

NEW YORK
state department of
HEALTH

Public

Nirav R. Shah, M.D., M.P.H.
Commissioner

Sue Kelly
Executive Deputy Commissioner

November 15, 2011

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Matthew M. Tomaino, M.D.

REDACTED ADDRESS

RE: License No. 171436

Dear Dr. Tomaino:

Enclosed is a copy of the New York State Board for Professional Medical Conduct (BPMC) Order No. 11-271. This Order and any penalty provided therein goes into effect November 22, 2011.

If the penalty imposed by the Order is a fine, please write the check payable to the New York State Department of Health. Noting the BPMC Order number on your remittance will assist in proper crediting. Payments should be directed to the following address:

Bureau of Accounts Management
New York State Department of Health
Corning Tower, Room 1717
Empire State Plaza
Albany, New York 12237

Please direct any questions to: Board for Professional Medical Conduct, 90 Church Street, 4th Floor, New York, NY 10007-2919, telephone # 212-417-4445.

Sincerely,

REDACTED SIGNATURE

Katherine A. Hawkins, M.D., J.D.
Executive Secretary
Board for Professional Medical Conduct

cc: Richard Tubiolo, Esq.
Hirsch and Tubiolo, P.C.
1000 Reynolds Arcade Building
16 East Main Street
Rochester, NY 14614-1796

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

IN THE MATTER
OF
MATTHEW TOMAINO, M.D.

CONSENT
ORDER
BPMC No. 11-271

Upon the application of **MATTHEW TOMAINO, M.D.**, (Respondent), in the attached Consent Agreement, that is made a part of this Consent Order, it is

ORDERED, that the Consent Agreement, and its terms, are adopted and it is further

ORDERED, that this Consent Order shall be effective upon issuance by the Board, either by mailing of a copy of this Consent Order, either by first class mail to Respondent at the address in the attached Consent Agreement or by certified mail to Respondent's attorney, or upon facsimile or email transmission to Respondent or Respondent's attorney, whichever is first.

SO ORDERED.

DATED: 11/15/11

REDACTED SIGNATURE

KENDRICK A. SEARS, M.D.
Chair
State Board for Professional
Medical Conduct

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

IN THE MATTER
OF
MATTHEW TOMAINO, M.D.

CONSENT
AGREEMENT

MATTHEW TOMAINO, M.D., Respondent, representing that all of the following statements are true, deposes and says:

That on or about July 30, 1997, I was licensed to practice medicine in the State of New York and issued license number 171436 by the New York State Education Department.

My current address is REDACTED ADDRESS, and I will advise the Director (Director) of the Office of Professional Medical Conduct (OPMC) of any change of my address within thirty (30) days, thereof.

I understand that the New York State Board for Professional Medical Conduct (Board) has charged me with sixteen (16) Specifications of professional misconduct.

A copy of the Statement of Charges, marked as Exhibit A, is attached to and part of this Consent Agreement.

I admit to the Thirteenth Specification, with regard to Factual Allegations A and A.1, and A.4; B and B.1, B.3, and B.5, in full satisfaction of the charges against me, and agree to the following sanctions:

I shall receive a Censure and Reprimand,

Pursuant to N.Y. Pub. Health Law § 230-a(9), I shall be placed on probation for a period of five (5) years, subject to the terms set forth in attached Exhibit B.

I shall pay a \$50,000.00 fine, to be paid within six (6) months of the effective date of the Consent Order to the NYS Department of Health, Bureau of Accounts Management, Revenue Unit, Empire State Plaza, Corning Tower, Room 1717, Albany, NY 12237-0016.

