IN THE MATTER OF	*	**BEFORE THE**
STEVEN J. BRAND, M.D.	*	**MARYLAND STATE BOARD**
Respondent	*	**OF PHYSICIANS**
License Number D30612	*	**Case Number 2014-0865B**

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FINAL DECISION AND ORDER

On October 8, 2014, Steven J. Brand, M.D. was charged under the Maryland Medical Practice Act with unprofessional conduct in the practice of medicine. Md. Code Ann., Health Occ. § 14-404(a)(3)(ii). The charges were based upon Dr. Brand's actions during a laparoscopic procedure when he tied a surgical technician's hands to a laparoscope using lap towels (gauze) and then secured the towels with clamps, because he wanted the surgical technician to hold the laparoscope with two hands and the technician was holding the laparoscope with one. The case was forwarded to the Office of Administrative Hearings ("OAH") for an evidentiary hearing and a proposed decision.

On February 19 and 20, 2015, an evidentiary hearing was held before an administrative law judge ("ALJ") at OAH. On May 14, 2015, the ALJ issued a proposed decision. The ALJ found that Dr. Brand was guilty of unprofessional conduct in the practice of medicine. Based upon the unprofessional conduct finding, the ALJ recommended that Dr. Brand attend "counseling/training to improve his communications with staff and to increase his sensitivity to the concerns of people working with him." The ALJ then recommended, "[t]o the extent that the Board has the power to issue such an Order without a Reprimand and/or a fine," that the Board reprimand and fine Dr. Brand if he fails to complete the "counseling/training."

On October 14, 2015, an exceptions hearing was held before Disciplinary Panel A (the "Panel") of the Maryland State Board of Physicians.

FINDINGS OF FACT

The Panel finds that the following facts were proven by the preponderance of evidence:

Dr. Brand is a general surgeon and has been licensed by the Board to practice medicine in Maryland continuously since 1984. He is board-certified in general surgery. Since completing his residency in 1984, Dr. Brand has practiced medicine in Maryland. Dr. Brand has been in private practice and has maintained privileges at a hospital in Maryland, where the incident took place.

A laparoscopic cholecystectomy ("lap chole") is a surgical procedure to remove the gallbladder. Dr. Brand routinely performs the procedure. To perform the lap chole, incisions are made for four openings into the patient's abdomen, and hollow plastic tubes are inserted into the openings, which are called ports (or trocars). The ports allow the surgical instruments access to the gallbladder site.

A lap chole uses a laparoscopic video camera. One of the four ports is for the end of the laparopscope to be inserted into the abdomen. During the lap choles at issue in this case, a surgical technician[1] stood next to the surgeon and held the laparoscopic camera. The laparoscope used during the surgeries is angled at 30 degrees at the end inserted into the abdomen. Attached to the other end of the laparoscope is a video camera head.[2] A cable cord comes out of the camera head connecting the camera head to a video box, which sends the images to a television monitor. The surgeon, technician, and surgical assistant view the video images live on the

[1] Surgical technicians are also commonly referred to as "scrub techs."
[2] For the sake of simplicity, this decision refers to the laparoscope to include the camera head and the light cord tube/handle.

television monitor to guide their actions. Attached at a 45 degree angle from the scope is a cable cord for the light. The light cord comes out of the scope in a tube, which can be used as a handle. The light cord connects the laparoscope to a light source machine. Light is then conducted to the end of the laparoscope, illuminating the inside of the abdominal cavity.

The three other ports were used by Dr. Brand and a surgical assistant to insert surgical instruments, such as forceps, to remove the gallbladder. The surgical assistant stood across from Dr. Brand. The patient was under anesthesia as provided by an anesthesiologist.

On April 25, 2014, Dr. Brand was scheduled to perform procedures on five patients: four lap choles and one port insertion.[3] The surgical technician scheduled to hold the laparoscope camera in the four lap choles (the "Technician") is female and was relatively new to the hospital, having been employed at the hospital for less than a year. The Technician had worked with Dr. Brand on approximately 12 previous surgeries, all without incident. As Dr. Brand stated, "the members of the team I had that day I have never had any problems working with in the past." In the operating room during the lap choles, in addition to Dr. Brand, the Technician, the surgical assistant, and the anesthesiologist, were two nurses. One of the two nurses ("Nurse 1") was new to the hospital and was observing the surgery as part of her orientation. The other was that nurse's preceptor.

