

BEFORE THE
MEDICAL QUALITY HEARING PANEL
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Petition For
Interim Order of Suspension:

BARBARA JOHNSTON,
Executive Director, Medical Board of California,
Department of Consumer Affairs, State of
California,

Petitioner,

v.

ANDREW RUTLAND, M.D.

Physician and Surgeon's Certificate No. A 24947,

Respondent.

Case Nos. 19-2009-198804, 19-
2009-202486; **D1-2006-176260**

OAH No. 2009120690

AMENDED INTERIM ORDER IMPOSING LICENSE RESTRICTIONS

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 7, 2010, in San Diego, California.

Douglas C.S. Lee, Deputy Attorney General, appeared on behalf of petitioner.

Peter R. Osinoff, Attorney at Law, appeared on behalf of respondent Andrew Rutland, M.D., who was also present.

The matter was submitted for decision on January 7, 2010.

The matter was reopened following receipt of a facsimile from Mr. Osinoff dated January 11, 2010, sent by facsimile on January 12, 2010, which sought clarification of the Interim Order Imposing License Restrictions that was signed and filed on January 7, 2010. Mr. Osinoff, on Dr. Rutland's behalf, argued that "Certain simple procedures, such as first trimester abortions and endometrial curettage . . . both involve aspiration of the interior of the uterus with a soft plastic curette, attached to a suction machine" sought inclusion of the following sentence in the Interim Order: "Respondent may continue to perform first

trimester abortions and endometrial curettage procedures; provided such procedures only involve aspiration with a soft plastic curette, attached to a suction machine.”

On January 12, 2010, Mr. Lee, on complainant’s behalf, advised that complainant believed the order was sufficiently clear and opposed the motion.

Based on the request for clarification, the Interim Order is modified as follows:

Respondent Andrew Rutland, M.D. shall be and hereby is immediately restrained and prohibited from performing any kind of surgery, defined as a procedure involving cutting, abrading, suturing, laser or otherwise physically changing body tissues and organs, from performing first trimester abortions and endometrial curettage procedures, and from delivering babies.

The Office of the Attorney General shall cause this order to be served upon respondent.

The parties shall contact the Office of Administrative Hearings to schedule further proceedings according to law.

FACTUAL BACKGROUND

This petition for an interim suspension order primarily arose out of Dr. Rutland’s care and treatment of patient YC at a medical clinic in San Gabriel on July 28, 2009. A preponderance of the evidence established the following.

1. Patient YC, a 30 year old non-English speaking female, presented to Dr. Rutland on July 28, 2009, when she was 16 or 17 weeks pregnant. She wanted an abortion.

Dr. Rutland met with the patient and provided an examination. Since patient CY was in her second trimester of pregnancy, Dr. Rutland determined it was necessary to dilate the cervix through the insertion of laminaria. Patient CY requested pain medication before her cervix would be manipulated to permit the insertion of laminaria.

Dr. Rutland told an investigating law enforcement officer immediately after the incident that he had examined patient CY for an abortion, that patient CY had an adverse reaction to the Lidocaine, and that patient CY lost consciousness before the abortion began. In a statement to a Medical Board consultant, Dr. Kennedy, on November 9, 2009, Dr. Rutland said that he did not intend to perform an abortion when he provided patient CY with a paracervical block using Lidocaine, but that he was prepared to do a surgical procedure six hours or so later if the patient became sufficiently dilated. In that interview, Dr. Rutland stated that there was emergency equipment available in his car that he planned to have available if he decided to perform the abortion.

A preponderance of the evidence established that Dr. Rutland intended to provide a second trimester abortion at the San Gabriel clinic on July 28, 2009, if patient CY's cervix became sufficiently dilated to perform that procedure. That was the reason he brought his crash cart with him to the clinic.

Dr. Rutland provided the patient with an injection of Demerol, which he brought from his Anaheim office. Dr. Rutland was not authorized by the DEA to dispense Demerol in an office not authorized by the DEA. Dr. Rutland also provided the patient with four injections of Lidocaine to accomplish the paracervical block, which he also brought with him from his Anaheim office.

