



***New York State Board for Professional Medical Conduct***

*433 River Street, Suite 303 • Troy, New York 12180-2299 • (518) 402-0863*

Antonia C. Novello, M.D., M.P.H., Dr. P.H.  
*Commissioner  
NYS Department of Health*

Dennis P. Whalen  
*Executive Deputy Commissioner  
NYS Department of Health*

Dennis J. Graziano, Director  
*Office of Professional Medical Conduct*

William P. Dillon, M.D.  
*Chair*

Michael A. Gonzalez, R.P.A.  
*Vice Chair*

Ansel R. Marks, M.D., J.D.  
*Executive Secretary*

**PUBLIC**

July 31, 2003

***CERTIFIED MAIL-RETURN RECEIPT REQUESTED***

Guy M. Whalen, M.D.  
151 Elmview Avenue  
Hamburg, NY 14075

Re: License No. 178512

Dear Dr. Whalen:

Enclosed please find Order #BPMC 03-200 of the New York State Board for Professional Medical Conduct. This order and any penalty provided therein goes into effect August 7, 2003.

If the penalty imposed by the Order is a surrender, revocation or suspension of this license, you are required to deliver to the Board the license and registration within five (5) days of receipt of the Order to the Board for Professional Medical Conduct, New York State Department of Health, Hedley Park Place, Suite 303, 433 River Street, Troy, New York 12180.

Sincerely,

Ansel R. Marks, M.D., J.D.

Executive Secretary

Board for Professional Medical Conduct

Enclosure

cc: Joseph V. McCarthy, Esq.  
Roach, Brown, McCarthy & Gruber, P.C.  
1620 Liberty Building  
420 Main Street  
Buffalo, NY 14202

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

IN THE MATTER  
OF  
GUY M. WHALEN, M.D.

CONSENT  
ORDER

BPMC No. 03-200

Upon the application of (Respondent) GUY M. WHALEN, M.D. in the attached Consent Agreement and Order, which is made a part of this Consent Order, it is

ORDERED, that the Consent Agreement, and its terms, are adopted and SO ORDERED, and it is further

ORDERED, that this Order shall be effective upon issuance by the Board, either

- by mailing of a copy of this Consent Order, either by first class mail to Respondent at the address in the attached Consent Agreement or by certified mail to Respondent's attorney, OR
- upon facsimile transmission to Respondent or Respondent's attorney, Whichever is first.

SO ORDERED.

DATED: 7/31/03



WILLIAM P. DILLON, M.D.  
Chair  
State Board for Professional Medical Conduct

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

**IN THE MATTER  
OF  
GUY M. WHALEN, M.D.**

**CONSENT  
AGREEMENT  
AND  
ORDER**

GUY M. WHALEN, M.D., representing that all of the following statements are true, deposes and says:

That on or about June 29, 1989, I was licensed to practice as a physician in the State of New York, and issued License No. 178512 by the New York State Education Department.

My current address is 151 Elmview Avenue, Hamburg, New York 14075, and I will advise the Director of the Office of Professional Medical Conduct of any change of address.

I understand that the New York State Board for Professional Medical Conduct has charged me with seven specifications of professional misconduct.

A copy of the Statement of Charges, marked as Exhibit "A", is attached to and part of this Consent Agreement.

I admit the Seventh Specification [failing to maintain an accurate record], in full satisfaction of the charges against me, and I agree to the following penalty:

My license to practice medicine in the state of New York shall be suspended for 1 years, with the suspension stayed pending my satisfactory compliance with a three year term of probation, in accordance with Terms of Probation [Exhibit B], which terms also require (1) that I obtain a clinical competency assessment within 45 days of the effective date of the Order herein at a

program approved for that purpose by the Director of OPMC, and that I (2) comply with any recommendations to complete personalized continuing medical education.