The following occurred during the lap choles on April 25, 2014:

First Lap Chole

The Technician was initially using one hand to hold the laparoscope. Dr. Brand told the Technician that she needed to use two hands to hold the laparoscope, stating, "You need to use

[3] The surgical technician scheduled for the four lap choles also worked on the port insertion case. It is unclear from the record where in the order of procedures the port insertion took place. In any event, the port insertion procedure was completed without incident.

two hands." At some point, the Technician again used one hand. Dr. Brand told her again, "You need to use two hands." This occurred one other time. There were no other occurrences of note, and the surgery was completed.

Second Lap Chole

The Technician used one hand to hold the laparoscope during the entirety of the second lap chole. Dr. Brand did not ask the Technician to hold the laparoscope with two hands during the second lap chole.[4] Dr. Brand testified before the ALJ that he did not remember asking her to hold the laparoscope with two hands: "I don't remember many problems during that case. I don't remember asking her." (T. 315.) When interviewed by the Board investigators, Dr. Brand stated, "I don't remember there being an issue." (Interview Transcript at 8.) Dr. Brand also stated, "I don't really remember why during the second case I didn't say anything." (Interview Transcript at 20.) In his written statement, Dr. Brand stated, "During the second case, she kept her other hand off the scope but I don't remember pushing the issue." The surgery was completed without incident.

Third Lap Chole

During the third lap chole, the Technician was not using two hands to hold the laparoscope. The Technician used one hand, which she used to hold the camera head. Dr. Brand saw that the Technician was not using two hands to hold the laparoscope. Dr. Brand, however, did not ask the Technician to use two hands during the third lap chole.[5] Instead Dr. Brand asked

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[4] The Surgical Assistant testified that, during the second lap chole, Dr. Brand told the Technician to "keep two hands on the camera." The Panel does not accept this testimony. It is contradicted by the other witnesses, thus, the Panel does not find the Surgical Assistant's testimony reliable.

[5] The Panel does not find credible Dr. Brand's testimony before the ALJ that, during the third lap chole, "I kept having to ask [the Technician] to use two hands." (Transcript, 2/20/15, at 316.) In two previous statements, Dr. Brand did not state he asked the Technician to use two hands during the third lap chole. When interviewed by the Board investigators, concerning the third lap chole,

the Technician to hand him two Ray-Tec gauzes ("Ray-Tec") and two hemostats ("clamps"). Ray-Tec is a sponge detectable by x-ray. Dr. Brand fully unwrapped the Ray-Tec. He then wrapped one Ray-Tec around the Technician's right hand and the camera head and clamped the Ray-Tec so the Technician's hand was bound to the camera head. He then asked the Technician to give him her other hand (her left hand). Dr. Brand took that hand and placed it on the scope. He then wrapped the other Ray-Tec around that hand and the scope, binding her hand to the scope, and clamped the Ray-Tec. When asked how tightly Dr. Brand wrapped the Ray-Tec, the Technician testified, "I couldn't get out of it, but it wasn't cutting off circulation or anything, but it was -- I couldn't get out of it. And he had put a clamp on it after that."

Dr. Brand did not ask the Technician for permission to bind her hands to the instrument, nor did Dr. Brand tell the Technician that he was going to bind her hands to the instrument. Dr. Brand also did not explain to the Technician why he was binding her hands to the laparoscope. The Technician did not want Dr. Brand to tie her hands to the laparoscope and felt humiliated.