Within minutes after Dr. Rutland injected the patient with Lidocaine, the patient's arms and legs contracted. According to Dr. Rutland's declaration, CY was initially alert, responsive, with a good blood pressure after this event. Dr. Rutland started an IV. About ten minutes later, the patient's speech changed and she developed respiratory difficulty. Dr. Rutland directed an acupuncturist who was present at the clinic to call the paramedics. Patient CY went into profound respiratory distress, which was followed by complete respiratory and cardiac arrest. Mouth-to-mouth resuscitation and chest compressions were initiated. The paramedics arrived sometime thereafter and patient CY was transported to a local hospital. Patient CY died six days later.

Although patient CY's adverse reaction to Lidocaine was rare, it was not entirely unforeseeable. Dr. Rutland, his physician associate, and the clinic where the incident occurred were ill-prepared to handle the emergency. According to his statement to the Medical Board consultant on July 28, 2009, Dr. Rutland was unaware that there was a crash cart at the back of the clinic. For that reason, Dr. Rutland was also unaware that the clinic crash cart was stocked with medications that were expired. Dr. Rutland did not use his own crash cart because he left it in his car.

2. Petitioner sought an interim suspension order on the basis that: (1) Dr. Rutland ran a medical clinic that did not have an appropriate municipal license; (2) Dr. Rutland owned the medical clinic where the incident occurred; (3) Dr. Rutland does not have medical malpractice insurance; (4) Dr. Rutland dispensed the Demerol in violation of DEA regulations; (5) Dr. Rutland engaged in dishonesty by representing to the DEA that his medical license had never been suspended or revoked, and (6) Dr. Rutland's treatment of patient CY fell below the standard of care in many respects, most importantly in that (a) Dr. Rutland intended to perform a second trimester abortion at a facility that was inadequately staffed for that purpose, (b) Dr. Rutland intended to perform a surgical procedure in a facility that was not adequately equipped to handle emergencies, (c) Dr. Rutland administered Lidocaine without knowing the safe dosage range or maximum safe dose, (d) Dr. Rutland's response to the medical crisis was inappropriate in that he failed to recognize Lidocaine toxicity in a timely manner, did not give the patient an oxygen mask, and delayed in calling the paramedics.

Dr. Jessica M. Kingston, Associate Clinical Professor, University of California, San Diego, School of Medicine, authored a comprehensive narrative report and signed a declaration that supported all of the charges in the petition for an interim suspension order. Dr. Kingston's report was comprehensive and unbiased.

3. Dr. Rutland acknowledged that the incident was terribly unfortunate, but asserted that everything he did was within the standard of care. Dr. Rutland denied operating a medical clinic on the premises, despite a sign on the door that said "Rutland MD Medical Clinic." Dr. Rutland denied owning the medical clinic where the incident occurred. Dr. Rutland argued that the nature of the procedures he performed did not require him to have malpractice insurance and did not require that the clinic be equipped for serious emergencies. Dr. Rutland claimed he administered, not dispensed the Demerol, and that doing so was not in violation of DEA regulations. Dr. Rutland asserted that an employee inadvertently failed to list the fact of his suspension on the DEA application and that the DEA issued the registration with full knowledge of his disciplinary history. Dr. Rutland denied that his treatment of patient CY fell below the standard of care in any respect, asserting that he had performed more than 10,000 paracervical blocks, that his practice was to not ever use an amount of Lidocaine that approached the safe maximum dosage, and that patient CY's death was not the result of an overdose but was, instead, a rare reaction he could not have anticipated. Dr. Rutland claimed he did not perform an abortion and that he had no intent to do so at the clinic on July 28, 2009.

Dr. Rutland provided a declaration and attachments purporting to refute the charges offered in support of the interim suspension order. Dr. Rutland had an interest in the outcome and therefore was biased. No independent opinion was offered to support his claims.

OTHER FACTUAL FINDINGS

4. Petitioner Barbara Johnston is the Executive Director of the Medical Board of California (the Board). On December 17, 2009, she petitioned the Medical Quality Hearing Panel of the Office of Administrative Hearings for an interim order prohibiting respondent Andrew Rutland, M.D. (Dr. Rutland or respondent) from practicing medicine.

