



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

November 18, 1999

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Barry Plunkett, Esq.  
NYS Department of Health  
Empire State Plaza  
Corning Tower – Room 2503  
Albany, New York 12237

Lawrence Stirling Krain, M.D.  
5419 North Sheridan Road  
Chicago, Illinois 60640

Lawrence Stirling Krain, M.D.  
5415 North Sheridan Road  
Chicago, Illinois 60640

**RE: In the Matter of Lawrence Stirling Krain, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 99-286) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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  
Hedley Park Place

433 River Street - Fourth Floor  
Troy, New York 12180

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), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "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., Administrative Law Judge  
New York State Department of Health  
Bureau of Adjudication  
Hedley Park Place  
433 River Street, Fifth Floor  
Troy, New York 12180

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,

A handwritten signature in cursive script that reads "Tyrone T. Butler". The signature is written in black ink and is positioned above the typed name.

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB: mla

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

DETERMINATION  
AND  
ORDER

IN THE MATTER  
OF  
LAWRENCE STIRLING KRAIN, M.D.

ORDER #99-286

**COPY**

ARSENIO G. AGOPOVICH, M.D., Chairman, ERNST A. KOPP, M.D. and MICHAEL WALKER, duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York, pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. MICHAEL P. MCDERMOTT, ESQ., Administrative Law Judge, served as Administrative Officer for the Hearing Committee.

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

**SUMMARY OF THE PROCEEDINGS**

Notice of Hearing and  
Statement of Charges:

August 27, 1999

Pre-Hearing Conference:

September 29, 1999

Hearing Dates:

October 7, 1999

Place of Hearing:

NYS Department of Health  
Hedley Park Place

433 River Street  
Troy, New York 12180

Date of Deliberations:

November 9, 1999

Petitioner appeared by:

Henry M. Greenberg  
General Counsel  
NYS Department of Health  
By: Barry Plunkett, Esq., of Counsel

Respondent appeared by:

The Respondent failed to appear.

**STATEMENT OF CHARGES**

Essentially, the Statement of Charges, charges the Respondent with misconduct in another state; revocation and suspension of licenses to practice in other states; moral unfitness; practicing the profession fraudulently and willfully filing a false report.

The charges are more specifically set forth in the Statement of Charges, a copy of which is attached hereto and made a part hereof.

**WITNESSES**

For the Petitioner:

- 1. Rita-Lee St. John
- 2. Kenneth J. Spooner

For the Respondent:

None

## FINDINGS OF FACT

Numbers in parenthesis 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. All Hearing Committee findings were unanimous unless otherwise specified.

## GENERAL FINDINGS

1. LAWRENCE STIRLING KRAIN, M.D., the Respondent, was authorized to practice medicine in New York State on May 16, 1973, by the issuance of license November 116081 by the New York State Education Department (Pet's. Ex. 7).

## FINDINGS AS TO THE CALIFORNIA DISCIPLINE

2. On October 23, 1987, in the Superior Court of the State of California, County of Orange, the Respondent pleaded guilty to one (1) felony count of violation of §653(f)(a), California Penal Code, in that he solicited another to join in the commission of subornation of perjury. This offense was eventually declared a misdemeanor by the Court on November 26, 1990, and the Respondent's plea was dismissed under §1203.4, California Penal Code.

As part of the plea bargain the Respondent was placed on two (2) years probation, with the first year to be spent at Brea Neuro-Psychiatric Hospital (Pets'. Exs. 8A, 8B, 8C, 8D, 9A, 9B, 9C and 9D).

3. By Decision and Order, dated October 23, 1996, effective November 22, 1996, the Division of Medical Quality, Medical Board of California, (hereinafter the "California Board"), revoked the Respondent's license to practice medicine.

The "California Board adopted the Proposed Decision of the Administrative Law Judge, who determined, among other things,

"On October 23, 1987, in the Superior Court of the State of California, County of Orange, Respondent was convicted on his plea of guilty, to one count of violating Penal Code Section 653(f)(a), solicitation to commit a felony (subornation of perjury), a misdemeanor involving moral turpitude and substantially related to the functions, duties and qualifications of a Board licensee.

As part of the plea bargain which resulted in Respondent's guilty plea, Respondent was placed on two years of probation, with the first year to be spent at Brea Neuro-Psychiatric Hospital ("Brea"). The requirement that Respondent spend a year in a psychiatric hospital resulted from an earlier related jury verdict holding that Respondent was mentally incompetent to stand trial. Although the jury so held, the Court believed Respondent to be in need of psychiatric treatment (undoubtedly because two of the three examining professionals believed likewise) and gave Respondent the option of spending a year in jail or a year at Brea. Respondent chose the latter.

The facts and circumstances underlying the crime were not established. The crime is clearly one, however, of moral turpitude and, as it has as its hallmark a basic act of dishonesty, is also substantially related to the functions, duties and qualifications of a medical doctor."

\* \* \*

"Finally, Respondent's contention that the criminal conviction cannot form a basis for discipline because the record thereof has been expunged pursuant to the provisions of Penal Code Section 1203.4 is found to be without merit. Business and Professions Code Section 2236, as it read when this charging allegation was first made, specifically provided that discipline for a conviction may be imposed

despite a subsequent order (that is, an order made after the conviction) under Penal Code Section 1203.4. While this language was dropped from Section 2236, it was incorporated in Business and Professions Code Section 2236.1(d) (1), which in turn refers to Business and Professions Code Section 2227, which is the "umbrella" section under which the Section 2236 operates. In other words, the change in the language of Section 2236 was not a change in the law.

Even if the changes made to Section 2236 are deemed to be a change in the law, meaning that an order under Penal Code Section 1203.4 would preclude license discipline for a misdemeanor conviction, such change, which was made in 1994 and became effective in 1995, would not have retroactive application since there is no indication in the statute that the change is to be applied in any other manner than prospectively." (Pet's. Ex. 10B)

4. The Respondent appealed the "California Board's" decision to the California Superior Court and that court denied the Respondent's petition.

The Respondent then sought review in the Court of Appeal of the State of California, First Appellate District, Division Five.