That Respondent shall maintain current registration of licensure with the New York State Education Department Division of Professional Licensing Services (except during periods of actual suspension), and shall pay all registration fees. This condition shall take effect thirty (30) days after the Consent Order's effective date and will continue so long as Respondent remains licensed in New York State; and

That Respondent shall cooperate fully with the Office of Professional Medical Conduct (OPMC) in its administration and enforcement of this Order and in its investigations of matters concerning Respondent. Respondent shall respond in a timely manner to all OPMC requests for written periodic verification of Respondent's compliance with this Order. Respondent shall meet with a person designated by the Director of OPMC, as directed. Respondent shall respond promptly and provide all documents and information within Respondent's control, as directed. This condition shall take effect upon the Board's issuance of the Consent Order and will continue so long as Respondent remains licensed in New York State.

I stipulate that my failure to comply with any conditions of this Order shall

constitute misconduct as defined by New York State Education Law §6530(29).

I agree that if I am charged with professional misconduct in future, this Consent Agreement and Order shall be admitted into evidence in that proceeding.


I ask the Board to adopt this Consent Agreement.

I understand that if the Board does not adopt this Consent Agreement, none of its terms shall bind me or constitute an admission of any of the acts of alleged misconduct; this Consent Agreement shall not be used against me in any way and shall be kept in strict confidence; and the Board's denial shall be without prejudice to the pending disciplinary proceeding and the Board's final determination pursuant to the Public Health Law.

I agree that, if the Board adopts this Consent Agreement, the Chair of the Board shall issue a Consent Order in accordance with its terms. I agree that this Order shall take effect upon its issuance by the Board, either by mailing of a copy of the Consent Order by first class mail to me at the address in this Consent Agreement, or to my attorney by certified mail, OR upon facsimile transmission to me or my attorney, whichever is first.

I ask the Board to adopt this Consent Agreement of my own free will and not under duress, compulsion or restraint. In consideration of the value to me of the Board's adoption of this Consent Agreement, allowing me to resolve this matter without the various risks and burdens of a hearing on the merits, I knowingly waive my right to contest the Consent Order for which I apply, whether administratively or judicially, I agree to be bound by the Consent Order, and ask that the Board adopt this Consent Agreement.

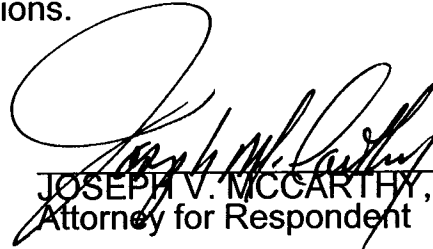
DATED 7/16/03

  
\_\_\_\_\_  
GUY M. WHALEN, M.D.  
RESPONDENT

The undersigned agree to Respondent's attached Consent Agreement and to its proposed penalty, terms and conditions.

DATE:

July 16, 2003



JOSEPH V. MCCARTHY, ESQ.  
Attorney for Respondent

DATE:

7/17/03



MICHAEL A. HISER, ESQ.  
Associate Counsel  
Bureau of Professional Medical Conduct

DATE:

7/29/03



DENNIS J. GRAZIANO  
Director  
Office of Professional Medical Conduct

## EXHIBIT "B"

### Terms of Probation

1. Respondent's conduct shall conform to moral and professional standards of conduct and governing law. Any act of professional misconduct by Respondent as defined by New York State Education Law §6530 or §6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to New York State Public Health Law §230(19).
2. Respondent shall provide the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299 with the following information, in writing, and ensure that such information is kept current: a full description of Respondent's employment and practice; all professional and residential addresses and telephone numbers within and outside New York State; and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty (30) days of each action.
3. Respondent shall cooperate fully with, and respond in a timely manner to, OPMC requests to provide written periodic verification of Respondent's compliance with the terms of this Consent Order. Upon the Director of OPMC's request, Respondent shall meet in person with the Director's designee.
4. Respondent's failure to pay any monetary penalty by the prescribed date shall subject Respondent to all provisions of law relating to debt collection by New York State, including but 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 probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of thirty (30) consecutive days or more. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive thirty (30) day period. Respondent shall then notify the Director again at least fourteen (14) days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period will resume and Respondent shall fulfill any unfulfilled probation terms.
6. The Director of OPMC may review Respondent's professional performance. This review may include but shall not be limited to: a review of office records, patient records and/or hospital charts; and interviews with or periodic visits with Respondent and Respondent's staff at practice locations or OPMC offices.
7. Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients and contain all information required by State rules and regulations concerning controlled substances.

