STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

June 6, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Anthony M. Benigno, Esq.
NYS Department of Health
433 River Street – Fourth Floor
Troy, New York 12180

Peter G. Barber, Esq.
4 Atrium Drive
Executive Woods
Albany, New York 12209

Edward P. Wright, Esq.
525 Fairmount Avenue
Jamestown, New York 14701

Dan G. Alexander, M.D.
21 Porter Avenue
Jamestown, New York 14701

RE: In the Matter of Dan G. Alexander, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-169) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either certified mail or in person to:

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street - Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties other than suspension or revocation until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

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

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

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

COPY

IN THE MATTER

OF

DAN G. ALEXANDER, M.D.

DETERMINATION

AND

ORDER

BPMC 2000 - 00-169

STEVEN GRABIEC, M.D., Chairperson, **JOHN CHOATE, M.D.** and **TRENA DEFRANCO**, 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.

TIMOTHY J. TROST, ESQ., Administrative Law Judge, served as the Administrative Officer for the Hearing Committee.

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

SUMMARY OF THE PROCEEDINGS

Notice of Hearing and Statement of Charges:		November 17, 1999
Pre-Hearing Conference: (Telephonically)		December 30, 1999
Hearing Dates:	(Jamestown)	January 13, 2000
	(Buffalo)	January 14, 2000
	(Buffalo)	February 1, 2000
	(Jamestown)	February 24, 2000
	(Jamestown)	February 25, 2000
	(Buffalo)	March 1, 2000

Date of Deliberations (Rochester) April 28, 2000

Petitioner appeared by:

Anthony M. Benigno, Esq.
Assistant Counsel
NYS Dept. of Health
Division of Legal Affairs
433 River Street
Troy, New York 12180

Respondent appeared by:

Peter G. Barber, Esq.
4 Atrium Drive
Executive Woods
Albany, New York 12209

Edward P. Wright, Esq.
525 Fairmount Avenue
Jamestown, New York 14701

WITNESSES

For the Petitioner

1/13 p. 10	Ruth Walton, RN
1/13 p. 39	John LaMancuso, M.D.
1/13 p. 51	Kimberly Ann Brink, RN
1/13 p. 59	Lillian Ney, M.D.
1/13 p. 80	Patient A
1/13 p. 108	Patient C
1/13 p. 143	Deborah Warner
1/13 p. 163	Patient B
1/13 p. 206	Patient D
1/13 p. 255	Bonnie Kay Mackie
1/14 p. 273	Det. John Conti
1/14 p. 333	Patient E
2/1 p. 3	Ian Frankfort, M.D.
2/1 p. 136	Nicole Rickard

For Respondent:

2/1 p. 165	Sandy Sorrentino, M.D.
2/24 p. 4	Ann P. Anderson
2/24 p. 107	Karen Chapman
2/24 p. 117	Joseph Scapplitte
2/24 p. 142	Robert M. Daniels, M.D.
2/24 p. 161	Kenneth Suh, M.D.
2/24 p. 201	Joanne LaPlaca
2/24 p. 266	Jo Alexander
2/25 p. 4	Daniel Bacus
2/25 p. 16	Laura Vincent

2/25 p. 26 Dan Alexander, M.D.
2/25 p. 191 Donald Boehm
3/1 p. 4 Re-examine Nicole Rickard
3/1 p. 21 Cross-exam Respondent

STATEMENT OF CHARGES

The Charges allege inappropriate comments to three staff nurses and three patients, failure to keep records or adequately document on three patients, inappropriate touching of three patients and inadequate management of one patient's medical treatment.

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. All exhibits with numbers are the Petitioner's exhibits. All exhibits with letters are the Respondent's.

GENERAL FINDINGS AS TO RESPONDENT

1. **DAN G. ALEXANDER, M.D.,** was licensed to practice medicine in New York State on September 5, 1991, by the issuance of license number 186803 from the New York State Education Department (Petitioner's exhibit 3, hereinafter Ex. 3).

2. Dr. Alexander is an adjunct clinical faculty member at the State University of New York at Buffalo and teaches anatomical and clinical diagnosis at his private office to fourth-year medical students and final year nurse students (Alexander, T. 27; Exh. A).

3. In 1991, Dr. Alexander completed a three year residency in internal medicine at St. Francis Medical Center, a large urban hospital in Pittsburgh, PA (Alexander, T. 28).

4. In August 1991, Dr. Alexander was hired by Women's Christian Association Hospital (WCA Hospital) in Jamestown, New York, and set up in a sole practice by the hospital (Alexander, T. 28).

5. Respondent was served with a Notice of Hearing, Statement of Charges and Summary of Department Hearing Rules on November 18, 1999. (Ex. 2)

FINDINGS AS TO NURSE A, B, & C

Respondent made inappropriate comments to female staff members at WCA Hospital consisting of:

1. Responding to Nurse A's question of what are you up to by stating, "about eight inches", or words to that effect, in the presence of a thirty-three year old female patient (Exhibit 4, page 2), (February 25, 2000 transcript at pages 29-30, hereinafter 2/25 T., at 29-30).

