consent of the patient, subject to
35 certain exceptions which are justified because of overriding considerations." Ex. A39. Such
36 overriding considerations include the need to protect others when a patient threatens to harm
37 someone, or when disclosure is required by law or by a court order. Even in those situations,
38 AMA Opinion 5.05 states that physicians should "disclose the minimal information required by
39 law, advocate for the protection of confidential information and, if appropriate, seek a change in
40 the law." (*Id.*)
41

42 The obligation to protect confidential information is also included in AMA Opinion 5.04
43 is titled "Communications Media: Standards of Professional Responsibility." (Ex. A38. That
44 opinion specifically addresses disclosure of patient information to the media, noting:
45
46

///

///

1 Physicians are ethically and legally required to protect the personal privacy and
2 other legal rights of patients. When information concerning a specific patient is
3 requested by the media, the physician must obtain the consent of the patient or an
4 authorized representative before releasing such information. The physician may
5 release only the authorized information or that which is public knowledge. The
6 patient-physician relationship and its confidential nature must be maintained.

7
8 (*Id.*)
9

10 Dr. Murphy argues that he did not violate his ethical duties in releasing Patient A's
11 confidential information. First, he asserts that he had never established a physician-patient
12 relationship because, he claims, "[b]y definition a physician patient relationship is not
13 established by a physician performing screening examination." Murphy Closing Argument at 5.
14 However, Dr. Murphy cites no authority for that proposition. The evidence established that the
15 military required Patient A, and other members of the National Guard, to undergo regular
16 preventative health examinations. The record also established that the military provided medical
17 doctors (including Dr. Murphy) to conduct such examinations. In that context, Dr. Murphy was
18 performing a military *medical* examination that Patient A was required to undergo. In that
19 context, Patient A was clearly relying on Dr. Murphy's medical expertise and his status as a
20 physician.

21 AMA Opinion 10.0.15 provides that "A patient-physician relationship exists when a
22 physician serves a patient's *medical needs*, generally by mutual consent between physician and
23 patient (or surrogate)." Emphasis added. Although Patient A may not have been seeking
24 medical *treatment*, her need to undergo a health examination by a physician was sufficient to
25 constitute a "medical need" as used in AMA Opinion 10.0.15. The record therefore established
26 that Dr. Murphy had a physician-patient relationship with Patient A.

27
28 Dr. Murphy next argued that he did not disclose confidential health information until it
29 became part of the public record, and only with the approval of Patient A's attorney. This
30 contention is not supported by the record. While it is true that Patient A's attorney provided the
31 Multnomah County Circuit Court a summary of the OCI report, that summary did not include
32 Patient A's confidential information. Second, although it is true that Patient A's attorney did not
33 object to Dr. Murphy providing the full report to the court, he did not consent to the confidential
34 health information being disseminated further. Third, the information provided to the court,
35 contrary to Dr. Murphy's belief, was *not* part of the public record. The OCI reports were
36 reviewed by the judge in camera and were never made available to the general public. Dr.
37 Murphy appears to have assumed that the information was publicly available, but took no steps
38 to confirm that assumption. Dr. Murphy was apparently sufficiently concerned about what he
39 thought was the public disclosure of the OCI summary report that he considered requesting that
40 the record be sealed. Notably, however, this was not out of any concern for Patient A's
41 confidentiality, but out of a concern for his own professional reputation.

42
43 In addition, Dr. Murphy argued that he had "the right to defend himself * * * against
44 legal attacks" and that he had "no alternative" other than to disclose the entire report, both to the
45 court and to the public, to "point out all the latent inconsistencies to a public that was now aware
46 of the OCI's conclusions." Murphy Closing Argument at 5. However, it is important to note

1 that Dr. Murphy was the plaintiff in the lawsuit and was therefore not “defending himself”
2 against a legal attack. Secondly, Patient A’s attorney filed the summary report to demonstrate
3 that Dr. Murphy had falsely asserted that OCI had “stated” that Patient A’s allegations were
4 “unsubstantiated.” That use of the summary report did not constitute a “legal attack.”
5

