



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

January 20, 1995

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OFFICE OF PROFESSIONAL
MEDICAL CONDUCT

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David Smith, Esq.
NYS Department of Health
Metropolitan Regional Office
5 Penn Plaza-Sixth Floor
New York, New York 10001

Marshall Hubsher, M.D.
1025 Northern Boulevard
Roslyn, New York 11576

Nathan L. Dembin, Esq.
225 Broadway, Suite 1905
New York, New York 10007

RE: In the Matter of Marshall Hubsher, M.D.

Dear Mr. Smith, Mr. Dembin and Dr. Hubsher:

Enclosed please find the Determination and Order (No. 95-12) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

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), "(t)he 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 all action 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
Empire State Plaza
Corning Tower, Room 2503
Albany, New York 12237-0030

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,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

waived the statutory time periods of PHL §230(f)10 (ALJ Ex. 1-3). Preliminary conference scheduled for July 5, 1994.

7/5/94 -- Conference call. ALJ granted the application of Respondent's counsel to adjourn preliminary hearing from July 5, 1994 to July 8, 1994 because Respondent's counsel broke his ankle.

8/26/94 -- Respondent made application to preclude disclosure of Richard Grossman, Ph.D.'s records of psychotherapy treatment of Respondent, Marshall Hubsher, M.D. as privileged communication. Application denied. There is no privilege accorded records of non-licensed philosophical psychoanalyst pursuant to CPLR §4507. Nor is Dr. Grossman a certified social worker whose records are privileged pursuant to CPLR §4508.

9/30/94-- Second application by Respondent to deny disclosure of the treatment records maintained by Richard Grossman, Ph.D. for psychotherapy of Marshall Hubsher, M.D. Motion denied since there is no privilege of non-licensed philosophical psychologist's records.

Review of the record by absent members of the panel: On August 24, 1994, Robin N. Buskey, R.P.A., was absent from the proceedings. On August 26, 1994, Sanders W. Davis, M.D. left the proceedings early. They have reviewed thoroughly the transcripts for the portion of the proceedings for which each was absent.

WITNESSES

For the Petitioner:

1. Merritt Hubsher, M.D.
2. Michelle Louise Kay née Neuner aka Purnell

For the Respondent:

1. K.L. (#26 on Pet's Ex. 1)
2. J.B. (#4 on Pet's Ex. 1)
3. M.C. (#9 on Pet's Ex. 1)
4. Patient B
5. Patient C
6. J.F. (#16 on Pet's Ex. 1)
7. Richard C. Grossman, Ph.D.
8. C.M. (#1 on Pet's Ex. 1)
9. Marshall Hubsher, M.D., the Respondent

For the Petitioner's Rebuttal:

1. Sandra Maurina
2. Melvin Purnell
3. Mary Janet Walcott
4. Dawn L. Ramirez
5. Vivian G. Hubsher

For the Respondent's Sur-Rebuttal:

1. Randye Hubsher
2. Eileen Jallete
3. Cyrus Modaressi
4. Edward Phillips
5. Richard Grossman, Ph.D.
6. Marshall Hubsher, M.D., the Respondent

STATEMENT OF CHARGES

Essentially the Respondent is charged with professional misconduct by reason of:

- a. Practicing medicine while his license is suspended;
- b. Failing to maintain records; and
- c. Practicing the profession fraudulently.

The Statement of Charges is annexed hereto as Appendix A.

FINDINGS OF FACT

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. Transcript page numbers are duplicated between pages 722 to 832, inclusive. For clarity, all citations to testimony between these pages will include the witness name and transcript page.

GENERAL FINDINGS

1. Marshall Hubsher, M.D., the Respondent, was duly licensed to practice medicine in New York State by the issuance on October 22, 1976 of license number 129123¹ by the New York State Education Department (Pet's Ex. 2).

2. The Respondent currently is registered with the New York State Education Department to practice medicine through December 31, 1994 (Pet's Ex. 2).

3. This proceeding was commenced by the service of the Notice of Hearing and Statement of Charges upon the Respondent on April 19, 1994 (Pet's Ex. 1).

4. Since July, 1978, Respondent has practiced medicine and psychiatry at a medical practice located at 1025 Northern Boulevard, Roslyn, New York 11576-1506 (hereafter called "office") (Pet's Ex. 2 and T. 497-498).

5. On March 25, 1988, The New York State Board of Regents suspended Respondent's license for five years, stayed the last 42 months of the suspension and placed Respondent on probation for 42 months. The period of suspension ran from April 27, 1988 until October 26, 1989 (Pet's Exs. 3 and 4).

6. During his suspension, Respondent intentionally left his "M.D." listing on the tenant board in his office building and on the sign outside the building, thereby falsely presenting himself publicly as a licensed medical doctor (Maurina T. 740-744).