2, Offering to use his hand to pump the breasts of Nurse B, a lactating mother who expressed the need to go to the maternity ward to use the breast pump (2/25, T., at 29-30) (Ex. 4, Pg. 2).

3. Announcing in the nurses' station that he was "stiff and sore because he had not been laid in three or four weeks" or words to that effect (Ex. 4, pg. 2).

These comments were inappropriate for a physician to make to the nursing staff (2/1 T., at 6-11).

4. In or about January of 1993 Respondent engaged in sexual harassment and/or harassment toward Nurse C. It consisted of questions of her personal life and unwanted attention outside the scope of their professional relationship. (Ex. 4, pgs. 4, 5, 6 and 8) (1/3 T., at 53-54). This conduct was inappropriate for a physician to engage in with a member of the nursing staff (2/1 T., at 11-13).

DISCUSSION

Nurse Walton is a veteran nurse who made a very credible appearance at the hearing. Her motives and professionalism were not questioned. Her testimony was clear, consistent and was not weakened on cross-examination. Although the stories of Nurse A and B were hearsay, the reports were credible in themselves. Obviously, both nurses were offended, thus they reported the comments.

In a small hospital in a small town, making such reports can put a nurse's career in harm's way, yet the reports were made. The reports and the counseling of Respondent by the management did have the desired effect because there were no further reports of such conduct. Nevertheless, the statements were made and they were socially and professionally unacceptable. These incidents could be viewed as the beginning of a pattern of behavior toward women which shows, at best, indifference and, at worst, a character aberration founded in sexual maladjustment and lack of impulse control.

The interaction with Nurse C went far beyond professional boundaries. Although the Respondent attempted to minimize the impact of the statements by pleading a sympathetic motive, he did not deny the conversation and, in fact, corroborated it. Nurse C was concerned and offended. Her earlier reports to Nurse Chipman (contained in Chipman's 2 page letter, Ex. 4) almost seem to suggest that the Respondent was stalking her. She was in a weakened psychological state because of the emotional stress of a divorce. Approaching a troubled female outside the professional boundary could be viewed as evidence of a possible predatory instinct. Once again, there is evidence of a pattern developing.

CONCLUSIONS AS TO NURSE A, B & C

The factual allegations of the charges were established by a preponderance of the evidence. However, the comments made by the Respondent do not rise to the level of moral unfitness. Since these factual allegations do not form the basis for any other specifications in the charges, there will be no penalty assessed.

FINDINGS AS TO PATIENT A

5. On May 24, 1993, Respondent conducted a physical examination of Patient A. During the examination Respondent made an inappropriate comment to her informing her that the reason why he married his wife was because she has large breasts but please don't tell her I told you that (1/13 T., at 86).

DISCUSSION

Respondent raised many issues regarding Patient A's office visit. Perhaps the Respondent was attempting to reassure the patient that her breast condition was not uncommon and, yes, the coincidence that both Respondent and Patient had lost a pet dog to cancer was remarkable. However, Patient A's demeanor and description of the office visit were credible. The fact that she did not formally complain about a rude and unprofessional remark made by the Respondent until years later does diminish her credibility somewhat but was overridden by the fact she did report the incident to two professionals very soon after and she wrote a letter describing the incident but never mailed it.

CONCLUSIONS AS TO PATIENT A

The comment made by the Respondent to Patient A was inappropriate for a physician to make to a patient (2/1 T., at 13-14). It was crude, unprofessional and out of bounds. However, these remarks do not rise to the level of moral unfitness since they

suggest neither depravity nor self-gratification. Even the fact that there is a pattern of such conduct with women cannot elevate four events of misconduct which did not possess the elements of moral unfitness to a violation entitled "moral unfitness" simply on the basis of repeatedly dropping weights on one side of a balance scale. Since no other specifications are based on the factual allegations regarding Patient A, no penalty can be assessed.

FINDINGS AS TO PATIENT B

6. On September 25, 1995, Respondent examined Patient B. During the examination Respondent made an inappropriate comment (2/1 T., at 14-16) to her that she had a sexy bra on and that she should not worry, things won't get kinky today, I'm tired (1/3 T., at 167) or words to that effect. Comments like that may diminish the trust the patient has in the physician and may have adverse affect on the doctor's ability to take care of the patient (2/1 T., at 16).

DISCUSSION

In spite of all the seemingly exacerbating circumstances suggested by the defense to diminish the credibility of Patient B, it is more likely than not that her description was truthful and accurate. Her demeanor was compelling, her description of the visit was convincing. If she were disposed to manufacture an incident in order to smear the Respondent, then she invented a relatively modest transgression as compared to what happened to her sister, Patient D., at the hands of the Respondent. If one were acting out of revenge it seems that one would use the opportunity to describe a much more heinous

act of misconduct. Furthermore, there is now a DEFINITE pattern developing which Patient B's allegation seems to fit well within. Respondent makes these rude and inappropriate remarks routinely.

CONCLUSION AS TO PATIENT B

The conclusion is the same as for that of Patient A.