## **CLINICAL COMPETENCY ASSESSMENT**

8. Within 45 days of the effective date of the Order herein, Respondent shall obtain a clinical competency assessment performed by a program for such assessment as directed by the Director of OPMC. Respondent shall cause a written report of such assessment to be provided directly to the Director of OPMC within thirty (30) days of the completion of the evaluation.
  - a. Respondent shall be responsible for all expenses related to the clinical competency assessment and shall provide to the Director of OPMC proof of full payment of all costs that may be charged. This term of probation shall not be satisfied in the absence of actual receipt, by the Director, of such documentation, and any failure to satisfy shall provide a basis for a Violation of Probation proceeding.

## **PERSONALIZED CONTINUING MEDICAL EDUCATION**

9. Following the Clinical Competency Assessment above, at the direction of the Board and within 90 days of the effective date of the Order, Respondent shall be enrolled in a course of personalized continuing medical education [PCME], which includes an assigned preceptor, preferably a physician board certified in the same specialty, to be approved, in writing, by the Director of OPMC. The PCME shall be directed to remediating any deficiencies identified in the Clinical competency Assessment. The Respondent shall remain enrolled and shall fully participate in the program for a period of not less than three months nor more than twelve months, at the discretion of the Director of OPMC.
10. Respondent shall cause the preceptor to
  - a. Submit reports on a quarterly basis to OPMC certifying whether Respondent is fully participating in the personalized continuing medical education program.
  - b. Report immediately to the Director of OPMC if Respondent withdraws from the program and report promptly to OPMC any significant pattern of non-compliance by Respondent.
  - c. At the conclusion of the program, submit to the Director of OPMC a detailed assessment of the progress made by Respondent toward remediation of all identified deficiencies.
11. During the term of probation, Respondent shall practice medicine in either private practice, hospitals or other institutional settings outside of the personalized continuing medical education program, only when monitored by a licensed physician, board certified in an appropriate specialty (practice monitor), proposed by Respondent and subject to the written approval of the Director of OPMC.



- a. Respondent shall make available to the practice monitor any and all records or access to the practice requested by the practice monitor, including on-site observation. The practice monitor shall visit Respondent's medical practice at each and every location, on a random unannounced basis at least monthly and shall examine a selection (no less than 10) of records maintained by Respondent, including patient records, prescribing information and office records. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation of accepted standards of medical care or refusal to cooperate with the monitor shall be reported within 24 hours to OPMC.
  - b. Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of OPMC.
  - c. Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year, in accordance with Section 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC prior to Respondent's practice after the effective date of this Order.
12. Respondent shall cause the practice monitor to report to OPMC on a quarterly basis regarding Respondent's compliance with the approved monitoring plan. These narrative reports shall address all aspects of Respondent's clinical practice including, but not limited to, the evaluation and treatment of patients, the monitor's assessment of patient records selected for review, detailed case description of any case found to not meet the established standards of care and Respondent's remediation of previously identified deficiency areas. The Respondent shall cause the practice monitor to monitor Respondent's medical practice in accordance with a monitoring plan to be approved by the Director of OPMC. Such monitoring plan shall include, but not be limited to, provisions for selected medical record reviews, occasional observation of the Respondent in practice settings, required participation in hospital departmental meetings and enrollment in ongoing education courses, if any.
13. Respondent shall be solely responsible for all expenses associated with these terms, including fees, if any, for the clinical competency assessment, the personalized continuing medical education program or to the monitoring physician.
14. For each of the two years after Respondent completes the PCME, Respondent shall enroll in and complete a continuing education program in the areas of the identification and management of high risk factors in adult patients, including evaluating and treating hypertension, hyperlipidemia, routine breast cancer screening, for a minimum of 24 credit hours/year. This continuing education program is in addition to any requirements the Respondent may have for maintaining his board certification. This continuing education program is subject to the Director of OPMC's prior written approval and shall be completed within the probation period, unless the Order specifies otherwise.

15. Respondent shall comply with this Order and all its terms, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with, or violation of, these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding, and/or any other such proceeding authorized by law, against Respondent.

IN THE MATTER  
OF  
GUY M. WHALEN, M.D.

STATEMENT  
OF  
CHARGES

GUY M. WHALEN, M.D., the Respondent, was authorized to practice medicine in New York State on or about June 29, 1989, by the issuance of license number 178512 by the New York State Education Department.

**FACTUAL ALLEGATIONS**

- A. Respondent provided medical care to Patient A [to preserve patient confidentiality, patients are identified only in the attached Appendix], a female 41 years old when treatment began, at various times between approximately February 12, 1998 and February 17, 1999, at the Respondent's office at 131 Elmview Avenue, Hamburg, New York 14075 ["Respondent's office"]. Respondent's care of Patient A failed to meet minimum standards of medicine in that:
1. Respondent, between February 1998 and January 1999, failed to recommend that the patient have a mammogram and/or refer her to another physician for that purpose, all of which was medically indicated in light of her history, or to document that he did so.
  2. Respondent failed to take medically indicated steps to appropriately evaluate the patient's breast mass discovered on or about January 7, 1999, including referral to another health care provider and/or ordering of a mammogram, or to document that he did so.
  3. Respondent, at his next visit with the patient on February 17, 1999, failed to follow up to evaluate the breast mass he noted on January 7, 1999, and/or refer the patient for appropriate care, or to document that he did so.

B. Respondent provided medical care to Patient B, a female 37 years old when first treated, at various times between approximately 1993 and 2001, at the Respondent's office. Respondent's care of Patient B failed to meet minimum standards of medicine in that:

1. Respondent failed to adequately evaluate and treat the patient's elevated lipids from at least August of 1997 through March 2000, despite medical indications, and/or document such adequate evaluation and treatment.
2. Respondent failed to adequately evaluate and treat the patient's elevated lipids from March 2000 onward, despite medical indications, and/or document such adequate evaluation and treatment.

C. Respondent provided medical care to Patient C, a male 63 years old when first treated, at various times between approximately 1994 and 2000, at the Respondent's office. Respondent's care of Patient C failed to meet minimum standards of medicine in that:

1. Respondent failed to adequately evaluate and treat the patient's elevated cholesterol and lipids from at least 1994 onward, despite medical indications, and/or document such adequate evaluation and treatment.
2. Respondent failed to adequately evaluate and treat the patient's diabetes from at least 1994 onward, despite medical indications, and/or document such adequate evaluation and treatment.

D. Respondent provided medical care to Patient D, a male approximately 76 years old when first treated, at various times between approximately 1994 and 2000, at the Respondent's office. Respondent's care of Patient D failed to meet minimum standards of medicine in that:

1. Respondent failed to adequately evaluate and treat the patient's elevated cholesterol and lipids from at least 1994 onward, despite

medical indications, and/or document such adequate evaluation and treatment.

2. Respondent failed to refer the patient for treatment of elevated cholesterol and lipids to another healthcare provider from at least 1994 onward, despite medical indications, and/or document such referral.
3. Respondent failed to adequately evaluate and treat the patient's hypertension from at least 1994 onward, despite medical indications, and/or document such adequate evaluation and treatment.
4. Respondent failed to refer the patient for treatment of hypertension to another healthcare provider from at least 1994 onward, despite medical indications, and/or document such referral.
5. Respondent failed to appropriately monitor the patient's cholesterol and/or lipids on an ongoing basis, despite indications.

E. Respondent provided medical care to Patient E, a male 68 years old when treatment began, at various times between approximately February 5, 1996 and February 10, 1997, at the Respondent's office. Patient E was treated for, among others insulin dependent diabetes, hypertension, and a bi-polar disorder. Respondent's care of Patient E failed to meet minimum standards of medicine in that:

1. Respondent failed to take medically indicated steps to treat the patient's significantly elevated blood pressures from approximately April 1996 through November 1996, and/or document that he took such steps.
2. Respondent failed to take medically indicated steps to treat the patient's significantly elevated blood pressures from November 1996 through February 1997, and/or document that he took such steps.

F. Respondent provided medical care to Patient F, a female 64 years old at the relevant time, at various times between approximately 1990 and 1998, at the Respondent's office. Respondent's care of Patient F failed to meet minimum standards of medicine in that:

1. Respondent, despite the patient's clinical presentation and laboratory

test results as of November 11 and November 21, 1996, failed to timely order medically indicated diagnostic testing to evaluate the patient's liver or biliary functioning, and/or refer the patient for such evaluation, or to document that he did so.

2. Respondent, when the patient's liver enzymes remained normal and the bilirubin became markedly elevated after November 21, 1996, failed to properly evaluate and treat the patient.

**SPECIFICATION OF CHARGES**  
**FIRST AND SECOND SPECIFICATIONS**  
**GROSS NEGLIGENCE**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(4) by practicing the profession of medicine with gross negligence on a particular occasion as alleged in the facts of the following:

1. The facts in paragraphs A and A.1, A and A.2, and/or A and A.3.
2. The facts in Paragraphs B and B.1 and/or B and B.2.

**THIRD AND FOURTH SPECIFICATIONS**  
**GROSS INCOMPETENCE**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(6) by practicing the profession of medicine with gross incompetence as alleged in the facts of the following:

3. The facts in paragraphs A and A.1, A and A.2, and/or A and A.3.
4. The facts in Paragraphs B and B.1 and/or B and B.2.

## **FIFTH SPECIFICATION**

### **NEGLIGENCE ON MORE THAN ONE OCCASION**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(3) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of two or more of the following:

5. The facts in paragraphs A and A.1, A and A.2, A and A.3, B and B.1, B and B.2, C and C.1, C and C.2, D and D.1, D and D.2, D and D.3, D and D.4, D and D.5, E and E.1, E and E.2, F and F.1, and/or F and F.2.

## **SIXTH SPECIFICATION**

### **INCOMPETENCE ON MORE THAN ONE OCCASION**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(5) by practicing the profession of medicine with incompetence on more than one occasion as alleged in the facts of two or more of the following:


6. The facts in paragraphs A and A.1, A and A.2, A and A.3, B and B.1, B and B.2, C and C.1, C and C.2, D and D.1, D and D.2, D and D.3, D and D.4, D and D.5, E and E.1, E and E.2, F and F.1, and/or F and F.2.

**SEVENTH SPECIFICATION**  
**FAILURE TO MAINTAIN RECORDS**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(32) by failing to maintain a record for each patient which accurately reflects the care and treatment of the patient, as alleged in the facts of:

7. The facts in paragraphs A and A.1, A and A.2, A and A.3, B and B.1, B and B.2, C and C.1, C and C.2, D and D.1, D and D.2, D and D.3, D and D.4, E and E.1, E and E.2, and/or F and F.1.

DATED: June 18, 2003  
Albany, New York

  
Peter D. Van Buren  
Deputy Counsel  
Bureau of Professional  
Medical Conduct