Shocked by Dr. Brand's conduct, Nurse 1 asked Dr. Brand, "Doctor, don't you think this is a little mean?" Dr. Brand responded, "No. We're just going to teach her a lesson. This is just something for her to learn." Nurse 1 looked at the Surgical Assistant, who stated, "No, this is fine. He's going to teach her. This is what she will learn." Nurse 1 then left the operating room

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Dr. Brand stated that he did not remember asking the Technician to use two hands. (Transcript, 8/7/14, at 12.) And also, in his written response to the complaint to the Board, Dr. Brand did not state that he had asked the Technician to use two hands during the third lap chole: "During the third case, I paused when I saw that she was still not using two hands, and LOOSELY WRAPPED an opened piece of gauze around each hand. . . ." The Surgical Assistant, who mistakenly testified about the second lap chole, also testified that Dr. Brand told the Technician to keep two hands on the camera during the third lap chole. The preponderance of the evidence shows this did not occur, and thus the Panel also does not accept this testimony by the Surgical Assistant.

and told the charge nurse, Nurse 2, that Dr. Brand had tied the Technician's hands to the laparoscope.

Nurse 2, a clinical operating room nurse, came into the room and observed that the Technician was upset and that her hands were tied to the laparoscope. Nurse 2 asked Dr. Brand to untie her hands. Dr. Brand responded by asking Nurse 2 who sent her into the room. Nurse 2 stated, "No one sent me into the room. I came on my own accord." Nurse 2 then asked Dr. Brand a second time to untie the Technician. Dr. Brand responded this time by stating that Nurse 2 would not understand what was going on. Nurse 2 stated that it did not matter whether she understood what was going on because humiliation is not the way to improve staff performance. Nurse 2 then asked Dr. Brand a third time to untie the Technician. Dr. Brand did not do so at that time. Nurse 2 then left the operation room.

Dr. Brand separated the gallbladder from the liver. He then "unsnapped" the clamps and pulled the Ray-Tec off from around the Technician's hands and the laparoscope. The Technician's hands were tied to the laparoscope for approximately 15-20 minutes. Dr. Brand released the Technician from the laparoscope before removing the gallbladder because, as Dr. Brand stated during his interview with the Board investigators, "I needed her to hand me another instrument." After freeing the Technician's hands, Dr. Brand removed the gallbladder.

Before the completion of the procedure, Nurse 3, the Director of Perioperative Services and the Technician's supervisor, entered the operating room after being notified by a clinical supervisor that Dr. Brand had tied the Technician's hands to the laparoscope. By the time Nurse 3 entered the room, the Technician's hands were untied. Dr. Brand asked Nurse 3 why she was there. Nurse 3 responded that she was there to see what was going on with the case. Nurse 3 stayed in the operating room for the remainder of the surgery.

Before the ports were removed, the Technician told Dr. Brand that she did not understand why he tied her hands to the laparoscope and asked Dr. Brand to explain how she should hold the laparoscope. Dr. Brand inserted the laparoscope and showed her how he used the scope. He then had the Technician take hold of the scope and told her how to direct the scope. This took "just a couple minutes." They then removed the ports.

After the third lap chole, Nurse 3 spoke with Dr. Brand in the pre-op area. Nurse 3 told Dr. Brand that his actions were bullying, inappropriate, unacceptable, and would never happen again in the operating suite. Dr. Brand responded by saying that he thought the incident was being blown out of proportion.

Fourth Lap Chole

Although initially scheduled to do so, the Technician did not participate in the fourth lap chole. Because the Technician was upset, she had been allowed to leave the hospital for the rest of the day. Another surgical technician filled in for the Technician on the fourth lap chole.

RESPONDENT'S EXCEPTIONS

I. UNPROFESSIONAL CONDUCT

Dr. Brand argues in his exceptions that the ALJ "did not base her finding of unprofessional conduct *on any law or on any standard.*" (Dr. Brand's Exceptions at 5) (emphasis added). Dr. Brand's description of the ALJ's finding is not accurate.

The ALJ's proposed decision provides:

> While the Medical Practices Act fails to provide any standard for or definition of the phrase "unprofessional conduct," in *Finucan v. Maryland Board of Physician Quality Assurance,* the Maryland Court of Appeals reasonably defined the term to include conduct that breaches rules or ethical code of professional conduct or conduct unbecoming to a member in good standing in the profession. 380 Md. 577, 593 (2004).

> I need neither an expert witness nor a standard adopted by the Board to find that the Respondent's conduct was *unbecoming for a physician* or, in fact, for any professional.