The Court of Appeal, by Decision, entered May 10, 1999, dismissed the Respondent's appeal's and denied the petition for extraordinary Writ of Mandamus.

The decision by the Court of Appeal is final since the Respondent did not petition the California Supreme Court for review.

The California Board's decision to revoke the Respondent's medical license is now final. (Pet's. Ex. 11A)

#### CONSLUSION AS TO THE CALIFORNIA DISCIPLINE

The conduct underlying the California Board's determination that the Respondent was guilty of unprofessional conduct would, if committed in New York State, constitute



professional misconduct under N.Y. Education Law §6530 (20) (conduct in the practice of medicine which evidences moral unfitness to practice medicine) (McKinney Supp. 1999).

### FINDINGS AS TO THE ILLINOIS DISCIPLINE

5. On November 2, 1992, Tommy H. Brewer, Chief Hearing Officer, Department of Professional Regulation, State of Illinois, issued a "Report and Recommendation of the Hearing Officer" wherein he concluded:

1. That the Illinois Medical Disciplinary Committee of the Department of Professional Regulation of the State of Illinois has jurisdiction of the subject matter and of the parties in this case.
2. That the Department proved by clear and convincing evidence:
  - a. That the Respondent has violated Illinois Revised Statutes (1987), Chapter 111, Paragraph 4400-22 (A)(3) in that he was convicted of a Felony in 1987 in the Orange County Superior Court, Santa Ana, California;
  - b. That the Respondent violated Illinois Revised Statutes (1987), Chapter 111, Paragraph 4400-22 (A)(27), in that he suffers from a mental illness or disability which results in the inability to practice with reasonable skill and safety.

The Hearing Officer Recommended:

1. That Dr. Lawrence Krain's certificate of Registration as a Physician in the State of Illinois, License No. 036-041550, issued by the Department of Professional Regulation of the State of Illinois be suspended indefinitely for a minimum period of one (1) year.
2. That Dr. Lawrence Krain show to the satisfaction of the Board that he is able to practice medicine with the degree of skill and safety required under the Act at the time he Petitions for Restoration of his license. (Pet's. Ex. 12A)

6. On December 16, 1992, the Medical Disciplinary Board of the Illinois Department of Professional Regulation (hereinafter the "Illinois Board") adopted the recommendation of the Hearing Officer and recommended to the Director that the Respondent's medical license be suspended indefinitely for a minimum of one (1) year and ordering, among other things, that Respondent undergo a neuropsychological examination. (Pet's Ex. 12A)

7. On March 22, 1993, Nikki M. Zollar, Director, Department of Professional Regulation of the State of Illinois, denied the Respondent's motion for a rehearing; adopted the Findings of Fact, Conclusion of Law and Recommendations of the Medical Disciplinary Board; and Ordered that the Respondent's license to practice medicine in the State of Illinois be indefinitely suspended for a minimum of one (1) year. (Pet's. Ex. 12A)

8. The Respondent appealed the "Illinois Board's" decision and after extensive litigation in the Illinois courts, the Illinois Supreme Court denied the Respondent's petition for leave for further appeal on October 6, 1998.

The Respondent's medical license has been indefinitely suspended in the State of Illinois since January 5, 1996 and remains suspended to date. (Pet's. Exs. 16, 16A and 30)

### CONCLUSION AS TO THE ILLINOIS DISCIPLINE

The conduct underlying the Illinois Department of Professional Regulation's determination that Respondent was guilty of unprofessional conduct would, if committed in New York State, constitute professional misconduct under N.Y. Education Law §6530 (7) (practicing the profession while impaired by a mental disability) (McKinney Supp. 1999).

## FINDINGS AS TO THE OHIO DISCIPLINE

9. On September 27, 1988, the Respondent signed an application for biennial renewal of his license to practice medicine in Ohio.

In response to a question contained on the form which asked, "Since you last renewed your Ohio medical license, have you been found guilty or pled guilty or no contest to: a.) A felony ...?", the Respondent checked the box marked "No."

In fact, on October 23, 1987, in the Superior Court of California, County of Orange, the Respondent pled guilty to one (1) felony count of violation of §653 (f)(a), California Penal Code, to wit: soliciting another to join in the commission of subornation of perjury. This offense was eventually declared a misdemeanor by the Court, but not until November 26, 1990.

At the time that the Respondent signed the 1988 Ohio license registration renewal card, his response to the felony question was not true. (See: Findings of Fact No. 2; Pet's. Exs. 18, 19B))

10. On September 28, 1990, the Respondent signed an application for biennial renewal of his license to practice medicine Ohio.

In response to the question, "Have you been found guilty of or pled guilty or no contest to: a.) A felony ...?", the Respondent, handwrote the word "finally" between the words "found" and "guilty" on the form.

In fact, on October 23, 1987, in the Superior Court of California, County of

Orange, the Respondent pled guilty to one (1) felony count of violation of §653 (f) (a), California Penal Code, to wit: soliciting another to join in the commission of subornation of perjury. This offense was eventually declared a misdemeanor by the Court, but not until November 26, 1990.

At the time that Respondent signed the 1990 Ohio license renewal card, his response to the felony question was not true. (See: Findings of Fact No. 2; Pet's. Ex. 18, 19B)

On the same September 28, 1990 Ohio renewal application, the Respondent checked the "No" box for the question, "At any time since signing your last application for renewal of your certificate have you: ...2.) Had any disciplinary action taken or initiated against you by any state licensing board?"

In fact, on May 30, 1990, the State of Illinois, Department of Professional Regulation, issued a complaint against the Respondent based upon his California conviction. This was followed by an amended complaint on August 10, 1990, in which additional allegations were raised.

The Respondent's answer to the question concerning whether he had any disciplinary action taken or initiated against him was not true (Pet's. Exs. 19 and 31).

11. On June 10, 1992, the Respondent signed an application for biennial renewal of his license to practice medicine in Ohio.

In response to the question, "at any time since signing your last application renewal of your certificate, have you: ...2.) Had a license denied by or had any disciplinary action taken or initiated against you by any state licensing

board other than the State Medical Board of Ohio?" The Respondent checked the box marked "No".