5. On July 9, 1973, the Medical Board of California (Board) issued Physician and Surgeon Certificate No. G 24947 to Dr. Rutland.

6. On August 8, 2007, Administrative Law Judge H. Stuart Waxman (ALJ Waxman), Office of Administrative Hearings, heard Dr. Rutland's petition for reinstatement of his revoked certificate. Following the hearing, ALJ Waxman issued a Proposed Decision that set forth information concerning Dr. Rutland's education, training and experience, Dr. Rutland's disciplinary history with the Medical Board, and other factual findings that were relevant to the Dr. Rutland's petition. Many of those factual findings have not changed over time and are set forth herein to provide a background.

ALJ Waxman concluded that cause was established to grant the petition under Business and Professions Code section 2307. The Proposed Decision reinstated Dr. Rutland's revoked certificate, revoked the reinstated certificate, stayed the revocation and placed Dr. Rutland on probation for five years upon various terms and conditions of probation including the requirement that he obey all laws, that he submit quarterly declarations, that he comply with the probation unit, that he submit to interviews as directed, that he pay probation monitoring costs, that he take and pass an oral or written competency examination, that he undergo a medical evaluation to determine his fitness to practice medicine, that his practice be monitored by a physician approved by the Medical Board, and that he not engage in a solo medical practice.

ALJ Waxman found:

Education, Training and Experience: Dr. Rutland attended medical school at Howard University where he graduated with honors. He performed his residency at Los Angeles County, University of Southern California (USC) Medical Center. After serving a fellowship in gynecological oncology at USC, he served in the United States Air Force, retiring as a Lieutenant Colonel. He remains a member of the Air Force Reserve today. Dr. Rutland became board certified in obstetrics and gynecology in 1977. In 1982, he joined a medical group in Inglewood, California where he remained for 10 years. He then maintained a private practice for another 10 years. Dr. Rutland also holds a law degree.

Prior Disciplinary Matters: In a Stipulation for Clinical Training and Evaluation, Board Investigation Nos. 04-94-37525 and 04-96-67144, finalized on July 30, 1998, in *In the Matter of the Investigation of Andrew Rutland*, Dr. Rutland agreed to attend a physician assessment and clinical education program, approved by the Board or its designee, in exchange for the closing of the investigations. Dr. Rutland successfully completed the course offered by the Physician Assessment and Clinical Education (PACE) program at the University of California, San Diego.

On April 29, 2002, in *In the Matter of the Accusation Against Andrew Rutland, M.D.*, Case No. 18-1999-101122, Administrative Law Judge Ralph B. Dash issued an Interim Order of Suspension restricting Petitioner's physician's and surgeon's certificate as follows:

"Respondent shall not perform any surgical procedure at any hospital, unless there is an independent medical doctor present at all times to observe and proctor Respondent. The proctor must have unrestricted surgical privileges at the hospital, and must be competent in the relevant field of surgery. If a volunteer cannot be found, Respondent shall bear the cost of the proctor. "

When Judge Dash issued his interim suspension order, the operative pleading was the Second Amended Accusation. On June 28, 2002, a Third Amended Accusation was filed, which contained the addition of numerous allegations involving several additional patients to those referenced in the Second Amended Accusation.

On July 3, 2002, Administrative Law Judge Roy W. Hewitt issued an Ex Parte Interim Suspension Order based on the allegations in the Third Amended Accusation. According to that Order, Petitioner's physician and surgeon's certificate was suspended, and Dr. Rutland was ordered not to "practice medicine or supervise physician's assistants in the State of California." On August 26, 2002, Dr. Rutland entered into a stipulation that the Interim Suspension Order would remain in effect until the case was either settled or resolved by a hearing on the merits.

In a Decision effective October 24, 2002, the Board accepted Petitioner's surrender of his physician and surgeon's certificate in resolution of the Third Amended Accusation. Dr. Rutland also agreed to pay \$ 3,160 in discovery costs. In addition, he agreed to pay \$37,000 in investigation and prosecution costs prior to the re-issuance of his license if he chose to seek reinstatement. Dr. Rutland further agreed to the following:

"For the purpose of resolving the Third Amended Accusation, Respondent hereby admits to the charges involving the B[. . .] matter, also known as " K.B.", as set forth in paragraphs 12 (except sub-paragraphs Q and R) and 13 (except sub-paragraphs K and O) of the Third Amended Accusation. Further, Respondent agrees that, at a hearing, Complainant could also establish a factual basis for the one or more of the other charges in the Third Amended Accusation.

