

June 5, 2013

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Paul Tsui, Esq.  
NYS Department of Health  
ESP-Corning Tower-Room 2512  
Albany, New York 12237

Barlow Smith, M.D.  
1811A Highway 281 – Suite 8  
Marble Falls, Texas 78654

Barlow Smith, M.D.  
REDACTED

**RE: In the Matter of Barlow Smith, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 13-167) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine together with the registration certificate. Delivery shall be by either certified mail or in person to:

Office of Professional Medical Conduct  
New York State Department of Health  
Office of Professional Medical Conduct  
Riverview Center  
150 Broadway - Suite 355  
Albany, New York 12204

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2013) and §230-c subdivisions 1 through 5, (McKinney Supp. 2013), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties other than suspension or revocation until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Chief Administrative Law Judge  
New York State Department of Health  
Bureau of Adjudication  
Riverview Center  
150 Broadway – Suite 510  
Albany, New York 12204

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

REDACTED  
James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH:cah  
Enclosure

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

COPY

-----X  
IN THE MATTER : DETERMINATION  
OF :  
BARLOW SMITH, M.D. :  
CO-11-12-6799-A : ORDER  
-----X

BPMC #13-167

A Notice of Referral Proceeding and Statement of Charges, both dated February 26, 2013, were served upon the Respondent, Barlow Smith, M.D. **ANDREW J. MERRITT, M.D. (Chair), JOHN D. THOMAS, II, M.D., and DAVID F. IRVINE, DHSc, R.P.A.-C,** duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **LARRY G. STORCH, ESQ., ADMINISTRATIVE LAW JUDGE,** served as the Administrative Officer. The Department of Health appeared by Paul Tsui, Esq., Associate Counsel. The Respondent failed to appear in person at the hearing but did submit various documents for the Hearing Committee's consideration. A hearing was held on May 15, 2013. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing where a licensee is charged solely with a violation of Education Law §6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York or another jurisdiction, or upon a prior administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, Respondent is charged with professional misconduct pursuant to Education Law §6530(9)(b) in that he was found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitute professional misconduct under the laws of this state.

He is also charged with having violated New York Education Law §6530(9)(d) by having had his license to practice medicine suspended in another state after disciplinary action was instituted by said other state. A copy of the Statement of Charges is attached to this Determination and Order in Appendix I.

### FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Barlow Smith, M.D. (hereinafter, "Respondent"), was authorized to practice medicine in New York State on July 19, 1967 by the issuance of license number 099338 by the New York State Education Department. (Exhibit #3).

2. On or about August 26, 2011, the Texas Medical Review Board (hereinafter "Texas Board"), by an Agreed Order required Respondent to complete at least eight (8) hours of continuing medical education on the topic of medical recordkeeping, based upon the Texas Board's findings that Respondent failed to delineate his thought processes in medical records, and failed to maintain medical records to support the treatment regimen for four patients prescribed pain medication and stimulants. (Exhibit #4).

3. On or about May 29, 2009, the Texas Board, by an Agreed Order, reprimanded Respondent and required him to complete a professional boundaries course and pay an administrative penalty in the amount of \$3,000.00, based upon findings that Respondent, while practicing psychiatry, engaged in sexual contact with a patient at the Respondent's invitation. (Exhibit #5).

#### CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The evidence clearly established that the Respondent was twice disciplined by the Texas Board as result of the commencement of disciplinary proceedings against him. Respondent, who purports to be an attorney and member of the New York Bar, submitted to the Administrative Law Judge a document styled as a "Motion for Adjudication". By this "motion", Respondent admitted the allegations regarding the 2011 disciplinary action. Respondent contested any allegation that he engaged in sexual contact with a patient, contending that the individual in question was a former patient at the time of the encounter.

In making this argument, Respondent is seeking to re-litigate the underlying Texas action. This is not an option under New York Law. The parties are bound by the findings of the Texas Board. That Board specifically found that the patient went to Respondent's office for his action on a form needed so that she could participate in a prescription assistance program. While the patient was in his office, Respondent then engaged in sexual contact with her. (Exhibit #5).

The patient went to see Respondent for assistance which only he, as her treating physician, could provide. Therefore, he was still in a psychiatrist/patient relationship with her. While in that relationship, he engaged in sexual contact with the patient. Respondent's conduct, had it occurred in New York, would constitute professional misconduct in violation of New York Education Law §6530(44) [in the practice of psychiatry, any physical contact of a sexual nature between the licensee and patient].