(ALJ's Proposed Decision at 15) (emphasis added). It is clear that the ALJ based her finding of unprofessional conduct on the standard of unprofessionalism set forth in *Finucan v. Maryland Board of Physician Quality Assurance,* 380 Md. 577, 593 (2004) (unprofessional conduct includes "conduct which is unbecoming a member in good standing of a profession."). (ALJ's Proposed Decision at 15.) Dr. Brand does not argue that the Panel should not apply the unbecoming conduct standard, which was articulated in *Finucan* and applied by the ALJ.

Dr. Brand contends that his conduct was not unprofessional because he was trying to teach the Technician to hold the instrument with two hands. The Panel finds his conduct unprofessional, regardless of his purported reason for binding the Technician's hands. It should have been patently obvious to Dr. Brand that binding the Technician's hands to the laparoscope was outrageous and needlessly humiliating to the Technician. As correctly explained by Nurse 1, "It didn't matter whether there w[ere] any lessons occurring. . . . What was happening was wrong. She shouldn't have been tied up." Dr. Brand's conduct, in binding the Technician's hands to the laparoscope, was unbecoming a member in good standing of the profession and was thus unprofessional. *See Finucan,* 380 Md. at 593.

If Dr. Brand felt it was essential that the Technician use two hands to hold the laparoscope, there were many options available to him far less demeaning than wrapping Ray-Tec around her hands and the laparoscope. Dr. Brand did not ask the Technician to hold the laparoscope with two hands during either the second or third lap chole. Instead of taking the deleterious measure he did, he could have, at least, asked the Technician to hold the laparoscope with two hands during either the second or third lap chole. And, even if he had directed the

Technician during either the second or third lap chole to hold the laparoscope with two hands, and the Technician failed to do so, there were still a multitude of other options available to him far less drastic than the one he opted for. For example, Dr. Brand could have explained to the Technician why he felt holding the laparoscope with two hands was optimal. Dr. Brand ultimately did explain and demonstrated using two hands, but it was too late at that point. This occurred after the Technician asked him for an explanation for his actions, which, of course, was after he had already tied her hands to the laparoscope. Dr. Brand could have also made arrangements with the hospital for another technician to hold the laparoscope after the first or second lap choles.

Although Dr. Brand refers to this incident as a teaching moment, his actions did not comport with any acceptable teaching method. He gave no explanation to the Technician for his actions until later when the Technician asked him for one. One would expect a teaching moment to include an explanation of the lesson being taught. He also did not tell the Technician that he was going to bind her hands to the laparoscope, nor did he ask permission to do so. Making his purported lesson even more oblique, Dr. Brand asked the Technician to hand him the Ray-Tec and clamps that were used to bind her hands. If he were trying to impart the need to hold the laparoscope with two hands, asking her to hand him the gauze and clamps surely confused the message. When one compares Dr. Brand's actions in this instance with his teaching method in other instances—when he would patiently demonstrate holding the laparoscope and then allow the technician to use the laparoscope to sample different angles—the difference is unmistakable. As the hospital's Vice President of Medical Affairs, who was also a witness for Dr. Brand, explained, his "behavior went far beyond any permissible teaching." Dr. Brand's conduct was unacceptable, even if he did intend it as a teaching episode.

Dr. Brand seems to argue that his actions would not be construed as disruptive behavior under the American Medical Association ("AMA") Opinion 9.045 – Physicians with Disruptive Behavior. This Opinion contains the following caveat: "criticism that is offered in good faith with the aim of improving patient care should not be construed as disruptive behavior." But the Panel cannot ascertain Dr. Brand's position on whether this AMA Opinion applies and controls. He argued before the ALJ that it does not (Transcript, 2/20/15, at 377), and he does not state that his position has changed. In any event, having already determined that Dr. Brand's conduct was unprofessional as unbecoming a member in good standing of the profession, *see Finucan,* 380 Md. at 593, there is no need for the Panel to address the AMA opinion. The Panel does note, however, what should be obvious, that even if one's actions are deemed criticism offered in good faith, there are limits in how one carries that out.[6]