6 But more significantly, Dr. Murphy’s belief that he needed to disclose the full report in
7 order to point out inconsistencies to the *public* is clearly based on his assumption that the OCI
8 summary report was part of the public record.¹¹ As noted above, that assumption was false.
9 Given the well-established ethical obligation not to disclose patient information, Dr. Murphy
10 should have sought clarification from the court before proceeding on the false assumption that
11 the OCI reports were publicly available. Had he done so, he would have discovered that his
12 assumption was incorrect.
13

14 The Board also asserted that Dr. Murphy’s disclosure violated HIPAA privacy
15 regulations. However, the record does not establish that Dr. Murphy’s conduct in this case fell
16 under those regulations. It is true that HIPAA generally prohibits the disclosure of patient
17 information by “covered entities” except under specifically enumerated circumstances. 45 CFR
18 §164.502(a)(1). An individual physician can be a “covered entity,” but only when the physician
19 “transmits any health information in electronic form in connection with a transaction covered [by
20 HIPAA regulations.]” Such transactions generally include “the transmission of information
21 between two parties to carry out financial or administrative activities related to health care.” 45
22 CFR §160.103. While Dr. Murphy did disclose Patient A’s confidential information through
23 electronic means (email), the record does not include evidence that he transmitted such electronic
24 information “to carry out financial or administrative activities related to health care.” The
25 evidence is therefore insufficient to establish that Dr. Murphy’s disclosures violated HIPAA.
26

27 Nevertheless, Dr. Murphy’s disclosures violated ORS 677.190(5). In addition, such
28 disclosures were contrary to well-established ethical standards of the medical profession and thus
29 constituted unprofessional and dishonorable conduct in violation of ORS 677.190(1)(a).
30

31 5. Using a False Name when Contacting Tuality Hospital 32

33 ORS 677.080(3) provides that no person shall “Impersonate anyone to whom a license
34 has been granted by the Oregon Medical Board.” Similarly, ORS 677.190(10) prohibits a
35 licensee from “Impersonating another licensee licensed under this chapter or permitting or
36 allowing any person to use the license.”
37

38 The evidence established that Dr. Murphy called Tuality Hospital in February of 2015
39 and asked to speak with Kathryn Gilbert, a registered nurse with whom he used to work and who
40 he knew socially.
41

42 However, while Dr. Murphy did not use his own name, the evidence did not establish that
43 he impersonated any specific licensee. In this case, neither Mr. Sparks nor the operator who took
44

45 ¹¹ It is also important to note that Dr. Murphy first contacted a reporter to discuss Patient A’s allegations in June or
46 July 2014, several months before Mr. Adams provided the OCI summary report to the court. While the record does
not indicate precisely what information Dr. Murphy disclosed to the reporter, it is clear that he was attempting to
bring the matter to the public’s attention well before the OCI report was provided to the court.

1 the call recognized the name used by the caller. Indeed, Mr. Sparks could not even recall what
2 name was used, other than to say that it sounded like "Hansen," or "Hansom" or something
3 similar. Ms. Gilbert likewise did not recognize the name, but thought it could be a physician she
4 knew named Hamdon. ORS 677.080(3), by its terms, prohibits impersonating "anyone" licensed
5 by the Board. Similarly, ORS 677.190(10) prohibits impersonation of "another licensee."
6 Neither statute expressly prohibits using a fictitious name.

7
8 The Board provided evidence that there are a number of physicians licensed by the Board
9 with the last name of Hanson. However, there is no evidence that Dr. Murphy intentionally tried
10 to persuade anyone that he was one of those specific individuals. At most, the record established
11 that Dr. Murphy used a false name – not referring to any specific licensed person – in order to
12 speak with Ms. Gilbert. While such actions are undoubtedly deceptive, they do not violate ORS
13 677.080(3) or ORS 677.190(10).

14 15 6. Failure to Provide Records Requested by the Board

16
17 By letter dated May 12, 2015, Board investigator Terry Lewis requested that Dr. Murphy
18 provide a complete copy of the medical records for his treatment and care of two patients,
19 including all records of prescriptions he wrote for the patients in 2013-2014. The letter asked for
20 a response by May 22, 2015. Dr. Murphy never provided the records.