7. After the suspension terminated, Respondent was on probation from October 27, 1989 through April 26, 1993 (Pet's Ex. 4).

8. From approximately October 1988 until the termination his suspension, Respondent's brother, Merritt Hubsher, M.D., a psychiatrist licensed in New York and New Jersey, agreed to issue prescriptions for Respondent's patients who required medication, provided Respondent first presented the patient's case to him (T. 44-45, 60-61, 102-103 and

¹ The Statement of Charges opening paragraph incorrectly indicates license #903282 as Dr. Marshall Hubsher's license number. The Committee conforms the Statement of Charges to the facts and amends the opening paragraph to read license number 129123.

119).

9. During this period, Dr. Merritt Hubsher issued prescriptions for approximately four or five patients (T. 44, 46, 58-59, 60-61 and 90).

10. Dr. Merritt Hubsher did not speak directly to any patients about medication (T.57-58, 59, 61 and 120-121).

11. Dr. Merritt Hubsher did not know any of Respondent's patients (T. 38), did not diagnose any of Respondent's patients (T.48) and never treated any of Respondent's or his own patients in Respondent's office (T. 48).

FINDINGS OF FACT AS TO PATIENT A

1. Between approximately March, 1988 and approximately December, 1988, Respondent medically treated Patient A for depression and other medical conditions at his office (Pet's Ex. 5 and T. 142-147). Respondent medically treated Patient A from May 4, through December 29, 1988, although his license to practice medicine was suspended (Pet. Exs. 2, 3 and 5).

2. When Respondent treated her, Patient A was 20 years old and suffered from bulimia (T. 143 and 159).

3. During his suspension, Respondent changed the diagnosis for Patient A from Paroxysmal Atrial Tachycardia to Depressive Neurosis, prescribed Imipramine for her (Pet's Ex. 9 p.6; T. 144-145 and 156-157), changed the dosage whenever he determined a different dose was necessary for treating her disorder (T. 156), took her pulse and blood pressure, and used his stethoscope to perform a heart and lung examination on her (T. 144-145).

4. Although Respondent medically treated Patient A during his suspension, Respondent did not keep any patient records for Patient A during this time (T.544-545 and 592-593).

5. Dr. Merritt Hubsher did not render medical treatment to Patient A during

this period of time (T. 33-37, 48, 57-58 and 160-161).

6. Patient A was referred to Respondent by her psychologist so that she could be treated by a psychiatrist who could prescribe medication to Patient A (T. 143).

7. Respondent intentionally and knowingly failed to advise Patient A, her mother or her step father that his license to practice medicine was suspended between April 27, 1988 and October 26, 1989 (T. 143 and 727-728).

8. By his intentional silence to Patient A and her family about the suspension of his license, Respondent knowingly and intentionally mislead Patient A and her family to believe Respondent could render psychiatric care to Patient A for her psychiatric problems, including prescribing medication, making diagnoses and performing other medical procedures to treat and diagnose Patient A.

9. Respondent submitted bills to Patient A's medical insurance company for services rendered up to the date of April 26, 1988 by signing the bill and insurance company Statement of Claim forms as "Marshall Hubsher, M.D." On bills submitted for all treatment from May 4, 1988 until December 29, 1988, Respondent signed "M. Hubsher, M.D." or "Merritt Hubsher, M.D., a Board Certified Psychiatrist." During the period of suspension, while Respondent informed Patient A's insurance company that psychotherapy was rendered to Patient A, he intentionally and knowingly mislead the insurance company to believe the services were provided by a licensed and board certified psychiatrist, by signing M. Hubsher, M.D. or Merritt Hubsher, M.D. (Pet's Ex. 5). Respondent nevertheless, used his own tax identification number and address on the forms (Pet's Ex. 5 pp. 3, 5, 7, 9 and 12) to assure he, and not Merritt Hubsher, received payment for medical services rendered by a purportedly licensed physician.

10. Contrary to the assertion on the stationary Respondent composed, Dr. Merritt Hubsher was not medical director of an enterprise called North Shore Health Center and did not authorize anyone to use his name as the Medical Director of North Shore Health Center (T. 32-33). Dr. Merritt Hubsher had not heard of an enterprise called North Shore

Health Center until approximately September 1993, when the stationary was shown to him by an investigator for the State.

11. Furthermore, Dr. Merritt Hubsher did not authorize anyone to sign or print his name on bills or the Statements of Claims submitted to Patient A's medical insurance company (T. 33-37).

CONCLUSIONS AS TO PATIENT A

In Allegation A.1, it is stated Respondent's medical license was actually suspended and Respondent could not practice medicine from April 27, 1988 through October, 1989. Respondent admits his license was suspended and documentation from the New York State Education Department report the suspension (Pet's Ex. 2 &3).

Therefore, Allegation A.1 is sustained.