FINDINGS AS TO PATIENT C

7. On December 15, 1993, Respondent examined nineteen year old Patient C at the Resource Center, Jamestown, New York (Ex. 5). During the course of the examination Respondent conducted a breast examination (1/3 T., at 113). Respondent failed to document in the patient's chart the results of the breast examination, which were negative for any abnormality (2/25 T., at 176). A negative finding for breast abnormalities is a pertinent negative, which must be recorded in a patient's chart (2/1 T., at 17-18). Respondent's failure to document a negative breast examination fell below generally accepted standards of medical care (2/1 T., at 18). Respondent failed to document that he had examined the patient's neurologic system and her extremities (2/25 T., at 176). Respondent's failure to document negative findings fell below generally accepted standards of medical care (2/1 T., at 18).

8. An inaccurate medical record could subject the patient to risk that a subsequent care provider may make erroneous medical decisions based upon the assumption that the medical record is an accurate statement as to what the patient's health was on this particular date and time (2/1 T., 20-21).

FINDINGS PATIENT C

9. Respondent failed to perform an adequate breast examination (1/13 T., at 133-117) (2/1 T., at 22-24) on Patient C. Respondent gently rubbed the patient's nipple area on one breast for approximately five minutes and then did the same on the other breast for approximately one minute (1/3 T., at 113-116). The Respondent failed to palpate the various areas of each breast (2/1 T., at 23). Respondent's breast examination on Patient C fell below generally accepted standards of medical practice (2/1 T., at 22-23).

10. Respondent touched Patient C's breast in a manner not medically justified (1/3 T., at 113-117) (2/1 T., at 22-24). During the breast examination Respondent did not converse with the patient, however, his breathing became louder and faster (1/3 T., at 116). Respondent gently rubbed the patient's nipple area on one breast for approximately five minutes and then did the same on the other breast for approximately one minute (1/3 T., at 113-116). The touching of Patient C's breasts for sexual gratification or non-medical purposes constituted an ethical boundary violation (2/1T ., at 24-25).

11. Respondent made an inappropriate comment to Patient C that, if you were a man I would have grabbed your balls and made you cough (1/3 T., at 118) (2/1 T., at 26-27).

12. Patient C upon leaving the Resource Center, immediately reported this incident to her mother and the manager at the Resource Center's group home on Falconer Street (1/3 T., at 119). Patient C was visibly shaken with red blotches on her face and neck, watery eyes and she looked like she had been crying and was about to (1/13 T., at 146). Patient C wanted to immediately report the incident to the police, but was talked out of it by officials from the Resource Center (1/3 T., at 121).

DISCUSSION

Patient C was young and inexperienced with adult medical problems. However, she described the touching of her breasts concisely. She was upset by the incident and told her mother immediately. Her description of that event was determined to be true and accurate. Even a nineteen year old women knows the difference between a medical procedure and a caress. On the other hand, the testimony of such a person about what medical procedures were NOT undertaken during a period when she was extremely uncomfortable about the caress was deemed insufficient evidence, without more, to prove that certain parts of the physical exam were NOT undertaken.

Once again the pattern of inappropriate comments to females in the professional setting has materialized and, for the first time, there is evidence of touching of female private parts for sexual gratification. Impulsive behavior which started with words now appears to be advancing to deeds.

CONCLUSIONS AS TO PATIENT C

Respondent's care and treatment of Patient C failed to meet acceptable standards of medical care, in that:

1. Respondent failed to maintain a record which accurately reflected the evaluation and/or treatment of Patient C. Respondent failed to indicate that he had performed a breast examination.
2. Respondent failed to perform an adequate breast examination.
3. Respondent touched Patient C's breasts without adequate medical justification.
4. Respondent made an inappropriate comment to Patient C.

The touching of Patient C's breasts was medically unjustified and done for personal gratification of a sexual nature. This touching constituted the gravest of boundary violations and is the most harmful to patients and the profession of all incidents of professional misconduct, except perhaps deliberate patient abuse. The evidence clearly supports the charge of moral unfitness and deliberate patient abuse. When coupled with the findings regarding Patient D, to follow, the breast exam was obviously inadequate and constituted negligence on more than one occasion. The State failed to carry its burden of proof relating to fraudulent practice because the testimony of Patient C on this issue was not accepted as competent. Finally, the fact that the Respondent did not enter the negative results of a breast exam in the chart and failed to include any written reference that a breast exam had been performed constitutes inadequate record keeping. There is no evidence that Respondent was professionally incompetent in his treatment of Patient C. As in all prior instances of inappropriate comments by the Respondent, the comment made to Patient C does not rise to the level of moral unfitness.

FINDINGS AS TO PATIENT D

13. On October 31, 1995, Respondent conducted a physical examination of Patient D as part of a pre-operative clearance. The examination took place at Respondent's medical office, 21 Porter Avenue, Jamestown, New York (Ex. 6)

14. Respondent failed to perform an adequate breast examination of Patient D (2/1 T., at 27-29). Respondent's examination consisted of a light caressing around the patient's nipple for 10 to 15 seconds. Respondent's breast examination of Patient D fell below generally accepted standards of medical practice (2/1 T., at 27-29).

15. Respondent touched Patient D's breasts in a manner not medically justified (2/1 T., 28-29). She testified that during the purported breast examination she felt stiff like a stone, scared and vulnerable (1/13 T., at 212).