Lastly, Dr. Brand tries to justify his actions by arguing there was the *"potential"* that the Technician's handling of the laparoscope "*could* cause an interruption in the procedure." (Exceptions at 12) (italics added). But, it was Dr. Brand who interrupted the procedure when he tied the Technician's hands to the laparoscope. And Dr. Brand's conduct certainly cannot be justified on the basis that the circumstances required him to act as he did. The circumstances leading up to Dr. Brand binding the Technician's hands to the laparoscope were unremarkable and certainly did not warrant Dr. Brand's extreme action. There is no indication that the Technician's handling of the laparoscope negatively affected Dr. Brand's view of the surgeries. The preponderance of the evidence does not show that Dr. Brand's view was distorted during any of the surgeries. He did not testify that he had viewing difficulties. And the second lap chole

[6] This was acknowledged by Dr. Brand's counsel, "obviously there is a line of which you can't go." (Transcript, Exceptions, October 14, 2015, at 10.) Concerning whether Dr. Brand's conduct constitutes criticism in good faith, the State argued, with good basis, that it does not.

was performed without any problems despite the Technician holding the laparoscope with one hand during the entirety of the procedure. To be clear, though, even if there were viewing difficulties, which does not appear to have been the case, Dr. Brand's actions would still not have been remotely justified. Dr. Brand's exception is denied.

II. ALJ'S FINDING OF BATTERY

Dr. Brand takes exception to the ALJ's statement that his conduct constituted battery. Dr. Brand argues that his actions do not meet the common law definition for civil battery. Whether Dr. Brand's actions do or do not constitute battery, however, is not a determination the Panel needs to make. The Panel instead determines whether Dr. Brand's conduct constitutes unprofessional conduct in the practice of medicine. The Panel, thus, declines to rule upon whether his conduct constitutes battery.

III. A PHYSICIAN'S GOOD REPUTATION DOES NOT PRECLUDE A FINDING OF UNPROFESSIONAL CONDUCT.

Dr. Brand argues that his actions do not constitute unprofessional conduct because: (1) this was an isolated incident and (2) he had a reputation for professionalism. Thus, according to Dr. Brand, a physician with a good reputation for professionalism has immunity for the first time he or she engages in unprofessional conduct. That is not the law, nor is the Panel willing to establish that precedent. Dr. Brand's exception is denied.

IV. ALLEGATIONS OF ALJ BIAS

Dr. Brand argues that the ALJ was biased against him. Under COMAR 28.02.01.11C(1)(a), "A judge shall withdraw from participation in any proceeding in which personal bias or other reasons render the judge unable to provide an impartial hearing and decision, or when an appearance of impropriety may reasonably be inferred from the facts." "The person seeking recusal bears a 'heavy burden to overcome the presumption of

impartiality.'" *Karanikas v. Cartwright,* 209 Md. App. 571, 579 (2013) (quoting *Attorney Grievance Comm'n v. Blum,* 373 Md. 275, 297 (2003)). Judges determine appearance of impropriety by whether "a reasonable person knowing and understanding *all the relevant facts* would recuse the judge." *Boyd v. State,* 321 Md. 69, 86 (1990) (emphasis added) (quoting *In re Drexel Burnham Lambert Inc.,* 861 F.2d 1307, 1313 (2d Cir. 1988)).

Dr. Brand's exception states, "At the scheduling conference the ALJ declared that the State's allegations, if true, would constitute unprofessional conduct." (Dr. Brand's Exceptions at 11.) Dr. Brand does not quote the ALJ nor provide a citation. Dr. Brand may be referring to the following comment made by the ALJ during the scheduling conference: "If everything that's alleged is actually true, then I think we could concede that that would be unprofessional." (Transcript, 12/30/14, at 39.) Dr. Brand's Second Motion for Recusal states that the ALJ made this declaration "despite the fact that Respondent's counsel explicitly stated during the conference that Respondent would be contending that that Respondent's actions, as alleged were not unprofessional." (Second Motion for Recusal, paragraph 8, page 5.) Dr. Brand's argument is inconsistent with the record and is not based upon all the relevant facts.