21
22 Dr. Murphy testified that he brought the requested records with him to a meeting of the
23 Board's Investigative Committee on June 4, 2015. However, he did not provide them either to
24 the Committee or to Mr. Lewis. After the meeting, Dr. Murphy met with Mr. Lewis and
25 provided him an affidavit from his military attorney. However, Mr. Lewis did not specifically
26 ask for the previously requested medical records and Dr. Murphy did not provide them.

27
28 ORS 670.190(17) prohibits "failing to comply with a board request pursuant to ORS
29 677.320." ORS 677.320(2)(e) allows Board investigators to "compel the production of books,
30 papers, accounts, documents and testimony pertaining to the matters under investigation." OAR
31 847-002-0024(1) provides:

32
33 Licensees and applicants must comply with a Board investigation, including
34 responding to inquiries and providing requested materials within the time allowed
35 and complying with a subpoena. Failure to comply with a Board investigation
36 violates ORS 677.190(17) and is grounds for disciplinary action.

37
38 Mr. Lewis, as a Board investigator, had the authority to compel Dr. Murphy to provide
39 the requested medical records. Dr. Murphy failed to provide them. Therefore, the record
40 establishes that Dr. Murphy violated ORS 670.190(17).

41 42 7. Asking Others to Not Cooperate with the Board's Investigation

43
44 The Board alleged that Dr. Murphy attempted to impede its investigation by asking
45 individuals not to cooperate with the Board. The Board asserts that this violated ORS
46 677.190(1)(a) as defined by ORS 677.188(4)(a). The evidence supports that allegation.

1
2 On April 11, 2015, Dr. Murphy sent an email to three members of ORANG leadership
3 and wrote:

4
5 I formally request that if any of my patients (any patients) are contacted by the
6 investigators from the Oregon Medical Board that they do NOT cooperate. [T]he
7 OMB has no investigative authority outside of license holders. If there is a
8 question regarding patient care, the investigator can contact me. This is a
9 significant infringement on patient confidentiality. This of course applies to any
10 and all medical records as well.

11
12 Ex. A25; emphasis in original.

13
14 As an initial matter, Dr. Murphy's statement that the Board has "no investigative
15 authority outside of license holders" is incorrect. ORS 677.320(1) allows the Board to
16 investigate "any alleged violation of this chapter." ORS 677.080¹² prohibits "any person" from
17 engaging in certain proscribed acts, including the unlicensed practice of medicine. It therefore
18 follows, as general principal, that the Board does have authority under ORS 677.320(1) to
19 investigate non-license holders.

20
21 Furthermore, the Board has specific statutory authority to contact witnesses. ORS
22 677.320(2) provides:

23
24 In the conduct of investigations, the board or its designated representative may:

- 25
26 (a) Take evidence;
27 (b) Take the depositions of witnesses, including the person charged;
28 (c) Compel the appearance of witnesses, including the person charged;
29 (d) Require answers to interrogatories; and
30 (e) Compel the production of books, papers, accounts, documents and
31 testimony pertaining to the matter under investigation.

32
33 ¹² ORS 677.080 prohibits provides:

34
35 No person shall:

- 36
37 (1) Knowingly make any false statement or representation on a matter, or willfully conceal any
38 fact material to the right of the person to practice medicine or to obtain a license under this
39 chapter.
40
41 (2) Sell or fraudulently obtain or furnish any medical and surgical diploma, license, record or
42 registration, or aid or abet in the same.
43
44 (3) Impersonate anyone to whom a license has been granted by the Oregon Medical Board.
45
46 (4) Except as provided in ORS 677.060, practice medicine in this state without a license required
by this chapter.

1 Dr. Murphy's email, "formally" asking that witnesses not cooperate with the Board was a
2 clear attempt to impede the Board's investigation. The Board asserts that this constituted
3 unprofessional or dishonorable conduct in violation of ORS 677.190(1)(a) as defined by ORS
4 677.188(4)(a).