Paragraphs 12 and 13 of the Third Amended Accusation contained allegations of gross negligence, repeated negligent acts and incompetence in Petitioner's care and treatment of three obstetrical patients. Two of those cases involved neonatal deaths in January 1997 and July 1999, respectively. One of those babies had been delivered by forceps delivery. The sub-paragraphs Dr. Rutland refused to admit alleged charting errors and alterations.

Findings on the Petition for Reinstatement: Dr. Rutland is deeply remorseful over the baby who died following the forceps delivery, and he has vowed never to deliver another baby using forceps again. Although he feels very badly about the other baby's death, he subsequently learned that, according to the autopsy report, the baby died after a pediatrician who was attempting to resuscitate the child perforated a blood vessel with a catheter inserted through the infant's umbilicus. That case was complicated by virtue of the mother being an insulin-dependent diabetic. Dr. Rutland has vowed never to treat a diabetic obstetrical patient without the patient concurrently seeing a peri-natologist.

Dr. Rutland believes some of his patients may have misunderstood his recommendations for surgery and become frightened by his strong feelings about it. To avoid that recurring in the future, he will include a second opinion option in his informed consent forms.

Dr. Rutland has been named as a defendant in approximately 15 to 18 civil lawsuits. Many of those were prosecuted by the same plaintiff's attorney. Several of those cases were consolidated. The plaintiffs' attorney selected what he considered to be the strongest case to try first. After 3.5 weeks of trial, a defense verdict was returned. All of the other

consolidated cases were subsequently voluntarily dismissed without payment by Dr. Rutland. In June 2005, the plaintiffs' attorney wrote a letter indicating that most of the lawsuits were targeted against "an unscrupulous manufacturer of medical equipment" which had "used and abused" Petitioner. In that letter, the plaintiffs' attorney minimized Dr. Rutland's involvement in the harm caused to the patients who filed lawsuits. Of the 15-18 civil cases filed against Dr. Rutland his more than 30 years of medical practice, he has settled only three for monetary sums.

Dr. Rutland has worked with Rev. Jerdail Lauder, the Pastor of New Jerusalem Christian Center and the National President of the United States Pastors Association, in creating medical seminars and workshops for parishioners. Dr. Rutland has served as a keynote speaker and panel member on many occasions, providing health-related information to attendees. He performed those functions without remuneration. Many of those who attended the seminars and workshops were indigent. Dr. Rutland treated those patients without charge. Dr. Rutland has also provided diversity training at churches and universities, again without remuneration.

Dr. Rutland took the Medical Record Keeping course at PACE in February of this year, and an ethics course offered by The Institute for Medical Quality/California Medical Association in March of 2006.

Since he surrendered his medical license, Dr. Rutland has kept up with developments in obstetrics and gynecology. His daughter began an OB/GYN residency at Loma Linda Medical Center at approximately the same time he surrendered his license. (She subsequently became chief resident.) Dr. Rutland devoted his time toward helping her by studying with her. From the time she began her residency, Petitioner's daughter had her journals and compendiums sent to Petitioner's home, including three journals, a compendium and a newspaper from the American Board of Obstetrics and Gynecology. Dr. Rutland has read each of those publications. He also discusses his daughter's cases with her (without the disclosure of any confidential information). In addition, he has learned to cross-reference literature on the Internet to obtain other scholarly articles, and he reads additional medical literature in medical libraries.

Petitioner's daughter considers her father to be a "phenomenal doctor." She described him as thorough and meticulous, and his thinking and teaching as methodical. Having observed him in the operating room via videotapes and DVD's while she was in medical school, she had high praise for his surgical approach and clinical thinking. She claimed Dr. Rutland can "sense a patient." Dr. Rutland educated his daughter to give her patients every option and to give them enough information to make an informed decision.