In Allegations A.2 and A.3, Respondent is charged with rendering medical treatment during his suspension to Patient A for depression and other medical conditions. Respondent admits treating Patient A from March to December 1988, but avers he only performed psychotherapy. The Committee finds Respondent's testimony is incredible; it is contradicted not only by Patient A, but also by a document created by Respondent and in evidence as Petitioner's Exhibit 9. During the period of his suspension, Respondent prescribed Imipramine, changed the dosage of the medication, changed the diagnosis, and monitored Patient A by taking her blood pressure and pulse, and by listening with a stethoscope to her heart and lungs. These acts were done for the purpose of diagnosing, treating and prescribing for Patient A's bulimia, paroxysmal atrial tachycardia and other disorders. The Committee concludes such acts constitute the practice of medicine

Therefore, Allegations A.2 and A.3 is sustained.

In Allegation A.4, Respondent intentionally and knowingly failed to inform Patient A at any time that he was not allowed to practice medicine during the period of his

suspension. Patient A was referred to Respondent by her psychologist so that Respondent, a psychiatrist, could treat her disorders with medication and therapy. Respondent knew Patient A came to him for medication. Respondent prescribed Imipramine to Patient A throughout his course of treating her. Respondent intentionally did not inform Patient A, who then was a minor, her mother or step-father that his license was suspended and he could not lawfully prescribe medication for or psychiatrically treat Patient A. The Committee determines that by his calculated silence, Respondent knowingly and intentionally misled Patient A and her family to believe Respondent could render psychiatric care to Patient A for her psychiatric problems, including prescribing medication, making diagnoses and performing other medical procedures to treat and diagnose Patient A. Respondent furthered this charade by presenting bills and insurance company Statements of Claim to Patient A's mother and step-father which he signed as Marshall Hubsher, M.D. for services rendered before April 26, 1988, and either as M. Hubsher, M.D. or Merritt Hubsher, M.D. Board Certified Psychiatrist for services rendered after his suspension began. By creating stationary which falsely named Merritt Hubsher, M.D. as Director of the North Shore Health Center, Respondent disingenuously concealed the fact that these services were performed by a person who was not licensed to practice medicine. Respondent intentionally and knowingly made it appear to the insurance company as if the medical services were performed by a licensed physician, and to Patient A and her family that the psychiatric services were properly performed by Respondent.

Therefore, Allegation A.4 is sustained.

In Allegation A.5, Respondent is charged with failure to maintain a record which reflects his evaluation and treatment of Patient A. Respondent admits he did not maintain records during the period of his suspension. Although this may appear to be a technical violation since he was not allowed to practice medicine during his period of suspension, this Committee concludes that upon violating the suspension and improperly practicing medicine, Respondent became obligated to maintain those records which a physician is required to keep

in his practice of medicine. As the Committee concludes he performed acts which constitute the practice of medicine, his failure to maintain appropriate records constituted professional misconduct.

Therefore, Allegation A.5 is sustained.

FINDINGS OF FACT AS TO PATIENT B

1. Between approximately May, 1988 through, at least approximately January, 1989, Respondent rendered medical treatment to Patient B for paroxysmal atrial tachycardia and other medical conditions at his office (Pet's Ex. 6 and T. 249-250).

2. During the period of his suspension, Respondent diagnosed and treated Patient B for Paroxysmal Atrial Tachycardia, a physical disorder of a rapid heartbeat. During this period, Respondent took Patient B's pulse and blood pressure, and examined her heart and lungs (Pet's Ex. 6). Even though Respondent purported these services were performed by a licensed physician, the medical bills Respondent submitted to Metropolitan Life Insurance Company are for services he rendered when his license was suspended. Respondent's statements to the insurance company that he performed these services are an admission that Respondent performed acts which constitute the practice of medicine during the period of his suspension (Pet's Ex. 6).

3. Although Respondent performed medical services on Patient B during his suspension, he failed to maintain medical records (T. 544-545 and 592-593).

4. Patient B's medical insurance policy provides reimbursement to a licensed physician (Ramirez T. 784-785, 800-801, 805 and 827-829).

CONCLUSIONS AS TO PATIENT B

In Allegations B and B.1, Respondent is charged with rendering medical treatment to Patient B for atrial tachycardia and other medical conditions at his office for a period from in or about May, 1988 through at least in or about January 1989, at a time when Respondent

was suspended from the practice of medicine in New York State. Respondent admits treating Patient B during this time period, but asserts he only performed psychotherapy. The Committee disbelieves Respondent. The Committee concludes that during the period of his suspension, Respondent continually reassessed the diagnosis for Patient B and monitored the effectiveness of his treatment of Patient B's medical condition by taking her blood pressure and pulse, and by listening with a stethoscope to her heart and lungs. These acts were done for the purpose of diagnosing, treating and prescribing for Patient B's paroxysmal atrial tachycardia. The Committee concludes such acts constitute the practice of medicine. **Therefore, Allegations B and B.1 is sustained.**

In Allegation B.2, Respondent is charged with failing to maintain medical records which reflect his evaluation and treatment of Patient B. Respondent admits he did not maintain records for any patient during the period of his suspension. As the Committee concludes he performed acts which constitute the practice of medicine, his failure to maintain appropriate records constitutes professional misconduct. Although this may appear to be a technical violation since during Respondent's period of suspension he was not allowed to practice medicine, this Committee concludes that having violated the suspension by improperly practicing medicine, Respondent became obligated to maintain those records which a physician is required to keep in his practice of medicine.

