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. , Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

August 6, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

PUBLIC

Jeffrey A. Buckner, M.D.
35A East 35th Street
New York, New York 10033

Anthony Z. Scher, Esq.
Wood & Scher
The Harwood Building
Scarsdale, New York 10583

Leni S. Klaimitz, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza, 6th Floor
New York, New York 10001

RE: In the Matter of Jeffrey A. Buckner, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 02-238) 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.

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.

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.

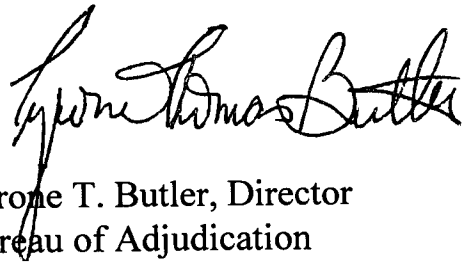
The notice of review served on the Administrative Review Board should be forwarded to:

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,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:djh
Enclosure

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

COPY

IN THE MATTER

OF

JEFFREY A. BUCKNER, M.D.

DETERMINATION

AND

ORDER

OPMC #02-238

BENJAMIN WAINFELD, M.D., Chairperson, **AIRLIE CAMERON, M.D, M.P.H.** and **PEGGY MURRAIN, Ed.D.**, 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 (hereinafter referred to as "the Committee") in this matter pursuant to Sections 230(10) of the Public Health Law and Sections 301-307, 401 and 501 of the New York State Administrative Procedure Act. **FREDERICK ZIMMER, ESQ.**, served as Administrative Officer for the Committee. The purpose of the hearing was to receive evidence concerning alleged violations of Section 6530 of the New York State Education Law by **JEFFREY A. BUCKNER, M.D.** (hereinafter referred to as "Respondent").

The New York State Board for Professional Medical Conduct (hereinafter referred to as the "State" or "Petitioner") appeared by **DONALD P. BERENS, ESQ.**, General Counsel, **LENI S. KLAIMITZ, ESQ.** of Counsel. Respondent appeared by **ANTHONY Z. SCHER, ESQ.** of **WOOD & SCHER**.

Witnesses were sworn or affirmed and examined. A stenographic record of the hearing was made. Exhibits were received in evidence and made a part of the record. There were numerous motions and/or briefs which are all part of the record herein whether submitted to the Committee or not.

The Committee has considered the entire record in the above captioned matter and hereby renders its decision.

SUMMARY OF PROCEEDINGS

Date of Service of Notice of Hearing and Statement of Charges	March 7, 2002
Prehearing Conference:	March 18, 2002
Hearing Dates:	April 4, May 6, May 13 and May 20, 2002
Deliberation Date:	June 17, 2002, July 10, 2002
Place of Hearing:	NYS Department of Health 5 Penn Plaza New York, New York
Petitioner appeared by:	Donald P. Berens, Jr., Esq. General Counsel NYS Department of Health By: Leni S. Klaimitz, Esq.
Respondent Appeared By:	Wood & Scher The Harwood Building Scarsdale, New York 10583 By: Anthony Z. Scher, Esq.

WITNESSES

For the Petitioner:	Patient A
	Patient A's Husband
	David Ackman, M.D.
For the Respondent:	Jeffrey A. Buckner, M.D.
	Patient M.L.
	Patient P.A.W.
	Patient W.K.
	Robbie Kempner, M.D.
	Stephanie Card
	William Slater, M.D.

STATEMENT OF CHARGES

The Statement of Charges charges the Respondent with professional misconduct by reason of his having willfully harassed, abused or intimidated a patient either physically or verbally, by engaging in conduct in the practice of the profession of medicine that evidences moral unfitness to practice and by practicing the profession of medicine fraudulently.

The charges are more specifically set forth in the Statement of Charges, a copy of which is attached hereto and made a part of this Determination and Order as Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Unless otherwise specified, all Findings and Conclusions herein are the unanimous determination of the Committee. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. Numbers in parentheses refer to transcript page numbers or exhibits, and they denote evidence that the Committee found persuasive in determining a particular finding. All Findings of Fact made by the Committee were established by at least a preponderance of the evidence.

