STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Mark R. Chassin, M.D., M.P.P., M.P.H.
Commissioner

Paula Wilson
Executive Deputy Commissioner

April 15, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Merab Boter, M.D.
170 Old Country Road
Riverhead, New York 11901

Walter R. Marcus, Esq.
Kern, Augustine, Conroy
& Schoppman
420 Lakeville Road
Lake Success, NY 11042

Ralph J. Bavaro, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

RE: In the Matter of Merab Boter, M.D.

Dear Dr. Boter, Mr. Marcus and Mr. Bavaro:

Enclosed please find the Determination and Order (No. BPMC-93-58) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 than 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
Corning Tower - Room 2503
Empire State Plaza
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.

Very truly yours,

Tyrone T. Butler/CRC

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:crc
Enclosure

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

IN THE MATTER	:	DETERMINATION
OF	:	AND
MERAB BOTER, M.D.	:	ORDER

ORDER NO. BPMC-93-58

ROBERT J. O'CONNOR, M.D., (Chair), LEO FISHEL, M.D. and MR. MORTON KLEINMAN, 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 the Administrative Officer for the Hearing Committee.

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

SUMMARY OF THE PROCEEDINGS

Notice of Hearing and Statement of Charges:	September 29, 1992
Pre-Hearing Conference:	October 20, 1992
Hearing Dates:	November 6, 1992 December 1, 1992 January 14, 1993
Place of Hearing:	NYS Department of Health 5 Penn Plaza New York, NY
Date of Deliberation:	March 17, 1993

Petitioner appeared by:

Peter J. Millock, Esq.
General Counsel
NYS Department of Health
BY: Ralph J. Bavaro, Esq.
Associate Counsel

Respondent appeared by:

Kern, Augustine Conroy
& Schoppman
420 Lakeville Road
Lake Success, N.Y.
BY: Walter R. Marcus, Esq.,
of Counsel

WITNESSES

For the Petitioner:

Robert Paradny, M.D.

For the Respondent:

Merab Boter, M.D., the Respondent
Frank Holmberg, M.D.
Andrew Natoloni, M.D.

STATEMENT OF CHARGES

Essentially, the Statement of Charges charges the Respondent with practicing with negligence on more than one occasion; practicing with incompetence on more than one occasion; practicing with gross negligence and practicing with gross incompetence.

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

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. All hearing Committee findings were unanimous unless otherwise specified.

GENERAL FINDING

The Respondent is a physician licensed to practice medicine in the State of New York under license number 173014 issued by the State Education Department (Pet's. Ex. 1).

The Respondent graduated from the Kiev Medical Institute, Kiev, Ukraine in 1970 (Tr. 177).

FINDINGS AS TO PATIENT A

1. On October 1, 1989, Patient A, a 66 year old female, was admitted to Central Suffolk Hospital, a small community hospital in Riverhead, New York. Patient A was admitted with obstructive jaundice. A CAT scan taken immediately prior to admission revealed a mass in the head of the pancreas, later found to be cancerous (Pet's Ex. 2, p. 3; Tr. 11-12).

2. Surgical consultation was sought from the Respondent, and on October 5, 1989, the Respondent performed an exploratory laparotomy, pancreatoduodenectomy (Whipple resection), partial gastrectomy, vagotomy and

cholecystectomy (Pet's. Ex. 2, pp. 3, 6 and 7; Tr. 12).

3. Upon surgical exploration prior to commencement of the Whipple Resection, the Respondent removed a .5 cm white lesion from Patient A's liver. The tissue was sent to pathology and found to be metastatic adenocarcinoma. The Respondent found no other tumor at that point and "decided to proceed with radical operation" (Pet's. Ex. 2, pp. 6-8).

4. The operative report does not reflect any inspection by the Respondent of the portal vein prior to the dissection of organs. Such inspection was indicated because cancerous involvement of the portal vein often precludes complete removal of the tumor. The Respondent subsequently found a pancreatic tumor 2 X .5 centimeters in the area of the portal vein and determined that it was unresectable. The Respondent finished the operation without removing the entire tumor (Pet's. Ex. 2, p. 7, Tr. 17-20, 247-248).

5. Except in certain circumstances, not present here, a Whipple Resection should not be done if it is not possible to completely remove the tumor (Tr. 20-21).