16. Respondent ran his fingers from the bottom of Patient D's labia to the top of the labia and then across her pubic area three or four times (1/13 T., at 214-215). Respondent touched Patient D's vagina and pubic area in a manner not medically justified (2/1 T., at 29-31). Dr. Frankfort testified that, "This is not an appropriate medical examination of anything" (2/1 T., at 30). Patient D felt vulnerable and violated by Respondent's actions (1/13 T., 215).

17. Patient D was visibly shaken after her encounter with Respondent. She drove around Jamestown for approximately a half-hour trying to compose herself. When she arrived at her family's place of business she immediately broke down in tears. After immediately informing her family of Respondent's inappropriate touching she went home, ripped off her clothes and took a long hot shower trying to get clean (1/13 T., at 217-218).

DISCUSSION PATIENT D

It was determined that Patient D was telling the truth accurately. She was completely credible. The defense proposed 63 facts and circumstances (Respondent's proposed findings of fact #132 to #195) to suggest why Patient D's testimony should not be believed.

The most troublesome of all the suggestions was the fact that Patient D told four different versions of the incident on four different occasions. The point is that the description of the touching grows more specific with each telling of the story. It goes from touching the pubic area reported to OPMC on the day of the incident by Patient D to insertion of fingers between the labia in the statement made in 1998 to Investigator Rickard and finally to insertion again but with different digits as explained at the Hearing. It was determined that this anomaly was not fatal to the credibility because the different versions were not necessarily inconsistent. It was clear that Patient D was touched in the pubic area in a manner which made her feel violated. It was always characterized as a rubbing of the pubic area. Such a motion would not be one made by lightly pressing the area where the leg joins the torso to ascertain the existence of a pulse. Clearly, what was explained by Patient D as a deliberate rather that casual or mistaken insertion of hand or fingers within the labia is far distant in degree from any activity consistent with the detection of a femoral pulse.

There may be many reasons why such details were not included in Patient D's reports. Only one of the possibilities could be deliberate exaggeration. This entire argument is a most speculative one and does not disprove the event.

The emphasis should be placed not on how the details of the explanation may have differed on each occasion but rather what Patient D was trying to say on each of those occasions. Patient D was making a very self-conscious and painful announcement of having had her person violated by a physician in a position of trust.

Most important and convincing about Patient D's account is her spontaneous reaction. She was most upset, went to her mother, then went home and took a cleansing shower to dissolve the violation of her body. Then, she sat down and typed a letter to the OPMC. This is neither casual nor contrived behavior. It is not difficult to understand why such a letter would not go into searing detail when prepared within hours of the event while the sense of helplessness, humiliation and outrage must still be boiling within.

Unfortunately, the evidence did not include an explanation of why the first investigation (in 1995) did not press the victim for details and why her complaint was not then taken more seriously by the authorities.

The testimony of Ms. Anderson was rejected because of her obvious interest in the well-being of the Respondent after working closely with him for several years and describing her bias in favor of Respondent by saying that "he did nothing wrong" and "I am here to defend him, Okay?" (T. 2/24 p. 73). Her recollection of one particular examination among many thousands was a little too clear.

It does seem unusual that members of Patient D's family would continue to seek treatment from the Respondent after Patient D's complaint. However, Patient D did not remember what, if anything, she may have told her grandmother about the incident. There is no evidence that the other female family members who may have seen Respondent knew anything at all about the incident.

CONCLUSIONS AS TO PATIENT D

Respondent's care and treatment of Patient D failed to meet acceptable standards of medical care, in that:

1. Respondent failed to perform an adequate breast examination.
2. Respondent touched Patient D's breasts in a manner not medically justified.
3. Respondent touched Patient D's vagina and pubic area in a manner not medically justified.

The touching of Patient D's breasts and genitalia was not medically justified. The credible description provided by Patient D could not have been mistaken for a valid breast exam or search for a femoral pulse. Absent a more credible explanation from the Respondent than his denial, this conduct can only be motivated by a lascivious intent for sexual gratification. Thus, the charges of moral unfitness and patient abuse must be sustained. As with Patient C, Respondent's failure to perform an adequate breast exam where the need for same was indicated constitutes negligence. Respondent was not incompetent in the professional services rendered to Patient D.

FINDINGS OF FACT PATIENT E

18. From November 6, 1995 through June 20, 1997, Respondent provided medical care to Patient E at his medical office, 21 Porter Street, Jamestown, New York (Ex. 7).

19. Respondent failed to adequately document and/or obtain a complete medical history for Patient E (2/1 T., at 33-35). Over the nineteen months of treatment Respondent had ample time to develop a complete history. Respondent's failure to obtain a complete medical history of Patient E fell below generally accepted standards of medical practice (2/1 T., at 35).

20. Respondent failed to adequately document and/or conduct an adequate physical examination of Patient E (2/1 T., at 36-39). There were sufficient number of patient visits to establish a complete database. Respondent's failure to conduct a complete physical fell below generally accepted standards of medical practice. (2/1 T., at 36-37). Respondent did not document in the patient's records that Patient E refused to undergo a complete physical.

21. Respondent did not maintain a record that accurately reflected the evaluation and treatment of Patient E. According to Respondent, Patient E declined submitting to a physical examination (2/25 T., at 101), yet he did not record that pertinent information in the patient's chart. Respondent testified that he requested Patient E submit to a complete physical on June 6, 1996, yet there is no documentation in the patient's chart (2/25 T., at 102-103) (Ex. 7, at 18) recording such recommendation nor her refusal. Respondent testified that Patient E was asked for a physical several times and did not agree to submit to one (2/25 T., at 103).

22. Respondent failed to obtain Patient E's prior medical records from her former treating physicians (2/1 T., at 39-40). Those records could have obtained information regarding concurrent medications or adverse drug interactions or given more timely information to the treating physician regarding prior testing. Additionally, you would not

duplicate tests or interventions (2/1 T., at 40). The failure to obtain Patient E's prior medical records fell below generally accepted standards of medical practice (2/1 T., at 39-40).

23. Respondent failed to determine whether Patient E was receiving concurrent medication from other physicians (2/1 T., at 39-40). The failure to obtain Patient E's prior medical records, which would contain information regarding medications, fell below generally accepted standards of medical practice (2/1 T., at 39-40).

DISCUSSION AS TO PATIENT E

Despite the Respondent's myriad excuses and explanations, the alleged ameliorating circumstances and the fact that Patient E lied and cajoled and was often out of control, the Respondent failed to discharge his duties as a physician to this troubled patient. When he found this task impossible and terminated her as a patient it was far too late. Proper attention to her medical needs might well have avoided the compounding problems. Physicians would sympathize with the Respondent in these dire straits because most have suffered through problem patients. Most physicians would also pay very close attention to these patients because difficult medical and behavioral problems can lead to negative outcomes both for the patient, the public and the treating physician. The Respondent failed to maintain the standard of care in the management of Patient E.

The alleged sexual abuse of Patient E is not nearly so clear. On the one hand the fact that Patient E was promiscuous tends to bolster the likelihood that she continued to submit to the alleged repeated incidents of abuse as opposed to the suggestion that the conduct impugned her credibility. On the other hand the apparent reason for the bizarre behavior which she consistently exhibited (to some extent even on the witness stand) was

obviously her disturbed psychological state. After hearing all the testimony and reading the argument of counsel, reasonable people could characterize the entire scenario as a "train wreck"! Use of the vernacular is the only adequate way to describe what transpired here.

Because of Patient E's consistent bizarre behavior throughout, it was impossible to adequately assess her credibility. Put another way, there was insufficient evidence to establish her as a credible witness.

Furthermore, there were inconsistencies in her testimony and her charge that she was routinely fondled on EVERY office visit was not plausible and void of sufficient specifics to make it believable.

Therefore, the State failed to carry its burden of proof that Patient E was sexually abused.

CONCLUSION AS TO PATIENT E

There was insufficient evidence to establish moral unfitness and willful patient abuse. The fact that Respondent failed to:

1. Obtain a complete medical history,
2. adequately document or conduct a physical exam.
3. determine whether concurrent medication was being given; constitute negligence on more than one occasion.

The charge regarding failure to suggest a psychiatric consultation and failure to conduct a breast exam were not established by a preponderance.

Respondent failed to maintain a proper medical record.

There was no evidence of professional incompetence. Respondent's skill and knowledge were not impugned.

RESPONDENT

The Respondent's lawyers presented a vigorous and talented defense. Yet, that defense was based primarily on emphasizing circumstances which served to create doubt about credibility of the State's witnesses. This type of defense was unsuccessful except in the case of Patient E. As one element of his defense the Respondent's testimony was professional, his demeanor was credible but his general denials were less likely truthful than the testimony of the complaining patients. He was trying to say that those patients misunderstood or exaggerated what was happening and that the medical treatment, including charting, was done (or not) as he had learned in his training. The issue of credibility was resolved against him in every instance on the basis that a "preponderance" equal a 51% probability. It was concluded that it was more likely than not (51% likely) that each of the patients were being truthful. This determination was arrived at after viewing the witnesses testify, digesting and discussing the testimony, weighing the circumstances surrounding the incident and considering the arguments of the defense against the credibility of each witness. One of the more compelling circumstances was the fact that five patients came forward, each with a somewhat similar experience. The improbability that five unconnected informants would be able to conspire to invent the whole scenario is obvious.

The one patient whose testimony was doubted (Patient E) does not necessarily mean that the Respondent was more credible. Rather, it means that the State did not carry its burden of proof that the events happened the way in which Patient E described them.

It was observed that the Respondent did not appear the slightest bit contrite for the pain and suffering of his assaulted victims nor did he seem to understand that he was the one with the problem. Perhaps this was done strategically as being consistent with the defense which he presented. One would hardly be contrite if he didn't do it. However, sensitivity seemed to be lacking just as it was lacking in the incidents with three nurses and at least four patients. This phenomenon did not help to establish the credibility of the Respondent.

VOTE OF THE HEARING COMMITTEE
(All votes are unanimous unless otherwise indicated)

FIRST THROUGHT TENTH SPECIFICATIONS
(MORAL UNFITNESS)

1. NOT SUSTAINED
2. NOT SUSTAINED
3. NOT SUSTAINED
4. SUSTAINED
5. NOT SUSTAINED
6. SUSTAINED
7. SUSTAINED
8. NOT SUSTAINED
9. NOT SUSTAINED
10. NOT SUSTAINED

ELEVENTH THROUGH SIXTEENTH SPECIFICATIONS
(WILLFULLY HARASSING OR ABUSING A PATIENT)

11. SUSTAINED

12. SUSTAINED

13. SUSTAINED

14. NOT SUSTAINED

15. NOT SUSTAINED

16. NOT SUSTAINED

SEVENTEENTH SPECIFICATION
(NEGLIGENCE ON MORE THAN ONE OCCASION)

Paragraph E and E 3 – SUSTAINED

Paragraph F and F2 – SUSTAINED

Paragraph G and G1 – SUSTAINED

Paragraph G and G2 – SUSTAINED

Paragraph G and G4 – SUSTAINED

Paragraph G and G6 – NOT SUSTAINED

Paragraph G and G7 – NOT SUSTAINED

EIGHTEENTH SPECIFICATION
(FRAUDULENT PRACTICE)

Paragraph E and E2 – NOT SUSTAINED

NINETEENTH THROUGH TWENTIETH SPECIFICATION
(INADEQUATE RECORD KEEPING)

19. SUSTAINED

20. SUSTAINED

TWENTY-FIRST SPECIFICATION
(INCOMPETENCE ON MORE THAN ONE OCCASION)

Paragraph E and E3 – NOT SUSTAINED

Paragraph F and F3 – NOT SUSTAINED

Paragraph G and G1 – NOT SUSTAINED

Paragraph G and G2 – NOT SUSTAINED

Paragraph G and G4 – NOT SUSTAINED

Paragraph G and G5 – NOT SUSTAINED

Paragraph G and G6 – NOT SUSTAINED

Paragraph G and G7 – NOT SUSTAINED

PENALTY

Evidence of consistently repeated incidents of the same type by the Respondent form a pattern. The existence of such a pattern would not in itself be sufficient evidence to prove any one incident. However, a pattern does add an element of plausibility to each succeeding incident so that the existence of each succeeding incident could not be discarded out of hand. In this case the evidence of a pattern played a miniscule role because the credibility of the victim witnesses was quite evident (or not). Rather, the evidence of a pattern of behavior is more relevant to the penalty phase of the proceeding.

There are two aspects to the penalty phase. First, the Respondent must be punished for heinous and immoral patient abuse. The present mores of our society and the professional standards of physicians decree "zero tolerance" for physicians who prey upon their patients for their own sexual gratification. The obvious penalty would be the harshest: revocation! There may be cases where the facts and circumstances might suggest a lesser penalty especially where the defense shows a treatable mental defect.

However, even in such a case the second aspect of the penalty must be dealt with: continued protection of the public.

The aforementioned pattern is evidence that the Respondent has a deep seated psychological problem which manifests itself in the lack of impulse control. Although there was no testimony on the issue, it is generally known (especially by experienced Board members) that the science of diagnosis and rehabilitation of physicians with such a problem is not very well advanced.

Therefore, even if there were circumstances which would argue for leniency of punishment, there is no mechanism available which would guarantee protection of the public in a zero tolerance society that the physician would not repeat the objectionable behavior if he were allowed to remain in practice with mandatory safeguards. The use of chaperones or even prohibiting the treatment of female patients are not absolutely fool-proof methods.

In this case the Respondent offered no evidence on the issue of leniency nor argument on rehabilitation. No ameliorating circumstances were proved. The Hearing Committee has sustained one charge of moral unfitness and one charge of willful abuse against Patient C. The Committee has sustained two charges of willful abuse against Patient D. It is not necessary to discuss the possible penalty for the less serious charges

because the ultimate penalty must be paid for Specifications 4, 6, 7, 11, 12 and 13. Suffice it to say that the other specifications surely add weight to the determination of the penalty but the penalty would be the same whether or not the less serious specifications were sustained.

After a review of the entire record of this case the Hearing Committee determines that the Respondent's license to practice medicine should be **REVOKED**.

ORDER

It is hereby ORDERED that Respondent's license to practice medicine in New York State is hereby **REVOKED**.

This ORDER shall be effective upon service on the Respondent or the Respondent's attorney by personal service or certified or registered mail.

DATED: 5/30/, **2000**
Niagara Falls, New York

STEVEN GRABIEC , M.D., Chairperson

JOHN CHOATE, M.D.
TRENA DEFRANCO

APPENDIX I

STATE OF NEW YORK : DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

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IN THE MATTER	:	STATEMENT
OF	:	OF
DAN G. ALEXANDER, M.D.	:	CHARGES

----------X

DAN G. ALEXANDER, M.D., the Respondent, was authorized to practice medicine in New York State on September 5, 1991 by the issuance of license number 186803 from the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period December 1, 1997, through November 30, 1999, with a registration address of 21 Porter Avenue, Jamestown, NY 14701.