Having heard testimony and considered evidence presented by the Petitioner and the Respondent respectively, the Committee hereby makes the following Findings of Fact;

1. Jeffrey A. Buckner, M.D., the Respondent, was licensed to practice medicine in the State of New York on or about August 8, 1980, by the issuance of license number 143135 (Petitioner's Exhibit 3 [hereinafter referred to as "Ex."]).

2. The Respondent is currently registered with the New York State Education Department to practice medicine at Suite 204 at 35A East 35th Street, New York, New York 10016-0000 (Ex. 3).

3. On December 28, 1998, Patient A, then a thirty-four year old woman, sought out the services of Respondent at his office at 35A East 35th Street, New York, New York. She was experiencing coughing and congestion and had been suffering from fatigue for approximately one month. Although she had never before consulted the Respondent, Patient A had selected him as her primary care physician with Oxford Health Plans and her husband had previously utilized his services (Transcript [hereinafter referred to as "T."] at 23-25, 28, 44-45, 70; Ex.4 p.4, 7; Ex. B p.7).

4. Patient A was shown into an examination room and was instructed to wear a paper gown. Patient A was not wearing a bra at the time of her examination (T. 26-28).

5. When Respondent entered the examination room, he did so alone and closed the door behind him. The patient was seated. He proceeded to discuss with Patient A her present symptoms and then began an examination of Patient A, first checking her eyes, nose, throat and ears. Respondent then moved behind the patient and, placing a stethoscope on her back, requested that she cough and breathe in and out deeply several times (T.28-29, 281-282).

6. Respondent continued his examination by coming to stand in front of Patient A and, placing the stethoscope on her chest, requested that she again cough and breathe in and out deeply. Respondent then dropped the stethoscope from his hand and tore the front of the patient's gown, causing a tear from the top of the gown of approximately five or six inches. The tear extended to just below Patient A's breast level (T.29-30, 49-50).

7. Respondent proceeded to place his right hand on and completely over Patient A's left breast with his fingers spread wide apart. With his hand covering her breast, Respondent squeezed and kneaded Patient A's breast, opening and closing his fingers, for approximately six or seven seconds. Patient A observed that as he did this Respondent's eyes were closed, his mouth was open and that he was breathing heavily. During this time the stethoscope was hanging from Respondent's neck, and was not being held by him (T. 29-34, 51).

8. If a physician finds it necessary to touch a female patient's breast to move it in order to listen to the patient's heartbeat, the breast should be lifted from underneath with an open palm and fingers turned upward (T.98-99).

9. If a physician finds it necessary to touch a female patient's breast to move it in order to listen to the patient's heart, it would be unusual for the physician to not simultaneously be holding the stethoscope (T. 109-110).

10. There is no medical justification for a physician to place his full hand over the breast of a female patient with the fingers spread wide or to knead the patient's breast while conducting an examination of the heart (T. 99-101).

11. Patient A reacted to the fondling by throwing herself back and asking of Respondent "What are you doing?" Respondent did not provide an explanation, but fumbled for words and spoke of the importance of breast self-examination. As he did so, Respondent first lifted Patient A's left arm and then her right and frantically poked her underarm areas. After a brief exchange about breast self-examination, Respondent told Patient A that she needed some rest and left the room (T. 31-35, 51-52).

12. Respondent truncated his examination of Patient A following her reaction to the fondling. Respondent did not listen to Patient A's heartbeat after tearing her gown nor did Respondent examine Patient A's abdominal area, although his medical record reflects an abdominal examination, or test her reflexes (T. 31-32, 34-37, 62-64, 299; Ex.4, p.4).

13. Patient A was very disturbed and upset by Respondent's fondling of her breast. She told her husband about the fondling two or three days after the incident had occurred. In December 1998, Patient A and her husband were employed in the restaurant business, Patient A as the manager of Maloney and Porcelli and her husband as a chef. Both were working long hours at that time of the year. Patient A waited for an opportunity to disclose what had occurred when there would be ample time to discuss the matter with her husband. The patient and her husband were unsure how to handle the situation (T. 22, 24, 38-39, 52-53, 64-65, 70-72).