In fact, the State of Illinois, Department of Professional Regulation, issued a Third Amended Complaint against the Respondent on January 7, 1991, a Fourth Amended Complaint on March 22, 1991, and finally, a Fifth Amended Complaint on December 30, 1991.

The Respondent's answer concerning the question as to whether he had any disciplinary action taken or initiated against him was not true. (See: Findings of Fact No. 5, 6, and 7; Pet's. Exs. 12D-12F, 18, 19B))

12. The State Medical Board of Ohio, by Decision and Order, effective July 2, 1997, determined that the Respondent, engaged in unprofessional conduct, in that he failed to acknowledge his California criminal conviction and the Illinois license action on three (3) license renewal applications, and thereby was found to have provided false information to the Board on the three (3) license renewal applications (1988, 1990 and 1992).

Concerning the 1990 and 1992 renewal applications the evidence was found to be sufficient to support a conclusion that Respondent intentionally provided false information, all in violation of §4731-22 (A) and §4731-22 (B)(5), Ohio Revised Code. (Pet's. Exs. 19A-19B)

13. The "Ohio Board" Ordered that the Respondent's Ohio medical license be suspended for an indefinite period, but not less than six (6) months. (Pet's Exs. 19, 19A and 20)

14. The Respondent appealed the "Ohio Board's" Indefinite Suspension Order, and after extensive litigation in the Ohio courts, the Ohio Board's Suspension Order finally became effective on August 17, 1999. (Pet's Ex. 20 and 31)

### CONCLUSION AS TO THE OHIO DISCIPLINE

The conduct underlying the Ohio Medical Board's determination that Respondent was guilty of unprofessional conduct would, if committed in New York State, constitute professional misconduct under N.Y. Education Law §6530 (2) (practicing the profession fraudulently) and/or §6530 (20) (moral unfitness), and/or §6530 (21) (willfully filing a false report) (McKinney Supp. 1999)

### FINDINGS AS TO THE RESPONDENT'S NEW YORK 1988, 1992 AND 1994

#### REGISTRATION APPLICATIONS

15. On October 3, 1988, the Respondent filed a biennial Registration Application for the period January 1, 1989 through December 31, 1991, with the New York State Education Department.

In response to question 2: "Since you last registered, have you been convicted of any crime or misdemeanor", the Respondent checked the box marked "No".

In fact on October 23, 1987, in the Superior Court of California, County of Orange, the Respondent pled guilty to one (1) felony count of violation of

§653(f)(a), California Penal Code. (See: Findings of Fact No. 2; Pet's. Exs. 7, 25)

16. On September 21, 1992, the Respondent filed a biennial Registration Application for the period January 1, 1993 through December 31, 1994, with the New York State Education Department.

In response to question 1.(a): "Since you last registered, has any state other than New York instituted charges against you for professional misconduct, unprofessional conduct, incompetence or negligence, or revoked, suspended or accepted surrender of a professional license held by you?", the Respondent checked the box marked "No".

In fact, on May 30, 1990, the Respondent had been served with misconduct charges by the Illinois Department of Professional Regulation and had attended a hearing held before the Illinois Medical Disciplinary Board during the period May 22, 1992 through July 10, 1992, on said charges. (See: Finding of Fact No. 5; Pet's. Exs. 7, 12A, 26)

17. On September 14, 1994, the Respondent filed a biennial Registration Application for the period January 1, 1995 through August 31, 1996, with the New York Education Department.

In Response to question 1.(a): "Since you last registered, has any state other than New York instituted charges against you for professional misconduct, unprofessional conduct, incompetence or negligence, or revoked, suspended or accepted surrender of a professional license held by you?", the Respondent checked the box marked "No".

In fact, the Respondent had been served with misconduct charges by the State Medical Board of Ohio on July 13, 1994. ( See: Findings of Fact Nos. 8, 9, 10, Pet's. Exs. 7, 18, 19B, 27)

## CONCLUSIONS AS TO THE RESPONDENT'S NEW YORK 1988, 1992 AND 1994

### REGISTRATIONS APPLICATIONS

1. (1988) The Respondent's response to the question concerning criminal convictions was not true.
2. (1992) The Respondent's response to the question concerning charges of disciplinary action by another state against his medical license was not true.
3. (1994) The Respondent's response to the question concerning charges of disciplinary action by another state against his medical license was not true.

### HEARING COMMITTEE DETERMINATION

The Respondent did not personally appear, nor was he represented, at the instant hearing.

The Administrative Officer instructed the hearing Committee that the failure of the Respondent to testify does not permit the trier of fact to speculate about what his testimony might have been nor does it require an adverse inference. It does, however, allow the trier of fact to draw the strongest inference against him that the opposing evidence in the record permits.

There is ample documentary evidence in the record to prove that the Respondent's California Medical License was revoked; his Illinois Medical license was



indefinitely suspended for a minimum of one (1) year; and his Ohio Medical License was suspended for an indefinite period, but not less than six (6) months.

The evidence in this case also indicates that in filing his biennial Registration Applications for his New York medical license (1988-1992-1994), the Respondent's response to certain questions were not true. (See Findings of Fact 15, 16 and 17).

The question to be determined by the Hearing Committee is: Whether the false answers on the Respondent's 1988, 1992 and 1994 New York biennial Registration Applications evidences Moral Unfitness, Practicing the Profession Fraudulently or Willfully Making a False Report?

In order to sustain a charge that a licensee was engaged in the fraudulent practice medicine, the Hearing Committee must find that (1) a false representation was made by the licensee, whether by words, conduct or concealment of that which should have been disclosed, (2) the licensee knew the representation was false, and (3) the licensee intended to mislead through the false representation.

The licensee's knowledge and intent may properly be inferred from facts found by the Hearing Committee, but the committee must specifically state the inferences it is drawing regarding knowledge and intent.

As has been previously noted, the Respondent did not personally appear, nor was he represented at the instant hearing.

However, the Respondent and his then attorney, Peter Danziger, participated in a telephone interview with Kenneth Spooner, Assistant Director of investigations, Office of Professional Medical Conduct, on August 24, 1998. Mr. Spooner submitted a written

Report of Interview (Pet's. Ex. 22) and he also testified at the instant hearing.

In his written report, dated August 24 1998, Mr. Spooner reported:

“ Concerning his NYS license registration dated 10/3/88 for the registration period of 1/1/89 to 12/31/91 KRAIN stated that Section 1203.4 of the California Statutes required him to report the conviction only on “new application” for which he did not already hold a proprietary interest. He therefore concluded that he could answer “No” to question #2 which reads “Since you last registered have you been convicted of any crime (felony or misdemeanor) in any state or country or is any criminal charge now pending against you in any state or country or have you been charged with any crime the disposition of which was other than acquittal or dismissal?”. KRAIN justified this answer by stating that by operation of California law, he was not “convicted” since he had appealed the 1987 conviction. He added that he answered the question “no” upon advice of counsel. KRAIN added that he believes he qualified his “NO” answer by placing an asterisk near his answer and by adding a written comment either on the reverse side of the application or by attaching written comments. KRAIN alleged that this asterisk was obscured by the added receipt stamp which states in part “FOR DEPOSIT ONLY”. When questioned why he marked the “NO” answer instead of the “YES” answer KRAIN again stated that a “NO” answer was correct and accurate since he was never convicted and because the registration application was not a “new application” under which he would have been obliged to answer in the affirmative.

Concerning the Illinois Board action, KRAIN acknowledged that action and stated that he had appealed this via a motion to vacate under case #85464. KRAIN stated that the initial action was stayed automatically pursuant to Illinois law based on his filing of a Notice of Intent to appeal and the ultimate filing of the appeal. KRAIN stated that this appeal is to be decided 10/1/98. KRAIN reiterated that he has never been impaired for the practice of medicine and that he had supplied the Illinois Board and the appeal court with much documentation from his treating physicians including his neurologist HARRY VIN LOVEREN, M.D. who ultimately accurately diagnosed and treated the Tic Douloureux. All of this documentation, per KRAIN, evidences that he was never truly impaired.

Concerning his NYS license registration application dated 9/21/92 for the registration period 1/1/93 to 12/31/94, KRAIN stated that he answered "NO" to question 1.(a) which reads: "Since you last registered, has any state other than New York instituted charges against you for professional misconduct, unprofessional conduct, incompetence, or negligence or revoked, suspended, or accepted surrender of a professional license held by you?". SPOONER pointed out that it appeared that he had been served with charges of professional misconduct by the Illinois Board which were dated 5/30/90 and that the Illinois records evidence he attended the hearing before the Illinois Board during the period of 5/22/92 through 7/10/92. KRAIN stated that his answer was truthful and that he believed he had been aware of the Illinois investigation and pending action prior to the registration period and had answered truthfully on prior applications particularly the 1988 registration

application in which he stated he qualified his answer. He added that his attorney SCOTT FIRSTMAN possesses notes concerning conversations that FIRSTMAN had with the Department of Health (DOH) investigators or employees concerning the truthfulness of his answer on this application. KRAIN stated that FIRSTMAN is currently on vacation and will return during September. KRAIN added that he does not recall the identity of the individual FIRSTMAN spoke to and acknowledged that FIRSTMAN may have spoken to someone with the State Education Department rather than DOH staff. KRAIN added that he qualified his answers on the 1988 application as described above. KRAIN added that he never intended to deceive anyone when completing his registration applications and when he completed these applications he suffered from Tic Douloureuz and was being improperly treated by medications that impaired his memory. KRAIN stated that he knows of case law which concluded that no intent to deceive could be established when an individual erroneously answers questions on applications while under the influence of medications which impair memory. KRAIN added that he did not have a complete copy of the question 1.(a) before him during this interview and that therefore he could not firmly respond to this questioning.

Concerning the Ohio Board action, KRAIN acknowledged that the Ohio Board took disciplinary action and that the action was currently stayed pending appeal.

Concerning his NYS license registration dated 9/14/94 for the period of 1/1/95 to 8/31/96, KRAIN stated that he answered "NO" to question 1.(a) which read: "Since you last registered, has any state other than New York instituted charges against you for professional misconduct, unprofessional conduct, incompetence or negligence or revoked, suspended or accepted surrender of a professional license held by you?". SPOONER pointed out that KRAIN had been served with a notice of charges from the Ohio Board dated 7/13/94 prior to his completion of this application. KRAIN stated that he qualified his answer by placing an asterisk next to his "NO" answer for question 1.(a). KRAIN stated that he had a copy of this application before him during this interview and he stated that the asterisk was directly to the right of his "NO" answer. SPOONER stated that mark, rather than being an asterisk, was a half-diamond shape on the application form itself designed to direct the person mailing the form were to fold the form when mailing it. KRAIN continued by stating that there were marks to the right of the "asterisk" which were made by him in an attempt to qualify his "NO" answer. SPOONER stated that these marks were actually the work "FOLD" written vertically on the form again directing the person completing the form where to fold it when mailing. KRAIN then stated that he answered the question truthfully, did not intend to deceive anyone with his answer and that he may have written qualifying comments on the reverse of the form. he added that although the Ohio Board charges are dated 7/13/94, he "may" not have received them prior to completing this application.

SPOONER asked KRAIN whether he maintained any copies of his NYS license renewal applications. KRAIN stated that he probably did, that he "never throws anything away", and that he rents a storage facility in Chicago where he has kept boxes of documents relating to his practice and numerous disciplinary actions. He added that FIRSTMAN may have maintained copies as well. KRAIN reiterated again that he has never intended to deceive in completing these applications and that they were completed while he was under the influence of memory impairing drugs. He also stated that the microfiched copies of the applications maintained by the State Education Department are poorly reproduced and that his written clarifications to his responses have been either destroyed in the record maintenance process or his comments have been obscured by the various stamps and other data entered by others."

Mr. SPOONER'S testimony at the hearing (Tr. 54-81) was consistent with his August 24, 1998 written report (Pet's. Ex. 22).

Based on the Respondent's answers concerning his 1988, 1992 and 1994 New York biennial Registration Applications, as reported by Mr. Spooner, the Hearing Committee determines that the exculpatory explanations offered by the Respondent for the false answers are not credible; they are contrived, evasive and self-serving.