Therefore, Allegation B.2 is sustained.

FINDINGS OF FACT AS TO PATIENT C

1. Between approximately January 1, 1989 through, at least June, 1989, Respondent rendered medical treatment at his office to Patient C for migraine headaches (Pet's Ex. 7, Rspt's Ex. C; T. 273-274 and 287-288).

2. During the period of his suspension, Respondent continually confirmed the diagnosis of migraine headache, treated Patient C for migraine headaches and performed neurological examinations on Patient C to assess the effectiveness of his treatment for her migraine headaches (Pet's Ex. 7). Although Respondent purported these services were

performed by a licensed physician, Respondent submitted to Metropolitan Life Insurance Company Group Health Claims medical bills on an insurance company form entitled "PHYSICIANS'/SURGEON'S STATEMENT" for services he rendered when his license was suspended (Pet's Ex. 7 pp. 7-12) . Respondent's statements to the insurance company that he performed neurological examinations on Patient C between approximately January 23 and June 26, 1989 are an admission by Respondent that he performed acts which constitute the practice of medicine during the period of his suspension (Pet's Ex. 7).

3. Although Respondent performed medical services on Patient C during his suspension, he failed to maintain medical records (T. 544-545 and 592-593).

CONCLUSIONS AS TO PATIENT C

In Allegations C and C.1, Respondent is charged with rendering medical treatment to Patient C for migraine headaches at his office for a period from in or about January, 1989 through at least June 26, 1989, during which time Respondent was suspended from the practice of medicine in New York State. Respondent admits treating Patient C during this time period, but asserts he only performed psychotherapy. As with Patients A and B discussed above, the Committee disbelieves Respondent. The Committee concludes that during the period of his suspension, Respondent, as a physician, continually reassessed the diagnosis for Patient C and monitored the effectiveness of his treatment for Patient C's medical condition of migraine headaches by performing neurological examinations on her. The Committee concludes such acts constitute the practice of medicine.

Therefore, Allegations C and C.1 is sustained.

In Allegation C .2, Respondent is charged with failing to maintain medical records which reflect his evaluation and treatment of Patient C. Respondent admits he did not maintain records for any patient during the period of his suspension. As the Committee concludes he performed acts which constitute the practice of medicine, his failure to maintain appropriate records constitutes professional misconduct. Although this may appear to be a

technical violation since he was not allowed to practice medicine during his period of suspension, this Committee concludes that having violated the suspension by improperly practicing medicine, Respondent became obligated to maintain those records which a physician is required to keep in his practice of medicine.

Therefore, Allegation C.2 is sustained.

FINDINGS OF FACT AS TO PATIENT D

1. Between approximately July, 1988 through, December, 1988, Respondent rendered medical treatment to Patient D for paroxysmal atrial tachycardia and other medical conditions at his office (Pet's Ex. 8).

2. During the period of his suspension, Respondent diagnosed and treated Patient D for Paroxysmal Atrial Tachycardia, a physical disorder of a rapid heartbeat. During this period, Respondent took Patient D's pulse and blood pressure, and examined his heart and lungs (Pet's Ex. 8). Even though Respondent purported these services were performed by a licensed physician, the medical bills Respondent submitted to Metropolitan Life Insurance Company are for services he rendered when his license was suspended. Respondent's statements to the insurance company that he performed these services are an admission that Respondent performed acts which constitute the practice of medicine during the period of his suspension (Pet's Ex. 8).

3. At times during his treatment of Patient D, Respondent prescribed Doxepin to Patient D for his disorder (Pet's Ex. 9 p.7).

4. Although Respondent performed medical services on Patient D during his suspension, he failed to maintain medical records (T. 544-545 and 592-593).

5. Patient D's medical insurance policy provides reimbursement to a licensed physician (Ramirez T. 784-785, 800-801, 805 and 827-829).