14. Patient A discussed the incident with her gynecologist at her next appointment. The gynecologist referred Patient A to the Office of Professional Medical Conduct. Patient A then filed a complaint with the Department of Health describing Respondent's fondling of her breast (T. 39-40).

15. Prior to December 28, 1998, Patient A had had numerous breast examinations, including examinations of the axilla. The manner in which Respondent touched her breast and axilla was unlike any previous touches which Patient A had experienced (T. 37-38).

CONCLUSIONS

The following conclusions were made pursuant to the Findings of Fact listed above. The Committee concluded that Factual Allegations A and A.1 were proven by a preponderance of the evidence and were supported by the Findings of Fact noted above.

The Committee unanimously concluded that the following Specifications should **be sustained**. The citations in parentheses refer to the Factual Allegations from the Statement of Charges which support each specification.

WILLFULLY HARASSING, ABUSING OR INTIMIDATING A PATIENT EITHER PHYSICALLY OR VERBALLY

First Specification: (Paragraphs A and A.1);

MORAL UNFITNESS

Second Specification: (Paragraphs A and A.1).

DISCUSSION

Patient A and Respondent were the only individuals present during the incident in question. The Committee, therefore, viewed this case as involving Patient A's word against that of the Respondent. Limited weight was given to the testimony of the character witnesses who came forth to testify on behalf of Respondent. The Committee weighed the Respondent's credibility against that of Patient A and believed that Patient A was the more credible witness.

The Committee observed that Patient A was calm and consistent in her testimony. They noted that she had nothing to gain from coming forward to testify against the Respondent. Her testimony that she had no lawsuit against the Respondent was unrebutted. Patient A had no apparent grudge against Respondent and was unacquainted with Respondent prior to the incident in question. Both Patient A and her husband traveled a distance from Pennsylvania to testify.

The Committee accepts Patient A's testimony that she filed her complaint against Respondent to prevent a repetition of his abusive behavior to others and gave great weight to Patient A's testimony as to what transpired during her encounter with Respondent.

The Committee believed Patient A's account of Respondent's actions and found that Respondent was breathing heavily with his eyes closed as he squeezed and kneaded Patient A's breast while his unheld stethoscope was hanging from his neck. Patient A's testimony supported the allegation that Respondent was fondling Patient A's breast for no legitimate medical purpose. Expert testimony was provided by both Petitioner and Respondent as to the proper method of conducting a heart examination. The Committee did not find Respondent's touching of Patient A's breast as testified to by Patient A to be part of a heart examination. The Committee found Respondent evasive and questioned his credibility in several respects. With regard to Respondent's recollection of the incident concerning Patient A, it was observed that Respondent was quite clear in his recollection of certain particulars of his encounter with Patient A. He testified that his meeting with Patient A was "memorable" (T.167) due to several unique features of Patient A's visit to his office. Respondent recollected that Patient A was employed at a restaurant which he had recently frequented (T. 167-170), that Patient A's husband was his patient, that Patient A lived in the same building where Respondent had his office and that Patient A was a walk in patient which is extremely unusual in Respondent's practice (T. 170-172). Most notably, he also recalled meeting with Patient A in his consultation room and going through her medical history form with her (T. 160-162) and recalled the specific examining room where he examined Patient A because of the hydraulic chair that is present in the room (T. 281).

In contrast to the above, Respondent testified that he remembered little of the actual physical examination because it was an "unremarkable interaction" although he did recall that the incident as recalled by Patient A did not occur and that she was not bothered or disturbed by the examination (T. 212-214).

The Committee did not find it credible that Respondent could have a specific recollection of Patient A, remember certain particulars of her visit and yet be totally unaware of Patient A's reaction to his purported examination of her heart. The argument was made during the hearing that Patient A simply mistook Respondent's manipulation of her breast during her heart examination, as fondling of her breast. If this were the case, Respondent should have had some recollection of Patient A's "mistaken" negative reaction to his heart examination given that he found Patient A's visit to his office so memorable. In order to believe the Respondent, one would need to conclude that Patient A had not only misconstrued the Respondent's touch of her breast, but that she had fabricated what occurred as a result; i.e.- her reaction and his counter-reaction.