Petitioner's daughter is presently practicing obstetrics and gynecology in Virginia. She plans to return to California to open a practice with Dr. Rutland should his license be reinstated. Dr. Rutland is near retirement age and would very much like to conclude his medical career in practice with his daughter.

Dr. Rutland raised and cared for his granddaughter after her father died and her mother (Petitioner's daughter) was performing her residency at Loma Linda Medical Center..

Dr. Rutland enjoys a good reputation for honesty.

On June 2, 2005, Dr. Rutland was involved in an automobile accident when another motorist traveling in the opposite direction crossed into Petitioner's lane. Dr. Rutland suffered neck, back and hip injuries and was confined to a wheelchair. Petitioner's injuries have resolved for the most part, and he takes pain medication only infrequently. He considers himself physically fit for medical practice, and he is willing to undergo a medical examination before returning to practice.

Standard of Proof and Issues

7. Business and Professions Code section 11529 provides in part:

“(a) The administrative law judge of the Medical Quality Hearing Panel . . . may issue an interim order suspending a license, or imposing . . . other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health profession, or is unable to practice safely due to a mental or physical condition, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare.

...

(e) Consistent with the burden and standards of proof applicable to a preliminary injunction entered under Section 527 of the Code of Civil Procedure, the administrative law judge shall grant the interim order where, in the exercise of discretion, the administrative law judge concludes that:

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

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

8. When a governmental entity seeks to enjoin a statutory violation, evidence that it is reasonably probable that the agency will prevail on the merits gives rise to a rebuttable presumption that the potential harm to the public outweighs the potential harm to the defendant. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72-73.)

Conclusions

9. On the issue that Dr. Rutland intended to perform a second trimester abortion at a facility that was inadequately staffed for that purpose and that Dr. Rutland intended to perform a surgical procedure in a facility that was not adequately equipped to handle emergencies, petitioner met the standard of proof. Dr. Rutland intended to perform a second trimester abortion at the San Gabriel clinic when that clinic was not sufficiently staffed and equipped for such a procedure. In this regard, Dr. Rutland violated the Medical Practices Act. His disavowal of his intention in this interim suspension proceeding is directly contrary to statements he provided to an investigating law enforcement officer immediately after the medical emergency and to a Medical Board consultant several months later.

A preponderance of the evidence established that Dr. Rutland engaged in gross negligence, a conclusion amply supported by the Dr. Kingston's declaration. Dr. Rutland's willingness to proceed with a second trimester abortion under these circumstances casts doubt on his professional judgment and he presently presents a risk of danger, and there is a likelihood of injury to the public in not issuing an interim suspension order that prohibits Dr. Rutland from engaging in surgery or deliveries.

Other alleged violations of the Medical Practice Act do not require the drastic sanction of an interim suspension order. Dr. Rutland has never engaged in any misconduct that was unrelated to the recommendation of surgery, surgery or the delivery of babies.

10. By reason of the matters set forth in the Factual Background and the Factual Findings herein, petitioner demonstrated that an interim suspension order is necessary to protect the public health, safety and welfare. Imposition of a full practice suspension is not warranted at this time. Issuing an interim order imposing license restrictions that prohibit Dr. Rutland from engaging in any surgery and in the delivery of any babies is sufficient to protect the public.

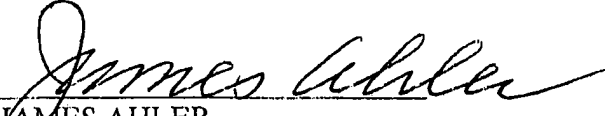
AMENDED INTERIM ORDER IMPOSING LICENSE RESTRICTIONS

Respondent Andrew Rutland, M.D. shall be and hereby is immediately restrained and prohibited from performing any kind of surgery, defined as a procedure involving cutting, abrading, suturing, laser or otherwise physically changing body tissues and organs, from performing first trimester abortions and endometrial curettage procedures, and from delivering babies.

The Office of the Attorney General shall cause this order to be served upon respondent.

The parties shall contact the Office of Administrative Hearings to schedule further proceedings according to law.

DATED: January 12, 2010


JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings