

State Medical Board of Ohio

30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127



Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov

December 12, 2007

Michael Shane Gainey, M.D.
9765 Murdock Goshen Road
Loveland, OH 45140

Dear Doctor Gainey:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Gretchen L. Petrucci, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on December 12, 2007, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal must be taken to the Franklin County Court of Common Pleas.

Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of an original Notice of Appeal with the State Medical Board of Ohio and a copy of the Notice of Appeal with the Franklin County Court of Common Pleas. Any such appeal must be filed within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12, Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO

Lance A. Talmage, M.D.
Lance A. Talmage, M.D. *rew*
Secretary

LAT:jam
Enclosures

CERTIFIED MAIL NO. 91 7108 2133 3931 8317 8530
RETURN RECEIPT REQUESTED

Duplicate mailing: Harrison Memorial Hospital ER
1210 KY Highway 36E
Cynthiana, KY 41031-7498
CERTIFIED MAIL NO. 91 7108 2133 3931 8317 8868
RETURN RECEIPT REQUESTED

Mailed 1-4-08

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of Gretchen L. Petrucci, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on December 12, 2007, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order; constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Michael Shane Gainey, M.D., as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.

Lance A. Talmage MD
Lance A. Talmage, M.D. RW
Secretary

(SEAL)

December 12, 2007
Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

MICHAEL SHANE GAINNEY, M.D.

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on December 12, 2007.

Upon the Report and Recommendation of Gretchen L. Petrucci, State Medical Board Attorney Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the modification, approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for the above date.

It is hereby ORDERED that:

The certificate of Michael Shane Gainney, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED.

This Order shall become effective immediately upon the mailing of notification of approval by the Board.

(SEAL)

Lance A. Talmage MD

Lance A. Talmage, M.D. RW
Secretary

December 12, 2007

Date

2007 OCT 19 A 10:33

**REPORT AND RECOMMENDATION
IN THE MATTER OF MICHAEL SHANE GAINNEY, M.D.**

The Matter of Michael Shane Gainney, M.D., was heard by Gretchen L. Petrucci, Hearing Examiner for the State Medical Board of Ohio, on September 28, 2007.

INTRODUCTION

I. Basis for Hearing

- A. By letter dated April 12, 2007, the State Medical Board of Ohio [Board] notified Michael Shane Gainney, M.D., that it had proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board's action was based on an allegation that the Kentucky Board of Medical Licensure [Kentucky Board] had entered an Emergency Order of Suspension in October 2006. Moreover, the Board alleged that, in January 2007, Dr. Gainney entered into an Agreed Order of Suspension and Order of Restriction and, in February 2007, a final Agreed Order of Suspension and Order of Restriction with the Kentucky Board. Additionally, the Board alleged that, as a result, the Kentucky Board suspended Dr. Gainney's Kentucky medical license for three months, required approval of his employment, and restricted his ability to prescribe controlled substances to emergency room patients.

The Board further alleged that the Kentucky Emergency Order of Suspension and the Kentucky final Agreed Order of Suspension and Order of Restriction, individually and/or collectively, constitute "[a]ny of the following actions taken by the agency responsible for regulating the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or the limited branches of medicine in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand," as set forth in Section 4731.22(B)(22), Ohio Revised Code. (State's Exhibit 1A)

- B. By letter filed on May 9, 2007, Theodore J. Froncek, Esq., requested a hearing for Dr. Gainney. (State's Exhibit 1B)

II. Appearances at the Hearing

- A. On behalf of the State of Ohio: Marc Dann, Attorney General, by Kyle C. Wilcox, Assistant Attorney General.
- B. The Respondent did not appear at the hearing, but submitted letters of support for Board consideration.

PROCEDURAL MATTER

On October 9, 2007, Dr. Gainey filed a letter, which was construed as a motion to reopen the hearing record and to schedule an additional day of hearing in this matter. Dr. Gainey stated that, due to confusion, misunderstanding, and many problems, he had missed the hearing. The State did not file a response to Dr. Gainey's request. The Hearing Examiner, by entry issued October 18, 2007, denied Dr. Gainey's request. Copies of these additional documents have been included in the record as Board Exhibit A.

EVIDENCE EXAMINED

I. Testimony Heard

None

II. Exhibits Examined

A. State's Exhibits

State's Exhibits 1A through 1K: Procedural Exhibits.

State's Exhibit 2: Copies of documents maintained by the Kentucky Board of Medical Licensure in *In Re: The License to Practice Medicine in the Commonwealth of Kentucky Held by Michael S. Gainey, M.D., License No. 22283, Case Nos. 962 and 1075*, redacted in part.

State's Exhibit 3: February 28, 2007, "Agreed Order of Suspension; Order of Restriction" in *Michael S. Gainey, Case No. 1075, supra*.

State's Exhibit 4: Copies of documents maintained by the Board in the previous *Matter of Michael Shane Gainey, M.D.*, before the Board, including decision in April 2004.

State's Exhibit 5: Verification of Dr. Gainey's Ohio licensure as of September 27, 2007.

B. Respondent's Exhibits

Respondent's Exhibit A: Cover letter and seven letters of support for Dr. Gainey.¹

¹Two copies of the letter written by J. Gregory Cooper, M.D., were included in this exhibit when admitted.

C. Board Exhibit

Board Exhibit A: Additional procedural exhibits submitted post-hearing.

SUMMARY OF THE EVIDENCE

All exhibits and the transcript of testimony, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

Background

1. Michael Shane Gainey, M.D., graduated from the Citadel Military College in South Carolina in 1976. He obtained his medical degree in 1980 from the College of Medicine at the Medical University of South Carolina. Afterward, he completed a residency in family medicine at Roanoke Memorial Hospital in Roanoke, Virginia. (State's Exhibit [St. Ex.] 4 at 11)
2. Dr. Gainey then worked for Acute Care America, a corporation that arranges for physicians to staff emergency departments in several states. In that position, Dr. Gainey was the medical director of 45 emergency departments. From 1987 to 1989, Dr. Gainey participated in a fellowship in geriatric medicine at the University of Cincinnati. He also worked during that time in the emergency department at Jewish Hospital in Kenwood, Ohio. Later, Dr. Gainey established his own corporation, Cincinnati Emergency Services, to staff emergency departments in the Cincinnati area. (St. Ex. 4 at 11)
3. In the early 1990s, Dr. Gainey attended the University of Cincinnati Law School. However, as of November 2003, he was not licensed to practice law. Also, as of November 2003, Dr. Gainey held board certifications in family medicine, geriatrics, emergency medicine and sports medicine. (St. Ex. 4 at 11)
4. Dr. Gainey has held medical licenses in nine states: Indiana, Kentucky, Ohio, Oregon, South Carolina, Washington, West Virginia, Wisconsin, and Virginia. He formally terminated his West Virginia and Virginia licenses.² His Kentucky license was suspended for three months between November 2006 and February 2007. His Ohio license expired in January 2007 due to non-renewal; however, it can be renewed by paying the renewal and penalty fees and certifying completion of the continuing medical education requirements. (St. Ex. 3 at 7; St. Ex. 4 at 11; St. Ex. 5)

²A more detailed explanation of Dr. Gainey's background is set forth in the Board's April 14, 2004, decision in the previous *Matter of Michael Shane Gainey, M.D.* [Gainey I] decided in April 2004. (St. Ex. 4)

Ohio Board's 2004 Disciplinary Decision

5. In April 2004, the Board issued a decision in *Gainey I*. The Board concluded that Dr. Gainey had failed to conform to the minimal standards of care and violated the American Medical Association's Code of Medical Ethics when, in October 2000, he received oral sex in the emergency department at Jewish Hospital in Kenwood, Ohio, from a patient whom he had treated in the same hospital emergency department. As a result, the Board found that Dr. Gainey had violated Sections 4731.22(B)(6) and (B)(18), Ohio Revised Code, and Principles I, II and IV of the American Medical Association's Principles of Medical Ethics. The Board suspended Dr. Gainey's Ohio certificate for a period of 90 days and imposed probationary terms, conditions, and limitations for at least a two-year period. (St. Ex. 4)

It is not clear from the record whether Dr. Gainey's two-year probationary period ended prior to the expiration of his Ohio certificate in January 2007, due to nonrenewal.

Kentucky Board's 2004 Disciplinary Action

6. On August 26, 2004, the Kentucky Board entered into an Agreed Order of Probation with Dr. Gainey, based in part on the 2004 Ohio disciplinary decision. Dr. Gainey and the Kentucky Board agreed that, as a result of the October 2000 incident, Dr. Gainey had violated Kentucky Revised Statutes [KRS] 311.595(17) and (21). As a result, the Kentucky Board placed Dr. Gainey's Kentucky license on probation for five years and required him: (a) to abide by the decision in *Gainey I*, (b) to remain in good standing with the Ohio Board, (c) to refrain from sexual contact with any patient, and (d) to comply with all provisions of KRS 311.595 and/or 311.597. (St. Ex. 2 at 37-41)

Kentucky Board's 2006-2007 Disciplinary Action

7. On October 26, 2006, a complaint was filed with the Kentucky Board and the Kentucky Board issued an Emergency Order of Suspension, immediately suspending Dr. Gainey's Kentucky license. (St. Ex. 2 at 12-20, 31-36)
8. On January 2, 2007, Dr. Gainey and the Kentucky Board entered into an "Agreed Order of Suspension; Order of Restriction." (St. Ex. 2 at 2-11)
9. On February 28, 2007, Dr. Gainey and the Kentucky Board entered into a final "Agreed Order of Suspension; Order of Restriction." They stipulated to the following facts:
 - In November 2005, Fleming County Hospital notified the Kentucky Board that Dr. Gainey had voluntarily surrendered his clinical privileges while under investigation for falsification of medical records and narcotics violations.

- A nurse at Fleming County Hospital stated that female emergency-room patients were leaving messages for Dr. Gainey, one of whom appeared to be leaving messages using another name.
- Patient A received controlled substances from Dr. Gainey all seven times that he treated her over the course of approximately five weeks in 2005. On two occasions, Patient A had not been registered/admitted to the emergency room, but Dr. Gainey added to her medical records on those occasions. Dr. Gainey told the records department to add to her medical record on a third occasion.
- Calls from Fleming County Hospital to Patient A were made, which gave the appearance that Dr. Gainey was contacting her prior to visits.
- Patient B received controlled substances from Dr. Gainey five times over the course of approximately seven months in 2005. On one occasion, Patient B received a prescription from Dr. Gainey without being admitted.
- Eleven patients received multiple controlled substances, which would be atypical for a physician with a specialty in emergency medicine.
- A Kentucky Board consultant reviewed 11 of Dr. Gainey's patient records. The consultant concluded that the cases were below the minimum standard of care and concluded that the pattern of acts by Dr. Gainey was pervasive enough to be deemed "gross negligence." Six different specific deviations were identified by the consultant: (1) repeatedly prescribing controlled substances over short periods of time; (2) contacting the patients' primary care physicians in only five percent of the visits and providing narcotics in one case although the primary care physician had wished no outpatient narcotics; (3) repeatedly prescribing fentanyl patches through the emergency department; (4) repeatedly providing controlled substances linked to "non-documented encounters outside the Emergency Department"; (5) where extractable from the patient charts, administering parenteral controlled substances during patient visits greater than 90 percent of the time; and (6) for seven patients, writing 57 controlled substance prescriptions (totaling 1,134 doses) over a per-patient average duration period of 6.5 weeks.
- Dr. Gainey responded to the allegations, stating that they were due to a conflict between himself and a nurse. He claimed that all treatment provided by him at Fleming County Hospital was documented even though the patient may not have gone through the hospital's entry process. More specifically, his response indicated that:

Patient A presented with abdominal pain and a CT was ordered, which was negative. Due to her long wait in the [emergency

room], she was instructed to return for an ultrasound, at which time she was treated as an outpatient. [Dr. Gainey] stated that he treated Patient B without using the hospital's entry system due to her inability to pay. [Dr. Gainey] stated that he felt the patients receiving controlled substances had legitimate illnesses. He stated that if the pharmacy contacted him about a patient's prescription overlapping or being filled too early he would not authorize it. He stated that he would counsel his patients on returning to their primary [care] physician for treatment, but they would return to the [emergency room] due to the primary [care] physician not treating their pain. [Dr. Gainey] maintained that if it were obvious the patient was high, intoxicated, or diverting he would not prescribe to them. * * * [Dr. Gainey] explained that Patient C is a friend and is employed on his farm. Patient C self rehabilitated from an addiction of cocaine and was feeling hyper/anxious, therefore prescriptions of Ativan were given for a short time. [Dr. Gainey] stated that he saw Patient C every day and kept a medical chart.

The Kentucky Board and Dr. Gainey further agreed that his conduct constituted violations of KRS 311.595(10), (21), (13), and (9).³ (St. Ex. 3 at 2-6)

10. The Kentucky Board and Dr. Gainey agreed upon the following discipline: (a) Dr. Gainey's Kentucky medical license would be suspended for the three-month period of November 27, 2006 through February 27, 2007; (b) during the suspension period, Dr. Gainey would not practice medicine; and (c) after the suspension period, Dr. Gainey's Kentucky license would be restricted/limited for an indefinite period in the following manner:
 - The Kentucky Board's Inquiry Panel (or its Chair) must preapprove Dr. Gainey's employment and any change in practice location.
 - The Inquiry Panel approved his employment by the Whittaker Corporation in the Emergency Room/Department at Harrison Memorial Hospital.

³The cited statutes address the Kentucky Board's authority to take certain action due to: (1) dishonorable, unethical, or unprofessional conduct that is likely to deceive, defraud, or harm the public; (2) knowingly making, or causing to be made, or aiding or abetting in the making of, a false statement in any document executed in connection with the practice of a licensee's profession; (3) violation of an agreed order, letter of agreement, final order, or emergency order issued by the Kentucky Board; and (4) being disciplined by a licensed hospital or medical staff of the hospital, including removal, suspension, limitation of hospital privileges, failing to renew privileges for cause, resignation of privileges under pressure of investigation, or other disciplinary action if the action was based upon what the hospital or medical staff found to be unprofessional conduct, professional incompetence, malpractice, or a violation of any provisions of KRS Chapter 311. Kentucky Revised Statutes, May 30, 2007, Kentucky Legislative Research Commission, October 4, 2007, <<http://www.lrc.ky.gov/KRS/311-00/595.PDF>>.

- Dr. Gainey shall only provide medical treatment to patients who are properly registered through the hospital's emergency room admission procedures.
- Dr. Gainey shall establish a physician-patient relationship prior to rendering medical treatment, including prescriptions.
- Dr. Gainey shall maintain appropriate medical records on all his patients and ensure that the patient records document all treatment rendered.
- Dr. Gainey's use of controlled substances is limited to use in a hospital emergency department setting for treatment of patients or, upon discharge "from treatment for conditions where the use of controlled substances is medically necessary for the health, welfare and/or safety of the patient for the particular medical procedure being performed." However, he is limited to prescribing a controlled substance to a 72-hour period for patients being discharged from the emergency department.
- Dr. Gainey was required to complete two specific education courses, provide proof of successful completion of those courses, and pay the costs of the 2006-2007 Kentucky proceeding.
- Dr. Gainey is required to not violate any provision of KRS 311.595 and/or 311.597.

(St. Ex. 3 at 6-9)

Letters of Support

11. The Director of the Emergency Room at Harrison Memorial Hospital, Don. R. Stephens, M.D., wrote a letter in support of Dr. Gainey. Dr. Stephens stated that Dr. Gainey is knowledgeable, honest, dependable, and very cooperative. Also, he noted that, during the more than 12 years that Dr. Gainey has worked at Harrison Memorial Hospital, less than 15 complaints have been raised by patients about Dr. Gainey. He highly recommended Dr. Gainey and stated that "[w]e hope to keep him for another twelve years or longer." (Respondent's Exhibit [Resp. Ex.] A at 7)
12. Three nurses (Sheila Currans, Mary Jo Powers, and Mary-Mac Barnett) who have worked with Dr. Gainey in the emergency department at Harrison Memorial Hospital in Cynthiana, Kentucky, also wrote letters of support. Ms. Currans is also the Chief Operating Officer at the Harrison Memorial Hospital. They stated that Dr. Gainey has provided excellent emergency care, accurately identified and addressed the patients' medical problems, put the patient's best interests and well-being first, and followed through to "ensure that all aspects of patient care are completed in a timely manner." Further, one nurse wrote that she had heard of numerous compliments about his care from both customers and medical staff. (Resp. Ex. A at 2, 4, 5)

13. J. Gregory Cooper, M.D., and Gerald R. Harpel, M.D., have had their patients treated by Dr. Gainey. Dr. Cooper stated that, when contacted by Dr. Gainey, he found Dr. Gainey's assessments accurate, concise and informative. Dr. Harpel stated that he found Dr. Gainey to be "extremely conscientious and a cautious, caring physician." (Resp. Ex. A at 6, 8)
14. In addition, a letter was written by one of Dr. Gainey's patients who had failed to register with the emergency department at Fleming County Hospital. She stated that Dr. Gainey "has only done this for me at my request because of financial and personal reason[s]." She further stated that Dr. Gainey did not ask for anything in return for the visits. (Resp. Ex. A at 3)

FINDINGS OF FACT

1. On April 14, 2004, the Board issued an Order in the *Matter of Michael Shane Gainey, M.D. [Gainey I]*, which suspended Dr. Gainey's Ohio certificate to practice medicine and surgery for 90 days and imposed subsequent probationary terms, conditions and limitations for at least two years. The April 2004 Board Order was based upon Dr. Gainey's failure to conform to the minimal standards of care and for violation of American Medical Association's Code of Medical Ethics because he received oral sex in a hospital emergency department from a patient whom he had treated in the same hospital emergency department.
2. On August 26, 2004, the Kentucky Board of Medical Licensure [Kentucky Board] entered into an Agreed Order of Probation with Dr. Gainey and placed Dr. Gainey's Kentucky license on probation for five years, based in part on the Ohio Board's decision in *Gainey I*. Among other things, Dr. Gainey agreed not to violate any provision of Kentucky Revised Statutes 311.595 and/or 311.597.
3. On October 26, 2006, the Kentucky Board issued an Emergency Order of Suspension, immediately suspending Dr. Gainey's Kentucky medical license.
4. On January 2, 2007, the Kentucky Board and Dr. Gainey entered into an "Agreed Order of Suspension; Order of Restriction."
5. On February 28, 2007, the Kentucky Board and Dr. Gainey entered into a final "Agreed Order of Suspension; Order of Restriction," which among other things suspended Dr. Gainey's Kentucky medical license for three months (November 27, 2006 through February 27, 2007), required approval of his employment by the Kentucky Board's Inquiry Panel or its Chair, and restricted his ability to prescribe controlled substances to emergency room patients beyond a 72-hour period. Dr. Gainey stipulated that he had violated Kentucky Revised Statutes 311.595(9), (10), (13), and (21).

Dr. Gainey's conduct underlying this "Agreed Order of Suspension; Order of Restriction" included, in part: (1) his voluntary surrender of clinical privileges at Fleming County Hospital in Kentucky while under investigation for falsification of medical records and for

narcotics violations, and (2) prescribing controlled substances to multiple patients who were not registered and/or admitted to the emergency room.

CONCLUSION OF LAW

The Kentucky Board's Emergency Order of Suspension and final "Agreed Order of Suspension; Order of Restriction" individually and/or collectively constitute "[a]ny of the following actions taken by the agency responsible for regulating the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or the limited branches of medicine in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand," as set forth in Section 4731.22(B)(22), Ohio Revised Code.

* * * * *

The administrative proceedings in Ohio and Kentucky demonstrate that, since 2000, Dr. Gainey engaged in a variety of professional misconduct. He received oral sex in his place of employment from one of his patients, told varying versions of that event, treated patients at the hospital who had not been admitted/registered, knew that at least one such patient was not admitted/registered prior to treating her, modified medical records, and dispensed or prescribed controlled substances at questionable rates. Also, he surrendered his clinical privileges while under investigation.

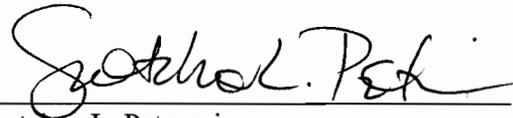
Moreover, Dr. Gainey appears to have been subject to two sets of probationary terms at the time the most recent violations occurred. In 2004, this Board suspended Dr. Gainey's Ohio certificate and imposed probationary terms for two years. The Kentucky Board imposed probationary terms for five years beginning in 2004. Thus, the prior disciplinary measures did not impress upon Dr. Gainey the need to comply with the law and regulations. Even though several medical professionals have expressed positive opinions of Dr. Gainey's current and past emergency care, his admitted transgressions and violations indicate that Dr. Gainey is not conforming to requirements and minimal standards of care, is not trustworthy, and is lacking in personal and professional ethics. Dr. Gainey should be precluded from reinstating or restoring his expired Ohio certificate.

PROPOSED ORDER

It is hereby ORDERED that:

- A. **PERMANENT REVOCATION:** The certificate of Michael Shane Gainey, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED.
- B. **DO NOT APPLY FOR REINSTATEMENT OR RESTORATION:** Michael Shane Gainey, M.D., shall not apply for reinstatement or restoration of his certificate.

This Order shall become effective immediately upon mailing notification of approval by the Board.



Gretchen L. Petrucci
Hearing Examiner


State Medical Board of Ohio
30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127

Richard A. Whitehouse, Esq.
Executive Director

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EXCERPT FROM THE DRAFT MINUTES OF DECEMBER 12, 2007

REPORTS AND RECOMMENDATIONS

Dr. Kumar announced that the Board would now consider the Reports and Recommendations appearing on its agenda. He asked whether each member of the Board had received, read, and considered the hearing records, the proposed findings of fact, conclusions of law, and orders, and any objections filed in the matters of: Kimberli Jo Burbach; Michael Shane Gainey, M.D.; Russell L. Gaudett; Cynthia Joan Johnson, P.A.; Kandhasamy Kannapiran, MD.; Ali Khan, M.D.; Robert M. Moore, M.T.; Kolli Mohan Prasad, M.D.; Willie Calvin Rabb, Jr., D.P.M.; Mary Ellen Ratcliff; and Robert Rowan Summers, D.O. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Madia	- aye
	Mr. Browning	- aye
	Mr. Hairston	- aye
	Dr. Amato	- aye
	Dr. Steinbergh	- aye
	Dr. Kumar	- aye

Dr. Kumar asked whether each member of the Board understands that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Madia	- aye
	Mr. Browning	- aye
	Mr. Hairston	- aye

Dr. Amato - aye
Dr. Steinbergh - aye
Dr. Kumar - aye

Dr. Kumar noted that, in accordance with the provision in Section 4731.22(F)(2), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of these matters. In the matters before the Board today, Dr. Talmage served as Secretary and Mr. Albert served as Supervising Member.

The original Reports and Recommendations shall be maintained in the exhibits section of this Journal.

.....
MICHAEL SHANE GAINNEY, M.D.

Dr. Kumar directed the Board's attention to the matter of Michael Shane Gainney, M.D. He advised that objections were filed to Hearing Examiner Petrucci's Report and Recommendation and were previously distributed to Board members.

DR. VARYANI MOVED TO APPROVE AND CONFIRM MS. PETRUCCI'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER IN THE MATTER OF MICHAEL SHANE GAINNEY, M.D. DR. BUCHAN SECONDED THE MOTION.

Dr. Kumar stated that he would now entertain discussion in the above matter.

Dr. Steinbergh referred to the two paragraphs following the five stars on page nine of the Report and Recommendation, stating that she is in full agreement with them. She stated that these paragraphs fully describe the lack of professionalism of the physician. In order to protect the citizens of Ohio, she agrees with the Proposed Order, which is a permanent revocation of Dr. Gainney's license.

Dr. Steinbergh stated that the Proposed Order of permanent revocation implies that there would be no reinstatement or restoration; therefore, she feels that paragraph B of the Proposed Order is not necessary.

DR. STEINBERGH MOVED TO AMEND THE PROPOSED ORDER IN THE MATTER OF MICHAEL SHANE GAINNEY, M.D., BY DELETING PARAGRAPH B OF THE PROPOSED ORDER. DR. BUCHAN SECONDED THE MOTION.

Dr. Egner stated that she agrees with the motion and the amended Proposed Order.

Dr. Buchan stated that he agrees 100 percent. Based upon the Kentucky Emergency Order, he absolutely agrees with the Proposed Order, as amended.

Mr. Albert left the meeting during the previous discussion

A vote was taken on Dr. Steinbergh's motion to amend:

ROLL CALL:	Dr. Egner	- aye
	Dr. Talmage	- abstain
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Madia	- aye
	Mr. Browning	- aye
	Mr. Hairston	- abstain
	Dr. Amato	- aye
	Dr. Steinbergh	- aye
	Dr. Kumar	- aye

The motion carried.

DR. BUCHAN MOVED TO APPROVE AND CONFIRM MS. PETRUCCI'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER, AS AMENDED, IN THE MATTER OF MICHAEL SHANE GAINEY, M.D. DR. STEINBERGH SECONDED THE MOTION.

Dr. Kumar stated that he would entertain further discussion. There was none.

A vote was taken on Dr. Buchan's motion:

ROLL CALL:	Dr. Egner	- aye
	Dr. Talmage	- abstain
	Dr. Varyani	- aye
	Dr. Buchan	- aye
	Dr. Madia	- aye
	Mr. Browning	- aye
	Mr. Hairston	- abstain
	Dr. Amato	- aye
	Dr. Steinbergh	- aye
	Dr. Kumar	- aye

The motion carried.



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.med.ohio.gov

April 12, 2007

Michael Shane Gainey, M.D.
9765 Murdock-Goshen Road
Loveland, OH 45140

Dear Doctor Gainey:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio [Board] intends to determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery, or to reprimand you or place you on probation for one or more of the following reasons:

- (1) On or about April 14, 2004, based on your failure to conform to minimal standards of care and violation of the American Medical Association's Code of Professional Ethics due to your having engaged in oral sex with a patient in a hospital emergency department whom you had treated in the same hospital emergency department, the Board approved an Order suspending your certificate to practice medicine and surgery in Ohio for a period of ninety days, and imposed subsequent probationary terms, conditions and limitations for at least two years.
- (2) On or about August 26, 2004, you entered into an Agreed Order of Probation [Kentucky Agreed Probation] with the Kentucky Board of Medical Licensure [Kentucky Board] based in part on the Ohio Board's aforementioned Order. You agreed in the Kentucky Agreed Probation, *inter alia*, not to violate any provision of Kentucky Revised Statutes §§311.595 and/or 311.597.

On or about October 26, 2006, the Kentucky Board issued an Emergency Order of Suspension [Kentucky Emergency Suspension] suspending your Kentucky medical license. On or about January 2, 2007, you subsequently entered into an Agreed Order of Suspension and Order of Restriction with the Kentucky Board and, on or about February 28, 2007, you entered into a final Agreed Order of Suspension; Order of Restriction [Kentucky Agreed Suspension] with the Kentucky Board which, *inter alia*, suspended your Kentucky medical license for three months, required approval of your employment by the Kentucky Board, and restricted your ability to prescribe controlled substances to emergency room patients beyond a seventy-two hour period. You stipulated in the Kentucky

Mailed 4-12-07

Agreed Suspension that you violated Kentucky Revised Statutes Sections 311.595(9), (10), (13) and (21).

Your conduct underlying the Kentucky Agreed Suspension included, in part, your having voluntarily surrendered your clinical privileges at Fleming County Hospital in Kentucky while under investigation for falsification of medical records and narcotics violations, and for having prescribed controlled substances to multiple patients who were not registered and/or admitted to the emergency room.

Copies of selected portions of the Kentucky Agreed Probation, Kentucky Emergency Suspension and Kentucky Agreed Suspension are attached hereto and incorporated herein.

The Kentucky Emergency Suspension and Kentucky Agreed Suspension as alleged in paragraph (2) above, individually and/or collectively, constitute “[a]ny of the following actions taken by the agency responsible for regulating the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or the limited branches of medicine in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand,” as that clause is used in Section 4731.22(B)(22), Ohio Revised Code.

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty days of the time of mailing of this notice.

You are further advised that, if you timely request a hearing, you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

In the event that there is no request for such hearing received within thirty days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand you or place you on probation.

Please note that, whether or not you request a hearing, Section 4731.22(L), Ohio Revised Code, provides that “[w]hen the board refuses to grant a certificate to an

Michael Shane Gainey, M.D.

Page 3

applicant, revokes an individual's certificate to practice, refuses to register an applicant, or refuses to reinstate an individual's certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate."

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Lance A. Talmage, M.D.
Secretary

LAT/DPK/flb
Enclosures

CERTIFIED MAIL #91 7108 2133 3933 8841 3849
RETURN RECEIPT REQUESTED

FILED OF RECORD

FEB 28 2007

K.B.M.L.

COMMONWEALTH OF KENTUCKY
BOARD OF MEDICAL LICENSURE
CASE NO. 1075
ADMINISTRATIVE ACTION NO. 06-KBML-0349

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF KENTUCKY HELD BY MICHAEL S. GAINNEY, M.D., LICENSE NO. 22283, HARRISON MEMORIAL HOSPITAL, 1210 KENTUCKY HIGHWAY 36 EAST, CYNTHIANA, KENTUCKY 41031-7498

AGREED ORDER OF SUSPENSION; ORDER OF RESTRICTION

Come now the Kentucky Board of Medical Licensure (hereafter "the Board"), acting by and through its Hearing Panel A, and Michael S. Gainey, M.D., and, based upon their mutual desire to fully and finally resolve this pending Complaint without an evidentiary hearing, hereby ENTER INTO the following Agreed Order of Suspension; Order of Restriction:

STIPULATIONS OF FACT

The parties stipulate the following facts, which serve as the factual bases for this Agreed Order of Suspension; Order of Restriction:

1. At all relevant times, Michael S. Gainey, M.D. (hereafter, "the licensee"), was licensed by the Kentucky Board of Medical Licensure (hereafter "the Board") to practice medicine in the Commonwealth of Kentucky.
2. The licensee's medical specialty is Emergency Medicine.
3. On August 26, 2004, the licensee entered into an Agreed Order of Probation in Case No. 962 for a period of five (5) years.
4. Under condition 2(c) of the Agreed Order of Probation, the licensee shall not violate any provision of KRS 311.595 and/or 311.597.

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5. On November 2, 2005, Marsha Mitchell, Human Resources Director/Medical Staff Coordinator, Fleming County Hospital (FCH), wrote a letter to the Board advising that the licensee voluntarily surrendered his clinical privileges while under investigation for falsification of medical records and narcotics violations. Additionally, Ms. Mitchell provided a copy of the National Practitioner Data Bank report filed by the hospital pertaining to the same event.
6. Marsha Gorman, RN, Risk Management, FCH, stated that female emergency room patients were leaving messages for the licensee. It appeared that one patient was leaving messages for the licensee using another name. A review of the patients' charts revealed that Patient A was treated seven times in the emergency room from September 15, 2005 through October 23, 2005 and received controlled substances each time from the licensee. On two occasions, September 19th & 22nd, Patient A was not registered/admitted to the emergency room, but received controlled substances from the licensee. The licensee submitted additions to her medical records for the September 19th and 22nd visits and informed the records department to add them to her September 15th admission date. Ms. Gorman stated that several calls from the Hospital to Patient A were made which gave the appearance that the licensee was contacting her prior to the visits. RN Gorman stated that Patient B was seen five times in the emergency room from March 3, 2005 to October 7, 2005 receiving controlled substances from the licensee. On March 17th, Patient B received a prescription from the licensee without being admitted.

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7. Based upon a review of KASPER, eleven (11) patients (including Patients A & B) were identified as receiving multiple controlled substances, which would be atypical for a physician with a specialty in emergency medicine.
8. The eleven (11) patient records were obtained and reviewed by a Board Consultant. The Board Consultant concluded that the licensee's treatment and records in the eleven (11) cases reviewed were below the minimum standard of care. In fact, the Consultant concluded the pattern of acts by the licensee were pervasive enough to be deemed gross negligence and that the licensee does constitute a danger to the health, welfare and safety of the physician's patients and the public. In concluding that the licensee departed from or failed to conform to the standards of accepted and prevailing medical practice within the Commonwealth of Kentucky, the Consultant found the following deviations,
 1. The pattern of prescribing multiple repeat controlled substances over short periods of time does not conform to prevailing standards.
 2. Dr. Gainey acknowledges in his response letter to the Board that it is important to contact the patient's primary care physician (PCP) when prescribing controlled substances. However, in the 99 emergency room visits distributed among this core group of patients, there is documented PCP contact in only 5 cases. Additionally, in one of those cases, it is documented that the PCP wishes "NO outpatient narcotics" yet they are provided on that and subsequent visits.
 3. Fentanyl patches are a modality in chronic pain control suited to PCP office and/or pain clinic. It is beyond prevailing standards to repeatedly prescribe them through the Emergency Department.
 4. Repeatedly providing controlled substances linked to non-documented encounters outside the Emergency Department is outside prevailing standards. This is repeated multiple times in three patients in the small cohort reviewed.
 5. Though not in the strict review requested, among the charts where it is easily extracted, there appears to be greater than 90% administration of a parenteral controlled substance during the visit. This "conditioning" toward return visits creates an enormous cost to the general public.
 6. The prescribing records for this small group of 7 patients, shows that 57 controlled substance prescriptions were written totaling 1134 doses over a

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period averaging 6.5 weeks per patient. This far exceeds prevailing emergency medical standard practices.

9. The licensee provided a response to the allegations. He stated that the allegations from FCH are due to a conflict between the licensee and a nurse. The licensee maintained that all treatment provided by him at FCH was documented even though the patient may not have gone through the hospital's entry process. He stated that Patient A presented with abdominal pain and a CT was ordered, which was negative. Due to her long wait in the ER, she was instructed to return for an ultrasound, at which time she was treated as an outpatient. The licensee stated that he treated Patient B without using the hospital's entry system due to her inability to pay. The licensee stated that he felt the patients receiving controlled substances had legitimate illnesses. He stated that if the pharmacy contacted him about a patient's prescription overlapping or being filled too early he would not authorize it. He stated that he would counsel his patients on returning to their primary physician for treatment, but they would return to the ER due to the primary physician not treating their pain. The licensee maintained that if it were obvious the patient was high, intoxicated, or diverting he would not prescribe to them. The licensee does not utilize KASPER. The licensee explained that Patient C is a friend and is employed on his farm. Patient C self rehabilitated from an addiction of cocaine and was feeling hyper/anxious, therefore prescriptions of Ativan were given for a short time. The licensee stated that he saw Patient C every day and kept a medical chart.
10. The Inquiry Panel issued an Emergency Order of Suspension on October 26, 2006. Rather than challenge that Emergency Order, the licensee entered into an

OHIO STATE MEDICAL BOARD

MAR 12 2007

agreement with the Board that is incorporated into this Agreed Order of Suspension; Order of Restriction. The Panel Chair tentatively ratified this Agreed Order and it was filed on January 2, 2007, pending ratification by the Panel and approval of employment status. The licensee's medical license has remained suspended pending the Panel's ratification. Inquiry Panel A ratified the terms of this agreement and approved his employment at its February 15, 2007 meeting.