6. The Whipple Procedure is better done at the larger medical centers where they have teams trained in the procedure; they do the procedure more frequently; and they have skilled post-operative teams to care for the patient. The Respondent agreed with this assessment (Tr. 53-54, 212).

7. Patient A underwent a surgical re-exploration of her abdomen on October 5, 1989 due to post-operative intra-

abdominal bleeding. Patient A took a downhill course and expired on October 27, 1989 (Pet's Ex. 2, pp. 3-4; Tr. 17).

CONCLUSIONS AS TO PATIENT A

The Hearing Committee concludes that the Respondent committed errors in judgment in proceeding with the full Whipple Resection because of the presence of a metastatic carcinoma nodule in the liver, and the unressectability of the portal vein involved with carcinoma.

In addition the Hearing Committee concludes that the Respondent also erred in not referring this case to a major medical center where the Whipple Procedure is done on a more frequent basis.

FINDINGS AS TO PATIENT B

1. On October 5, 1988 Patient B, a 62 year old female, was admitted to Central Suffolk Hospital under the Respondent's surgical care. She presented with nausea, vomiting, abdominal pain in the right lower quadrant and right flank and abdominal distension (Pet's. Ex. 3; p. 4; 70-71).

2. On October 5, 1988, a central venous catheter and an naso-gastric tube were placed, and IV fluids and antibiotics were started (Pet's. Ex. 3, pp. 7, 56; Tr. 71).

3. Within three days Patient B's symptoms subsided except for some tenderness in the right lower quadrant which

was still present on October 8th. A gastrograffin enema performed on October 7th ruled out any colonic or cecal lesions (Pet's. Ex. 3, pp. 15-17, 45; Tr. 71).

4. Patient B's white blood count was 17 on October 5th; 17.8 on October 6th; and 14.5 on October 8th at 6:44 a.m. She was apparently responding favorably to antibiotics. Patient B was a diabetic and her blood sugars came down pre-operatively, an indication that her condition was improving (Pet's. Ex. 3, p. 32).

5. A gynecological consultant on October 5th diagnosed small cervical fibroids but recommended that no further gynecological action be taken with respect to this finding (Pet's. Ex. 3, p. 28).

6. On October 8, 1988 Patient B underwent an exploratory laparotomy, lysis of adhesions, and a total abdominal hysterectomy and bilateral salpingo-oophorectomy (TAHBSO). The exploratory laparotomy was performed based upon the preoperative diagnosis of acute abdomen and to rule out possible appendicitis. Patient B and her husband were not sure whether Patient B's appendix had been removed in an operation performed 20 years prior. The October 8, 1988 operation revealed that Patient B had already had her appendix removed (Pet's. Ex. 3, pp. 5 and 8).

7. The surgical exploration on October 8th revealed multiple adhesions which required a "lengthy dissection of small bowel from surrounding tissues" (Pet's. Ex. 3, p. 8).

8. The surgical exploration also revealed a tumor on the supra-cervical area of the uterus which was later, upon pathological examination, found to be multiple leiomyomas. Based upon that finding, the Respondent proceeded to perform a TAHBSO (Pet's. Ex. 3, pp. 8 and 10).

CONCLUSIONS AS TO PATIENT B

The Hearing Committee concludes that while Patient B may have had an acute abdomen on admission, there is insufficient evidence in the record to determine a specific diagnosis. However, there is sufficient evidence in the record to conclude that Patient B did not have an acute abdomen on October 8, 1988, when the Respondent performed an exploratory laparotomy and a total hysterectomy. Under the circumstances neither of the procedures were indicated.

FINDINGS AS TO PATIENT C

1. On August 2, 1990, Patient C, a 32 year old male, was admitted to Central Suffolk Hospital under the Respondent's surgical care. The patient complained of a six day history of persistent right upper quadrant abdominal pain and one episode of vomiting (Pet's. Ex. 6, p. 4).

2. An abdominal ultrasound performed immediately prior to admission on August 2nd showed gallstones with considerable thickening of the gallbladder wall. It also showed sludge and calculi within the gallbladder and a

normal size common bile duct (Pet's. Ex. 6, p. 37).