5
6 As noted by Dr. Egner, and supported by *Medical Professionalism in the New*
7 *Millennium: A Physician's Charter*, and the article by Dr. Zwick, "Toward a Normative
8 Definition of Medical Professionalism," the ethical obligations of physicians include a standard
9 of professional conduct owed not just to patients, but to society as a whole. Logically entailed in
10 that obligation, is a duty to cooperate with the Board in its statutory obligation to regulate the
11 practice of medicine, including the Board's duty to investigate allegations of unprofessional
12 conduct. See ORS 677.015 and 677.320. That important public duty is seriously undermined
13 when a physician attempts to prevent or discourage others from cooperating with a Board
14 investigation into the physician's conduct. By formally asking patients not to cooperate, Dr.
15 Murphy attempted to undermine the Board's investigation and thus engaged in unprofessional
16 and dishonorable conduct in violation of ORS 677.190(1)(a).

17 18 8. Pattern of Belligerent and Obstructive Behavior

19
20 The Board alleged that Dr. Murphy engaged in a pattern of belligerent and obstructive
21 behavior during the course of the Board's investigation and that such behavior constituted
22 unprofessional or dishonorable conduct in violation of ORS 677.190(1)(a) as defined by ORS
23 677.188(4)(a). The evidence supports that allegation.

24
25 Dr. Murphy self-reported Patient A's allegations to the Board. His initial contacts with
26 the Board were professional and appropriate. However, over the course of the investigation his
27 communications became increasingly hostile, belligerent, and offensive. He refused to cooperate
28 with the Board's investigation and "formally" encouraged witnesses to do the same

29
30 He stated that Patient A was going to jail, and ended the email with "the great and
31 powerful Oz has spoken." *Id.*

32
33 His emails to members of the military, including former colleagues and those involved in
34 investigating Patient A's allegations, were hostile, belligerent, and unprofessional, including his
35 suggestion that a military investigator "be shot." He accused female officers of acting as
36 politically popular "female activists." He implied that Colonel Kjos was using the allegation as a
37 way to advance her career. His communication with Mr. Shapiro was often hostile and
38 unprofessional. Over the course of the litigation (which he initiated) and the various
39 investigations, he either filed or threatened to file numerous complaints with the state bar, with
40 the Inspector General's office, and with Congress.

41
42 The Board asserts that this constituted unprofessional or dishonorable conduct in
43 violation of ORS 677.190(1)(a) as defined by ORS 677.188(4)(a). In support of that assertion,
44 the Board provided testimony from Barry Egner, MD, a board certified internist and the medical
45 director for both the Foundation for Medical Excellence and its subdivision, the Northwest
46 Center for Physician-Patient Communication, and the author of numerous journal articles on the

1 topics of medical professionalism and physician-patient communication. Dr. Egener identified
2 three broad domains of medical professionalism, focused on a physician's relationship with
3 patients, with colleagues, and with society. In Dr. Egener's view, Dr. Murphy's hostile,
4 demeaning, and belittling behavior fell far short of his obligations as a professional.
5

6 In addition, both the Board and Dr. Egener placed great emphasis on concepts of
7 professionalism outlined in *Medical Professionalism in the New Millennium: A Physician's*
8 *Charter* (the Charter), published by the American Board of Internal Medicine in 2004. Like Dr.
9 Egener, the Charter emphasizes the societal obligations of a physician as a professional,
10 including the obligation to maintain standards of competence and integrity, and to promote
11 public trust in physicians. Notably, the Charter emphasizes the physician's duty to:

12
13 [W]ork collaboratively to maximize patient care, be respectful of one another, and
14 participate in the process of self regulation, including remediation and discipline
15 of members who have failed to meet professional standards. * * * These
16 obligations include engaging in internal assessment and accepting external
17 scrutiny of all aspects of their professional performance.
18

19 Ex. A49 at 2.
20

21 The Board also relied on the professional obligations set forth in the article "Toward a
22 Normative Definition of Medical Professionalism," published in the journal *Academic Medicine*
23 in June 2000, by Herbert M. Zwick, MD. The obligations identified in the article include a
24 responsibility to adhere to high ethical and moral standards, to act with honesty and integrity, to
25 exercise accountability for themselves, and to reflect upon their actions and decisions.
26

27 In addition, the Board relied on AMA Opinion 8.02 which emphasizes the professional
28 obligations of physicians outside of the clinical setting. The opinion notes that physicians must
29 be held to standards of professionalism in order to earn the trust of both patients and the general
30 public.
31

32 Dr. Murphy's conduct fell well short of his obligations as a professional. He openly
33 mocked and belittled his colleagues, Patient A, and numerous attorneys.¹³ He referred to Patient
34 A, in an email to multiple recipients (including a reporter), as "mentally deranged." He
35 threatened numerous people with complaints to various regulatory bodies. In short, his conduct
36 was hostile, belligerent and not consistent with his obligations as a physician and a professional.
37 Indeed, his conduct violated his professional obligations in the three domains identified by Dr.
38 Egener: he belittled a patient, he mocked his colleagues, and he made public comments
39 (including to a reporter) that detracted from public trust in the medical community. The
40 evidence therefore established that Dr. Murphy engaged in a pattern of belligerent and
41 obstructive behavior during the course of the Board's investigation and that his behavior
42

43
44 ¹³ The Board has removed discussion of Dr. Murphy's rude and insulting comments made to and about Board
45 personnel, as well as his non-violent threats against the Board and personnel. Although Dr. Murphy failed to
46 demonstrate civility or respect in his dealings with and comments about Board personnel, Dr. Murphy was
exercising his 1st Amendment right to speak out against the government. While the Board finds Dr. Murphy's
manner of exercising that right regrettable, it is not a basis for professional license discipline.

1 constituted unprofessional or dishonorable conduct in violation of ORS 677.190(1)(a) as defined
2 by ORS 677.188(4)(a).

3
4 9. Sanction

5
6 ORS 677.205 authorizes the Board to sanction a licensee for violations of the Medical
7 Practices Act as follows:

8
9 (1) The Oregon Medical Board may discipline as provided in this section
10 any person licensed, registered or certified under this chapter who has:

11
12 * * * * *

13
14 (b) Been found to be in violation of one or more of the grounds for
15 disciplinary action of a licensee as set forth in this chapter;

16
17 * * * * *

18
19 (2) In disciplining a licensee as authorized by subsection (1) of this section,
20 the board may use any or all of the following methods:

21
22 (a) Suspend judgment.

23
24 (b) Place the licensee on probation.

25
26 (c) Suspend the license.

27
28 (d) Revoke the license.

29
30 (e) Place limitations on the license.

31
32 (f) Take such other disciplinary action as the board in its discretion finds
33 proper, including assessment of the costs of the disciplinary proceedings as
34 a civil penalty or assessment of a civil penalty not to exceed \$10,000, or
35 both.

36
37 The Board has proposed revocation of Dr. Murphy's medical license, assessment of a
38 \$10,000 civil penalty, and assessment of the costs of the proceedings.

39
40 Recommending revocation of a physician's medical license is a serious matter. Here, the
41 determination of whether revocation is appropriate comes down to whether the Board can meet
42 its statutory obligations to the public while still allowing Dr. Murphy to remain licensed.

43
44 The Board proposed revocation of Dr. Murphy's license on multiple grounds; revocation
45 of Dr. Murphy's license would be appropriate for any one of a number of those grounds,
46 including inappropriately disclosing confidential patient information, failing to provide

1 documents properly requested by the Board, asking witnesses not to cooperate with the Board's
2 investigation, and engaging in a course of belligerent, unprofessional, and dishonorable
3 conduct¹⁴. That he committed so many of them, certainly warrants revocation of Dr. Murphy's
4 license.