STIPULATED CONCLUSIONS OF LAW

The parties stipulate the following Conclusions of Law, which serve as the legal bases for this Agreed Order of Suspension; Order of Restriction:

1. The licensee's Kentucky medical license is subject to regulation and discipline by the Board.
2. Based upon the information contained in the Stipulations of Fact, the licensee has engaged in conduct which violates KRS 311.595(10), (21), (13) and (9) as illustrated by 311.597(1), (3) and (4). Accordingly, there are legal bases for disciplinary action against her Kentucky medical license.
3. Pursuant to KRS 311.591(6) and 201 KAR 9:082, the parties may fully and finally resolve a pending non-compliance report through informal means, such as this Agreed Order of Suspension; Order of Restriction.

AGREED ORDER OF SUSPENSION; ORDER OF RESTRICTION

Based upon the forgoing Stipulations of Fact and Stipulated Conclusions of Law, and based upon their mutual desire to fully and finally resolve this pending Complaint without an evidentiary hearing, the parties hereby ENTER INTO the following AGREED ORDER OF SUSPENSION; ORDER OF RESTRICTION:

OHIO STATE MEDICAL BOARD

MAR 12 2007

1. The license to practice medicine in the Commonwealth of Kentucky held by Michael S. Gainey, M.D., is hereby **SUSPENDED** for three (3) months from November 27, 2006 through February 27, 2007.
2. During that period of suspension, the licensee **SHALL NOT** perform any act which would constitute the "practice of medicine," as that term is defined in KRS 311.550(10) – the diagnosis, treatment, or correction of any and all human conditions, ailments, diseases, injuries, or infirmities by any and all means, methods, devices, or instrumentalities.
3. Following the completion of the three (3) month period of suspension, the licensee's Kentucky medical license **SHALL BE RESTRICTED/LIMITED** for an indefinite period by the following **TERMS AND CONDITIONS**:
 - a. The licensee's employment must be approved by the Panel or its Chair in advance of commencing employment and the Panel's or its Chair's approval must be in writing. The Panel or its Chair must approve any change in practice location for the licensee in writing and prior to the licensee practicing medicine at that location(s);
 - b. The Panel has approved the licensee's employment by the Whittaker Corporation in the Emergency Room/Department at Harrison Memorial Hospital, averaging 14-18 shifts per month;
 - c. The licensee **SHALL** only provide medical treatment to patients who are properly registered through the hospital's emergency room admission procedures;

OHIO STATE MEDICAL BOARD

MAR 12 2007

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- d. The licensee SHALL establish a physician-patient relationship prior to rendering any medical treatment, to include medically appropriate prescriptions, to a patient;
- e. The licensee SHALL maintain appropriate medical records on all patients to whom he provides medical treatment and ensure that the patient records document all treatment rendered;
- f. The licensee's utilization of controlled substances is expressly limited to use in a hospital Emergency department setting for treatment of patients or upon discharge from treatment for conditions where the use of controlled substances is medically necessary for the health, welfare and/or safety of the patient for the particular medical procedure being performed. The licensee shall be limited to prescribing a controlled substance prescription for a 72-hour period for patients being discharged from the emergency department. The licensee SHALL NOT prescribe, dispense, or otherwise professionally utilize controlled substances in any other context and/or for any other person(s);
- g. Prior to July 2, 2007, the licensee SHALL complete the "*Prescribing Controlled Substances: Critical Issues and Common Pitfalls*" course at The Center for Professional Health at Vanderbilt University Health Center, Nashville, TN, (615) 936-0678 or the University of South Florida, Tampa, Florida (813) 396-9217, at his expense;
- h. Prior to July 2, 2007, the licensee SHALL complete the "*Maintaining Proper Boundaries*" course through the Center for Professional Health at

OHIO STATE MEDICAL BOARD

MAR 12 2007

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Vanderbilt University Medical Center in Nashville, Tennessee, at his expense;

- i. The licensee SHALL provide written proof that he has successfully completed the "*Prescribing Controlled Substances: Critical Issues and Common Pitfalls*" course to the Board's agent assigned to supervise his compliance with this Agreed Order and the Board's General Counsel or Assistant General Counsel;
 - j. The licensee SHALL provide written proof that he has successfully completed the "*Maintaining Proper Boundaries*" course to the Board's agent assigned to supervise his compliance with this Agreed Order and the Board's General Counsel or Assistant General Counsel;
 - k. The licensee SHALL pay the costs of the administrative proceedings in the amount of \$993.75 within six (6) months from entry of this Agreed Order of Suspension; Order of Restriction;
 - l. The licensee SHALL NOT violate any provision of KRS 311.595 and/or 311.597.
4. The licensee expressly agrees that, if the licensee should violate any term or condition of this Agreed Order of Suspension; Order of Restriction, the licensee's practice SHALL constitute an immediate danger to the public health, safety, or welfare, as provided in KRS 311.592 and 13B.125. The parties further agree that, if the Board should receive information that he has violated any term or condition of this Agreed Order of Suspension; Order of Restriction, the Panel Chair is authorized by law to enter an Emergency Order of Suspension or Restriction

OHIO STATE MEDICAL BOARD

MAR 12 2007

immediately upon a finding of probable cause that a violation has occurred, after an *ex parte* presentation of the relevant facts by the Board's General Counsel or Assistant General Counsel. If the Panel Chair should issue such an Emergency Order, the parties agree and stipulate that a violation of any term or condition of this Agreed Order of Suspension; Order of Restriction would render the licensee's practice an immediate danger to the health, welfare and safety of patients and the general public, pursuant to KRS 311.592 and 13B.125; accordingly, the only relevant question for any emergency hearing conducted pursuant to KRS 13B.125 would be whether the licensee violated a term or condition of this Agreed Order of Suspension; Order of Restriction;

5. The licensee understands and agrees that any violation of this Agreed Order may serve as the basis for additional disciplinary action pursuant to KRS 311.595(13), including revocation of his Kentucky medical license.

SO AGREED this ____ day of _____, 2006.

FOR DR. GAINNEY:

MSL 6 - ms

MICHAEL S. GAINNEY, M.D.

Dr. P
DEAN PISACANO, ESQ. *per client authorization*
COUNSEL FOR DR. GAINNEY

OHIO STATE MEDICAL BOARD

MAR 12 2007

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FOR THE BOARD:

Donald J. Swibert

DONALD J. SWIBERT, M.D.
CHAIR, HEARING PANEL A

C. Lloyd Vest II

C. LLOYD VEST II
General Counsel
Kentucky Board of Medical Licensure
310 Whittington Parkway, Suite 1B
Louisville, Kentucky 40222
(502) 429-7150

OHIO STATE MEDICAL BOARD

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FILED OF RECORD

OCT 26 2006

K.B.M.L.

COMMONWEALTH OF KENTUCKY
BOARD OF MEDICAL LICENSURE
CASE NO. 1075

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF KENTUCKY HELD BY MICHAEL S. GAINEY, M.D., LICENSE NO. 22283, HARRISON MEMORIAL HOSPITAL, 1210 KENTUCKY HIGHWAY 36 EAST, CYNTHIANA, KENTUCKY 41031-7498

EMERGENCY ORDER OF SUSPENSION

The Kentucky Board of Medical Licensure (hereafter "the Board"), acting by and through its Inquiry Panel B, considered this matter at its October 19, 2006 meeting. At that meeting, Inquiry Panel B considered a memorandum prepared by Eric Tout, Medical Investigator, dated August 22, 2006; correspondence dated November 2, 2005 and September 13, 2006 prepared by Marsha Mitchell, Human Resources Director/Medical Staff Coordinator, Fleming County Hospital; a National Practitioner Data Bank Adverse Action Report dated November 2, 2005; correspondence dated December 19, 2005 and January 3, 2006 prepared by Carol Dozier, CEO, Fleming County Hospital; correspondence dated November 1, December 7 and December 28, 2005 prepared by the licensee; correspondence dated November 28, 2005 prepared by Harrell L. Connelly, Interim CEO, Fleming County Hospital; correspondence dated November 10, 2005 prepared by Paul T. Brizendine, M.D., NES Regional Medical Director, Whitaker National; correspondence dated November 1, 2005 prepared by Glenn R. Womack, M.D.; a memo dated November, 2005 prepared by Dr. Jane Wiczkowski; a facsimile cover sheet dated November 1, 2005 prepared by Lisa Huff/the licensee; the Agreed Order of Probation filed of record August 26, 2004; an October 19, 2005 outline of patient visits, phone calls, and prescriptions from Marsha Gorman, RN; the licensee's response dated

OHIO STATE MEDICAL BOARD

MAR 19 2007

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May 11, 2006 submitted by Dean A. Pisacano, Esq.; and Expert Review Worksheets prepared by a Board consultant dated July 8, 2006 with three Tables attached.

Having considered all of this information and being sufficiently advised, Inquiry Panel B ENTERS the following EMERGENCY ORDER OF SUSPENSION, in accordance with KRS 311.592(1) and 13B.125(1):

FINDINGS OF FACT

Pursuant to KRS 13B.125(2) and based upon the information available to it, Inquiry Panel B concludes there is probable cause to make the following Findings of Fact, which support its Emergency Order of Suspension:

1. At all relevant times, Michael S. Gainey, M.D., was licensed by the Board to practice medicine in the Commonwealth of Kentucky.
 2. The licensee's medical/osteopathic specialty is Emergency Medicine.
 3. On August 26, 2004, the licensee entered into an Agreed Order of Probation in Case No. 962 for a period of five (5) years.
 4. Under condition 2(c) of the Agreed Order of Probation, the licensee shall not violate any provision of KRS 311.595 and/or 311.597.
 5. On November 2, 2005, Marsha Mitchell, Human Resources Director/Medical Staff Coordinator, Fleming County Hospital (FCH), wrote a letter to the Board advising that the licensee voluntarily surrendered his clinical privileges while under investigation for falsification of medical records and narcotics violations.
- Additionally, Ms. Mitchell provided a copy of the National Practitioner Data Bank report filed by the hospital pertaining to the same event.

OHIO STATE MEDICAL BOARD

MAR 19 2007

6. Marsha Gorman, RN, Risk Management, FCH, stated that female emergency room patients were leaving messages for the licensee. It appeared that one patient was leaving messages for the licensee using another name. A review of the patients' charts revealed that Patient A was treated seven times in the emergency room from September 15, 2005 through October 23, 2005 and received controlled substances each time from the licensee. On two occasions, September 19th & 22nd, Patient A was not registered/admitted to the emergency room, but received controlled substances from the licensee. The licensee submitted additions to her medical records for the September 19th and 22nd visits and informed the records department to add them to her September 15th admission date. Ms. Gorman stated that several calls from the Hospital to Patient A were made which gave the appearance that the licensee was contacting her prior to the visits. RN Gorman stated that Patient B was seen five times in the emergency room from March 3, 2005 to October 7, 2005 receiving controlled substances from the licensee. On March 17th, Patient B received a prescription from the licensee without being admitted.
7. Based upon a review of KASPER, eleven (11) patients (including Patients A & B) were identified as receiving multiple controlled substances, which would be atypical for a physician with a specialty in emergency medicine.
8. The eleven (11) patient records were obtained and reviewed by a Board Consultant. The Panel has considered the Consultant's report and incorporates it by reference into the findings of fact. The Board Consultant concluded that the licensee's treatment and records in the eleven (11) cases reviewed were below the minimum standard of care. In fact, the Consultant concluded the pattern of acts by the licensee were

OHIO STATE MEDICAL BOARD

pervasive enough to be deemed gross negligence and that the licensee does constitute a danger to the health, welfare and safety of the physician's patients and the public.

In concluding that the licensee departed from or failed to conform to the standards of accepted and prevailing medical practice within the Commonwealth of Kentucky, the Consultant found the following deviations,

1. The pattern of prescribing multiple repeat controlled substances over short periods of time does not conform to prevailing standards.
 2. Dr. Gainey acknowledges in his response letter to the Board that it is important to contact the patient's primary care physician (PCP) when prescribing controlled substances. However, in the 99 emergency room visits distributed among this core group of patients, there is documented PCP contact in only 5 cases. Additionally, in one of those cases, it is documented that the PCP wishes "NO outpatient narcotics" yet they are provided on that and subsequent visits.
 3. Fentanyl patches are a modality in chronic pain control suited to PCP office and/or pain clinic. It is beyond prevailing standards to repeatedly prescribe them through the Emergency Department.
 4. Repeatedly providing controlled substances linked to non-documented encounters outside the Emergency Department is outside prevailing standards. This is repeated multiple times in three patients in the small cohort reviewed.
 5. Though not in the strict review requested, among the charts where it is easily extracted, there appears to be greater than 90% administration of a parenteral controlled substance during the visit. This "conditioning" toward return visits creates an enormous cost to the general public.
 6. The prescribing records for this small group of 7 patients, shows that 57 controlled substance prescriptions were written totaling 1134 doses over a period averaging 6.5 weeks per patient. This far exceeds prevailing emergency medical standard practices.
9. The licensee provided a response to the allegations. He stated that the allegations from FCH are due to a conflict between the licensee and a nurse. The licensee maintained that all treatment provided by him at FCH was documented even though the patient may not have gone through the hospital's entry process. He stated that Patient A presented with abdominal pain and a CT was ordered, which was negative. Due to her long wait in the ER, she was instructed to return for an ultrasound, at

OHIO STATE MEDICAL BOARD

MAR 19 2007

which time she was treated as an outpatient. The licensee stated that he treated Patient B without using the hospital's entry system due to her inability to pay. The licensee stated that he felt the patients receiving controlled substances had legitimate illnesses. He stated that if the pharmacy contacted him about a patient's prescription overlapping or being filled too early he would not authorize it. He stated that he would counsel his patients on returning to their primary physician for treatment, but they would return to the ER due to the primary physician not treating their pain. The licensee maintained that if it were obvious the patient was high, intoxicated, or diverting he would not prescribe to them. The licensee does not utilize KASPER. The licensee explained that Patient C is a friend and is employed on his farm. Patient C self rehabilitated from an addiction of cocaine and was feeling hyper/anxious, therefore prescriptions of Ativan were given for a short time. The licensee stated that he saw Patient C every day and kept a medical chart.

CONCLUSIONS OF LAW

Pursuant to KRS 13B.125(2) and based upon the information available to it, Inquiry Panel B finds there is probable cause to support the following Conclusions of Law, which serve as the legal bases for this Emergency Order of Suspension:

1. The licensee's Kentucky medical license is subject to regulation and discipline by this Board.
2. KRS 311.592(1) provides that the Board may issue an emergency order suspending, limiting, or restricting a physician's license at any time an inquiry panel has probable cause to believe that a) the physician has violated the terms of an order placing him

OHIO STATE MEDICAL BOARD

on probation; or b) a physician's practice constitutes a danger to the health, welfare and safety of his patients or the general public.

3. There is probable cause to believe that the licensee has violated the Agreed Order of Probation and KRS 311.595(13).
4. There is probable cause to believe that the licensee has violated KRS 311.595(10), (21), and (9) as illustrated by 311.597(1)(a)(b) and (c), (3) and (4).
5. The Panel concludes there is probable cause to believe this physician's practice, specifically his deviations from the accepted standards of practice of emergency medicine, constitutes a danger to the health, welfare and safety of his patients or the general public.
6. The Board may draw logical and reasonable inferences about a physician's practice by considering certain facts about a physician's practice. If there is proof that a physician has violated a provision of the Kentucky Medical Practice Act in one set of circumstances, the Board may infer that the physician will similarly violate the Medical Practice Act when presented with a similar set of circumstances. Similarly, the Board concludes that proof of a set of facts about a physician's practice presents representative proof of the nature of that physician's practice in general.

Accordingly, probable cause to believe that the physician has committed certain violations in the recent past presents probable cause to believe that the physician will commit similar violations in the near future, during the course of the physician's medical practice.
7. The United States Supreme Court has ruled that it is no violation of the federal Due Process Clause for a state agency to temporarily suspend a license, without a prior

evidentiary hearing, so long as 1) the immediate action is based upon a probable cause finding that there is a present danger to the public safety; and, 2) the statute provides for a prompt post-deprivation hearing. Barry v. Barchi, 443 U.S. 55, 61 L.Ed.2d 365, 99 S.Ct. 2642 (1979); FDIC v. Mallen, 486 U.S. 230, 100 L.Ed.2d 265, 108 S.Ct. 1780 (1988) and Gilbert v. Homar, 117 S.Ct. 1807 (1997). Cf. KRS 13B.125(1).

KRS 13B.125(3) provides that the Board shall conduct an emergency hearing on this emergency order within ten (10) working days of a request for such a hearing by the licensee. The licensee has been advised of his right to a prompt post-deprivation hearing under this statute.

EMERGENCY ORDER OF SUSPENSION

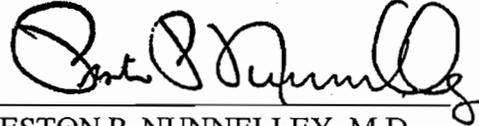
Based upon the foregoing Findings of Fact and Conclusions of Law, Inquiry Panel B hereby ORDERS that the license to practice medicine in the Commonwealth of Kentucky held by MICHAEL S. GAINNEY, M.D. is SUSPENDED and Dr. Gainney is prohibited from performing any act which constitutes the "practice of medicine," as that term is defined by KRS 311.550(10) – the diagnosis, treatment, or correction of any and all human conditions, ailments, diseases, injuries, or infirmities by any and all means, methods, devices, or instrumentalities - until the resolution of the Complaint setting forth the allegations discussed in this pleading or until such further Order of the Board.

OHIO STATE MEDICAL BOARD

MAR 19 2007

Inquiry Panel B further declares that this is an EMERGENCY ORDER, effective upon receipt by the licensee.