The Hearing Committee concludes that the Respondent knowingly, willfully and with an intent to deceive, deliberately answered falsely on his 1988, 1992 and 1994 New York biennial Registration Applications.

The Hearing Committee determines unanimously (3-0) that the Respondent license to practice medicine in the State of New York should be REVOKED.

**VOTE OF THE HEARING COMMITTEE**

**SPECIFICATIONS**

**FIRST SPECIFICATION**

**MISCONDUCT IN ANOTHER STATE**

Respondent is charged with professional misconduct under New York Education law §6530(9)(b) (McKinney Supp. 1999) by reason of 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.

VOTE:       SUSTAINED (3-0)

**SECOND SPECIFICATION**

**REVOCATION AND SUSPENSIONS OF LICENSE**

**TO PRACTICE IN OTHER STATES**

Respondent is charged with professional misconduct under New York Education law §6530(9)(d) (McKinney Supp. 1999) by having his license to practice medicine, revoked in California and suspended in Illinois and Ohio, where the conduct resulting in the revocation and suspensions would, if committed in New York State, constitute professional misconduct under the laws of New York State.

VOTE: SUSTAINED (3-0)

**THIRD SPECIFICATION**

**MORAL UNFITNESS**

Respondent is charged with professional misconduct under New York Education law §6530(20) (McKinney Supp. 1999) by reason of his conduct in practice of medicine which evidences moral unfitness to practice medicine.

VOTE: SUSTAINED (3-0)

**FOURTH SPECIFICATION**

**PRACTICING THE PROFESSION FRAUDULENTLY**

Respondent is charged with professional misconduct under New York Education law §6530(2) (McKinney Supp. 1999) by reason of having practiced the profession fraudulently.

VOTE: SUSTAINED (3-0)

**FIFTH THROUGH SEVENTH SPECIFICATIONS**

**WILLFULLY FILING A FALSE REPORT**

Respondent is charged with professional misconduct under New York Education law §6530(21) (McKinney Supp. 1999) by reason of his willfully making of filing a false report.

VOTE: SUSTAINED (3-0)



ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent's license to practice medicine in the State of New York is hereby REVOKED.
2. The Hearing Committee further **ORDERS** that should the Respondent apply for the reinstatement of his license in the future, his application must be accompanied by a complete psychiatric evaluation by a psychiatrist who is familiar with the Respondent's history of psychiatric illness and who is approved by the Office of Professional Medical Conduct.
3. The Hearing Committee further **ORDERS** that no consideration be given to restoring the Respondent New York medical license until such time as the Respondent submits proof to the Director of the Office of Professional Medical Conduct that his California, Illinois and Ohio medical licenses have been fully restored.

Dated: Troy, New York

Nov. 18, 1999

  
ARSENIO G. AGOIOVICH  
Chairman

ERNST A. KOPP, M.D.  
MR. MICHAEL WALKER

**APPENDIX ONE**



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

-----X

IN THE MATTER : NOTICE  
OF : OF  
LAWRENCE STIRLING KRAIN, M.D. : HEARING

-----X

TO: Lawrence Stirling Krain, M.D.  
5415 North Sheridan Road  
Chicago, Illinois 60640

Lawrence Stirling Krain, M.D.  
5419 North Sheridan Road  
Chicago, Illinois 60640

PLEASE TAKE NOTICE:

A hearing will be held pursuant to the provisions of N.Y. Pub. Health Law Section 230 and N.Y. State Admin. Proc. Act Sections 301-307 and 401. The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on the 7th day of October, 1999, at 10:00 in the forenoon of that day at the Department of Health, Office of Professional Medical Conduct, Hedley Building, 433 River Street 5th Floor, Troy, New York 12180 and at such other adjourned dates, times and places as the committee may direct.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. You shall appear in person at the hearing and may be represented by counsel. You have the right to produce witnesses and evidence on your behalf, to issue or have subpoenas issued on your behalf in

order to require the production of witnesses and documents and you may cross-examine witnesses and examine evidence produced against you. A summary of the Department of Health Hearing Rules is enclosed.

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the Bureau of Adjudication, Hedley Park Place, 5th Floor, 433 River Street, Troy, New York 12180, (518-402-0748), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law Section 230(10)(c) you shall file a written answer to each of the Charges and Allegations in the Statement of Charges no later than ten days prior to the date of the hearing. Any Charge and Allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. Pursuant to Section 301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

At the conclusion of the hearing, the committee shall make findings of fact, conclusions concerning the charges sustained or dismissed, and, in the event any of the charges are sustained, a determination of the penalty to be imposed or appropriate action to be taken. Such determination may be reviewed by the administrative review board for professional medical conduct.

THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED, AND/OR THAT YOU BE FINED OR SUBJECT TO THE OTHER SANCTIONS SET OUT IN NEW YORK PUBLIC HEALTH LAW SECTION 230-a. YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York  
*August 27*, 1999

*Peter D. Van Buren*  
PETER D. VAN BUREN  
Deputy Counsel

Inquiries should be directed to:

Barry Plunkett  
Associate Counsel  
Division of Legal Affairs  
Bureau of Professional  
Medical Conduct  
Corning Tower Building  
Room 2509  
Empire State Plaza  
Albany, New York 12237-0032  
(518) 473-4282

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

-----X

IN THE MATTER : STATEMENT  
OF : OF  
LAWRENCE STIRLING KRAIN, M.D. : CHARGES

-----X

LAWRENCE STIRLING KRAIN, M.D., Respondent, was authorized to practice medicine in New York State on May 16, 1973, by the issuance of license number 116081 by the New York State Education Department.

**FACTUAL ALLEGATIONS**

**California**

A. The Division of Medical Quality, Medical Board of California (hereafter the "California Board"), by Decision and Order dated October 23, 1996, effective November 22, 1996, revoked Respondent's license to practice medicine based upon the determination that Respondent, during the approximate period of 1987 through 1996, engaged in unprofessional conduct, in violation of California Business and Professions Code §§ 2227, 2234 and 2236, by reason of the fact that on or about October 23, 1987, in Superior Court of the State of California, County of Orange, Respondent pleaded guilty to one (1) felony count of: Soliciting another to join in the commission of subornation of perjury in violation of California Penal Code §§ 6530(f)(a).