A review of the transcript shows that, during the scheduling conference, as part of trial management, the ALJ was attempting to identify the issues being contested. To that end, the ALJ asked Dr. Brand's counsel whether Dr. Brand was going to challenge whether his conduct was unprofessional. *Id.* at 64. In response, Dr. Brand's counsel made clear that he was not conceding that Dr. Brand's conduct as alleged would constitute unprofessional conduct. *Id.* at 64. The ALJ did not "declare" at the scheduling conference that Dr. Brand's conduct was unprofessional after Dr. Brand's counsel answered the ALJ. Once learning Dr. Brand's position, the ALJ appropriately presided over the proceeding. The ALJ gave Dr. Brand ample opportunity

to present his evidence and argue his positions and wrote a thorough and carefully considered proposed decision addressing Dr. Brand's arguments. And a review of the evidentiary hearing transcript shows that the ALJ maintained an open mind. A reasonable person, knowing and understanding all the relevant facts, would not find that recusal was required. *Cf. Jefferson-El v. State,* 330 Md. 99, 108 (1993) (judge should have recused from violation of probation preceding in which judge had declared in previous trial of defendant that the jury's verdict acquitting the defendant was an "abomination").

Dr. Brand also refers to several of the ALJ's findings of fact and argues that these findings are so distorted that they demonstrate the ALJ's bias. For example, Dr. Brand argues that the ALJ's finding of fact 5—that the Technician "had been taught to always keep one hand free during surgery, to allow for the prompt handing of instrument to a surgeon, upon his or her request"—was a deliberate distortion of the evidence. The evidence, however, supports the ALJ's finding. The Technician testified that she was trained to hold the laparoscope camera with one hand (Transcript, 2/19/15, at 48), and this testimony was undisputed. In fact, Dr. Brand testified that the Technician was probably taught to hold the laparoscope with one hand. (Transcript, 2/20/15, at 357.)

As another example, Dr. Brand argues that the ALJ's finding—"that Dr. Brand never told the technician to hold the scope and camera with 2 hands throughout the procedure"—is "patently false." (Dr. Brand's Exceptions at 12.) But the ALJ asked Dr. Brand during the hearing whether he ever told the Technician, "'Use both hands at all times,' as opposed to, 'Use both hands,' so she knew that you just didn't need her to do it at that moment?" (Transcript, 2/20/15, at 356.) Dr. Brand answered, "I don't think I asked her that way." (*Id.*) The examples

Dr. Brand refers to do not demonstrate that recusal was required. Dr. Brand's exception is denied.

CONCLUSION OF LAW

Based upon the findings of fact, Board Disciplinary Panel A concludes that Dr. Brand is guilty of unprofessional conduct in the practice of medicine, in violation of § 14-404(a)(3)(ii) of the Health Occupations Article.

SANCTION

The Panel has decided to reprimand Dr. Brand. While his mistreatment of his colleague might call for a more severe sanction, he does not have any prior disciplinary history and there are indications from the record that he understands he erred. He has also apologized to those involved in the incident and told the Technician that she is a "great tech" and that he would be "grateful to work with her again." Finally, as pointed out by Dr. Brand, this was an isolated incident. The Panel hopes it remains so.

ORDER

Based upon the findings of fact and conclusion of law, it is, by an affirmative vote of a majority of the quorum of Board Disciplinary Panel A, hereby

ORDERED that Steven J. Brand, M.D. is **REPRIMANDED;** and it is further

ORDERED that this is a public order.

12/21/2015
Date

Christine A. Farrelly
Christine A. Farrelly, Executive Director
Maryland State Board of Physicians

NOTICE OF RIGHT TO APPEAL

Pursuant to § 14-408(a) of the Health Occupations Article, Dr. Brand has the right to seek judicial review of this Final Decision and Order. Any petition for judicial review must be filed within 30 days from the date this Final Decision and Order is mailed. The petition for judicial review must be made as directed in the Maryland Administrative Procedure Act, Md. Code Ann., State Gov't § 10-222, and Maryland Rules 7-201 *et seq.*

If Dr. Brand petitions for judicial review, the Board is a party and should be served with the court's process. In addition, Dr. Brand should send a copy of his petition for judicial review to the Board's counsel, David Wagner, Assistant Attorney General, Office of the Attorney General, 300 W. Preston Street, Suite 302, Baltimore, Maryland 21201. The administrative prosecutor is not involved in the circuit court process and does not need to be served or copied on pleadings filed in circuit court.