FACTUAL ALLEGATIONS

A. On or about March, 1992, while at the Women's Christian Association (WCA) Hospital, Jamestown, New York, Respondent made sexual comments to several female staff members, including, but not limited to the following:

1. Nurse A (a list of health professionals and patients is attached hereto as Exhibit 1)and Respondent were working together to admit a female patient. In the patient's presence, in response to Nurse A's question, "what are you up to?", Respondent replied, "About eight (8) inches", or words to that effect.
2. Nurse B, a lactating mother, and Respondent were working together when she realized she needed to go to

the maternity ward and use the breast pump. Respondent told her he would pump her breasts by using his hands, or words to that effect.

3. Respondent announced in the nurses station that he was "stiff and sore because he had not been laid in three or four weeks", or words to that effect.

B. In or about January 1993, while at WCA Hospital, Respondent engaged in conduct towards Nurse C. Said conduct includes, but is not limited to: complaining about her giving him a hard time regarding a certain medication when in fact she had not; stroking her left ring finger and asking "what happened here" or words to that effect; giving her a note stating "you are very attractive" or words to that effect; frequently sitting down next to her in the nurse's station; asking her personal questions.

C. On or about May 24, 1993, during an examination of Patient A Respondent made remarks to her regarding female breasts, including, but not limited to, informing Patient A that the reason he married his wife was because she has large breasts, or words to that effect.

D. On or about September 25, 1995 at Respondent's office, Respondent made comments to Patient B during his examination of her, including, but not limited to, commenting that she had a "sexy bra on" and "don't worry, things won't get kinky today, I'm tired", or words to that effect.

E. On or about December 15, 1993, at the Resource Center, Jamestown, New York, Respondent conducted a pre-employment health screen on Patient C. Respondent's care and treatment of Patient C failed to meet acceptable standards of medical care, in that:

1. Respondent failed to maintain a record which accurately reflected the evaluation and/or treatment of Patient C. Respondent failed to indicate that he had performed a breast examination.
2. Respondent represented in the record that he had conducted parts of the examination which, in fact, he had not performed, including, but not limited to failing to examine Patient C's skin, mouth, head, eyes, ears, nose and throat and check for a hernia.
3. Respondent failed to perform an adequate breast examination.
4. Respondent touched Patient C's breasts in a manner not medically justified.
5. Respondent made a comment to Patient C, that, "If you were a man I would be squeezing your balls", or words to that effect.

F. On or about October 31, 1995, at Respondent's medical office in Jamestown, New York, Respondent conducted a pre-operative physical on Patient D. Respondent's care and treatment of patient D failed to meet acceptable standards of medical care, in that:

1. Respondent failed to perform an adequate breast examination.

2. Respondent touched Patient D's breasts in a manner not medically justified.

3. Respondent touched Patient D's vagina and pubic area in a manner not medically justified.

G. From on or about November 6, 1995 through and including June 20, 1997, Respondent provided medical care to Patient E at his medical office in Jamestown, New York. Respondent's care and treatment of patient E failed to meet acceptable standards of medical care, in that:

1. Respondent failed to adequately document and/or obtain a complete medical history for Patient E.
2. Respondent failed to adequately document and/or conduct an adequate physical examination of Patient E.
3. Respondent failed to maintain a record which accurately reflected the evaluation and treatment of Patient E.
4. Respondent failed to obtain Patient E's prior medical records from her former treating physicians.
5. Respondent failed to determine whether Patient E was receiving concurrent medication from other physicians.
6. Respondent failed to suggest a psychiatric or psychological evaluation in a timely manner.
7. Respondent, in his medical office on or about May 30, 1997, failed to conduct a breast examination despite patient E's complaint of sore breasts.
8. Respondent, during the summer of 1996, in his office, fondled Patient E's breasts and asked her to "show me

your titties", or words to that effect.

9. Respondent fondled Patient E's breasts on several occasions after the initial incident mentioned in paragraph 8.

10. Respondent, at various times from approximately July 1996 through June 1997, made sexual comments to Patient E both at his office and over the telephone.

SPECIFICATIONS OF MISCONDUCT

FIRST THROUGH TENTH SPECIFICATIONS

MORAL UNFITNESS

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

1. The facts in paragraphs A and A1, A and A2 and A and A3.
2. The facts in paragraph B.
3. The facts in paragraphs C and D.
4. The facts in paragraphs E and E4.
5. The facts in paragraphs E and E5.
6. The facts in paragraphs F and F2.
7. The facts in paragraphs F and F3.
8. The facts in paragraphs G and G8.
9. The facts in paragraphs G and G9.
10. The facts in paragraphs G and G10.

ELEVENTH THROUGH SIXTEENTH SPECIFICATIONS

WILLFULLY HARASSING OR ABUSING A PATIENT

Respondent is charged with committing professional misconduct as defined in N.Y. Education Law §6530(31) by willfully harassing, abusing, or intimidating a patient either physically or verbally, in that Petitioner charges:

11. The facts in paragraphs E and E4.
12. The facts in paragraphs F and F2.
13. The facts in paragraphs F and F3.
14. The facts in paragraphs G and G8.
15. The facts in paragraphs G and G9.
16. The facts in paragraphs G and G10.