B. More specifically, the California Board determined that Respondent engaged in the following unprofessional conduct:

1. Respondent, on or about October 23, 1987, in the Superior Court of the State of California, County of Orange, Respondent pleaded guilty to one (1) felony count of violation of §653(f)(a), California Penal Code, in that Respondent solicited another to join in the commission of subornation of perjury. This offense was eventually declared a misdemeanor by the Court on November 26, 1990, and Respondent's plea of guilty was changed to not guilty and the case dismissed under §1203.4, California Penal Code. Respondent's plea of guilty to this conduct constituted an admission which involved moral turpitude and was substantially related to the functions, duties and qualifications of a Board licensee under California Business and Professions Code §§227,2234-2236. As part of the plea bargain which resulted in Respondent's guilty plea, Respondent was placed on two (2) years probation, with the first year to be spent at Brea Neuro-Psychiatric Hospital.

C. The conduct underlying the California Board's determination that Respondent was guilty of unprofessional conduct would, if committed in New York State, constitute professional misconduct under N.Y. Education Law §6530(20) (conduct in the practice of medicine which evidences moral unfitness to practice medicine) (McKinney Supp. 1999).

ILLINOIS

D. The Illinois Department of Professional Regulations by Decisions and Orders dated December 16, 1992 and March 22, 1993, determined that Respondent, during the approximate period of 1987 through 1993, engaged in unprofessional conduct in that Respondent suffered from a mental illness or disability which resulted in the inability to practice medicine with reasonable skill and safety in violation of Illinois Revised Statutes.

E. More specifically, the Illinois Department of Professional Regulation determined that Respondent engaged in the following unprofessional conduct:

1. On November 2, 1992, the Hearing Officer for the State of Illinois Department of Professional Regulation found that Respondent had violated, among other statutes, Illinois Revised Statutes (1987) Chapter III, Paragraph 4400-22(A)(27), in that Respondent then suffered from a mental illness or disability which resulted in the inability to practice with reasonable skill and safety. On December 16, 1992, the Medical Disciplinary Board of the Illinois Department of Professional Regulation adopted the recommendation of the Hearing Officer and recommended to the Director that Respondent's license be suspended indefinitely for a minimum of one (1) year and ordering, among other things, Respondent to undergo a neuropsychological examination.



F. The Medical Disciplinary Board of the Department of Professional Regulations of the State of Illinois by Decision and Order dated December 16, 1992, determined and recommended to Nikki M. Zollar, the Director of the Department of Professional Regulations, who then adopted such on March 22, 1993 that Respondent's license be indefinitely suspended for a minimum of one (1) year and ordered, among other things, Respondent to undergo a neuropsychological examination.

G. The conduct underlying the Illinois Department of Professional Regulation's determination that Respondent was guilty of unprofessional conduct would, if committed in New York State, constitute professional misconduct under N.Y. Education Law §6530(7) (practicing the profession while impaired by a mental disability) (McKinney Supp. 1999).

#### OHIO

H. The State Medical Board of Ohio (hereafter the "Ohio Board"), by Decision and Order effective July 2, 1997, determined that Respondent, during the approximate period of 1988 through 1992, engaged in unprofessional conduct, in that Respondent failed to acknowledge his criminal conviction and the Illinois license action on three (3) license renewal applications, and thereby was found to have provided false information to the Board on three (3) renewal applications of Respondent's license to practice medicine (1988, 1990 and 1992), and concerning two of these renewal applications, the evidence was found to be sufficient to support a conclusion that Respondent intentionally

provided false information, all in violation of §4731-22(A) and § 4731-22(B) (5), Ohio Revised Code.

I. More specifically, the Ohio Medical Board determined that Respondent engaged in the following unprofessional conduct:

1. On or about September 27, 1988, Respondent signed an application for biennial renewal of his license to practice medicine in Ohio. In response to a question contained on the form which asked, "Since you last renewed your Ohio medical license, have you been found guilty or pled guilty or no contest to: a.) A felony ...?", Respondent checked the box marked "No." In fact, on or about October 23, 1987, in the Superior Court of California, County of Orange, Respondent pleaded guilty to one (1) felony count of violation of §653(f) (a), California Penal Code, soliciting another to join in the commission of subornation of perjury. This offense was eventually declared a misdemeanor by the Court, but not until November 26, 1990. At the time that Respondent signed the renewal card, his response to the felony question was untrue.
2. On or about September 28, 1990, Respondent signed an application for renewal of his certificate to practice medicine and surgery in Ohio, certifying that the information that he provided on the application was "true and correct in every respect." In response to

the question, "Have you been found guilty or no contest to: a.) A felon Respondent checked the box marked "1" the word "finally" between the words "found" and "guilty" on the form. In fact, on or about October 23, 1987, in the Superior Court of California, County of Orange, Respondent pled guilty to one (1) felony count of violation of §653(f)(a), California Penal Code, soliciting another to join in the commission of subornation of perjury. This offense was eventually declared a misdemeanor by the Court, but not until November 26, 1990. At the time that Respondent signed the renewal card, his response to the felony question was untrue.

3. On or about September 28, 1990, Respondent signed an application for biennial renewal of his license to practice medicine in Ohio, certifying that the information that he provided on the application was "true and correct in every respect." Respondent checked the "No" box for the question, "At any time since signing your last application for renewal of your certificate, have you: ... 2.) Had any disciplinary action taken or initiated against you by any state licensing board?" In fact, the State of Illinois Department of Professional Regulation, on or about May 30, 1990, issued a Complaint against Respondent, based upon his California conviction. This was

followed by an Amended Complaint on or about August 10, 1990, in which additional allegations were raised.