5
6 By his behavior, Dr. Murphy has not demonstrated the sound judgment and professional
7 responsibility required of physicians. Notably, he treated his ethical obligation to safeguard a
8 patient's confidential information in a cavalier and unprofessional manner. In the name of
9 protecting *himself* in the eyes of the public, Dr. Murphy used Patient A's medical records to
10 smear her and to portray her as "mentally deranged." He filed a defamation action against the
11 patient before the military had even concluded its investigation. After the military issued the
12 results of the investigation, Dr. Murphy intentionally misled the court as to the results of that
13 investigation in an ultimately unsuccessful attempt to keep the case from being dismissed.

14
15 His communication with and about his colleagues has been unnecessarily vituperative
16 and unprofessional. If he were ever to practice medicine in the future, it would likely be difficult
17 for him to reestablish professional relationships with colleagues based on mutual respect and
18 trust.

19
20 He urged others not to cooperate with the Board and he failed to provide documents that
21 the Board requested during the course of its investigation. While going through an investigation
22 is undoubtedly a stressful ordeal for a physician, the Board must be able to rely on the
23 cooperation and professionalism of licensees in order for the Board to perform its statutory
24 obligation to regulate the medical profession.

25
26 The Board has established sufficient grounds for revocation of Dr. Murphy's license, and
27 that the sanction is appropriate under the circumstances. Moreover, it is within the scope of the
28 Board's authority to assess a \$10,000 civil penalty and the costs of the proceeding against Dr.
29 Murphy. In light of the number of serious violations, and Dr. Murphy's repeated instances of
30 unprofessional and belligerent actions, those penalties are also appropriate.

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46 ¹⁴ The Board removed the ALJ's editorial comment regarding which of the alleged violations he believed to be most
notable. Any of the serious grounds for discipline found in this case would make revocation appropriate.

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ORDER


After considering all of the above, the Oregon Medical Board adopts the findings of fact and conclusions of law in the Proposed Order by ALJ Mann, as reflected in this document, and issues the following order:

1. The Oregon medical license of Licensee James Michael Murphy, MD is revoked.
2. Licensee is assessed a civil penalty of \$10,000, which is due and payable as outlined in ORS 183.745(2).
3. Licensee is assessed the cost of these proceedings. Costs are due within 60 days of the issuance of the Bill of Costs by the Board.

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DATED this 14 day of March, 2018.

OREGON MEDICAL BOARD
State of Oregon


K. DEAN GUBLER, DO
Board Chair

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APPEAL

If you wish to appeal the final order, you must file a petition for review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* ORS 183.480 *et seq.*

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CERTIFICATE OF MAILING

On March 2, 2018, I mailed the foregoing Final Order regarding James Michael Murphy, MD, to the following parties:

By: First Class Certified/Return Receipt U.S. Mail
Certified Mail Receipt # 7017 2680 0000 6195 6622

James Michael Murphy, MD
PO Box 55116
Portland, OR 97238

By: UPS GROUND

Business Activities Section
Department of Justice
1162 Court St NE
Salem OR 97301

Lindsay Branch
Lindsay Branch
Investigations Secretary
Oregon Medical Board

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1 4.

2 At the conclusion of the Board's investigation, the Board will decide whether to close the
3 case or to proceed to some form of disciplinary action. If the Board determines, following that
4 review, not to lift the requirements of this Order, Licensee may request a hearing to contest that
5 decision.

6 5.

7 This order is issued by the Board pursuant to ORS 677.410, which grants the Board the
8 authority to attach conditions to the license of Licensee to practice medicine. These conditions
9 will remain in effect while the Board conducts a complete investigation in order to fully inform
10 itself with respect to the conduct of Licensee. Pursuant to ORS 677.425, Board investigative
11 materials are confidential and shall not be subject to public disclosure, nor shall they be admissible
12 as evidence in any judicial proceeding. However, as a stipulation this Order is a public document
13 and is reportable to the National Databank and the Federation of State Medical Boards.

14 IT IS SO STIPULATED THIS 1st day of March, 2018.

15 
16
17 FRANCISCO XAVIER SOLDEVILLA, MD

18 IT IS SO ORDERED THIS 5th day of March, 2018.

19
20 OREGON MEDICAL BOARD
21 State of Oregon

22 
23 KATHLEEN HALEY, JD
24 EXECUTIVE DIRECTOR
25
26