CONCLUSIONS AS TO PATIENT D

In Allegations D and D.1, Respondent is charged with rendering medical treatment

to Patient D for atrial tachycardia and other medical conditions at his office for a period from in or about July, 1988 through in or about December, 1988, at a time when Respondent was suspended from the practice of medicine in New York State. Respondent admits treating Patient D during this time period, but asserts he only performed psychotherapy. The Committee disbelieves Respondent. The Committee concludes that during the period of his suspension, Respondent reassessed the diagnosis for Patient D and monitored the effectiveness of his treatment of Patient D's medical condition by taking his blood pressure and pulse, and by listening with a stethoscope to his heart and lungs. Petitioner's Exhibit 9 indicates that Respondent prescribed Doxepin to Patient D at some time during his treatment, but the Committee is unable to find by a preponderance of evidence that Respondent issued prescriptions to Patient D during his period of suspension. The Committee concludes Respondent's acts during his suspension were done for the purpose of diagnosing, treating and determining whether to prescribe medication for Patient D's paroxysmal atrial tachycardia. The Committee concludes such acts constitute the practice of medicine.

Therefore, Allegations D and D.1 is sustained.

In Allegation D.2, Respondent is charged with failing to maintain medical records which reflect his evaluation and treatment of Patient D. Respondent admits he did not maintain records for any patient during the period of his suspension. As the Committee concludes that he performed acts which constitute the practice of medicine, his failure to maintain appropriate records constitutes professional misconduct. Although this may appear to be a technical violation since during the period of suspension he was not allowed to practice medicine, this Committee concludes that having violated the suspension by improperly practicing medicine, Respondent became obligated to maintain those records which a physician is required to keep in his practice of medicine.

Therefore, Allegation D.2 is sustained.

**FINDINGS OF FACT AS TO RESPONDENT'S PROVIDING
MEDICAL TREATMENT TO PATIENTS DURING HIS
SUSPENSION FROM THE PRACTICE OF MEDICINE**

1. In or about November or December 1989, Respondent prepared notes consisting of ten pages listing patients he treated during his suspension. These notes are in evidence as Petitioner's Exhibit 9 (hereafter called "Marshall Hubsher's list") (Pet's Ex. 9; T. 70-71 and 670).

2. During the period of Respondent's suspension from the practice of medicine between April 27, 1988 and October 26, 1989, Respondent provided medical treatment to numerous patients, including the patients noted on Marshall Hubsher's list (Pet's Exs. 9 and 14; T. 70-71 and 670).

3. Respondent telephoned or wrote prescriptions for the patients named in Marshall Hubsher's list (T. 70-72).

4. Respondent telephoned these prescriptions to pharmacies using the names Merritt Hubsher, M.D., Hubsher, M.D. or M. Hubsher, M.D. (Maurina T. 742) in order to intentionally and knowingly disguise that he issued the prescriptions during his suspension and to falsely cause the pharmacies to believe that the prescriptions were ordered by a licensed physician.

5. Specifically, Respondent treated patient AH from April to June 1989, when his license to practice medicine was suspended. During this period, Respondent diagnosed, treated and prescribed medication for Patient AH (Pet's Exs. 9 and 14; Maurina T. 738-739).

6. Respondent intentionally never told Patient AH his license to practice medicine was suspended (Maurina T. 738-739)

7. During the period of his suspension, Respondent accepted Patient AH as a new patient, diagnosed her condition, prescribed medications, assessed the effectiveness of the medications for treating her condition, and when he determined it necessary, modified the dosage and medications prescribed (Pet's Exs. 9 and 14; Maurina T. 739).

8. By his intentional silence to Patient AH about the suspension of his license,

Respondent knowingly and intentionally mislead Patient AH to believe Respondent could render psychiatric care to Patient AH for her psychiatric problems, including prescribing medication, making diagnoses and performing other medical procedures to treat and diagnose Patient AH.

9. Respondent failed to keep patient records for Patient AH during the time he treated her or the other patients listed in Marshall Hubsher's list (T. 544-545 and 592-593).

10. During his suspension, when Respondent was treating Patients A, B, C, D, AH and others named in his list, he knowingly and intentionally continued to falsely hold himself out as a physician with a "Marshall Hubsher, M.D." sign outside his professional office building and a "Marshall Hubsher, M.D." listing in the professional office building directory. In addition, the telephone directory in late 1989 listed Respondent as Marshall Hubsher, M.D. (Maurina T. 740-744).

11. In or about October 1988, Respondent asked his brother, Merritt Hubsher, M.D., to provide prescription refills for Respondent's patients while he was suspended. Merritt agreed. (T. 44-45 and 118-1190)

12. During the time Respondent was suspended, Merritt Hubsher telephoned in prescriptions for only four or five of Respondent's patients (T. 44-46, 58-59, 60-61 and 90).

13. During his suspension, Respondent rendered diagnoses and telephoned prescriptions to pharmacists for, among others, Patients AH, AC, Sr. (Statement of Charges Ex. I² #7), AC, Jr. (Ex. I #8), TM (Ex. I #29), DK (Ex. I #23), TP (Ex. I #23), Todd Aldridge, KT (Ex. I #37), PT (Ex. I #9), RB (Ex. I # 3), RS (Ex. I #34), SK (Ex. I #25) and CS (Ex. I # 36) (Pet's Exs. 9 and 14; T. 71).