4. On or about June 10, 1992, Respondent signed an application for biennial renewal of his certificate to practice medicine in Ohio, certifying that the information provided on the application was "true and correct in every respect." Respondent checked the "No" box in response to the question, "Have you been found guilty of or pled guilty or no contest to: A.) A felony or misdemeanor?" In fact, on or about October 23, 1987, in the Superior Court of California, County of Orange, Respondent pleaded guilty to one (1) felony count of violation of §653(f)(a), California Penal Code, to wit: Soliciting another to join in the commission of subornation of perjury. This offense was eventually declared a misdemeanor by the Court on November 26, 1990, and Respondent's plea of guilty was changed to not guilty and the case was dismissed under §1203.4, California Penal Code. Respondent was under a continuing legal duty to "disclose the conviction in response to any direct question contained in any questionnaire of application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery." Section 1203.4(a), California Penal Code (Emphasis added).

5. On or about June 10, 1992, Respondent signed a application for biennial renewal of his certificate to practice medicine in Ohio, certifying that the information provided on the application was "true and correct in every respect." Respondent checked the "No" box in response to the question, "At any time since signing your last application for renewal of your certificate, have you: ... 2.) Had a license denied by or had any disciplinary action taken or initiated against you by any state licensing board other than the State Medical Board of Ohio?" In fact, the State of Illinois Department of Professional Regulation issued a Third Amended Complaint on or about January 7, 1991, a Fourth Amended Complaint on or about March 22, 1991, and finally, a Fifth Amended Complaint on or about December 30, 1991.

J. The conduct underlying the Ohio Medical Board's determination that Respondent was guilty of unprofessional conduct would, if committed in New York State, constitute professional misconduct under N.Y. Education Law §6530(2) (practicing the profession fraudulently) and/or §6530(20) (moral unfitness), and/or §6530(21) (willfully filing a false report) (McKinney Supp. 1999).

New York 1988 Registration Application

K. Respondent, on or about October 3, 1988, filed a Registration Application for the period January 1, 1989 through December 31, 1991, with the New York State Education Department.

1. Respondent answered "No" to question 2.):

Since you last registered, have you been convicted of any crime or misdemeanor?

when, in fact, on or about October 23, 1987, in the Superior Court of California, County of Orange, Respondent pled guilty to one (1) felony count of violation of §653(f)(a), California Penal Code, and Respondent knew such facts.

New York 1992 Registration Application

L. Respondent, on or about September 21, 1992, filed a Registration Application for the period January 1, 1993 through December 31, 1994, with the New York State Education Department.

1. Respondent answered "No" to question 1.(a):

"Since you last registered, has any state other than New York instituted charges against you for professional misconduct, unprofessional conduct, incompetence or negligence, or revoked, suspended or accepted surrender of a professional license held by you?"

when, in fact, on or about May 30, 1990, Respondent had been served with misconduct charges by the Illinois Department of Professional Regulation and had attended a hearing held before the Illinois Medical Disciplinary

Board during the period May 22, 1992 through July 10, 1992, on said charges, and Respondent knew such facts.

New York 1994 Registration Application

M. Respondent on or about September 14, 1994, filed a Registration Application for the period January 1, 1995 through August 31, 1996, with the New York State Education Department.

1. Respondent answered "No" to question 1.(a):

"Since you last registered, has any state other than New York instituted charges against you for professional misconduct, unprofessional conduct, incompetence or negligence, or revoked, suspended or accepted surrender of a professional license held by you?"

when, in fact Respondent had been served with misconduct charges by the State Medical Board of Ohio on July 13, 1994, and Respondent knew such fact.

**SPECIFICATIONS**

**FIRST SPECIFICATION**

**MISCONDUCT IN ANOTHER STATE**

Respondent is charged with professional misconduct under N.Y. Education law §6530(9)(b) (McKinney Supp. 1999) by reason of 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, in that Petitioner charges:

1. The facts in Paragraphs A, B and B.1, B.2, C, D, E and E.1, F, G, H, I and I.1 and I and I.2, I and I.3, I and I.4, I and I.5 and/or J.

**SECOND SPECIFICATION**

**REVOCATION AND SUSPENSIONS OF LICENSES**

**TO PRACTICE IN OTHER STATES**

Respondent is charged with professional misconduct under N.Y. Education law §6530(9)(d) (McKinney Supp. 1999) by having his license to practice medicine, revoked in California and suspended in Illinois and Ohio, where the conduct resulting in the revocation and suspensions 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 B.1, B.2, C, D, E. and E.1, F, G, H, I and I.1, I and I.2, I and I.3, I and I.4, I and I.5 and/or J.



**THIRD SPECIFICATION**

**MORAL UNFITNESS**

Respondent is charged with professional misconduct under N.Y. Education law §6530(20) (McKinney Supp. 1999) by reason of His conduct in the practice of medicine which evidences moral unfitness to practice medicine, in that Petitioner charges:

3. The facts in Paragraphs K and K.1 and L and L.1 and/or M and M.1.

**FOURTH SPECIFICATION**

**PRACTICING THE PROFESSION FRAUDULENTLY**

Respondent is charged with professional misconduct under N.Y. Education law §6530(2) (McKinney Supp. 1999) by reason of having practiced the profession fraudulently, in that Petitioner charges:

4. The facts in Paragraphs K and K.1, L and L.1 and/or M and M.1.

**FIFTH THROUGH SEVENTH SPECIFICATIONS**

**WILLFULLY FILING A FALSE REPORT**

Respondent is charged with professional misconduct under N.Y. Education law §6530(21) (McKinney Supp. 1999) by reason of his willfully making or filing a false report, in that Petitioner charges:

5. The facts in Paragraphs K and K.1.
6. The facts in Paragraph L and L.1.
7. The facts in Paragraph M and M.1.

DATED: *August 27*, 1999  
Albany, New York

*Peter D. Van Buren*  
PETER D. VAN BUREN  
Deputy Counsel  
Bureau of Professional  
Medical Conduct

SUMMARY OF DEPARTMENT OF HEALTH HEARING RULES

(Pursuant to Section 301 SAPA)

The following items are addressed by the Uniform Hearing Procedures Rules of the New York State Department of Health:

Applicability

Definitions

Notice of Hearing

Adjournment

Answer or Responsive Pleading

Amendment of Pleadings

Service of Papers

Discovery

Hearing Officer/Pre-Hearing Conference

Pre-Hearing Conference

Stipulations and Consent Orders

The Hearing

Hearing Officer's Report

Exceptions

Final Determination and Order

Waiver of Rules

Time Frames

Disqualification for Bias

The exact wording of the rules is found at 10 NYCRR Part 51 of Volume 10 of the New York Code of Rules and Regulations. Each of the above items may be summarized as following:

51.1 Applicability. These regulations apply to most hearings conducted by the Department of Health.

51.2 Definitions.

1. "Commissioner" means Commissioner of the New York State Department of Health.
2. "CPLR" means Civil Practice Law and Rules.
3. "Department" means New York State Department of Health.
4. "Hearing Officer" means the person appointed to preside at the hearing or the person designated as administrative officer pursuant to Public Health Law Section 230.
5. "Party" means all persons designated as petitioner, respondent or intervenor.
6. "Report" means the Hearing Officer's summary of the proceeding and written recommendation or the findings, conclusions and determination of the hearing committee pursuant to Public Health Law Section 230.