SO ORDERED this 26th day of October, 2006.



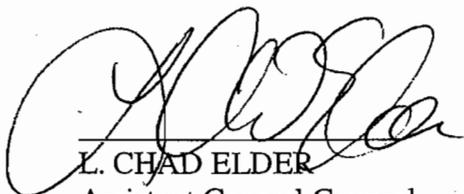
PRESTON P. NUNNELLEY, M.D.
CHAIR, INQUIRY PANEL B

OHIO STATE MEDICAL BOARD

MAR 19 2007

CERTIFICATE OF SERVICE

I certify that the original of this Emergency Order of Suspension was delivered to Mr. C. William Schmidt, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; and copies were mailed via certified mail return-receipt requested to Michael S. Gainey, M.D., 10050 Montgomery Road, #154, Cincinnati, Ohio 45242 and Dean A. Pisacano, Esq., 214 E. Fourth Street, Covington, Kentucky 41011 on this 26th day of October, 2006.



L. CHAD ELDER
Assistant General Counsel
Kentucky Board of Medical Licensure
310 Whittington Parkway, Suite 1B
Louisville, Kentucky 40222
(502) 429-7150

OHIO STATE MEDICAL BOARD

MAR 19 2007

COMMONWEALTH OF KENTUCKY
BOARD OF MEDICAL LICENSURE
CASE NO. 962

FILED OF RECORD

AUG 26 2004

K.B.M.L.

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF
KENTUCKY HELD BY MICHAEL S. GAINNEY, M.D., LICENSE NO. 22283,
1210 KY HIGHWAY 36 EAST, CYNTHIANA, KENTUCKY 41031-6055

AGREED ORDER OF PROBATION

Come now the Kentucky Board of Medical Licensure (hereafter "the Board"), acting by and through its Inquiry Panel B, and Michael S. Gainney, M.D., and, based upon their mutual desire to fully and finally resolve the pending grievance without an evidentiary hearing, hereby ENTER INTO the following AGREED ORDER OF PROBATION:

STIPULATIONS OF FACT

The parties stipulate the following facts, which serve as the factual bases for this Agreed Order of Probation:

1. At all relevant times, Michael S. Gainney, M.D. (hereafter "the licensee"), was licensed by the Board to practice medicine in the Commonwealth of Kentucky
2. The licensee's medical specialty is Emergency Medicine.
3. The licensee reported on his 2003 Kentucky Renewal Application that he voluntarily resigned from the medical staff of an Ohio hospital. No further action was taken due to his resignation. The hospital reported his resignation to the National Data Bank as "resigned while under investigation." The hospital investigation stemmed from an accusation by a female patient that she performed oral sex on Dr. Gainney in an Ohio hospital bathroom.

OHIO STATE MEDICAL BOARD

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4. On April 14, 2004, the licensee's Ohio certificate to practice medicine was suspended for ninety (90) days and placed on probation under appropriate terms for a period of at least two years. The Ohio action was based upon the finding from a hearing conducted on November 18 and 19, 2003 by the Ohio Board. The hearing examiner found that,

"On October 27, 2000, in the routine course of his practice, Dr. Gainey signed the medical record as the treating physician of Patient 1 in the emergency department of a Cincinnati-area hospital. Within a few hours of that patient's discharge from the emergency department, Dr. Gainey met her in a bathroom of the emergency department and received oral sex from her."

The hearing examiner concluded that the licensee was in violation of the Ohio Revised Code governing the practice of medicine and Principles I, II, and IV of the American Medical Association's Principles of Medical Ethics.

5. The licensee stated that the female patient in question arrived at the Ohio hospital emergency room complaining of an injured arm. He did not remember treating/seeing her, but signed off on the treatment provided by a Physician Assistant. The licensee stated that he went out to the parking lot, saw a female not knowing she was the individual he signed the charts on, began a conversation with her, and she offered to show him her tan lines. They went to the restroom where she performed oral sex on him. She subsequently filed rape charges and a civil suit, which were dismissed. The licensee stated that he is guilty of poor moral behavior but the sex was consensual.

STIPULATED CONCLUSIONS OF LAW

The parties stipulate the following Conclusions of Law, which serve as the legal bases for this Agreed Order of Probation:

OHIO STATE MEDICAL BOARD

1. The licensee's Kentucky medical license is subject to regulation and discipline by the Board.
2. Based upon the Stipulations of Fact, the licensee has engaged in conduct, which violates KRS 311.595(17) and (21). Accordingly, there are legal bases for disciplinary action against the licensee's Kentucky medical license.
3. Pursuant to KRS 311.591(6) and 201 KAR 9:082, the parties may fully and finally resolve the pending grievance without an evidentiary hearing by entering into an informal resolution such as this Agreed Order of Probation.

AGREED ORDER OF PROBATION

Based upon the foregoing Stipulations of Fact and Stipulated Conclusions of Law and, based upon their mutual desire to fully and finally resolve this pending grievance without an evidentiary hearing, the parties hereby ENTER INTO the following

AGREED ORDER OF PROBATION:

1. The license to practice medicine in the Commonwealth of Kentucky held by Michael S. Gainey, M.D., is hereby PLACED ON PROBATION for a period of FIVE (5) YEARS, with that period of probation to commence immediately upon the filing of this Agreed Order of Probation.
2. During that period of probation, the licensee SHALL BE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:
 - a. The licensee shall abide by all terms and conditions of his Ohio Order of suspension and probation entered on April 14, 2004 and remain in good standing with the State Medical Board of Ohio;
 - b. The licensee shall not have sexual contact with any patient;

OHIO STATE MEDICAL BOARD

- c. The licensee shall not violate any provision of KRS 311.595 and/or 311.597.
3. The licensee expressly agrees that, if the licensee should violate any term or condition of this Agreed Order of Probation, the licensee's practice shall constitute an immediate danger to the public health, safety, or welfare, as provided in KRS 311.592 and 13B.125. The parties further agree that, if the Board should receive information that he has violated any term or condition of this Agreed Order of Probation, the Panel Chair is authorized by law to enter an Emergency Order of Suspension or Restriction immediately upon a finding of probable cause that a violation has occurred, after an *ex parte* presentation of the relevant facts by the Board's General Counsel or Assistant General Counsel. If the Panel Chair should issue such an Emergency Order, the parties agree and stipulate that a violation of any term or condition of this Order would render the licensee's practice an immediate danger to the health, welfare and safety of patients and the general public, pursuant to KRS 311.592 and 13B.125; accordingly, the only relevant question for any emergency hearing conducted pursuant to KRS 13B.125 would be whether the licensee violated a term(s) or condition(s) of this Agreed Order of Probation.
4. The licensee understands and agrees that any violation of this Agreed Order of Probation may serve as the basis for additional disciplinary action, pursuant to KRS 311.595(13), including revocation of his Kentucky medical license.

SO AGREED this 26th day of August, 2004.

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FOR THE LICENSEE:

W. S. G. ———
MICHAEL S. GAINY, M.D.

COUNSEL FOR DR. GAINY
(IF APPLICABLE)

FOR THE BOARD:

P. P. Nunnolley MS
PRESTON P. NUNNELLEY, M.D.
CHAIR, INQUIRY PANEL B

L. Chad Elder
L. CHAD ELDER
Assistant General Counsel
Kentucky Board of Medical Licensure
310 Whittington Parkway, Suite 1B
Louisville, Kentucky 40222
(502) 429-8046

ENTERED: 08/26/04



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.med.ohio.gov

April 14, 2004

Michael Shane Gainey, M.D.
9765 Murdock-Goshen Road
Loveland, OH 45140

Dear Doctor Gainey:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Sharon W. Murphy, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on April 14, 2004, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal must be taken to the Franklin County Court of Common Pleas.

Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of a Notice of Appeal with the State Medical Board of Ohio and the Franklin County Court of Common Pleas. Any such appeal must be filed within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12, Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO

Lance A. Talmage, M.D.
Secretary

LAT:jam
Enclosures

CERTIFIED MAIL NO. 7000 0600 0024 5150 0811
RETURN RECEIPT REQUESTED

Cc: Theodore J. Froncek, Esq.
CERTIFIED MAIL NO. 7000 0600 0024 5150 0828
RETURN RECEIPT REQUESTED

Mailed 5/4/04

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of Sharon W. Murphy, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on April 14, 2004, including motions approving and confirming the Findings of Fact and Conclusions of the Hearing Examiner, and adopting an amended Order; constitute a true and Michael Shane Gainey, M.D., as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.



Lance A. Talmage, M.D.
Secretary

(SEAL)

April 14, 2004
Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF *

*

MICHAEL SHANE GAINEY, M.D. *

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on April 14, 2004.

Upon the Report and Recommendation of Sharon W. Murphy, State Medical Board Attorney Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the modification, approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for the above date.

It is hereby ORDERED that:

- A. **SUSPENSION OF CERTIFICATE:** The certificate of Michael Shane Gainey, M.D., to practice medicine and surgery in the State of Ohio shall be shall be SUSPENDED for a period of ninety days.
- B. **PROBATION:** Upon reinstatement, Dr. Gainey's certificate shall be subject to the following Probationary terms, conditions, and limitations for a period of at least two years:
 - 1. **Obey Laws in Ohio:** Dr. Gainey shall obey all federal, state, and local laws; and all rules governing the practice of medicine in Ohio.
 - 2. **Quarterly Declarations:** Dr. Gainey shall submit quarterly declarations under penalty of Board disciplinary action or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on the first day of the third month following the month in which Dr. Gainey's certificate is restored or reinstated. Subsequent quarterly declarations

must be received in the Board's offices on or before the first day of every third month.

3. **Appearances**: Dr. Gainey shall appear in person for an interview before the full Board or its designated representative during the third month following the month in which Dr. Gainey's certificate is restored or reinstated, or as otherwise directed by the Board. Subsequent personal appearances must occur every three months thereafter, and/or as otherwise requested by the Board. If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled.
4. **Professional Ethics Course**: Before the end of the first year of probation, or as otherwise approved by the Board, Dr. Gainey shall provide acceptable documentation of successful completion of a course or courses dealing with professional ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education acquisition period(s) in which they are completed.
5. **Personal Ethics Course**: Before the end of the first year of probation, or as otherwise approved by the Board, Dr. Gainey shall provide acceptable documentation of successful completion of a course or courses dealing with personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education period(s) in which they are completed.
6. **Absence from Ohio**: In the event that Dr. Gainey should leave Ohio for three continuous months, or reside or practice outside the State, Dr. Gainey must notify the Board in writing of the dates of departure and return. Periods of time spent outside Ohio will not apply to the reduction of this probationary period, unless otherwise determined by the Board in instances where the Board can be assured that probationary monitoring is otherwise being performed.
7. **Violation of Probation; Discretionary Sanction Imposed**: If Dr. Gainey violates probation in any respect, the Board, after giving him notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of his certificate.

- C. **TERMINATION OF PROBATION:** Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Gainey's certificate will be fully restored.
- D. **REQUIRED REPORTING BY LICENSEE TO EMPLOYERS AND HOSPITALS:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Gainey shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Gainey shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments.
- E. **REQUIRED REPORTING TO OTHER STATE LICENSING AUTHORITIES:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Gainey shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license. Dr. Gainey shall also provide a copy of this Order by certified mail, return receipt requested, at the time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration or restoration of any professional license. Further, Dr. Gainey shall provide this Board with a copy of the return receipt as proof of notification within thirty days of receiving that return receipt, unless otherwise determined by the Board.

EFFECTIVE DATE OF ORDER: This Order shall become effective thirty days after the mailing of notification of approval by the Board.

(SEAL)



Lance A. Talmage, M.D.
Secretary

April 14, 2004
Date

2004 FEB 24 P 2: 39

**REPORT AND RECOMMENDATION
IN THE MATTER OF MICHAEL SHANE GAINEY, M.D.**

The Matter of Michael Shane Gainey, M.D., was heard by Sharon W. Murphy, Esq., Hearing Examiner for the State Medical Board of Ohio, on November 18 and 19, 2003.

INTRODUCTION

I. Basis for Hearing

- A. By letter dated June 11, 2003, the State Medical Board of Ohio [Board] notified Michael Shane Gainey, M.D., that it had proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board's proposed action was based on allegations that Dr. Gainey had engaged in sexual conduct with a patient in the bathroom of the Emergency Department of a Cincinnati-area hospital.

The Board further alleged that Dr. Gainey's conduct constitutes "[a] departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established,' as that clause is used in Section 4731.22(B)(6), Ohio Revised Code." In addition, the Board alleged that Dr. Gainey's conduct constitutes a "[v]iolation of any provision of a code of ethics of the American medical association, the American osteopathic association, the American podiatric medical association, or any other national professional organizations that the board specifies by rule,' as that clause is used in Section 4731.22(B)(18), Ohio Revised Code, to wit: Principles I, II and IV of the American Medical Association's Principles of Medical Ethics."

Accordingly, the Board advised Dr. Gainey of his right to request a hearing in this matter. (State's Exhibit 1A)

- B. On July 7, 2003, Theodore J. Froncek, Esq., submitted a written hearing request on behalf of Dr. Gainey. (State's Exhibit 1B)

II. Appearances

- A. On behalf of the State of Ohio: Jim Petro, Attorney General, by Kyle C. Wilcox, Assistant Attorney General.
- B. On behalf of the Respondent: Theodore J. Froncek, Esq.

EVIDENCE EXAMINED

I. Testimony Heard

A. Presented by the State:

1. Michael Shane Gainey, M.D., as if on cross-examination
2. David C. Romano, M.D.

B. Presented by the Respondent:

1. Loraine Zakem-Glazer, M.D.
2. Scott Robert Welden, M.D.
3. Scott Douglas Longevin, M.D.
4. Steve Michael Kordis, M.D.
5. Michael Shane Gainey, M.D.

II. Exhibits Examined

A. Presented by the State:

1. State's Exhibits 1A through 1M: Procedural exhibits.
2. State's Exhibit 2: Copy of a February 12, 2003, deposition of Dr. Gainey (as redacted by the parties).
- * 3. State's Exhibit 3: Copy of an October 9, 2001, interview of Dr. Gainey by the Hamilton County Sheriff's Office (as redacted by the parties).
4. State's Exhibit 4: Copy of an April 27, 2003, letter to the Board from David C. Romano, M.D.
- * 5. State's Exhibit 5: Certified copy of an October 27, 2001, medical record for Patient 1 from The Jewish Hospital, Cincinnati, Ohio.
6. State's Exhibit 6: Copy of the March 2000 Physician Assistant Utilization Plan for University Emergency Physicians, Inc.
- * 7. State's Exhibit 7: Patient key.
8. State's Exhibit 8: Curriculum vitae of Dr. Romano.
9. State's Exhibit 9: State's Closing Argument.

- B. Presented by the Respondent:
1. Respondent's Exhibit A: Copy of the American Medical Association's guideline E-8.14, "Sexual Misconduct in the Practice of Medicine."
 2. Respondent's Exhibit B: Respondent Michael Shane Gainey's Closing Argument.
- C. Admitted sua sponte by the Hearing Examiner post-hearing.

Board Exhibits A and B: The parties' joint Notice to Hold Hearing Record Open, faxed and mailed, respectively.

* Note: Exhibits marked with an asterisk [*] have been sealed to protect patient confidentiality.

PROFFERED EXHIBITS

Proffer A: In his opening statement, Counsel for the Respondent stated that he would submit evidence regarding a lawsuit related to this matter. Counsel for the State objected. The Hearing Examiner sustained the State's objection, but allowed Dr. Gainey to proffer the pertinent evidence. Dr. Gainey proffered that material as Proffer A. (See Hearing Transcript at 16-17) (Note: Exhibit sealed to protect patient confidentiality)

PROCEDURAL MATTERS

1. The hearing record in this matter was held open until January 23, 2004, to allow the parties to submit written closing arguments. The parties submitted the documents in a timely manner, and the documents were admitted to the record as State's Exhibit 9 and Respondent's Exhibit B.
2. On January 26, 2004, the parties submitted, by facsimile, a Notice to Hold Hearing Record Open [Notice]. In the Notice, the parties advised that, pursuant to Rule 4731-13-17(A), Ohio Administrative Code, the parties had agreed that the matter should be held open until February 20, 2004. Rule 4731-13-17(A), Ohio Administrative Code, provides as follows:
 - (A) Any matter which is the subject of a hearing may be settled at any time prior to the close of the hearing record. If settlement negotiations are to continue after the close of the hearing record, the representatives of record must, within ten days of the close of the hearing, jointly present the attorney hearing examiner with written notice specifying a period of time, not to exceed thirty days, for which the record is to be held open

for purposes of negotiation. Such notice shall toll the attorney hearing examiner's thirty-day time period for issuance of findings of fact and conclusions of law pursuant to section 4731.23 of the Revised Code. If the attorney hearing examiner has not received appropriate written notice that a settlement agreement has been executed within the time period specified by the representatives' joint notice, the tolling of the attorney hearing examiner's thirty-day period for issuance of findings of fact and conclusions of law shall cease, no further settlement negotiations shall be undertaken, and no settlement agreement shall be executed in lieu of the issuance of a final order by the board.

O.A.C. 4731-13-17(A) (emphasis added).

In this case, the hearing closed on November 19, 2003. Pursuant to the rule, the parties would have had to submit their notice on or before December 1, 2003, to assure that the hearing record would be held open to allow settlement subsequent to the close of the hearing record. The parties did not submit their notice until January 26, 2003, significantly more than ten days after the close of the hearing. Accordingly, the parties forfeited their opportunity to invoke the language of the rule.

It may be argued, however, that the rule can be interpreted to state that the Notice must be filed within ten days of the close of the hearing record. Nevertheless, even if such an interpretation is correct, the parties did not file written notice that a settlement agreement had been executed by February 20, 2004, the date set forth in the Notice. Therefore, pursuant to the rule, "no settlement agreement shall be executed in lieu of the issuance of a final order by the board."