I agree, further, that the Consent Order shall impose the following conditions:

That I shall remain in continuous compliance with all requirements of New York Education Law § 6502 including, but not limited to, the requirements that a licensee shall register and continue to be registered with the New York State Education Department (except during periods of actual suspension) and that a licensee shall pay all registration fees. Respondent shall not exercise the option provided in New York Education Law § 6502(4) to avoid registration and payment of fees. This condition shall take effect 30 days after the effective date of the Consent Order and will continue so long as Respondent remains a licensee in New York State; and

That I shall cooperate fully with the OPMC in its administration and enforcement of the Consent Order and in its investigations of matters concerning Respondent. Respondent shall respond in a timely manner to all OPMC requests for written periodic verification of Respondent's compliance with this Consent Agreement. Respondent shall meet with a person designated by the Director, OPMC, as directed. Respondent shall respond promptly and provide all documents and information within Respondent's control, as directed. This condition shall take effect upon the Board's issuance of the Consent Order and will continue so long as Respondent remains licensed in New York State.

I stipulate that my failure to comply with any conditions of the Consent Order shall constitute misconduct as defined by New York Education Law § 6530(29).

I agree that, if I am charged with professional misconduct in future, this Consent Agreement and the Consent Order shall be admitted into evidence in that proceeding.

I ask the Board to adopt this Consent Agreement.

I understand that if the Board does not adopt this Consent Agreement, none of its terms shall bind me or constitute an admission of any of the acts of alleged misconduct; this Consent Agreement shall not be used against me in any way and shall be kept in strict confidence; and

the Board's denial shall be without prejudice to the pending disciplinary proceeding and the Board's final determination pursuant to New York Public Health Law.

I agree that, if the Board adopts this Consent Agreement, the Chair of the Board shall issue a Consent Order in accordance with its terms. I agree that the Consent Order shall take effect upon its issuance by the Board, either by mailing of a copy of the Consent Order by first class mail to me at the address in this Consent Agreement, or to my attorney by certified mail, or upon facsimile or email transmission to me or my attorney, whichever is first. The Consent Order, this Consent Agreement, and all attached Exhibits shall be public documents, with only patient identities, if any, redacted. As public documents, they may be posted on the Department of Health website.

I stipulate that the proposed sanction and Consent Order are authorized by New York Public Health Law §§ 230 and 230-a, and that the Board and OPMC have the requisite powers to carry out all included terms. I ask the Board to adopt this Consent Agreement of my own free will and not under duress, compulsion or restraint. In consideration of the value to me of the Board's adoption of this Consent Agreement, allowing me to resolve this matter without the various risks and burdens of a hearing on the merits, I knowingly waive my right to contest the Consent Order for which I apply, administratively and/or judicially, I agree to be bound by the Consent Order, and I ask that the Board adopt this Consent Agreement.

I understand and agree that the attorney for the Department, the Director, OPMC, and the Chair of the Board each retain complete discretion either to enter into the proposed Consent Agreement and Consent Order, based upon my application, or to decline to do so. I further understand and agree that no prior or separate written or oral communication can limit that discretion.

AFFIRMED:

DATED: October 19, 2011

REDACTED SIGNATURE

MATTHEW TOMAINO, M.D.
Respondent

The undersigned agree to Respondent's attached Consent Agreement and to its proposed penalty, terms and conditions.

DATE: 10-19-11

REDACTED SIGNATURE

RICHARD S. TUBIOLLO, Esq.
Attorney for Respondent

DATE: October 24, 2011

REDACTED SIGNATURE

CINDY M. FASCIA
Associate Counsel
Bureau of Professional Medical Conduct

DATE: 11/11/11

REDACTED SIGNATURE

KEITH W. SERVIS
Director
Office of Professional Medical Conduct

IN THE MATTER
OF
MATTHEW TOMAINO, M.D.