14. Specifically for Patient AH, between April 25 and June 7, 1989, a period during which he was suspended from practicing medicine, Respondent prescribed Doxepin.

² Hereafter referred to as Ex. I.

On April 25, 1989, Respondent telephoned to Picken Drugs a prescription for Doxepin, 25 mg., with directions Patient AH take two tablets at bedtime. On May 9, 1989, after evaluating that Patient AH felt better, Respondent continued the medication at the same level. On June 7, 1989, Respondent modified the dose to three tablets at bedtime. On June 19, 1989, after noting that Patient AH experienced negative side effects from Doxepin, Respondent changed her medication to Imipramine (Pet's Exs. 9 and 14).

15. On June 19, 1989, during his suspension, Respondent discussed the use of the medication Doxepin, evaluated the negative side effects Patient AH was experiencing on Doxepin and discussed the use of other antidepressants as an alternative (Pet's Exs. 9 and 14).

16. From April through June, 1989, a period during Respondent's suspension, at least 15 prescriptions were telephoned to pharmacies for Respondent's patients. The person who telephoned in the prescriptions used the name Merritt Hubsher five times, and the remaining called in prescriptions listed Dr. M. Hubsher or Dr. Hubsher (Maurina T. 742).

17. Respondent admitted to Merritt Hubsher, M.D. that he telephoned to the pharmacies the prescriptions noted in Marshall Hubsher's list (Pet's Ex. 9; T. 70-72 and 76-77).

**CONCLUSIONS AS TO ALLEGATIONS IN E THROUGH E.2
THAT RESPONDENT PRACTICED MEDICINE DURING
THE PERIOD OF HIS SUSPENSION**

In Allegations E and E.1, Respondent is charged with providing medical treatment to a number of patients during the time his license to practice medicine was suspended and that Respondent issued prescriptions intentionally, knowingly and falsely indicating that the prescriptions had been issued by his brother Merritt Hubsher, M.D. The Committee concludes that Respondent medically treated many patients during his suspension for whom he rendered diagnoses and prescribed medicine.

Respondent accepted Patient AH as a new patient during his suspension. He diagnosed her condition, treated her, prescribed medication, altered the dose and changed the medication in an on-going effort to treat her medical condition. From a letter dated June 20, 1989, written by Patient AH to Respondent, it is evident when Patient AH came to Respondent she already had a psychotherapist (Pet's Ex. 14); she came to Respondent for treatment by a psychiatrist who could prescribe medication. Although Respondent's license to practice medicine was suspended when she came to him, he intentionally and knowingly did not inform Patient AH that his license to practice as a psychiatrist was suspended and he could not psychiatrically treat her or prescribe medication to her. The Committee determines that by his calculated silence, Respondent knowingly and intentionally misled Patient AH to believe Respondent could render psychiatric treatment to her, including making diagnoses, prescribing medication, evaluating dosage and alternative medication and performing other medical procedures to treat and diagnose Patient AH's disorder.

While Merritt Hubsher, M.D. telephoned prescriptions for about four or five of Respondent's patients during the period of Respondent's suspension, at least thirteen patients received prescriptions on numerous dates during Respondent's suspension. The Committee concludes that Respondent telephoned the prescriptions to pharmacies for the majority of these patients during the time his license was suspended. The Committee further concludes that during his suspension, Respondent intentionally and knowingly disguised that he was the prescriber by using the name Hubsher, M.D., Merritt Hubsher, M.D. or M. Hubsher, M.D.

The Committee concludes Respondent's acts during his suspension of diagnosing a patients' disorder, prescribing medication, assessing patients' responses to medicine, evaluating the effectiveness of a medication, modifying dosage and/or altering medication in order to treat these patients' physical or psychiatric disorders constitutes the practice of medicine without a license.

Therefore, Allegations E and E.1 are sustained.

In Allegation E.2, Respondent is charged with failure to maintain medical records which reflect the evaluation and treatment of such patients. Respondent admitted he did not keep records during the period of his suspension. As the Committee concludes he performed acts which constitute the practice of medicine, his failure to maintain appropriate records is misconduct. Although this may appear to be a technical violation since during Respondent's period of suspension he was not allowed to practice medicine, this Committee concludes that upon violating the suspension and improperly practicing medicine, Respondent became obligated to maintain those records which a physician is required to keep in his practice of medicine.

Therefore, Allegation E.2 is sustained.

VOTE OF THE HEARING COMMITTEE

THE HEARING COMMITTEE VOTES UNANIMOUSLY (3-0) AS FOLLOWS:

FIRST THROUGH FIFTH SPECIFICATIONS:

(Practicing While License is Suspended)

The Hearing Committee hereby determines that the First through Fifth Specifications are sustained. It is established by a preponderance of the evidence that Respondent did provide treatment, issue prescriptions, formulate diagnoses, modify dosage and alter medication for many of his patients including A, B, C, D and AH during the period of his suspension.

SUSTAINED AS TO PARAGRAPHS: A, A1-3; B, B.1; C, C.1, D, D.1; and E.

SIXTH THROUGH ELEVENTH SPECIFICATIONS:

(Failing to Maintain Records)

The Hearing Committee hereby determines that the Sixth through Eleventh Specifications are sustained. A preponderance of the evidence, including Respondent's own admissions, establish that during his suspension he failed to keep any records reflecting the

evaluation and treatment of his patients while he treated them.

SUSTAINED AS TO PARAGRAPHS: A, A.5.; B, B.2; C, C.2; D, D.2; E and E.2.

TWELFTH THROUGH THIRTEENTH SPECIFICATIONS:

(Practicing the Profession Fraudulently)

The Hearing Committee hereby determines that the Twelfth and Thirteenth Specifications are sustained. It is established by a preponderance of the evidence that Respondent intentionally did not inform Patients A and AH that his license was suspended and that he intentionally and knowingly concealed this fact in order to mislead them to falsely believe he was licensed to practice psychiatry and could prescribe medications for their disorders. Respondent intentionally concealed the fact he was suspended so that Patient A and AH would continue to use him as their psychiatrist.

SUSTAINED AS TO PARAGRAPHS: A, A1-4; E and E.1.

DETERMINATION OF THE HEARING COMMITTEE AS TO PENALTY

Respondent has demonstrated an unwillingness and inability to work within the framework of suspension. He knowingly and intentionally misled his patients, pharmacies and insurance carriers. He manipulated circumstances to intentionally conceal he was practicing medicine during the suspension of his license. He purposely dissembled by signing bills as "M. Hubsher, Certified Psychiatrist" or "M. Hubsher, M.D." and calling in prescriptions using the name "M. Hubsher, M.D.," "Hubsher, M.D.," or "Merritt Hubsher, M.D." for the purpose of making patients, insurance carriers, and pharmacies falsely believe that treatment and prescriptions were rendered by a licensed physician.

Further, Respondent perjured himself before the Committee. For example, he falsely testified that he gave his brother, Merritt Hubsher, M.D., a check for \$30,000.00 for being available to prescribe medications to Respondent's patients during the period of suspension. Respondent neither claimed a business tax deduction for the appropriate tax year nor issued

an IRS Form 1099 to Merritt Hubsher for income paid. The Committee finds this testimony patently incredible and intentionally false.

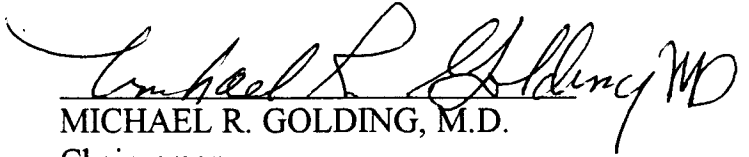
The Hearing Committee unanimously determines because of the serious nature of the charges and the cumulative occurrences of medical misconduct the Respondent's license to practice medicine in the State of New York should be **REVOKED**.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

Respondent's license to practice medicine in the State of New York is **REVOKED**.

DATED: New York, New York
January ,1995


MICHAEL R. GOLDING, M.D.
Chairperson

Sanders W. Davis, M.D.
Robin N. Buskey, R.P.A.

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

-----X
IN THE MATTER : STATEMENT
OF : OF
MARSHALL HUBSHER, M.D. : CHARGES
-----X

MARSHALL HUBSHER, M.D., the Respondent, was authorized to practice medicine in New York State on October 22, 1976 by the issuance of license number 903282 by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1993 through December 31, 1994.

FACTUAL ALLEGATIONS

- A. On or about March 25, 1988, the New York State Board of Regents suspended the medical license of Respondent for a period of five (5) years, the last forty-two (42) months of which were stayed. Such suspension was based on a 1982 federal criminal conviction for possession of 2000 methaqualone tablets, a 1983 conviction for issuance of a triplicate prescription with a false date in violation of Article 33 of the N.Y.S. Public Health law and a 1987

"Appendix A"

conviction for fraud, [REDACTED]
[REDACTED]

1. Respondent's medical license was actually suspended and Respondent could not practice medicine from April 27, 1988 through October 26, 1989. He was on probation from October 27, 1989 through April 26, 1993.
2. Between in or about May, 1988 and December, 1988, Respondent rendered medical treatment to Patient A for depression and other medical conditions at his office at 1025 Northern Boulevard, Roslyn, New York. (All patients are identified in the Appendix attached hereto).
3. On the following dates in 1988, Respondent rendered medical care to Patient A, at a time when Respondent was suspended from the practice of medicine in New York State: May 4, 11, 16, 19, 23, 26, 30; June 2, 6, 9, 13, 16, 20, 23, 27, 30; July 5, 7, 11, 14, 18, 21, 25, 28; August 1, 4, 8, 11, 15, 18, 22, 25, 29; September 1, 6, 8, 12, 15, 19, 22, 26, 29; October 3, 6, 10, 13, 17, 20, 24, 27, 31;

November 3, 7, 10, 14, 17, 24, 25, 28; December 1, 5, 8, 12, 15, 19, 22, 26 and 29.