51.3 The Department's Notice of Hearing and/or Statement of Charges should be served at least 15 days prior to the first hearing date, specify time, place and date(s) and should contain the basis for the proceeding. Pursuant to Public Health Law §230, the Notice of Hearing must, additionally, specify that the licensee shall file a written answer.

51.4 Adjournment. Only the Hearing Officer may grant an adjournment and only after he/she has consulted with both parties. In hearings pursuant to Public Health Law Section 230, an adjournment on the initial day may be granted by the hearing committee.

51.5 Answer or Responsive Pleading. A party may serve an answer or response to the allegations of the Department. In matters governed by PHL §230, the licensee is required to file a written answer to each of the charges and allegations of the Department. Under the law, any charge or allegation which is not so answered shall be deemed admitted.

51.6 Amendment to Pleadings. A party may usually amend papers if no substantial prejudice results by leave of the Hearing Officer.

51.7 Service of Papers. Except for the Notice of Hearing and/or Statement of Charges, all papers may be served by ordinary mail.

51.8 Disclosure. Generally, there is no disclosure of any kind and the Hearing Officer cannot require it, unless all parties agree. If agreed to, the Hearing Officer will ensure all parties proceed in accordance with their agreement. However, in a hearing in which revocation of a license or permit is sought or possible, a party may demand in writing that another party disclose the names of witnesses, document or other evidence such other party intends to offer at the hearing. A demand for such disclosure must be served at least 10 days prior to the first scheduled hearing date. Disclosure or a statement that the party has nothing to disclose must be made at least 7 days before the first scheduled hearing date. A party that determines to present witnesses or evidence not previously disclosed must supplement its disclosure as soon as is practicable. The Hearing Officer may, upon good cause shown, modify the times for demands for and response to disclosure or allow a party not to disclose or limit, condition or regulate the use of information disclosed and may preclude the introduction of evidence not disclosed pursuant to a demand.

51.9 Hearing Officer. He/she presides over the hearing and has the authority to ensure it is conducted in an orderly fashion. He/she may also order the parties to meet before the hearing to discuss the procedure. He/she does not have the authority to remove testimony from the transcript and/or dismiss charges unless authorized by delegation.

51.10 Stipulation and Consent and Surrender Orders. At any

time prior to a final order, parties may resolve all or any issues by stipulation. An order issued pursuant to a stipulation has the same force and effect as one issued after hearing.

51.11 The Hearing. A party may have an attorney represent him or her. Failure to appear may result in an adverse ruling. A hearing may be combined with or separated from another hearing depending on whether such action will result in delay, cost or prejudice. While the rules of evidence as applied in a courtroom are not observed, witnesses must be sworn or give an affirmation and each party has the right to present its case and to cross-examine. The Department has broad discretion to place documents into evidence. A record of the proceeding must be made. In enforcement cases, the Department has the burden of proof and of going forward. In matters relating to neglect or abuse of patients under Public Health Law Section 2803-d, the Hearing Officer may not compel disclosure of the identity of the person making the report or who provided information in the investigation of the report.

Complaints relating to Public health Law Section 230 may not be introduced into evidence by either party and their production cannot be required by the Hearing Officer.

Claims that a hearing has been unreasonably delayed is treated as an affirmative defense (Section 51.5) or as part of the claimant's case. The burden of going forward and of proof are on the claimant.

A verbatim record of the proceeding shall be made by any means determined by the Department. The record shall include notice of hearing and any statement of charges, responsive pleadings, motions, rulings, transcript or recording, exhibits, stipulations, briefs, any objections filed, any decision, determination, opinion, order or report rendered.

51.12 Hearing Officer or Hearing Committee Report. The report or determination should be submitted within 60 days of completion of the hearing.

51.13 Filing of Exceptions. Within 30 days of the date of a copy of the report of the Hearing Officer and proposed order any party may submit exceptions to said report and proposed order

to the Supervising Administrative Law Judge. On notice of all parties, a party may request, before the expiration of the exception period, the Supervising Law Judge to extend the exception period. All parties have the opportunity to state their position on the extension on the record. Extensions may be granted on good cause shown; however, they are not granted to allow a party to respond to exceptions already filed. Pursuant to PHL 230(c), a notice of request for review of the Hearing Committee determination must be served upon the ARB within 14 days of service of the determination. All parties have 30 days thereafter to submit briefs and 7 days from service of a brief to submit a reply.

51.14 Final Determination Order. The hearing process ends when an order is issued by the Commissioner or his designee or the appropriate board of council. The order should state a basis for the decision. Each party receives a copy of the order.

51.15 Waiver of Rules. These rules and regulations may be dispensed with by agreement and/or consent.

51.16 Establishment, Construction, Rate Hearings. Hearings involving any of these issues have time limits concerning the issuance of notices of hearing of 365 days of receipt by the Department of a request for hearing.

51.17 Disqualification for Bias. Bias shall disqualify a Hearing Officer and/or a committee member in hearings governed by Public health Law Section 230. The party seeking disqualification must submit to the hearing officer an affidavit pursuant to SAPA Section 303. Mere allegations are insufficient. The Hearing Officer rules on the request.

DATED: Albany, New York  
March 20, 1997

  
HENRY M. GREENBERG  
General Counsel