STATEMENT
OF
CHARGES

MATTHEW TOMAINO, M.D., Respondent, was authorized to practice medicine in New York State on or about July 30, 1987, by the issuance of license number 171436 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. Respondent provided medical care to Patient A on various occasions, including but not limited to an office visit on or about October 25, 2006, and surgery he performed on Patient A on or about October 25, 2006 at Lattimore Community Surgicenter (LCS). Respondent failed to meet the standard of care, in that:
1. Respondent, on October 25, 2006, performed a carpal tunnel release on Patient A without appropriate indication and/or performed the wrong procedure on Patient A, by performing a carpal tunnel release rather than a de Quervain's release.
 2. Respondent, in his office note for Patient A's post-operative office visit of October 30, 2006, stated the following:

[Patient A] is now five days following a left carpal tunnel release and index and long trigger releases...we had originally scheduled her for an index and long trigger release and de Quervain's but based on pre-operative dialogue, I told her she had a carpal tunnel and triggers and the de Quervain's had settled down....so we did a carpal tunnel release and the long trigger releases...

Respondent's office note was made with intent to deceive and/or with reckless disregard of the truth, in that Respondent had no such pre-operative dialogue with Patient A and/or in that Respondent, on October 25, 2006, performed the wrong procedure on Patient A by performing a carpal tunnel release rather than a de Quervain's release.

3. Respondent, despite the fact that he performed the carpal tunnel release on Patient A without adequate and/or appropriate indication, and/or performed the wrong procedure on Patient A by performing a carpal tunnel release rather than a de Quervain's release, changed or amended the consent form signed pre-operatively by Patient A and had Patient A post-operatively sign the amended consent form on October 25, 2006, the same day that Respondent performed the incorrect procedure on Patient A, which amended consent form stated Patient A consented to the carpal tunnel release.
4. Respondent's office note of Patient A's October 30, 2006 post-operative visit and/or Respondent's other post-operative documentation pertaining to the surgical procedures he performed on Patient A on October 25, 2006 failed to accurately document Respondent's care and treatment of Patient A.

- B. Respondent provided medical care to Patient B on various occasions, including but not limited to a reverse right shoulder arthroplasty which Respondent performed on Patient B on or about June 11, 2009 at Rochester General Hospital. Respondent's care of Patient B failed to meet accepted standards of care, in that:

1. Respondent, despite being told by nursing staff that the sponge count was off and there was a sponge missing, or words to such effect, proceeded with closure of Patient B's surgical wound.
2. Respondent, when nursing staff told him there was a missing sponge and/or when nursing staff refused to give Respondent the dressing sponges until the sponge count was correct, said: "give me the dressing, don't hold me up" or "do you want to be responsible for holding up the room?", or words to such effect.
3. Respondent, despite the fact that he was told by nursing staff prior to closure of the wound that the sponge count was not correct, closed the wound without first obtaining an x-ray and/or without the missing sponge having been located.
4. Respondent, despite the fact that he was told by nursing staff prior to closure of the wound that the sponge count was not correct, dictated an operative report after the procedure which read in part as follows:

At this point, the wound was irrigated and the subcutaneous tissue was closed with a running Quill suture. The skin was closed with staples. A sterile dressing and sling were placed. **I was surprised at this time that the sponge count was incorrect.**

Respondent's operative report was made with intent to deceive and/or with reckless disregard of the truth, in that Respondent knew that the sponge count was incorrect prior to closure.

5. Respondent's dictated operative report for the June 11, 2009 surgery he performed on Patient B failed to accurately reflect Respondent's care and treatment of Patient B.
- C. Respondent provided medical care to Patient C, a then 71 year old male with a history of atrial fibrillation, in an office appointment on or about May 12,

2008, at the University of Rochester Medical Center's Orthopedic Clinic (URMC), where Respondent administered a cortisone injection into Patient C's ulnocarpal joint, which was the first such injection Respondent had administered to Patient C. Respondent failed to meet the standard of care, in that:

1. Respondent failed to respond appropriately when, after he had administered the cortisone injection into Patient C's ulnocarpal joint, Patient C became unresponsive, pale in color, had agonal respirations, and for a time had no discernable pulse. Patient C responded after he was shaken by staff and was moved to a supine position on the examination table. Patient C, when moved, was noted to have been incontinent of urine.
2. Respondent, when an ambulance contacted by nursing staff arrived to care for Patient C and/or transport him to the hospital, told the paramedics that Patient C did not need to be placed on their monitor.
3. Respondent, in Patient C's presence, stated that Patient C did not need to go to the Emergency Department.
4. Respondent said to Patient C "you're fine, aren't you?", or words to such effect and/or dissuaded Patient C from going to the Emergency Department in the ambulance.
5. Respondent, despite the fact that Patient C remained pale, clammy, and diaphoretic, sent away the ambulance.
6. Respondent told Patient C that he would drive Patient C to see Patient C's cardiologist, when in fact Respondent did not intend to bring Patient C himself.
7. Respondent permitted Patient C to remain in Respondent's office from approximately 12:30 p.m. until approximately 2:50 p.m. without making

appropriate arrangements for Patient C's care and/or until nursing staff called Patient C's cardiologist and the cardiologist said Patient C should be sent to the Emergency Department.

8. Respondent permitted Patient C to be transported to the Emergency Department by Patient C's wife in their private car, unattended by medical personnel.

SPECIFICATION OF CHARGES

FIRST THROUGH THIRD SPECIFICATIONS

FRAUDULENT PRACTICE

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law § 6530(2) by practicing the profession of medicine fraudulently, in that Petitioner charges:

1. The facts in Paragraphs A and A.2.
2. The facts in Paragraphs A and A.3.
3. The facts in Paragraphs B and B.4.

FOURTH THROUGH SIXTH SPECIFICATIONS

FALSE REPORT

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(21) by wilfully making or filing a false report, or failing to file a report required by law or by the department of health or the education department, in that Petitioner charges:

4. The facts in Paragraphs A and A.2.
5. The facts in Paragraphs A and A.3.
6. The facts in Paragraphs B and B.4.

SEVENTH THROUGH NINTH SPECIFICATIONS

PRACTICING WITH GROSS NEGLIGENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(4) by practicing the profession of medicine with gross negligence on a particular occasion, in that Petitioner charges:

7. The facts of Paragraph A and any or all of the following subparagraphs: A.1, A.2, A.3, and/or A.4.
8. The facts of Paragraphs B and any or all of the following subparagraphs: B.1, B.2, B.3, B.4 and/or B.5.
9. The facts of Paragraph C and any or all of the following subparagraphs: C.1, C.2, C.3, C.4, C.5, C.6 and C.7.

TENTH THROUGH TWELFTH SPECIFICATIONS

PRACTICING WITH GROSS INCOMPETENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(6) by practicing the profession of medicine with gross incompetence, in that Petitioner charges:

10. The facts of Paragraph A and any or all of the following subparagraphs: A.1, A.2, A.3, and/or A.4.
11. The facts of Paragraphs B and any or all of the following subparagraphs: B.1, B.2, B.3, B.4 and/or B.5.
12. The facts of Paragraph C and any or all of the following subparagraphs: C.1, C.2, C.3, C.4, C.5, C.6 and C.7.

THIRTEENTH SPECIFICATION

PRACTICING WITH NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(3) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of two or more of the following:

13. The facts of Paragraphs A, B and/or C, and any or all subparagraphs.

FOURTEENTH SPECIFICATION

PRACTICING WITH INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(5) by practicing the profession of medicine with incompetence on more than one occasion as alleged in the facts of two or more of the following:

14. The facts of Paragraphs A, B and/or C, and any or all subparagraphs.

FIFTEENTH THROUGH SIXTEENTH SPECIFICATIONS

FAILURE TO MAINTAIN ACCURATE RECORDS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(32) by failing to maintain a record for each patient which accurately reflects the care and treatment of the patient, in that Petitioner charges:

15. The facts of Paragraphs A and A.4.
16. The facts of Paragraphs B and B.5.

DATE: November / , 2011
Albany, New York

REDACTED SIGNATURE

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct

EXHIBIT B
Terms of Probation

1. Respondent's conduct shall conform to moral and professional standards of conduct and governing law. Any act of professional misconduct by Respondent as defined by N.Y. Educ. Law §§ 6530 or 6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to N.Y. Pub. Health Law § 230(19).
2. Respondent shall maintain active registration of Respondent's license (except during periods of actual suspension) with the New York State Education Department Division of Professional Licensing Services, and shall pay all registration fees.
3. Respondent shall provide the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299 with the following information, in writing, and ensure that this information is kept current: a full description of Respondent's employment and practice; all professional and residential addresses and telephone numbers within and outside New York State; all current and past affiliations and/or privileges, with hospitals, institutions, facilities, medical practices, managed care organizations, and/or applications for such affiliations and/or privileges; and all investigations, arrests, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility. Respondent shall notify OPMC, in writing, within 30 days of any additions to or changes in the required information.
4. Respondent shall cooperate fully with, and respond in a timely manner to, OPMC requests to provide written periodic verification of Respondent's compliance with the terms of this Consent Order. Upon the Director of OPMC's request, Respondent shall meet in person with the Director's designee.
5. Respondent's failure to pay any monetary penalty by the prescribed date shall subject Respondent to all provisions of law relating to debt collection by New York State, including but not limited to: the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses [Tax Law § 171(27); State Finance Law § 18; CPLR § 5001; Executive Law § 32].
6. The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of 30 consecutive days or more. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive 30 day period. Respondent shall then notify the Director again at least 14 days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period shall resume and Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose as reasonably relate to the matters set forth in Exhibit A or as are necessary to protect the public health.
7. The Director of OPMC may review Respondent's professional performance. This review may include but shall not be limited to: a review of office records, patient records, hospital charts, and/or electronic records; and interviews with or periodic visits with Respondent and staff at practice locations or OPMC offices.
8. Respondent shall adhere to federal and state guidelines and professional standards of care with respect to infection control practices. Respondent shall ensure education,

training and oversight of all office personnel involved in medical care, with respect to these practices.

9. Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients and contain all information required by State rules and regulations concerning controlled substances.

CONTINUING MEDICAL EDUCATION

10. Respondent, during the first two years of the probationary period, shall complete a total of one hundred fifty (150) hours of Category I Continuing Medical Education (CME). Said CME shall include courses in all of the following areas: ethics, medical records, and orthopedic surgery. All CME courses are subject to the prior written approval of OPMC. Said 150 hours of CME shall be in addition to any other CME that Respondent may be required to complete to maintain board certification, or licensure in any jurisdiction, or privileges in any facility.

PRACTICE MONITOR

11. Respondent shall practice medicine only when monitored by a licensed physician, board certified in orthopedic surgery, ("practice monitor") proposed by Respondent and subject to the written approval of the Director of OPMC. Any medical practice in violation of this term shall constitute the unauthorized practice of medicine.
 - A. Respondent shall make available to the monitor any and all records or access to the practice requested by the monitor, including on-site observation. The practice monitor shall visit Respondent's medical practice at each and every location, on a random unannounced basis at least monthly and shall examine a selection (no fewer than 20) of records maintained by Respondent, including patient records, hospital records, prescribing information and office records. In addition to the twenty records per month as set forth above, the monitor shall review the pre-operative consent forms, operative notes, and post-operative office notes for at least ten additional surgical cases per month. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation of accepted standards of medical care; inconsistencies between pre-operative documentation, operative reports, and post-operative documentation or refusal to cooperate with the monitor shall be reported by the monitor within 24 hours to OPMC.
 - B. Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of OPMC.
 - C. Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the practice monitor.

Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year, in accordance with Section 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC prior to Respondent's practice after the effective date of this Order.

12. Respondent shall comply with this Consent Order and all its terms, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with, or a violation of, these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding, and/or any other such proceeding authorized by law, against Respondent.