3. Significant laboratory findings on the morning of August 3, 1990 were an elevated bilirubin of 2.66 and an elevated alkaline phosphatase of 230, both indicative of obstructive jaundice (Pet's. Ex. 6 p. 34; Tr. 104).

4. The Respondent performed an exploratory laparotomy and cholecystectomy on August 3, 1990. The gallbladder was dissected with some difficulty due to dense adhesions. The common duct was punctured and drained of bile. The gallbladder appeared to be inflamed and diffusely oozing blood which was controlled with packing (Pet's. Ex. 6, pp. 7-8; Tr. 105-106).

5. During the cholecystectomy, the Respondent purposefully punctured the fundus of the gallbladder in order to decompress the very tense and distended gallbladder and bile was drained out. The Respondent unavoidably injured Patient C's liver during the procedure. Pathological examination revealed abundant liver parenchyma adjacent to the wall of the gallbladder (Pet's. Ex. 6, pp. 7-9; Tr. 113-117, 535-536).

6. The Respondent did not perform a cystic duct cholangiogram or a common bile duct exploration during the surgery on August 3, 1990.

An intraoperative cystic duct cholangiogram was attempted but was not successful because of the narrowness of the duct.

An intra-operative common bile duct exploration was not indicated because stones could not be palpated and there was a normal pre-operative sonogram (Pet's. Ex. 6; Tr. 529-531).

7. Following the operation of August 3, 1990, Patient C developed bile peritonitis and subphrenic abscesses (Pet's. Ex. 6, p. 14; Tr. 115).

8. On August 7th, Patient C underwent a second exploratory laparotomy performed by the Respondent. The Respondent also performed a drainage of intra-abdominal abscesses, common bile duct exploration, T-Tube choledochostomy, a T-Tube cholangiogram, and ligation of a leaking bile duct in the gallbladder bed (Pet's. Ex. 6, pp. 14-18).

9. On August 13th a post-operative T-Tube cholangiogram was performed which showed no evidence of obstruction or filling defect. The T-Tube was then clamped (Pet's. Ex. 6, p. 5 and 43).

10. Following the T-Tube cholangiogram and clamping on August 13, 1990, Patient C was discharged from the hospital (Pet's. Ex. 6, pp. 4-5).

11. The Patient's discharge was not premature (Tr. 545).

CONCLUSIONS AS TO PATIENT C

The Hearing Committee concludes that the Respondent's treatment and care of Patient C was appropriate.

An intra-operative cystic duct cholangiogram was attempted but was not successful because of the narrowness of the duct.

An intra-operative common bile duct exploration was not indicated because stones could not be palpated and there was a normal pre-operative sonogram.

The injury to Patient C's liver during the procedure on August 3, 1990 was unfortunate but unavoidable.

The Respondent's discharge of Patient C on August 3, 1990 was not premature because the clinical status of the patient was stable and the laboratory abnormalities were not significant and would resolve in time.

FINDINGS AS TO PATIENT D

1. Patient D, a 36 year old female, was admitted to Central Suffolk Hospital under the Respondent's care on FEbruary 2, 1990 with a diagnosis of acute cholecystitis. Patient D had a severe right upper quadrant pain. An abdominal sonogram revealed gallstones and a markedly enlarged gallbladder with intraluminal sludge, bile and stones (Pet's. Ex. 7, pp. 6, 46).

2. On February 3, 1990, Patient D underwent an exploratory laparotomy and cholecystectomy. The Respondent did not perform a cystic duct cholangiogram intra-operatively (Pet's. Ex. 7, pp. 8-9).

3. An intra-operative cystic duct cholangiogram was

not indicated in this case because there is nothing in the patient's hospital record to suggest that such a test was necessary (Pet's. Ex. 7).

4. Post-operatively, Patient D developed mechanical jaundice. She had an elevated bilirubin of 4.79 on February 6th. At that level jaundice is clinically observable (Pet's. Ex. 7, p. 39; Tr. 165-166).

5. On February 8, 1990, a disida scan was performed on Patient D. On February 9, 1990, an abdominal sonogram and a CT scan of the abdomen were also performed on the patient. All the tests showed obstruction of the biliary tree and were consistent with retained stone in the common duct (Pet's. Ex. 7, pp. 48-50).