The Committee also notes that Patient A's record (Pet. Ex. 4) reflects a total examination of Patient A. The Committee accepts Patient A's testimony that her physical examination was abruptly terminated following Respondent's touching of her breast and her protest and does not believe that his record accurately reflects Respondent's examination of Patient A. Respondent's testimony concerning the entry in Patient A's medical record "await bloods" (Pet. Ex. 4) was also questioned. The Committee notes that the record lacks any indication that Respondent followed up on this entry and does not find credible Respondent's testimony that based on his practice and

habit, he directed Patient A to obtain blood work at a local laboratory at her convenience (T. 207).

The Committee observed that Respondent indicated in Patient A's medical record that Patient A's bra was left on. The Committee viewed Respondent's testimony concerning his general practice of using the phrase "bra left on" in his medical records to be strange and unusual. The Committee noted that this phrase has no medical significance. Respondent testified that his use of the phrase "bra left on" signaled that he had not done a breast examination on a patient (T.198-199). The Committee found it extremely curious that Respondent did not simply state in his medical records that "no breast examination had been conducted" rather than use the phrase "bra left on". The Committee accepted Patient A's testimony that her bra was off during the examination.

If Respondent's testimony (T. 200-201, 236) and Patient A's medical record (Ex. 4, pg. 4) are to believed, Patient A's bra was left on during her examination. Both the Petitioner's and the Respondent's expert testified that the appropriate standard of care would have required that in order to effectively listen to Patient A's heart, Patient A's bra should have been off during Respondent's purported heart examination (T. 363, 366). The Committee does not find credible Respondent's testimony that he would have listened to Patient A's heart through her bra (T.369-378). The Committee, therefore, questions both Respondent's testimony and recorded entry that Patient A's bra was left on during her examination.

The Committee found the testimony of Patient A's husband to be credible. Questions were raised concerning Patient A's husband's return to Respondent's office following his wife's

account to him of the incident. The Committee was satisfied with his explanation that he merely returned to Respondent's office for the purpose of picking up a referral to another physician. The Committee also did not find the two or three days it took for Patient A to relate the incident to her husband to be unusual.

Based on the preponderance of evidence, the Committee sustains the Factual Allegations, concludes that Respondent willfully harassed and abused Patient A in a physical manner and sustains the First Specification. The Committee also concludes that Respondent engaged in the practice of the profession of medicine in a manner evidencing moral unfitness to practice medicine and sustains the Second Specification. The Committee believed that Respondent's conduct failed to meet the ethical and moral standards of the community.

The Committee declines to sustain the Third Specification, which charged Respondent with practicing the profession of medicine fraudulently. The Committee considered the definition of fraud set forth in the Definitions of Profession Misconduct (hereinafter referred to as "the Definitions") issued by the Division of Legal Affairs. The definition of fraud requires some intentional misrepresentation or concealment of a known fact in the practice of medicine made with an intent to deceive. The Committee does not find, given the definition of fraud, that the Factual Allegations or evidence provide a sufficient basis for sustaining the Third Specification.

PENALTY

The Committee determined to impose a six month stayed suspension of Respondent's license together with a five-year period of probation requiring a chaperone to be present when Respondent sees female patients. This penalty will protect the public while delivering a message to Respondent that the conduct described in the charges will not be tolerated.

The Committee declined to revoke Respondent's license. While in no way minimizing Respondent's actions, the Committee notes that this incident was the only reported instance of sexual misconduct in Respondent's medical career which began over twenty years ago and that there is no evidence of repetitive conduct. The Committee, therefore, believes Respondent should be allowed to practice albeit with the restriction of a chaperone being present when he sees a female patient.

ORDER

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

1. The First and Second Specifications as set forth in the Statement of Charges (Appendix 1) are **SUSTAINED**. The Third Specification is **DISMISSED**.

2. Respondent's license to practice medicine in New York State be and hereby is suspended for a period of six months. The suspension shall be stayed. Respondent shall also be placed on probation for a period of five years in accord with the Terms of Probation, which are attached hereto as Appendix II. In accord with the Terms of Probation, Respondent will only see female patients in the presence of a chaperone.