4. Respondent intentionally and knowingly failed to inform Patient A at any time that he was not allowed to practice medicine.

5. Respondent failed to maintain a record which reflects his evaluation and treatment of Patient A.

B. From in or about May, 1988 through, at least in or about January, 1989, Respondent rendered medical treatment to Patient B for atrial tachycardia and other medical conditions at his office at 1025 Northern Boulevard, Roslyn, New York.

1. On or about the following dates in 1988 and 1989, Respondent rendered medical care to Patient B at a time when Respondent was suspended from the practice of medicine in New York State. In 1988, June 6, 10, 17 and 24; July 1, 8 and 15; September 2, 9, 14, 19, 23, 30; October 5, 12, 14, 21, 26, 31; November 4, 11, 17, 23, 30; and December 2, 9, 15, 21, 26, and 31. In 1989, January 6, 13 and 20.

2. Respondent failed to maintain a record which reflects his evaluation and treatment of Patient B
- C. From in or about January 1989 through in or about June 1989, Respondent rendered medical treatment to Patient C for migraine headache and other medical conditions at his office at 1025 Northern Boulevard, Roslyn, New York.
1. On or about the following dates in 1989, Respondent rendered medical care to Patient C at a time when Respondent was suspended from the practice of medicine in New York State:
January 23, 30; February 3, 10, 17, 23;
March 1, 8, 14; May 4, 11, 18, 25, 31, and
June 5, 12, 19, 26.
 2. Respondent failed to maintain a record which reflects his evaluation and treatment of Patient C.
- D. From in or about July, 1988 through in or about December, 1988, Respondent rendered medical treatment to Patient D for atrial tachycardia and other medical conditions at his office at 1025 Northern Boulevard, Roslyn, New York.

1. On the following dates in 1988, Respondent rendered medical care to Patient D at a time when he was suspended from the practice of medicine in New York State: July 28; August 9 and 23; September 6 and 20; October 1, 11 and 25; November 8 and 22; December 6 and 20.
 2. Respondent failed to maintain a record which reflects his evaluation and treatment of Patient D.
- E. Between in or about April 27, 1988 and October 26, 1989, Respondent provided medical treatment for a number of patients at a time when he was suspended from the practice of medicine in New York State. Attached hereto as Exhibit "I" is a list of such patients:
1. Respondent issued prescriptions for such patients during his suspension intentionally, knowingly and falsely indicating that the prescriptions had been issued by his brother, Merritt Hubsher, M.D.
 2. Respondent did not maintain a record which reflects the evaluation and treatment of such patients.

SPECIFICATIONS

FIRST THROUGH FIFTH SPECIFICATIONS

PRACTICING WHILE SUSPENDED

Respondent is charged with practicing the profession while his license is suspended within the meaning of N.Y. Educ. Law Section 6530(12) (McKinney Supp. 1994). Specifically Petitioner charges:

1. The facts in Paragraph A and A1-3.
2. The facts in Paragraph B and B1.
3. The facts in Paragraph C and C1.
4. The facts in Paragraph D and D1.
5. The facts in Paragraph E.

SIXTH THROUGH ELEVENTH SPECIFICATIONS

FAILING TO MAINTAIN RECORDS

Respondent is charged with failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient within the meaning of N.Y. Educ. Law

Section 6530(32) (McKinney Supp. 1994). Specifically, Petitioner charges:

6. The facts in Paragraph A and A5.
7. The facts in Paragraph B and B2.
8. The facts in paragraph C and C2.
9. The facts in paragraph D and D2.
10. The facts in Paragraph E and E2.

TWELFTH AND THIRTEENTH SPECIFICATIONS
PRACTICING THE PROFESSION FRAUDULENTLY

Respondent is charged with practicing the profession fraudulently within the meaning of N.Y. Educ. Law Section 6530(2) (McKinney Supp. 1994). Specifically, Petitioner charges:

11. The facts in Paragraph A and A1-4.

12. The facts in Paragraph E and E1.

DATED: New York, New York
4/15/94



CHRIS STERN HYMAN
Counsel
Bureau of Professional
Medical Conduct