6. On February 9, 1990, it was apparent that Patient D suffered from an obstruction and there was an indication for a re-operation at that time (Tr. 154-156, 169).

7. On February 12th Patient D underwent an exploratory laparotomy, cholangiogram and choledochoduodenal anastomosis. The pre-operative diagnosis was "obstructive jaundice due to possible ligated common bile duct, status post cholecystectomy, possibility of common bile duct stone". The post-operative diagnosis was "obstructive jaundice after ligation of the common bile duct, status post cholecystectomy (Pet's. Ex. 7, pp. 6-7, 14-15).

8. The exploration on February 12, 1990, revealed that Patient D had a ligated common duct, admittedly done in

error by the Respondent during the February 3, 1990 procedure (Pet's. Ex. 7, pp. 6-7, 14-15; Tr. 351-355, 359).

CONCLUSIONS AS TO PATIENT D

The Hearing Committee concludes that by February 9, 1991 the Respondent had sufficient evidence of a mechanical obstruction warranting an immediate reoperation to correct the problem.

There is nothing in Patient D's hospital record to suggest that an intra-operative cystic duct cholangiogram was indicated on February 3, 1990.

The Respondent admitted that he erroneously ligated the common duct during the procedure of February 3, 1990. Such an outcome is a recognized complication even in the best of hands when unrecognized anomalies are present.

VOTE OF THE HEARING COMMITTEE

(All votes were unanimous)

FIRST SPECIFICATION (Practicing with negligence on more than one occasion)

SUSTAINED as to those charges specified in paragraphs A-A1, B-B1, B2, B3 and D-D3 of the Statement of Charges.

NOT SUSTAINED as to those charges specified in paragraphs A-A2, C-C1, C2, C3, C4, C5 and D-D1, D2 of the Statement of Charges.

SECOND SPECIFICATION (Practicing with incompetence on more than one occasion)

NOT SUSTAINED as to any of the charges specified in the Statement of Charges.

THIRD THROUGH SIXTH SPECIFICATION (Practicing with gross negligence)

NOT SUSTAINED as to any of the charges specified in the Statement of Charges.

SEVENTH THROUGH TENTH SPECIFICATION (Practicing with gross incompetence)

NOT SUSTAINED as to any of the charges specified in the Statement of Charges.

DETERMINATION

The Hearing Committee voted unanimously to **SUSTAIN** the charge of "Practicing with negligence on more than one occasion" relative to those charges specified in paragraphs A-A1, B-B1, B2, B3 and D-D3 of the Statement of Charges.

The Hearing Committee voted unanimously that those charges alleging "Practicing with incompetence on more than one occasion"; "Practicing with gross negligence" and "Practicing with gross incompetence are **NOT SUSTAINED**."

The Hearing Committee has considered the full spectrum of available penalties, including revocation, suspension, probation, censure and reprimand or the imposition of civil penalties not to exceed $10,000 per violation.

The Hearing Committee determines that the interests of the people of the State of New York would best be served by **SUSPENDING** the Respondent's license to practice medicine for a period of three years, **STAYING** said suspension and placing the Respondent on **PROBATION** for a period of one year, during

which time the Respondent's practice should be monitored as specified in the **ORDER**.

ORDER

IT IS HEREBY ORDERED that the Respondent's license to practice medicine in the State of New York is **SUSPENDED FOR A PERIOD OF THREE YEARS**. Said suspension is **STAYED** and the Respondent is placed on **PROBATION FOR ONE YEAR** subject to the following conditions.

1) The Respondent shall obtain an appropriate monitor, approved by the Director of the Office of Professional Medical Conduct, to monitor the Respondent's practice.

2) Said monitor shall submit a report to the Office of Professional Medical Conduct every three (3) months regarding the quality of the Respondent's practice.

3) Upon satisfactory completion of the one year probation period, the three-year suspension of the Respondent's license shall be lifted.

4) Failure to comply with the conditions of **PROBATION** will result in automatic reinstatement of the **THREE YEAR SUSPENSION** penalty upon notice to the Respondent.