Dated: New York, New York
7/29, **2002**

Benjamin Wainfeld, M.D
Chairperson

Airlie Cameron, M.D., M.P.H.
Peggy Murrain, Ed.D.

APPENDIX I

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

IN THE MATTER

OF

JEFFREY A. BUCKNER, M.D.

STATEMENT

OF

CHARGES

Jeffrey A. Buckner, M.D., the Respondent, was authorized to practice medicine in New York State on or about August 8, 1980, by the issuance of license number 143135, by the New York State Education Department. Respondent is currently registered to practice medicine with the New York State Department of Education for the period March 2001 through February 2003.

FACTUAL ALLEGATIONS

A. On or about December 28, 1998, Respondent examined Patient A (whose identity is set forth in the annexed Appendix) at his medical office located at 35A East 35th Street, New York, New York 10016.

1. Respondent, not for any legitimate medical purpose, fondled Patient A's breast.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

WILLFULLY HARASSING, ABUSING OR INTIMIDATING A PATIENT EITHER PHYSICALLY OR VERBALLY

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(31) by willfully harassing, abusing or intimidating a

patient either physically or verbally as alleged in the facts of:

1. Paragraphs A and A(1).

SECOND SPECIFICATION

MORAL UNFITNESS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(20) by engaging in conduct in the practice of the profession of medicine that evidences moral unfitness to practice as alleged in the facts of the following:

2. Paragraphs A and A(1).

THIRD SPECIFICATION

FRAUDULENT PRACTICE

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

3. Paragraphs A and A(1).

DATED: March 4, 2002
New York, New York

Roy Nemerson
Deputy Counsel
Bureau of Professional
Medical Conduct

(6)

APPENDIX II

APPENDIX II

TERMS OF PROBATION

1. Respondent shall conduct himself/herself in all ways in a manner befitting his/her professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his/her profession. Respondent acknowledges that if s/he commits professional misconduct as enumerated in New York State Education Law §6530 or §6531, those acts shall be deemed to be a violation of probation and that an action may be taken against Respondent's license pursuant to New York State Public Health Law §230(19).

2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street, Suite 303, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.

3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.

4. Any civil penalty not paid by the date prescribed herein shall be subject to all provisions of law relating to debt collection by New York State. This includes, but is not limited to, the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses [Tax Law section 171(27)]; State Finance Law section 18; CPLR section 5001; Executive Law Section 32].

5. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.

6. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.

7. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

8. Respondent shall, in the course of practicing medicine in New York State, examine and/ treat any female patient only in the presence of a chaperone. The chaperone shall be a female licensed or registered health care professional or other health care worker, shall not be a family member, personal friend, or be in a professional relationship with Respondent which could pose a conflict with the chaperone's responsibilities. The chaperone shall be proposed by Respondent and subject to the written approval of the Director of OPMC. Prior to the approval of any individual as chaperone, Respondent shall cause the proposed chaperone to execute and submit to the Director of OPMC an acknowledgment of her agreement to undertake all of the responsibilities of the role of chaperone. Said acknowledgment shall be made upon a form provided by and acceptable to the Director. Respondent shall provide the chaperone with a copy of the Order and all of its attachments and shall, without fail, cause the approved chaperone to:

a. Report quarterly to OPMC regarding her chaperoning of Respondent's practice.

b. Report within 24 hours any failure of Respondent to comply with the Order, including, but not limited to, any failure by Respondent to have the chaperone present when required, any sexually suggestive or otherwise inappropriate comments by Respondent to any patient, and any actions of a sexual nature by Respondent in the presence of any patient.

c. Confirm the chaperone's presence at each and every examination and treatment of a female patient by Respondent, by placing her name, title and date in the patient record for each and every visit, and by maintaining a separate log, kept in her own possession, listing the patient name and date of visit for each and every patient visit chaperoned.

d. Provide copies of the log described in paragraph c, above, to OPMC at least quarterly and also immediately upon the Director's request.

9. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.