SUMMARY OF THE EVIDENCE

All exhibits and transcripts of testimony, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

1. Michael Shane Gainey, M.D., testified that he was born in Fair Bluff, North Carolina, and had been raised in a town of fifty people. Dr. Gainey further testified that his parents had not been well educated: his father had finished second grade and his mother had finished first grade. Dr. Gainey added that his father had been a mean alcoholic who had "a lot of scrapes and run-ins with the law" and was "constantly beaten up by the South Carolina state troopers." (Hearing Transcript at [Tr.] 275-277)

Dr. Gainey testified that he had attended a very small school for the first seven years, and that all grades had been taught in the same room. During the seventh grade, Dr. Gainey's

mother realized that he was smarter than the other children she knew, so she made great sacrifices to drive him to a larger school. Dr. Gainey testified that he is the first member of his family ever to finish high school. (Tr. 278-279)

Dr. Gainey testified that, when he finished high school, the options available to him had been limited: he could work at the mill or join the military. Dr. Gainey testified that he decided to join the military. Dr. Gainey testified that, because he had been a very good athlete in high school, the military had offered him a scholarship to play baseball at the Citadel Military College in South Carolina. Dr. Gainey testified that he had accepted the offer, and had graduated from the Citadel in 1976. In 1980, Dr. Gainey graduated from the Medical University of South Carolina. (Tr. 20, 279-284)

In 1983, Dr. Gainey completed a residency in family medicine at Roanoke Memorial Hospital in Roanoke, Virginia. Nevertheless, Dr. Gainey testified that his true love had been emergency medicine, and that there had been few emergency medicine residency programs at that time. (Tr. 285)

Dr. Gainey stated that, during his internship, he had started a company arranging for interns and residents to staff local hospitals. When he completed his residency, he sold the company to younger residents. Through contacts he had made running that company, Dr. Gainey was offered and accepted a position with Acute Care America, a corporation in Huntington, West Virginia, which arranged for physicians to staff emergency departments in several states. In that position, Dr. Gainey was the medical director of forty-five emergency departments. Dr. Gainey traveled to Ohio, Kentucky, Wisconsin, and other states. (Tr. 285-287)

From 1987 through 1989, Dr. Gainey participated in a fellowship in geriatric medicine at the University of Cincinnati. Dr. Gainey testified that he had been the first fellow accepted into that program. To supplement his income as a fellow, Dr. Gainey started “moonlighting” in the emergency department at Jewish Hospital in Kenwood, Ohio. Eventually, Dr. Gainey set up his own corporation, Cincinnati Emergency Services [CES], to staff emergency departments in the Cincinnati area. Dr. Gainey testified that he works through CES and, currently, is the only employee of CES. (Tr. 20-22, 289-294)

From 1990 to 1993, Dr. Gainey attended the University of Cincinnati Law School. Dr. Gainey testified that he is not licensed to practice law. (Tr. 22-23, 289)

Dr. Gainey is board certified in family medicine, geriatrics, emergency medicine, and sports medicine. (Tr. 289-290; State’s Exhibit [St. Ex.] 3 at 2) Dr. Gainey has been licensed to practice medicine and surgery in Ohio since 1982. He also holds an active license in Kentucky. Dr. Gainey testified that, in the past, he had held active licenses in Indiana, South Carolina, Oregon, Washington, Wisconsin, Virginia, and West Virginia. He stated that he formally terminated his licenses in Virginia and West Virginia, and he is

unsure of the status of the others. Dr. Gainey testified that he has never had any action taken against any of those licenses. (Tr. 19, 272-274, 287, 296)

2. Dr. Gainey testified that, on October 27, 2000, he had been working at Jewish Hospital. He had been working a twelve-hour shift, from 11:00 a.m. to 11:00 p.m. (Tr. 23-24)

Dr. Gainey described the physical layout of the emergency department at Jewish Hospital as it was in 2000. He stated that there was a lobby through which ambulatory patients entered the department. Those patients were seen first at a triage desk. (Tr. 25)

Dr. Gainey further explained that the treatment area of the emergency department was divided into several main sections. One section was connected to the ambulance entrance. There were eight to ten beds in that section. The patients in that section were more likely to need more extensive care and to be admitted to the hospital. The second section was a trauma center, and the third was for patients who would not require extensive care. Dr. Gainey testified that physicians staffed these areas. There was a physician who worked from 7:00 a.m. to 7:00 p.m., a physician who worked from 7:00 p.m. to 7:00 a.m., and a physician who worked from 11:00 a.m. to 11:00 p.m. (Tr. 25-26)

Finally, there was a newly created “fast track” that was staffed by physician assistants. Dr. Gainey testified that there had not been a specific physician assigned to the fast track area. For each patient seen in the fast track area, the physician assistant could consult with any physician working in the other areas of the emergency department. (Tr. 25-27)

3. Patient 1, a 41 year-old female, was seen in the emergency department at Jewish Hospital on October 27, 2000. Patient 1 entered the emergency department at 6:12 p.m. She complained of pain at her left wrist and elbow, pain on movement, and inability to rotate the left wrist. The left elbow and wrist were swollen. Patient 1 reported that she had been suffering from multiple sclerosis for eleven years. That morning, she had fallen and injured her wrist. (St. Ex. 5 at 3, 9; Tr. 32-33)

On Patient 1’s emergency department record, the “Physician Treatment Orders” were written at 8:00 p.m. and are listed as x-ray left wrist and elbow. The x-ray revealed no fracture and mild soft tissue swelling. The “Medication Orders” are listed as, “Sling to left hand; Velcro splint; Lortab.” These orders were written at 9:40 p.m. Patient 1’s history and physical examination was dictated at 9:45 p.m. The dictated note was signed by the physician assistant and Dr. Gainey, although Dr. Gainey testified that it had been dictated by the PA. The diagnosis was “Acute left wrist and left elbow sprain.” The “Patient Instructions” include the directive to keep the left arm in a splint and a sling. (St. Ex. 5 at 3, 9,10, 11; Tr. 32, 43-44)

Dr. Gainey testified that before leaving the emergency department, Patient 1’s left wrist would have been splinted, but the emergency department staff may have given her the sling

to take home. Therefore, despite the directive to keep the left arm in a splint and sling, Dr. Gainey testified that Patient 1's left arm would not have been immobilized when she left the emergency department. (Tr. 34)

4. At first, Dr. Gainey suggested that he had not seen Patient 1 and had not examined her that evening. (Tr. 25, 30) Later, Dr. Gainey testified that he has no recollection of having seen Patient 1 that evening, although he did sign her medical record. (Tr. 30-31) Dr. Gainey testified that he had not taken her history or participated in the triage decision regarding Patient 1. Dr. Gainey did not make an early assessment or order the x-ray for Patient 1. Moreover, Dr. Gainey did not review the x-ray films for Patient 1. In fact, Dr. Gainey testified that he had first learned that Patient 1 "claimed" to have been his patient one year later during an interview of Dr. Gainey by the Hamilton County Sheriff's Department. (Tr. 298-300)

When asked why he had signed the medical record, Dr. Gainey responded, in part,

I have no independent recollection, counselor, of seeing this lady while she was in the ER as a patient. Why the PA chose to use my name – it may have been I did see her. I have no independent recollection. It may have been that the PA came out and presented the patient to me and I made some kind of cursory—it may have been that [another physician] saw her and then [the PA] chose to use my name because he didn't know [the other physician].

* * *

[T]he testimony I'm giving is that, one, I signed the chart; two, I have to take responsibility for signing the chart; three, I have no independent recollection of seeing the patient over three years ago. That's the best I can say.

(Tr. 40-41)

5. Dr. Gainey testified that, after completing his shift that evening, he had left the emergency department shortly after 11:00 p.m. Dr. Gainey testified that he had signed out, changed his clothes, and left. Dr. Gainey also testified that he had gone to the parking lot to find a patient who he believed might be there smoking a cigarette. Dr. Gainey further testified that, when he went to look for that patient, he had left the hospital by the main entrance rather than by the emergency department entrance. (Tr. 46-47, 301, 303-304)

Dr. Gainey stated that, when he went out to the parking lot, he had not found the patient he had sought. Nonetheless, he found Patient 1 standing in the hospital parking lot. He said that she had appeared to be either looking for something or to be angry about something. Dr. Gainey testified that he had not recognized Patient 1 as a patient, and that he does not remember her wearing a splint or a sling. Dr. Gainey further testified that he had not been

wearing anything that would have identified him as a physician. When asked what transpired at that point, Dr. Gainey testified that he can not recall the conversation verbatim since it had occurred three years ago. (Tr. 47-48, 304-305, 307, 324-325)

Nevertheless, Dr. Gainey testified that, to the best of his recollection, he had asked Patient 1 if she needed some help. Patient 1 answered that she was angry because her husband had not come to take her home. Patient 1 also stated that she wanted to go to the bathroom, and Dr. Gainey offered to show her where the bathroom was located in the hospital. Dr. Gainey testified that he had walked her to the bathroom door. (Tr. 49, 307)

Dr. Gainey added that, when he walked her to the bathroom, Patient 1 had “made an overture to [him], and unfortunately [he had] accepted.” Dr. Gainey testified that he had gone into the bathroom with her, and she had performed oral sex on him. He stated that there had not been any other sexual activity. He further stated that he had not hugged or kissed Patient 1. Upon further questioning, Dr. Gainey testified that she may have hugged him, although he did not recall it. Moreover, Dr. Gainey could not recall if Patient 1 had been wearing the splint at that time. He did state, however, that she had not had any limitation in the use of her extremities. (Tr. 51-53, 307)

Dr. Gainey testified that he had not threatened or forced Patient 1 to engage in oral sex with him. (Tr. 308)

Dr. Gainey stated that, after Patient 1 finished providing oral sex, they both left the bathroom. Patient 1 asked Dr. Gainey to call her, and gave him her telephone number. Dr. Gainey testified that he had called her within the next few days, because Patient 1 had indicated that she wanted to have an ongoing relationship with him. Dr. Gainey testified that, when he called her, he had apologized for the incident in the bathroom, and told her that he could not have an affair with her because he had been married at that time. (Tr. 53, 309-310)

6. On October 9, 2001, Dr. Gainey was interviewed, without an attorney, by the Hamilton County Sheriff’s Department. During the interview, Dr. Gainey stated that, when he met Patient 1 in the parking lot, she had looked familiar to him, but that he had not really known her. Dr. Gainey stated that, during the emergency department visit, he had “only supervised the physician assistant” and that he had not “in any meaningful way examine[d] her.” (St. Ex. 3 at 2-3; Tr. 59)

During the interview, Dr. Gainey further stated that, after Patient 1 had been discharged from the emergency department, he had seen her in the back hallway of the emergency department and then again in the hospital parking lot. Dr. Gainey testified that he had gone outside for a reason which he could not, at that time, recall. He added that it might have been to look for someone who had been asked to wait outside. (St. Ex. 3 at 3)

Dr. Gainey further stated that he and Patient 1 had started talking and, he guessed, there had been “mutual attraction.” Dr. Gainey stated that Patient 1 had offered to show him that she had no “tan lines” and that he had agreed to look. Therefore, they went to the bathroom in the hallway of the emergency department so that she could show him the parts of her body that did not have tan lines. (St. Ex. 3 at 3-4)

Dr. Gainey stated that, in the bathroom, she had shown him her breasts and buttocks, but he had not touched them. Then she had “pulled her clothes back on,” and they had hugged. Dr. Gainey testified that Patient 1 had touched him on the penis and had given him oral sex. Dr. Gainey added that there had been no coercion. (St. Ex. 3 at 4-5)

Dr. Gainey stated that, after finishing the sexual act, Patient 1 had wanted to use the bathroom facilities. Dr. Gainey stated that he had “had to help her onto the bathroom cause she had a hurt arm.” He left the bathroom and, when she was finished, he helped her out. Dr. Gainey walked Patient 1 back to the lobby. (St. Ex. 3 at 5-6)

Dr. Gainey stated that he and Patient 1 had chatted on the way to the lobby. He added that there had been no animosity between them. They had discussed meeting again, and Patient 1 had introduced Dr. Gainey to her husband when he arrived. (St. Ex. 3 at 6-7)

7. Regarding the inconsistencies in the events as he had relayed them during the interview and as he had relayed them at hearing, Dr. Gainey testified that he had been under great duress during the interview. Dr. Gainey testified that that interview had been the third or fourth time he had met with the officers. (Tr. 57-60, 308-309, 323-326) Moreover, Dr. Gainey testified that, prior to giving his statement,

They kept me there for four hours in a small room, couldn't move, couldn't go to the bathroom, nothing to drink and browbeat me for many, many hours; and on my seventh time, I told them what happened. They recorded it.

* * *

I'll be honest with you, counselor, when I gave this, I was crying, sick, almost suicidal, and I was willing to give whatever it took to get me out of there, because [a sheriff's deputy] had already told me, 'We at the police do not think you raped anybody, We're not interested in arresting you but you've got to give a statement.'

* * *

You've got to remember, counselor, they asked me there for rape. This woman says I raped her, I forcibly raped her. This woman didn't say I went to the hospital and offered the ER doctor or some guy there a blow job, and

I gave it to him, and two years later since he won't pay me money I want to file a charge. They didn't say that. They said we're here—we're going to put you in jail for rape.

(Tr. 57-60)

8. On February 12, 2003, Dr. Gainey appeared, with his attorney, for a deposition before an Enforcement Attorney for the Board. During the deposition, Dr. Gainey denied having hugged or kissed Patient 1. (St. Ex. 2 at 48, Tr. 61-63)
9. At hearing, Dr. Gainey was asked if it is his position that Patient 1 had not been his patient. Dr. Gainey responded as follows:

In the world of ER medicine—you have to remember some of these statutes are sort of rawly written to cover all of medicine; but in ER medicine, I think any reasonable ER physician would testify that our interaction with a patient begins with a sign-in and ends when they're discharged.

Now, you could argue that if you write admitting orders on someone, extend your liability or extend your relationship, you can maybe argue that if you tell Susie Cucumber to come back next Tuesday when you're working in the ER and let you look at her laceration, you've extended the physician-patient relationship; but in general, most ER doctors—I think, most ER doctors would say that our relationship ends and begins when they're in the ER. We don't know them before. We don't know them after. I don't have an office. I don't have my name in the phone book to call or anything like that.

Now, it would be my testimony that—and I've said it before. I guess I'm the victim of a PA that just happened to pick my name to put on this chart. I don't independently recollect seeing this lady in the emergency department while she was there for her hurt arm.

* * *

I've admitted I signed the chart. So if that makes her my patient while she was in the ER, then so be it, but I would suggest that when you look at this in the real world, when you look at it in the spirit of this thing, I mean, this patient, this person's doctor/patient relationship ended when she was discharged at 9:00.

(Tr. 64-66)

10. Dr. Gainey was asked if he believes that having a sexual relationship with a patient is a violation of a physician's standard of care. Thereafter, the following exchange ensued:
- A. (By Dr. Gainey) I believe it's a moral lapse, and it depends on how you read it. Was this a surreal act to me? Did I plot this? Did I plan this? Did I go out and seek this? No.
- Q. (By Mr. Wilcox) In general and not necessarily this case, do you believe it is unethical to have a relationship, sexual in manner, with a patient?
- A. Counselor, I would like to suggest that I only have interest in my case.
- Q. So you don't want to answer that question for the Board?
- A. I did answer the question. You say not pertaining to my case. I'm only interested in my case.
- Q. (By the Hearing Examiner) He's asking you * * *
- A. I'm not interested in any physician violating whatever rules.
- Q. (By the Hearing Examiner) Just a second. He's asking you what your understanding is. I believe this is how I would interpret it. He's asking what your understanding is of the ethical obligations of a physician should a physician engage in sexual conduct with a patient.
- A. I believe that the physician should not engage with a patient.
- Q. (By Mr. Wilcox): Why?
- A. Why? Because they don't want to end up here.
- Q. Is that the only reason?
- A. No, counselor.
- Q. Tell us why.
- A. Your Honor, I don't want to—the State Board has regulations they publish, and I'm in agreement with the state board regulations. I'm only interested in the specifics of my case, which I think are different and unique.

Do I think that a family practitioner who has an ongoing relationship with a patient that sees her every week should have an ongoing sexual relationship? No, I don't think it's necessarily right, but are there circumstances where patients and doctors fall in love? Sure. Are there situations where doctors and patients have a sexual relationship, and it never rises to the level where the Board is aware of it? I'm sure it happens. But if you ask me a blanket statement, the only thing I can answer is that there's rules about that.

(Tr. 71-73)

Thereafter, the Hearing Examiner explained to Dr. Gainey that it is important for the Board to understand Dr. Gainey's perception of the ethical obligation that a physician owes to his patients. At that point, Dr. Gainey became extremely emotional, and discussed the significantly negative impact these events have had in his life. After apologizing for his emotionality, Dr. Gainey continued. (Tr. 74-78) Dr. Gainey stated, in part, the following:

[I]n response to your question, counselor, am I aware of the ethics laws and a physician should not have sex with a patient? I'm aware of that, and I believe in that, and I've always practiced that before this event and after this event.

(Tr. 78)

Dr. Gainey testified that he "maintains a certain dignity" for Patient 1 and he has forgiven her for the problems she has caused him. Dr. Gainey testified that he was not implying that what happened is Patient 1's fault. He further stated that he accepts one-half of the responsibility for what happened. (Tr. 306)

Dr. Gainey testified that what happened between him and Patient 1 was a one-time event. He stated that he has never acted inappropriately with any other patient. (Tr. 320)

Dr. Gainey further testified that, when treating patients now, he never meets with a female patient alone. He always has a chaperone. Dr. Gainey testified that, although he would never want to jeopardize a patient, he does this to assure that he does not put himself in jeopardy. (Tr. 321-322)

11. The American Medical Association's guideline, E-8.14, "Sexual Misconduct in the Practice of Medicine," provides as follows:

Sexual contact that occurs concurrent with the physician-patient relationship constitutes sexual misconduct. Sexual or romantic interactions between physicians and patients detract from the goals of the physician-patient

relationship, may exploit the vulnerability of the patient, may obscure the physician's objective judgment concerning the patient's health care, and ultimately may be detrimental to the patient's well-being.

If a physician has reason to believe that non-sexual contact with a patient may be perceived as or may lead to sexual contact, then he or she should avoid the non-sexual contact. At a minimum, a physician's ethical duties include terminating the physician-patient relationship before initiating a dating, romantic, or sexual relationship with a patient.

Sexual or romantic relationships between a physician and a former patient may be unduly influenced by the previous physician-patient relationship. Sexual or romantic relationships with former patients are unethical if the physician uses or exploits trust, knowledge, emotions, or influence derived from the previous professional relationship. (I, II, IV)

(Respondent's Exhibit [Resp. Ex.] A)

12. David C. Romano, M.D., testified at hearing on behalf of the State. Dr. Romano testified that he had received his medical degree in 1984 from the Wright State University School of Medicine. In 1987, Dr. Romano completed a residency in emergency medicine at Akron City Hospital in Akron, Ohio. From 1987 through 1995, Dr. Romano served as an attending physician in the emergency department at Green Memorial Hospital in Xenia. (Tr. 82-83; St. Ex. 8)

Since 1995, Dr. Romano has been employed by Premier Health Care Services, an emergency medicine staffing company that provides emergency medicine physician services to thirty-five emergency departments. Dr. Romano testified that, as part of his responsibilities for Premier Health Care Services, Dr. Romano serves as the medical director for two emergency departments in Ohio. (Tr. 80-81, 83-85; St. Ex. 8)

Moreover, as an additional part of his responsibilities for Premier Health Care Services, Dr. Romano serves as the Director of the Emergency Medicine Section of Catholic Health Partners for Western Ohio. Dr. Romano testified that he has been a member of the Ethics Committee for Catholic Health Partners for five years, and has served as the Chairman of that committee. Dr. Romano further testified that, as Chairman of the Ethics Committee, his duties included reviewing the implementation and development of ethics policies regarding health care. He also reviewed and rendered opinions on emergent ethical considerations and provided ethics education seminars. (Tr. 86, 95; St. Ex. 8)

Dr. Romano testified that he also served as the AMA representative on the rules committee for the development of DNR comfort care and for the Ohio Department of Health to

develop regional trauma centers in Ohio. Dr. Romano testified that both of those committees had considered significant ethical issues during their deliberations. (Tr. 96)

Dr. Romano testified that he is board certified in emergency medicine. (Tr. 85; St. Ex. 8)

13. Dr. Romano testified that it is his opinion that, in his interactions with Patient 1, Dr. Gainey had failed to conform to the minimal standards of care due to his failure to act within the ethical standards of the profession. (Tr. 93-94) Dr. Romano further testified that it is his opinion that Dr. Gainey's conduct with Patient 1 violated the AMA Code of Ethics. (Tr. 96-97)

In a report prepared for the Board in this matter, Dr. Romano stated that Dr. Gainey's conduct with Patient 1 violates the Principles of Medical Ethics as defined by the AMA, as follows:

- I) Engaging in sexual gratification with a patient in the acute care setting negates the concept of compassion and demeans the dignity and rights of the patient. A physician-patient relationship violates professional ethics in that the sexual contact can occur as the result of the use or exploitation of trust, knowledge, influence, or emotions derived from a current or former professional relationship.
- II) Sexual gratification with a patient involves fraud and deception as to the physician's intent in regards to the patient-doctor relationship. The act of sexual contact between patient and physician disrupts the patient's trust that the physician shall work only for the patient's welfare.
- IV) Sexual contact in this manner violates the physician's duty to safeguard patient confidences and privacy.

(St. Ex. 4) (See also Tr. 94, 98-99)

14. Dr. Romano acknowledged that there is no indication that Dr. Gainey actually used his position as an ER physician or exploited the trust or confidence of Patient 1 in order to have sexual contact with her. Dr. Romano further acknowledged that there is no evidence that Dr. Gainey used fraud or deception to encourage a sexual encounter with Patient 1. (Tr. 153-155, 157)
15. Dr. Romano testified that, in an emergency department setting, the physician-patient relationship does not terminate when the patient leaves the emergency department. Dr. Romano further testified that he is not aware of any defined rule as to when a physician-patient relationship terminates. (Tr. 99, 163-164)

Dr. Romano further stated that, if an emergency department physician wants to enter into an intimate relationship with a patient, it would be appropriate to first allow a period of time to pass between the time the physician treats the patient and the time the physician enters into the intimate relationship. Dr. Romano suggested several months or a year would be an appropriate time period. Dr. Romano testified that “an hour and a half or two hours” is not a sufficient time, concluding that a sufficient amount of time had not passed before Dr. Gainey engaged in sexual conduct with Patient 1. (Tr. 158-159)

Dr. Romano added that, although there is no clearly defined period of time in which a physician must avoid sexual contact with a former patient, an emergency department physician “should have a firm ethical basis to understand that it’s probably inappropriate to engage in sexual activity with someone that just left the emergency department.” (Tr. 165)

16. Dr. Romano testified that, in Ohio, when a physician works with a physician assistant, the physician assistant may not prescribe medications. Only the physician may prescribe medications. He noted that the physician assistant may write the prescription, but the physician must make the final determination that the medication is appropriate and must sign the prescription. (Tr. 105)

Dr. Romano further testified that, in an emergency room setting, every patient is considered a new patient and every new patient must be seen by a physician. Moreover, the physician is responsible to assure that the history, physical examination, and treatment is appropriate. Finally, it is the physician who actually sees the patient who must sign the medical record. (Tr. 106-110)

17. Loraine Zakem-Glazer, M.D., testified at hearing on behalf of Dr. Gainey. Dr. Glazer testified that she had received her medical degree in 1985 from the University of Cincinnati. Thereafter, she completed an internship and residency in internal medicine at Jewish Hospital in Cincinnati. Dr. Glazer testified that she had practiced internal medicine for five years. Thereafter, from 1993 through 1998, Dr. Glazer worked for CES in the emergency department at Jewish Hospital. Since that time, she has been working at St. Elizabeth’s Hospital in northern Kentucky. Dr. Glazer testified that she is board certified in internal medicine. (Tr. 177-182)

Dr. Glazer testified that she has known Dr. Gainey since her residency at Jewish Hospital. Moreover, Dr. Gainey was the director of the emergency department at Jewish Hospital during the time that she worked there. (Tr. 182-183)

Dr. Glazer testified that she has never known Dr. Gainey to act inappropriately with any female patient, female staff member, or female physician. Moreover, Dr. Glazer testified that Dr. Gainey is a competent emergency room physician. (Tr. 183-185, 189)

Dr. Glazer further testified that it is her opinion that, in an emergency department setting, if a physician signs a patient's chart, then there is a physician-patient relationship for that patient visit. She added that the physician-patient relationship ends when the patient is discharged from the emergency department. (Tr. 190-191, 193-194)

Furthermore, Dr. Glazer was asked if it is ethical for a physician to engage in a sexual act with a patient under the following circumstances: the physician sees a patient in the emergency department; the patient leaves the emergency department but does not leave the hospital; and, within one hour of the patient's leaving the emergency department the physician engages in a sexual act with the patient. Dr. Glazer responded, "If the individual was no longer a patient under the physician's care, what he does in his time not giving patient care is his personal business." (Tr. 195-199)

18. Scott Robert Welden, M.D., testified at hearing on behalf of Dr. Gainey. Dr. Welden testified that he had graduated from the University of Cincinnati Medical School. He added that he had completed an internship and residency in emergency medicine at the University of Cincinnati, and is board certified in emergency medicine. Dr. Welden has worked in emergency medicine for the past two and one half years at Harrison Memorial Hospital in Cynthiana, Kentucky; Brown County General Hospital in Georgetown, Ohio; and Highland District Hospital in Hillsboro, Ohio. (Tr. 213-215)

Dr. Welden testified that he has known Dr. Gainey since Dr. Welden's residency, and had worked with Dr. Gainey after completing his residency. Dr. Welden testified that he has never seen Dr. Gainey act inappropriately with any female patient or professional. Moreover, Dr. Welden testified that Dr. Gainey is a competent emergency room physician. (Tr. 215-217)

Furthermore, Dr. Welden testified that, in an emergency department setting, a physician-patient relationship ends when the patient is discharged from the emergency department. (Tr. 217-218)

Finally, Dr. Welden testified that he is aware that the AMA Code of Ethics prohibits a physician from engaging in sexual conduct with a patient during the course of the physician-patient relationship. Dr. Welden was then asked if it would be appropriate for an emergency department physician to engage in sexual conduct with a patient after the patient is discharged from the emergency department but before the patient leaves the hospital. (Tr. 220-221) Dr. Welden replied as follows:

Well, I think * * * that the patient-doctor relationship does end once the patient is discharged from the emergency department. * * * I don't think that it would be appropriate morally to—to engage in any sexual relationship during the course of—while that former patient was still on the hospital

grounds but, you know, I guess ethically, according to those guidelines you had asked me, I don't think that it's an ethical issue.

(Tr. 221)

19. Scott Douglas Longevin, M.D., testified at hearing on behalf of Dr. Gainey. Dr. Longevin testified that he had received his medical degree from the Medical College of Ohio in Toledo, Ohio. Dr. Longevin further testified that he has been practicing emergency medicine since 1988 and he has been board certified in emergency medicine since 1996. Dr. Longevin practices primarily in Ohio, Indiana, and Kentucky. (Tr. 223-225)

Dr. Longevin testified that, through the course of his practice, he has become familiar with Dr. Gainey. Dr. Longevin testified that Dr. Gainey is a man of good moral character. (Tr. 225)

Dr. Longevin testified that, in an emergency department setting, the physician-patient relationship ends when the patient is discharged from the emergency department and has received appropriate discharge instructions. (Tr. 226-227)

Dr. Longevin stated that it is his opinion that Dr. Gainey's conduct with Patient 1 did not violate any ethical rules of the AMA because Patient 1 had been discharged from the emergency department at the time the sexual conduct occurred. Moreover, Dr. Longevin testified that Dr. Gainey's conduct did not violate the minimal standards of care because Dr. Gainey had discharged Patient 1 with appropriate discharge instructions before engaging in sexual conduct. (Tr. 227-229)

Dr. Longevin opined that it would be an ethical violation if the physician had walked the patient to the car and then engaged in sexual conduct. After repeatedly avoiding answering the question, Dr. Longevin testified that he would distinguish that scenario from Dr. Gainey's conduct because, "[E]scorting somebody from the hospital and accidentally coming upon them on discharge of a patient from the emergency room may, I think, represent totally two different situations." (Tr. 231-238)

Finally, Dr. Longevin testified that Dr. Gainey's conduct did not violate the minimal standards of care. Dr. Longevin testified that there was "most likely an indiscretion morally. But on an ethical basis, patient care had been delivered appropriately and there was no violation of the ethics." (Tr. 240-246)

20. Steve Michael Kordis, M.D., testified at hearing on behalf of Dr. Gainey. Dr. Kordis testified that he had received his medical degree from the University of Cincinnati. Dr. Kordis completed a residency in internal medicine and a fellowship in cardiology at Jewish Hospital. Dr. Kordis further testified that he has been practicing emergency medicine since 1984, although he is not board certified in emergency medicine. Dr. Kordis

practices at Brown County General Hospital in Georgetown, Ohio, and at Harrison Memorial Hospital in Cynthiana, Kentucky. (Tr. 249-250)

Dr. Kordis testified that he has known Dr. Gainey for approximately twelve years. Dr. Kordis testified that he has never seen Dr. Gainey do anything that would be considered inappropriate, particularly in his interactions with female patients and co-workers. (Tr. 251-252)

Dr. Kordis testified that, in an emergency department setting, the physician-patient relationship ends when the patient is discharged from the emergency department. (Tr. 254-255) Dr. Kordis stated that it is his opinion that Dr. Gainey's conduct with Patient 1 did not violate any ethical rules of the AMA or violate the minimal standards of care because Patient 1 had been discharged from the emergency department at the time the sexual conduct occurred. (Tr. 257-264)

Dr. Kordis testified that Dr. Gainey does not wear a name tag or other badge identifying himself as a doctor. Moreover, he does not wear a white lab coat while working. (Tr. 258)

21. At the end of the hearing, Dr. Gainey was asked if he believes that what he did was appropriate. Dr. Gainey replied as follows:

I had a moral lapse; it will never happen again, and I fully understand the ethics now. And I appreciate much more how all these rules, how the Board, all this, is [here] to protect me. And I never quite really appreciated that before.

And I've often said I want to make a positive out of a negative. I'm quite willing to go around everywhere but Cincinnati, University of Cincinnati, and preach the gospel and tell doctors and doctors' groups you can get yourself in trouble if you think the rules are only to protect the patients. They're here for us, too. They're here to help us keep that therapeutic distance, to keep ourselves from getting in trouble, to keep ourselves from getting accused of things that will impact our lives beyond what we'll ever know.

I have learned a lot. Am I remorseful? Yes. Am I educated: Yes.

* * *

I have learned what * * * they always used to say, if it sounds too good to be true, it [is]. You know what? There ain't no way no human being's ever going to talk me into doing anything that's even remotely—if I can't do it in front of everybody else, I ain't doing it under no circumstances for nothing.

So, did I learn a lot? Yes. Am I more ethical now? Yes. Do I understand the ethics now? Yes. And did we quibble a little bit about me trying to pretend to be a little bit of a lawyer? Yes. But to satisfy you, to make you feel better, I walk out of here—I am not the same Shane Gainey that I was three years ago. If we were talking back in November of 2000, that would be different. We're talking about a person that's been through one hell of a lot.

Am I a lot wiser? Absolutely. Am I better? Am I a better person? Yes. Am I a good doctor? Damn good. And you know, and so I want you to rest, I want the Court to rest, I want the Board to know I am a different person. I am a changed person. And I'm fully aware of my ethical responsibilities and I would never put my license, my children, my family, or anyone else in jeopardy because of anything I would do.

(Tr. 341-342)

LEGAL ISSUES

There was discussion at hearing regarding whether Dr. Gainey actually saw and examined Patient 1 before he signed her medical record as the attending physician. That issue can not be resolved based on the evidence presented in the hearing record. Moreover, that issue should not be considered in making a final determination in this matter. There was no related allegation made in the notice of opportunity for hearing. Accordingly, that issue shall not be considered in developing Findings of Fact, Conclusions of Law, a Proposed Order, or a Final Order in this matter. See Hearing Transcript at 102-105.

FINDINGS OF FACT

On October 27, 2000, in the routine course of his practice, Dr. Gainey signed the medical record as the treating physician of Patient 1 in the emergency department of a Cincinnati-area hospital. Within a few hours of that patient's discharge from the emergency department, Dr. Gainey met her in a bathroom of the emergency department and received oral sex from her.

CONCLUSIONS OF LAW

1. The conduct of Michael Shane Gainey, M.D., as set forth in the Findings of Fact, constitutes, "[a] departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established," as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

2. The conduct of Dr. Gainey, as set forth in the Findings of Fact, constitutes, “[v]iolation of any provision of a code of ethics of the American medical association, the American osteopathic association, the American podiatric medical association, or any other national professional organizations that the board specifies by rule,” as that clause is used in Section 4731.22(B)(18), Ohio Revised Code, to wit: Principles I, II, and IV of the American Medical Association’s Principles of Medical Ethics.

* * * * *

Dr. Gainey argued that his sexual conduct with Patient 1 was not unethical because the physician-patient relationship had ended when Patient 1 left the emergency department. He based his argument, in part, on the American Medical Association’s guideline, E-8.14, “Sexual Misconduct in the Practice of Medicine,” which provides, in part, as follows:

At a minimum, a physician’s ethical duties include terminating the physician-patient relationship before initiating a dating, romantic, or sexual relationship with a patient. * * * Sexual or romantic relationships with former patients are unethical if the physician uses or exploits trust, knowledge, emotions, or influence derived from the previous professional relationship.

Dr. Gainey’s argument seems to be that the ethical prohibition against a physician entering into a sexual relationship with a former patient only applies when “the physician uses or exploits trust, knowledge, emotions, or influence derived from the previous professional relationship.”

Dr. Gainey fails to recognize, however, that the guideline does not state that such a relationship is always ethical if the physician does not exploit trust, knowledge, emotions, or influence derived from the previous professional relationship. In this case, where, in a hospital bathroom, within a few hours of his having treated her, Dr. Gainey allowed Patient 1 to perform oral sex on him, Dr. Gainey’s conduct was unethical regardless of the fact that she had been discharged.

Dr. Gainey also argued that his conduct was not unethical because he had not recognized Patient 1 as a patient. Regarding this issue, Dr. Gainey’s testimony was unconvincing. Dr. Gainey suggested that it is possible that he had not actually seen Patient 1 in the emergency department, but had only signed her medical record because the physician assistant had asked him to do so. Dr. Gainey also stated that he might have seen Patient 1 in the emergency department but, in the hospital parking lot a few hours later, he did not remember seeing her. Dr. Gainey raised these issues in support of his contention that he had not known that Patient 1 had been his patient; therefore, he had not intentionally engaged in sexual conduct with a patient or former patient. This argument is not plausible.

Moreover, Patient 1 had been seen in the emergency department for pain at her left wrist and elbow, pain on movement, and inability to rotate her left wrist. Her left elbow and wrist were

swollen. Moreover, she had been discharged from the emergency department with instructions to wear a left wrist splint and a sling. Despite Dr. Gainey's testimony at hearing that he had not observed any deficiency in Patient 1's use of her left arm, it is highly unlikely that there had not been some indication of Patient 1's recent treatment in the emergency department.

Dr. Gainey's testimony to the contrary is even less credible since, in his interview by the Hamilton County Sheriff's Department, he had stated that he had had to assist Patient 1 due to the injury to her left arm.

Finally, Dr. Gainey's behavior at hearing makes it difficult to find his testimony truly credible. Dr. Gainey repeatedly attempted to avoid questions. His answers were often hostile, accusing the Board of attempting to "railroad" him. Finally, his testimony at hearing differed from statements he had made on prior occasions.

On the other hand, it is clear that Dr. Gainey has suffered significantly because of his interactions with Patient 1. As a result, Dr. Gainey is understandably distraught regarding this matter, and clearly has difficulty discussing it. Finally, it appears unlikely that Dr. Gainey would repeat such conduct in the future. Therefore, the Board may wish to provide Dr. Gainey an opportunity to return to the practice of medicine and surgery in Ohio after a period of suspension.

PROPOSED ORDER

It is hereby ORDERED that:

- A. **PERMANENT REVOCATION, STAYED; SUSPENSION:** The certificate of Michael Shane Gainey, M.D., to practice medicine and surgery in the State of Ohio shall be PERMANENTLY REVOKED. Such permanent revocation is STAYED, and Dr. Gainey's certificate shall be SUSPENDED for an indefinite period of time, but not less than eighteen months.
- B. **CONDITIONS FOR REINSTATEMENT OR RESTORATION:** The Board shall not consider reinstatement or restoration of Dr. Gainey's certificate to practice medicine and surgery until all of the following conditions have been met:
 1. **Application for Reinstatement or Restoration:** Dr. Gainey shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.
 2. **Professional Ethics Course:** Dr. Gainey shall provide acceptable documentation of successful completion of a course or courses dealing with professional ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical

Education requirements for relicensure for the Continuing Medical Education acquisition period(s) in which they are completed.

3. **Personal Ethics Course**: Dr. Gainey shall provide acceptable documentation of successful completion of a course or courses dealing with personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education acquisition period(s) in which they are completed.
4. **Assessment/Treatment**: At least 180 days prior to submission of his application for reinstatement or restoration, Dr. Gainey shall submit to an evaluation for sexual psychopathology at the Center for Marital and Sexual Health, Inc., in Beachwood, Ohio, or by another practitioner approved in advance by the Board. Prior to the initial assessment, Dr. Gainey shall furnish the approved practitioner copies of the Board's Order regarding Dr. Gainey, including the Summary of the Evidence, Findings of Fact, and Conclusions, and any other documentation from the hearing record which the Board may deem appropriate or helpful to that practitioner.

Upon completion of the initial assessment, Dr. Gainey shall cause a written report to be submitted to the Board from the approved practitioner. The written report shall include:

- a. A detailed report of the evaluation of Dr. Gainey's current status and condition;
- b. A detailed plan of recommended treatment, if any, based upon the practitioner informed assessment of Dr. Gainey's current needs;
- c. A statement regarding any recommended limitations upon his practice, and
- d. Any reports upon which the treatment recommendation is based, including reports of physical examination and psychological or other testing.

Should the Board-approved practitioner recommend treatment, and upon approval by the Board, Dr. Gainey shall undergo and continue such treatment weekly or as otherwise directed by the Board. The sessions shall be in person and may not be conducted by telephone or other electronic means. Dr. Gainey shall comply with his treatment plan.

Dr. Gainey shall continue in treatment until such time as the Board determines that no further treatment is necessary. To make this determination, the Board shall require reports from the approved treating practitioner. The reports shall contain information

describing Dr. Gainey's current treatment plan and any changes that have been made to the treatment plan since the prior report; Dr. Gainey's compliance with the treatment plan; Dr. Gainey's status; Dr. Gainey's progress in treatment; and results of any laboratory studies that have been conducted since the prior report. Dr. Gainey shall ensure that the reports are forwarded to the Board on a quarterly basis.

In addition, Dr. Gainey shall ensure that his treating practitioner immediately notifies the Board of Dr. Gainey's failure to comply with his treatment plan and/or any determination that Dr. Gainey is unable to practice due to his disorder.

In the event that the designated practitioner becomes unable or unwilling to serve in this capacity, Dr. Gainey must immediately so notify the Board in writing and make arrangements acceptable to the Board for another practitioner as soon as practicable. Dr. Gainey shall further ensure that the previously designated practitioner also notifies the Board directly of his or her inability to continue to serve and the reasons therefore.

5. **Additional Evidence of Fitness To Resume Practice:** In the event that Dr. Gainey has not been engaged in the active practice of medicine and surgery for a period in excess of two years prior to application for reinstatement or restoration, the Board may exercise its discretion under Section 4731.222 of the Revised Code to require additional evidence of his/her fitness to resume practice.
- C. **PROBATION:** Upon reinstatement or restoration, Dr. Gainey's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least three years:
1. **Obey Laws in Ohio:** Dr. Gainey shall obey all federal, state, and local laws; and all rules governing the practice of medicine in Ohio.
 2. **Quarterly Declarations:** Dr. Gainey shall submit quarterly declarations under penalty of Board disciplinary action or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on the first day of the third month following the month in which Dr. Gainey's certificate is restored or reinstated. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.
 3. **Appearances:** Dr. Gainey shall appear in person for an interview before the full Board or its designated representative during the third month following the month in which Dr. Gainey's certificate is restored or reinstated, or as otherwise directed by the Board. Subsequent personal appearances must occur every three months thereafter, and/or as otherwise requested by the Board. If an appearance is missed or

is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled.

4. **Continue Treatment:** If the practitioner approved by the Board prior to Dr. Gainey's reinstatement or restoration recommended that Dr. Gainey undergo treatment, Dr. Gainey shall continue in treatment until such time as the Board determines that no further treatment is necessary. To make this determination, the Board shall require reports from the approved treating practitioner. The reports shall contain information describing Dr. Gainey's current treatment plan and any changes that have been made to the treatment plan since the prior report; Dr. Gainey's compliance with the treatment plan; Dr. Gainey's status; Dr. Gainey's progress in treatment; and results of any laboratory studies that have been conducted since the prior report. Dr. Gainey shall ensure that the reports are forwarded to the Board on a quarterly basis and are received in the Board's offices no later than the due date for Dr. Gainey's quarterly declaration.

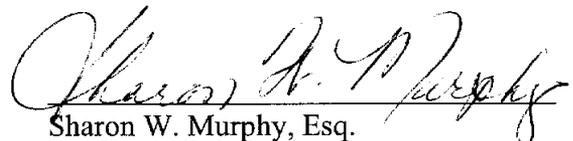
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In the event that the designated practitioner becomes unable or unwilling to serve in this capacity, Dr. Gainey must immediately so notify the Board in writing and make arrangements acceptable to the Board for another practitioner as soon as practicable. Dr. Gainey shall further ensure that the previously designated practitioner also notifies the Board directly of his or her inability to continue to serve and the reasons therefore.

5. **Third-Party Presence During Exam/Treatment:** If recommended by the Board approved practitioner, Dr. Gainey shall have a third party present while examining or treating female patients.
6. **Absence from Ohio:** In the event that Dr. Gainey should leave Ohio for three continuous months, or reside or practice outside the State, Dr. Gainey must notify the Board in writing of the dates of departure and return. Periods of time spent outside Ohio will not apply to the reduction of this probationary period, unless otherwise determined by the Board in instances where the Board can be assured that probationary monitoring is otherwise being performed.
7. **Violation of Terms of Probation:** If Dr. Gainey violates the terms of his probation in any respect, the Board, after giving him notice and the opportunity to be heard, may set aside the stay order and impose the permanent revocation of his certificate.

- D. **TERMINATION OF PROBATION:** Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Gainey's certificate will be fully restored.
- E. **REQUIRED REPORTING BY LICENSEE TO EMPLOYERS AND HOSPITALS:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Gainey shall provide a copy of this Order to all employers or entities with which he is under contract to provide health care services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, Dr. Gainey shall provide a copy of this Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments.
- F. **REQUIRED REPORTING TO OTHER STATE LICENSING AUTHORITIES:** Within thirty days of the effective date of this Order, or as otherwise determined by the Board, Dr. Gainey shall provide a copy of this Order by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license. Dr. Gainey shall also provide a copy of this Order by certified mail, return receipt requested, at the time of application to the proper licensing authority of any state in which he applies for any professional license or reinstatement or restoration of any professional license. Further, Dr. Gainey shall provide this Board with a copy of the return receipt as proof of notification within thirty days of receiving that return receipt, unless otherwise determined by the Board.

EFFECTIVE DATE OF ORDER: This Order shall become effective thirty days after the mailing of notification of approval by the Board.


Sharon W. Murphy, Esq.
Hearing Examiner



State Medical Board of Ohio

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EXCERPT FROM THE DRAFT MINUTES OF APRIL 14, 2004

REPORTS AND RECOMMENDATIONS

Ms. Sloan announced that the Board would now consider the findings and orders appearing on the Board's agenda. She asked whether each member of the Board had received, read, and considered the hearing record, the proposed findings, conclusions, and order, and any objections filed in the matters of: Adel Abdullah Bakhsh, M.D.; Minakshi B. Deshmukh, M.D.; Michael Shane Gainey, M.D.; Louis A. Ling, M.D.; Brian F. McNamee, M.D.; Michael T. Salwitz, M.D.; Ahmad Shahamat, M.D.; Luke A. Siegel-Schaefer, M.T.; and Brian D. Southern, M.D. A roll call was taken:

ROLL CALL:	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Bhati	- aye
	Dr. Buchan	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Dr. Davidson	- aye
	Dr. Robbins	- aye
	Dr. Garg	- aye
	Dr. Steinbergh	- aye
	Ms. Sloan	- aye

Ms. Sloan asked whether each member of the Board understands that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. A roll call was taken:

ROLL CALL:	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Bhati	- aye
	Dr. Buchan	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Dr. Davidson	- aye
	Dr. Robbins	- aye
	Dr. Garg	- aye

Dr. Steinbergh - aye
Ms. Sloan - aye

Ms. Sloan noted that, in accordance with the provision in Section 4731.22(F)(2), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of these matters.

Ms. Sloan stated that, if there were no objections, the Chair would dispense with the reading of the proposed findings of fact, conclusions and orders in the above matters. No objections were voiced by Board members present.

The original Reports and Recommendations shall be maintained in the exhibits section of this Journal.

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MICHAEL SHANE GAINNEY, M.D.

Ms. Sloan directed the Board's attention to the matter of Michael Shane Gainney, M.D. She advised that objections were filed to Hearing Examiner Murphy's Report and Recommendation and were previously distributed to Board members.

Ms. Sloan continued that a request to address the Board has been timely filed on behalf of Dr. Gainney. Five minutes would be allowed for that address.

Dr. Gainney was accompanied by his attorney, Theodore J. Froncek.

Mr. Froncek thanked the Board for the opportunity to address it. He stated that they did conduct an evidentiary hearing with Ms. Murphy; and, although he disagrees with some of Ms. Murphy's conclusions, the Board is very fortunate to have someone with Ms. Murphy's skill, experience and expertise. He thanked Ms. Murphy for her patience in the hearing.

Mr. Froncek stated that he thinks that there is an awful lot of mitigation in this particular case. It happened four years ago, it was an isolated incident, and there was no harm to the patient. For those reasons, they object to the punishment, not necessarily the conclusions, that Ms. Murphy recommended. Mr. Froncek at this time deferred to Dr. Gainney.

Dr. Gainney also thanked the Board for allowing him the opportunity to speak. The Hearing Examiner started the review process by stating that she had two goals: 1. Ensure that he understood that what he did was wrong; and 2. Ensure that it would not reoccur as a protection of the public interest. Dr. Gainney stated that he has always admitted to the event that occurred and his part in it. He has come to understand his actions in relationship to the standards of his profession and on a personal level. He added that he has

always been candid and forthcoming about his role in this event.

Dr. Gainney noted that it is stated in Ms. Murphy's conclusion that it is "unlikely that Dr. Gainney would repeat such conduct in the future." Dr. Gainney stated that he concurs with this statement without reservation, as is evidenced by the fact that this event occurred almost four years ago. He continued that the report states that "(a)t the end of the hearing Dr. Gainney was asked if he believes what he did was appropriate." Dr. Gainney replied that he had a moral lapse, it would never happen again, and he fully understands. He has learned a lot. He's remorseful, he's educated, and he understands the ethics.

Dr. Gainney stated that this has been a terribly disruptive and destructive event for him personally and professionally. He has suffered personal and professional humiliation; abandonment by colleagues, family and friends; estrangement from his family and children; significant loss of income; a large legal debt; and episodes of depression, loss of health and well-being. He has endured personal and professional harassment, public embarrassment, criminal investigation and the adversarial nature of a civil suit. Despite all of this, he has been honest and the sole burden-bearer of this event.

Dr. Gainney continued that, initially, he was, for the lack of a better word, interrogated by a Medical Board lawyer who was adversarial, hostile, and willingly discounted any possibility that the events of September 2000 could be viewed in human contexts, such as the other party planned and executed this relationship for material reasons, and that mitigating circumstances, such as his personal fatigue, depression, unsettled home situation, financial difficulties and a personal lapse with a person who seemed to have a personal interest in him, had any bearing.

Dr. Gainney stated that during the hearing, Mr. Froncek raised legal issues:

1. The unique doctor/patient relationship of emergency room doctors differs from traditional doctor/patient relationships. This position was echoed by four physicians who testified to that effect.
2. He did not independently remember seeing the patient who was seen in the fast track by the P.A., but he did sign the chart later on.
3. He did not use or exploit trust, knowledge, emotion, or influence derived from his previous professional relationship.

Dr. Gainney stated that his lawyer's arguments were held against him by the reviewer as an attempt to escape responsibility. This is flagrantly untrue. He has always accepted responsibility for his personal actions, but he's asked that they be viewed in the total context of this case and in the total context of his career.

Dr. Gainney continued that it is without a doubt that he did not recognize the person as a previous patient, and that this person could use her extremities in any way she chose to. For any person not present at that

time to assume that his recollection is “not plausible” or “less credible” is biased speculation. Additionally, his behavior at the hearing must be viewed in the context of what, at the time, appeared to him to be a biased examiner who viewed all of his statements as false. He remarked on the calculated attacks of the State Attorney and the Examiner attempting to “impeach” him on statements that were made not under oath and under duress to the police, and the extreme emotional distress that this case has had upon him and his family and other life events, such as the sexual assault of his children that had occurred since then.

Dr. Gainney asked the Board to view this event in his life in the total context of the circumstances and the people involved and the totality of his professional career before and after this event. The people who know him best would acknowledge that he is a good person and a good doctor. He is a different person now than he was in September 2000. He’s a better person. He understands the rules and he understands his previous mistake. He has suffered tremendously for this singular event. He asked the Board’s equity and understanding as the greatest victims of this have been, and will be in the future, his children.

Ms. Sloan asked whether the Assistant Attorney General wished to respond.

Mr. Wilcox spoke in support of adoption of Ms. Murphy’s Report and Recommendation. He stated that he thinks that she did a thorough job of detailing all of the factual circumstances of this case. The transient nature of emergency department doctor/patient relationships makes this case unique to a point. Clearly, he doesn’t think that anyone would approve of Dr. Gainney’s behavior towards Patient 1 on hospital grounds. This was unprofessional and, he believes, unethical conduct.

Mr. Wilcox advised that, looking at the entire factual situation, he doesn’t believe that this is a revocation case. He does think that Dr. Gainney has had trouble coming to terms with this. Mr. Wilcox stated that he doesn’t think that all of Dr. Gainney’s explanations at hearing were believable, but he also thinks that Dr. Gainney has learned a significant amount from these events. Mr. Wilcox stated that Ms. Murphy’s proposed 18-month suspension is appropriate, and he does support that recommendation.

DR. STEINBERGH MOVED TO APPROVE AND CONFIRM MS. MURPHY’S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF MICHAEL SHANE GAINNEY, M.D. DR. BHATI SECONDED THE MOTION.

Ms. Sloan stated that she would now entertain discussion in the above matter.

Dr. Steinbergh stated that this was a difficult case to read through. She added that she’s sure that each of the Board members have been concerned about this particular case. In reviewing this, the incident occurred approximately three and a half years ago. Dr. Gainney was an emergency room physician who, at the end of his shift, left the hospital setting, went into the parking lot as he was leaving the hospital, and met with a woman who had been a patient in that emergency room, who, during discussion, eventually said that she wanted to use the restroom. He helped her into the hospital, showing her where the restroom was. She offered an act of sex, and he accepted it. Unfortunately, he walked back into the hospital setting,

which was, from her perspective, his place of work. Then she began to assess the case from the concept of a physician doing this in their place of work.

Dr. Steinbergh continued that, after this single episode, approximately a year and a half went on before this woman attempted to extort Dr. Gainney. Apparently, when he wouldn't pay her money, she charged him with violent rape and took him to the courts. The court dismissed the case because there was no evidence that he did rape her. Dr. Steinbergh stated that, from her perspective, this was a case of prostitution on the patient's part, and Dr. Gainney accepted.

Dr. Steinbergh stated that she thinks the issue of a physician/patient relationship was that, in most emergency room settings, and she deals a lot with a lot of emergency room physicians as a primary care physician, that they would agree that the patient, when he or she first signs into the emergency room, becomes a patient and at the time of discharge, that emergency room generally has no further responsibility to that patient. She noted that the State's expert went beyond that. The four physicians who testified on behalf of Dr. Gainney would agree with her comment. Dr. Steinbergh stated that she knows that some physicians do extend their relationships with their patients beyond the initial emergency room visits. Perhaps the patient was seen for abdominal pain or some other issue where the doctor was concerned. In this particular case, the patient was clearly discharged and had an injury to the wrist. Dr. Steinbergh questioned whether it is possible that Dr. Gainney didn't recognize the patient when he went out to the parking lot. She stated that she suspects that it's possible at 11:00 p.m., but what else is a person doing outside, waiting for her husband to pick her up? Dr. Steinbergh stated that she thinks that it's clear that this individual was a patient.

Dr. Steinbergh stated that she certainly questions the moral and ethical base and the value system of a physician who allows a stranger, as it were, to perform a sexual act in this particular episode. She acknowledged that Dr. Gainney accepts responsibility. She added that his coming before the Board today confirms for her that Dr. Gainney clearly understands. He's been obviously punished in so many different ways; he brought the punishment upon himself, but, nevertheless, he has suffered appropriately for his act.

Dr. Steinbergh stated that she believes that the Proposed Order is too harsh. She doesn't think that this case rises to the level of permanent revocation. She stated she does have an alternative order, which she asked be distributed to the Board members. Dr. Steinbergh noted that the A.M.A. Code of Ethics has been very important to this Board. This physician violated a Code of Ethics that the Board holds as being very important. Although the language may not be able to address every single episode of a misadventure of a physician, physicians know when there's been a breach of ethics. Many years ago, the Board was challenged by this when it disciplined a pediatrician for having sex with a certain number of patients' mothers. That physician challenged the Board on the fact that the A.M.A. Code of Ethics didn't address that issue. The Board knew it was a breach of ethics when it saw it, and the courts upheld the Board. The Council on Ethical and Judicial Affairs for the A.M.A. agreed with the Board, and they changed their guidelines. So, she does believe that the Board does know when there's been a breach of professional, and, in this case, personal ethics, which are important to the Board and practicing physicians.

DR. STEINBERGH MOVED THAT THE PROPOSED ORDER IN THE MATTER OF MICHAEL SHANE GAINNEY, M.D., BE AMENDED AS FOLLOWS:

1. BY SUBSTITUTING THE FOLLOW FOR PARAGRAPH A:

SUSPENSION OF CERTIFICATE: The certificate of Michael Shane Gainney, M.D., to practice medicine and surgery in the State of Ohio shall be SUSPENDED for a period of ninety days.

2. BY DELETING PARAGRAPH B IN ITS ENTIRETY.

3. BY MODIFYING PARAGRAPH C AS FOLLOWS:

- a) DELETING THE WORDS "or restoration" IN THE FIRST LINE
- b) SUBSTITUTING THE WORD "two" for the word "five" in THE THIRD LINE
- c) DELETING SUBPARAGRAPHS 4, 5 AND 7
- d) ADDING THE FOLLOWING AS NEW SUBPARAGRAPHS 4 AND 5:

4. **Professional Ethics Course:** Before the end of the first year of probation, or as otherwise approved by the Board, Dr. Gainney shall provide acceptable documentation of successful completion of a course or courses dealing with professional ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education acquisition period(s) in which they are completed.

5. **Personal Ethics Course:** Before the end of the first year of probation, or as otherwise approved by the Board, Dr. Gainney shall provide acceptable documentation of successful completion of a course or courses dealing with personal ethics. The exact number of hours and the specific content of the course or courses shall be subject to the prior approval of the Board or its designee. Any courses taken in compliance with this provision shall be in addition to the Continuing Medical Education requirements for relicensure for the Continuing Medical Education period(s) in which they are completed.

4. BY RENUMBERING THE PROVISIONS THIS ORDER THROUGHOUT AS NECESSARY.

Dr. Steinbergh stated that she thinks that this is an incident that Dr. Gainney will not repeat, and she feels confident with this Board Order that the Board is telling Dr. Gainney that he has breached ethical conduct, and he does need to take upon himself a review of his personal and professional ethics.

DR. BUCHAN SECONDED THE MOTION.

Dr. Buchan stated that he'd planned to suggest a very similar amendment as that Dr. Steinbergh has

prepared. Dr. Buchan stated that he doesn't condone the activity and he wrestles with these cases. He finds it difficult to understand the motivation or the act itself, but the fact of the matter is that his read was that Dr. Gainney is a changed man and that this will not likely be repeated. The Board will serve the public most appropriately if it suspends his license for a period of time. He had considered a suspension of three to six months, but he is comfortable with Dr. Steinbergh's proposal, and he commended Dr. Steinbergh for her read and take on this case.

Dr. Egner stated that she thinks that Dr. Gainney's appearance before the Board today has suited him well. He seems sincere on how this has affected him. She also agrees that sometimes the legal argument, although it needs to be made by his attorney, doesn't always work well for the physician. Dr. Egner took exception to defining when the patient/physician relationship ended, so that if the Board is in agreement that it ended at the time the patient was discharged, then this act was less egregious. She's not sure that she can say that. She agrees that it does make a difference that it was Dr. Gainney's name on the patient's chart. Dr. Gainney was her physician of record in the emergency room. They went back into the hospital. For her, that issue is very cloudy. It doesn't make her feel better that four other ER physicians have said that the relationship ends when the patient is discharged, because they might be wrong. She doesn't know that the Board can define that by this case or the next case. She does think that ER physicians should be aware that this is a cloudy area and that just because that person walked out of the emergency room, that doesn't mean that your responsibility has completely ended as a physician. Dr. Egner stated that she looks at that as a legal technicality, but not necessarily the right answer.

Dr. Egner stated that she thinks that the Report and Recommendation is too harsh. She's not sure that she agrees with Dr. Steinbergh in the sense that her proposed amendment seems pretty light. This was just an unbelievable act of really poor judgment. It really came back to haunt Dr. Gainney, but there are lots of things that the Board has seen that have come back to haunt physicians for what they've done. This was a very wrong act. She doesn't have any alternatives to present and will probably vote for the proposed amendment, but she stated that she doesn't do it with great confidence.

Dr. Bhati stated that the issue of whether the patient/physician relationship is over or not Dr. Egner elaborated eloquently, so he won't go back to that. His issue here is that a person with a wrist problem, standing in a parking lot at 11:00 at night, doesn't need another person to take her in to show her where the bathroom is, and then go into the bathroom itself. He stated that he thinks that there's more to the story, and he finds, after reading through this case, that his story was not credible. Dr. Bhati stated that he understands that this was a single action, that it happened more than two years ago, and that the chances of it being repeated are low. At the same time, he's in favor of the Report and Recommendation as written by the Hearing Examiner. Giving Dr. Gainney a little slap on the hand for such an act is too light in his opinion.

Mr. Browning stated that the Board is making a judgment call, as it always does, and his sense is that Dr. Steinbergh's recommendation is reasonable, given what the Board knows about this case, and given the presentation of the doctor.

Dr. Kumar asked when the order will become effective.

Dr. Steinbergh stated that it will become effective thirty days after the mailing of notification of approval by the Board, as it was originally written in the Hearing Examiner's Report and Recommendation. She noted that the Board generally gives the physician a 30-day time period to wind down his practice.

Dr. Kumar stated that, in this case, this is an emergency room physician who does not have patients.

Dr. Steinbergh stated that she would be willing to add that to her motion.

Dr. Kumar noted that the proposed amendment deletes paragraph 7, which indicates that if Dr. Gainney violates the terms of his probation the Board may, after giving Dr. Gainney notice and the opportunity to be heard, set aside the stay order and impose the permanent revocation. He asked that Dr. Steinbergh amend her proposal to keep that paragraph and amend it to read that the Board may take further action against Dr. Gainney's license if he violates the probationary terms.

Dr. Steinbergh stated that if there is a violation of the probationary terms, the Board automatically cites the physician. Paragraph 7 imposes a permanent revocation, should a violation occur under a stayed permanent revocation.

Dr. Kumar again stated that he would like Paragraph 7 changed to indicate that, if Dr. Gainney violates the terms of probation in any aspect, the Board after giving him notice and opportunity to be heard may take further action, as necessary.

Dr. Steinbergh agreed to accept that as part of her motion.

Dr. Steinbergh stated that she doesn't see her proposal as a slap on the wrist for Dr. Gainney. She thinks that this particular case does not rise to the level of permanent revocation of Dr. Gainney's license. It was a horrible, indiscretionary act, and it's a challenge to each of the Board members to think about the decision that went into that. However, Dr. Gainney has, in fact, been punished for that act. The Medical Board is obligated, and she believes rightly so, to assess Dr. Gainney's personal ethics, morals and so forth, as it has. She doesn't find any change in the Order, except she feels that the permanent revocation language is too harsh for this case, and she doesn't think that he needs to be out of practice for 18 months. What is being gained? There is no patient harm here. If anything, this particular patient, if the Board is to believe the record, which she does, brought on the action. The next issue of the probationary terms is to see that he does these courses and is monitored for two years. She doesn't see the need for anything else. She doesn't want anyone to think that she thinks that this is a slap on the wrist. She thinks that the Board has said what it needs to say in this case, and she thinks that Dr. Gainney has said what he needed to say. He accepts responsibility for what occurred.

Dr. Steinbergh stated that her changes to her motion to amend are to include the paragraph concerning violation of probationary terms, and to start the suspension immediately upon mailing rather than in 30

days.

Mr. Dilling asked for a clarification on the need for immediacy in this case. This act occurred three and a half years ago, and the suggested immediacy is because he's an emergency room physician.

Dr. Kumar stated that he questioned why a 30-day period was necessary. He noted that the Board usually allows 30 days to allow someone to wind his practice down and to make arrangements for someone else to take care of his patients. As an ER physician, Dr. Gainey doesn't have to make those kinds of arrangements.

Dr. Egner stated that Dr. Gainey would have the same difficulties with an immediate suspension as other physicians, because he has a schedule.

Mr. Froncek noted that Dr. Gainey's work is scheduled 30 days in advance.

Dr. Steinbergh stated that she would leave the effective date language as it is in the original Proposed Order.

Dr. Davidson stated that she's a bit surprised that she's in disagreement with several of the Board members who have spoken. She agrees with Dr. Bhati. Dr. Gainey, in his capacity as a physician, used this patient. She thinks that the other people in his life have punished him heartily – his family members have left him, his employer has fired him. She doesn't think that that takes away the Board's right, need or place to also pass judgment here. She had a lot of difficulty getting over Dr. Gainey's legal maneuvering in the hearing record. He's gone to law school, and he was playing the game along with the Board's lawyers.

Dr. Davidson stated that she resented that to a degree. She doesn't really think that he has owned up.

Dr. Davidson stated that she appreciated Dr. Egner's sense of the legal argument versus the argument that works for the Board, but her issue is how much Dr. Gainey has abused the privilege of being a physician. He has shamed all physicians. She takes a 90-day suspension as a slap on the wrist. She stated that there has to be a more severe punishment.

Dr. Robbins stated that he was also a little surprised. He stated that he thinks that Dr. Gainey has, at the very least, an equal part in this particular act, and that this was not totally patient-induced. He agrees with Dr. Bhati. As he read this, he felt it was full of holes. He's not comfortable with this. His feeling is that the proposed amended order is a slap on the wrist. Dr. Robbins stated that he would agree with the eloquence with which Dr. Egner characterized the physician/patient relationship. He stated that it's hard for him to imagine that, after leaving an emergency room and being treated, within a few hours there isn't a physician/patient relationship. Dr. Robbins stated that he doesn't think the amended order is severe enough.

Dr. Steinbergh asked whether those Board members who object to her amendment feel that a longer suspension should be ordered. If so, she stated that she would be willing to accept a friendly amendment.

Dr. Bhati stated that he thinks the Proposed Order, as written by Ms. Murphy, is appropriate. He added that he thinks that Ms. Murphy has done a great job in writing her Report and Recommendation.

Dr. Steinbergh stated that she doesn't disagree with Ms. Murphy's Order in terms of what she did as the Hearing Examiner, but she disagrees with the severity of the Order for this particular case.

Dr. Bhati stated that what is being discussed is either a 90-day or 18-month suspension, and a stayed permanent revocation or just a straight suspension. He's objecting to the less severe order.

Dr. Steinbergh stated that there are other conditions in the original order with which she disagrees. She doesn't think that Dr. Gainney needs any kind of assessment or needs to be ordered to have a third party in his patient room.

Dr. Bhati stated that the Board has required a third party in other cases in the past.

Dr. Steinbergh stated that the Board has no evidence that Dr. Gainney did anything wrong in the patient room. His act happened outside of the hospital.

Dr. Bhati disagreed, stating that the patient was brought back into the hospital facilities. Someone with a wrist problem doesn't need help to go to the bathroom.

Dr. Steinbergh stated that she suspects that, as they were walking, a conversation ensued.

Dr. Bhati stated that there might be some element of that young lady getting him involved in this, but he also had some responsibility there. Dr. Bhati stated that he doesn't for a minute think that this was a one-sided story.

Dr. Steinbergh asked whether other Board members wondered why Patient 1 wasn't seen as a witness at the hearing.

Dr. Bhati stated that that's immaterial to him at this stage.

Dr. Steinbergh stated that it wasn't to her, as she read the Board Order. She stated that when the State is attempting to demonstrate to the Board, they don't hesitate to bring the patient, to subpoena the patient to testify at hearing. Dr. Steinbergh stated that she interpreted that to mean that that particular patient was not going to be an appropriate witness for the State.

Dr. Buchan stated that this is not the first of these types of cases that the Board has seen, and he wrestled with the suspension time. Ultimately, he had to answer two questions as he thought about this case. One has to do with his serving the public. Based upon the evidence he read and Dr. Gainney's appearance today, he thinks the Board is. He's answered that question for himself. He thinks that Dr. Gainney is a changed individual and is in a healing mode. Dr. Gainney fell prey to the acts of this individual, and he thinks it's a

shared responsibility. He understands that. But Dr. Gainey was coerced into an act that will change his life forever, and the life of his family. Is the Board serving the public by taking this move and agreeing to the amended order? Dr. Buchan stated that he thinks that the answer is, yes.

Dr. Buchan stated that the second question is how is he serving this physician. Dr. Buchan stated that grace is not unreasonable. He believes that Dr. Gainey “gets it” and is where he needs to be. Dr. Buchan stated that he doesn’t think that this will ever happen again. Dr. Buchan added that his personal take is that Dr. Gainey should be extended some grace. Ninety days is reasonable and Dr. Gainey needs to get on with his life.

A vote was taken on Dr. Steinbergh’s motion to amend:

Vote:	Dr. Egner	- aye
	Dr. Talmage	- abstain
	Dr. Bhati	- nay
	Dr. Buchan	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Dr. Davidson	- nay
	Dr. Robbins	- nay
	Dr. Garg	- abstain
	Dr. Steinbergh	- aye

The motion carried.

MR. BROWNING MOVED TO APPROVE AND CONFIRM MS. MURPHY’S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER, AS AMENDED, IN THE MATTER OF MICHAEL SHANE GAINEY, M.D. DR. STEINBERGH SECONDED THE MOTION. A vote was taken:

Vote:	Dr. Egner	- aye
	Dr. Talmage	- abstain
	Dr. Bhati	- nay
	Dr. Buchan	- aye
	Dr. Kumar	- aye
	Mr. Browning	- aye
	Dr. Davidson	- nay
	Dr. Robbins	- nay
	Dr. Garg	- abstain
	Dr. Steinbergh	- aye
	Ms. Sloan	- aye

The motion carried.



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.state.oh.us/med/

June 11, 2003

Michael Shane Gainey, M.D.
9765 Murdock-Goshen Road
Loveland, OH 45140

Dear Doctor Gainey:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio intends to determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery, or to reprimand or place you on probation for one or more of the following reasons:

- (1) On or about October 27, 2000, in the routine course of your practice, you undertook the treatment of Patient 1 (as identified on the attached Patient Key- Key confidential to be withheld from public disclosure) in the Emergency Department of a Cincinnati-area hospital. Subsequently, on the same date, you met Patient 1 in a bathroom of the Emergency Department and received oral sex from her.

Your acts, conduct, and/or omissions as alleged in paragraph (1) above, individually and/or collectively, constitute “[a] departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established,” as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraph (1) above, individually and/or collectively, constitute “[v]iolation of any provision of a code of ethics of the American medical association, the American osteopathic association, the American podiatric medical association, or any other national professional organizations that the board specifies by rule,” as that clause is used in Section 4731.22(B)(18), Ohio Revised Code, to wit: Principles I, II and IV of the American Medical Association’s Principles of Medical Ethics.

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty days of the time of mailing of this notice.

You are further advised that, if you timely request a hearing, you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

Mailed 6-12-03

In the event that there is no request for such hearing received within thirty days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand or place you on probation.

Please note that, whether or not you request a hearing, Section 4731.22(L), Ohio Revised Code, provides that "[w]hen the board refuses to grant a certificate to an applicant, revokes an individual's certificate to practice, refuses to register an applicant, or refuses to reinstate an individual's certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate."

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Anand G. Garg, M.D.
Secretary

AGG/bjs
Enclosures

CERTIFIED MAIL # 7000 0600 0024 5148 0809
RETURN RECEIPT REQUESTED

Duplicate mailing to:

1064 Emerson Road
Park Hills, KY 41011

CERTIFIED MAIL # 7000 0600 0024 5148 0793
RETURN RECEIPT REQUESTED

Duplicate mailing to:

Theodore J. Froncek Esq.
1208 Sycamore Street
Cincinnati, OH 45210

CERTIFIED MAIL # 7000 0600 0024 5148 0786
RETURN RECEIPT REQUESTED