DATED: New York, New York
April 8, 1993

ROBERT J. O'CONNOR, M.D.
Chairman

LEO FISHEL, M.D.
MR. MORTON KLEINMAN

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

----------X

IN THE MATTER	:	STATEMENT
OF	:	OF
MERAB BOTER, M.D.	:	CHARGES

----------X

MERAB BOTER, M.D., the Respondent, was authorized to practice medicine in New York State on November 17, 1987 by the issuance of license number 173014 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, 1991 through December 31, 1992 at 887 Old Country Road, Riverhead, NY 11901.

FACTUAL ALLEGATIONS

A. Patient A (identified in Appendix A, along with all other patients mentioned herein), was admitted to Central Suffolk Hospital, Riverhead, New York with a diagnosis of obstructive jaundice on or about October 1, 1989, and underwent surgery performed by Respondent on or about October 5, 1989. Respondent:

1. Inappropriately performed a "Whipple resection" despite metastatic carcinoma of the liver.

2. Failed to completely remove pancreatic tumor intra-operatively.

B. Patient B was admitted to Central Suffolk Hospital under Respondent's surgical care from on or about October 5 through October 20, 1988, complaining of abdominal pain, nausea and vomiting. Respondent:

1. Inappropriately diagnosed acute abdomen without justification.

2. Inappropriately performed an exploratory laparotomy without justification on or about October 8.

3. Inappropriately performed a total hysterectomy without justification on or about October 8.

C. Patient C was admitted to Central Suffolk Hospital under Respondent's surgical care from on or about August 2 through August 13, 1990, and underwent a cholecystectomy on or about August 3, 1990. Respondent:

1. Failed to performed a cystic duct cholangiogram intra-operatively.

2. Failed to perform a common bile duct exploration intra-operatively.

3. Performed gall bladder dissection in an improper manner causing liver injury.

4. Inappropriately discharged Patient C prematurely following a post-operative cholangiogram.

5. Inappropriately discharged Patient C despite abnormal laboratory results.

D. Patient D was admitted to Central Suffolk Hospital under Respondent's surgical care from on or about February 2 through February 17, 1990. Patient D underwent a cholecystectomy on or about February 3, 1990 and a hepatico-duodenostomy on or about February 12, 1990. Respondent:

1. Dissected portal structures of the gall-bladder in an improper manner on or about February 3rd.

2. Failed to perform a cystic duct cholangiogram intra-operatively on or about February 3rd.

3. Failed to perform hepatico-duodenostomy in a timely manner.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

PRACTICING WITH NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with practicing the profession with negligence on more than one occasion under N.Y. Educ. Law Section 6530(3) (McKinney Supp. 1992) in that Petitioner charges the Respondent with having committed at least two of the following:

1. The facts contained in paragraphs A and A1-A2, B and B1-B3, C and C1-C5 and/or D and D1-D3.

SECOND SPECIFICATION

PRACTICING WITH INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with practicing the profession with incompetence on more than one occasion under N.Y. Educ. Law Section 6530(5) (McKinney Supp. 1992), in that Petitioner

charges the Respondent with having committed at least two of the following:

2. The facts contained in paragraphs A and A1-A2, B and B1-B3, C and C1-C5, and/or D and D1-D3.

THIRD THROUGH SIXTH SPECIFICATIONS

PRACTICING WITH GROSS NEGLIGENCE

Respondent is charged with practicing the profession with gross negligence under N.Y. Educ. Law Section 6530(4) (McKinney Supp. 1992), in that Petitioner charges:

3. The facts contained in paragraphs A and A1-A2.

4. The facts contained in paragraphs B and B1-B3.

5. The facts contained in paragraphs C and C1-C5.

6. The facts contained in paragraphs D and D1-D3.

SEVENTH THROUGH TENTH SPECIFICATIONS

PRACTICING WITH GROSS INCOMPETENCE

Respondent is charged with practicing the profession with gross incompetence under N.Y. Educ. Law Section 6530(6) (McKinney Supp. 1992), in that Petitioner charges:

7. The facts contained in paragraphs A and A1-A2.

8. The facts contained in paragraphs B and B1-B3.

9. The facts contained in paragraphs C and C1-C5.

10. The facts contained in paragraphs D and D1-D3.

DATED: New York, New York
September 29, 1992

CHRIS STERN HYMAN
Counsel
Bureau of Professional Medical
Conduct