Respondent was also disciplined in 2011 by the Texas Board for failures of medical record keeping with regard to four patients treated with pain medication and stimulants. This conduct, had it occurred within New York State would constitute professional misconduct in violation of New York Education Law §6530(3) [practicing the profession with negligence on more than one occasion], as well as in violation of New York Education Law

§6530(32) [failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient].

The Department has clearly sustained its burden of proof in this matter. Therefore, the First and Second Specifications of professional misconduct shall be sustained.

#### DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine in New York State should be revoked. This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

Respondent has twice been disciplined by the Texas Board, including once for sexual impropriety with a patient while he was her treating psychiatrist. Clearly, Respondent is either unwilling or unable to conform his behavior to the standards of the medical profession. The Texas Board did not see fit as to revoke Respondent's medical license. That is, of course, their prerogative. This Hearing Committee has an independent responsibility to determine the appropriate action to be taken



against Respondent's New York license.

Respondent's actions in engaging his patient in sexual contact were a gross breach of his professional and moral obligations as a psychiatrist. Rather than expressing remorse for his conduct, he attempted to excuse it by making a legalistic argument over whether or not she was a actually patient at the time of the encounter. It is clear that Respondent has learned nothing by his prior discipline by the Texas Board. Under the totality of the circumstances, the Hearing Committee unanimously determined that revocation is the only appropriate sanction to impose upon Respondent.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED THAT:

1. The First and Second Specifications of professional misconduct, as set forth in the Statement of Charges (Exhibit # 1) are SUSTAINED;

2. Respondent's license to practice medicine in New York State shall be, and hereby REVOKED.

3. This Determination and Order shall be effective upon service. Service shall be either by certified mail upon Respondent at Respondent's last known address and such service shall be effective upon receipt or seven days after mailing by certified mail, whichever is earlier, or by personal service and such service shall be effective upon receipt.

DATED: Marcellus, New York  
6/5, 2013

REDACTED

ANDREW J. MERRITT, M.D. (CHAIR)

JOHN D. THOMAS, II, M.D.  
DAVID F. IRVINE, DHSc, R.P.A.-C.

TO: Paul Tsui, Esq.  
Associate Counsel  
New York State Department of Health  
Corning Tower, Room 2512  
Albany, New York 12237

Barlow Smith, M.D.  
1811A Highway 281, Suite 8  
Marble Falls, TX 78654

Barlow Smith, M.D.

REDACTED

APPENDIX I



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

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IN THE MATTER  
OF  
BARLOW SMITH, M.D.  
CO-11-12-6799-A

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STATEMENT  
OF  
CHARGES

BARLOW SMITH, M.D., Respondent, was authorized to practice medicine in New York state on July 19, 1967, by the issuance of license number 099338 by the New York State Education Department.

**FACTUAL ALLEGATIONS**

A On or about August 26, 2011 the Texas Medical Review Board, (hereinafter "Texas Board"), by an Agreed Order (hereinafter "Texas Order"), inter alia, required the Respondent to complete at least eight (8) hours of continuing medical education (CME) in the topic of medical recordkeeping based upon the Texas Board's findings that Respondent failed to delineate his thought processes in medical records and failed to maintain medical records to support the treatment regimen for four patients prescribed pain medication and stimulants.

B On or about May 29, 2009, the Texas Board, by an Agreed Order, inter alia, REPRIMANDED the Respondent and required the Respondent to complete a professional boundaries course and pay an administrative penalty in the amount of \$3,000.00 based upon the Texas Board's finding that Respondent, while practicing psychiatry, engaged in sexual contact with a patient at the Respondent's invitation.

C The conduct resulting in the Texas Board disciplinary action against Respondent would constitute misconduct under the laws of New York State, pursuant to the following sections of New York State law:

1 New York Education Law §6530(3) (practicing the profession with negligence on more than one occasion)

2 New York Education Law §6530(32) (failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patients)

3. New York Education Law §6530(44) (in the practice of psychiatry, any physical contact of a sexual nature between the licensee and patient).

**SPECIFICATIONS**

**FIRST SPECIFICATION**

Respondent violated New York Education Law §6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitute professional misconduct under the laws of New York State. in that Petitioner charges:

- 1 The facts in Paragraphs A, B, and/or C.

**SECOND SPECIFICATION**

Respondent violated New York State Education Law §6530(9)(d) by having disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action would, if committed in New York State, constitute professional misconduct under the laws of New York State. in that Petitioner charges:

- 2 The facts in Paragraphs A, B, and or C.

DATED *Feb. 26*, 2013  
Albany, New York

REDACTED

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