SEVENTEENTH SPECIFICATION

NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Education Law §6530(3) by practicing the profession of medicine with negligence on more than one occasion, in that Petitioner charges:

17. The facts in paragraphs E and E3, F and F1, G and G1, G and G2, G and G4, G and G5, G and G6, and G and G7.

EIGHTEENTH SPECIFICATION

FRAUDULENT PRACTICE

Respondent is charged with committing professional misconduct as defined in N.Y. Education Law §6530(2) by practicing the profession of medicine fraudulently, in that

Petitioner charges:

18. The facts in paragraphs E and E2.

NINETEENTH THROUGH TWENTIETH SPECIFICATIONS

INADEQUATE RECORD KEEPING

Respondent is charged with committing professional misconduct as defined in N.Y. Education Law §6530(32) by failing to maintain record for each patient which accurately reflects the evaluation and treatment of the patient, in that Petitioner charges:

19. The facts in paragraphs E and E1.

20. The facts in paragraphs G and G3.

TWENTY-FIRST SPECIFICATION

INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Education Law §6530(5) by practicing the profession of medicine with incompetence on more than one occasion, in that Petitioner charges:

22. The facts in paragraphs E and E3, F and F1, G and G1, G and G2, G and G4, G and G5, G and G6, and G and G7.

DATED: November 17, 1999
Albany, New York

Peter D. Van Buren

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct

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

IN THE MATTER
OF
DAN G. ALEXANDER, M.D.,
Respondent

RULING

Five requests for instruction have been requested in this proceeding. Each such request was submitted in writing with a written response from opposing counsel, all included in the original decree The issue was to be decided after trial and before the date of deliberations. The ruling is as follows:

1. Regarding the expert testimony of Dr. Sorrentino, the Panel will be instructed to disregard his cross-examination by the State based on Feaster v. New York City Transit Authority, 172AD2d 284 (1st Dept. 1991).

2. The standard instruction regarding expert witnesses shall be given for the reasons proposed by the Respondent and the cases cited therein. (attached Exhibit A)

3. The General Instructions regarding Criminal Disposition shall be given as argued by the Respondent without the "tag on" as suggested by the State. (Exhibit B, herein)

4. There will be no instruction regarding "interested witnesses". In my experience, panels are made up of persons who are generally more sophisticated than petit jurors. Questions of "interest" are discussed by panel members routinely in their assessment of credibility during the deliberations.

5. The instruction regarding "moral unfitness" was given to the Panel as Exhibit C, herein.

6. Exhibit ALJ-1 through ALJ-6 were not viewed by the Panel.

The letters from Counsel containing arguments for the proposed instructions for each party are made a part of the formal record of this case.

Timothy J. Trost

Timothy J. Trost, ALJ

Dated: April 27, 2000

01_090 General Instruction--Expert Witness

You will recall that the witness(es) [state name(s)] testified concerning (his, her, their) qualifications as [an] expert(s) in the field(s) of [state profession(s)] and gave (his, her, their) opinion concerning the issues in this case. When a case involves a matter of science or art or requires special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state (his, her) opinion for the information of the court and jury. The opinion(s) stated by (the, each) expert who testified before you (was, were) based on particular facts, as the expert obtained knowledge of them and testified to them before you, or as the attorney(s) who questioned the expert asked the expert to assume. You may reject the expert's opinion if you find the facts to be different from those which formed the basis for the opinion. You may also reject the opinion if, after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion; it is entitled to such weight as you find the expert's qualifications in the field warrant and must be considered by you, but is not controlling upon your judgment.

EXHIBIT A

General Instruction--Criminal Disposition

You will recall that Detective John Conti testified regarding the investigation of Patient E's allegations of sexual abuse by the respondent. You are reminded that the disposition of these allegations by the Jamestown Police Department and the Chautauqua County District Attorney is not dispositive of whether professional misconduct occurred. You may consider the disposition of these allegations as one of the factors in reaching your decision.

EXHIBIT B

To sustain an allegation of moral unfitness, the State must show Respondent committed acts which "evidence moral unfitness." There is a distinction between a finding that an act "evidences moral unfitness" and a finding that a particular person is, in fact, morally unfit. In a proceeding before the State Board for Professional Medical Conduct, the Committee is asked to decide if certain alleged conduct is suggestive of, or would tend to prove, moral unfitness. They are not called upon to make an overall judgement regarding a Respondent's moral character. It is noteworthy that an otherwise moral individual can commit an act "evidencing moral unfitness" due to a lapse in judgement or other temporary aberration.

The standard for moral unfitness in the practice of medicine is twofold: First, there may be a finding that the accused has violated the public trust which is bestowed upon one by virtue of his licensure as a physician. Patients are asked to place themselves in potentially compromising positions with physicians, such as when they disrobe for examination or treatment. Hence, it is expected that a physician will not violate the trust the public has bestowed upon him by virtue of his professional status. This leads to the second aspect of the standard: Moral unfitness can be seen as a violation of the moral standards of the medical community which the Committee, as delegated members of that community, represent.

EXHIBIT C

Proposed Instruction

You have heard testimony from Dr. Sandy Sorrentino, Jr. regarding his testimony in a different proceeding regarding a different physician. You are directed to disregard this aspect of Dr. Sorrentino's testimony and you shall not consider it evaluating the weight you give to Dr. Sorrentino's opinions in the present matter.

DR SORRENTINO