



STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.
Commissioner

November 8, 2007

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

John William Smith, M.D.
Redacted Address

Wilfred T. Friedman, Esq.
The Bar Building
36 West 44th Street – Suite 1205
New York, New York 10036

Jean Bresler, Esq.
NYS Department of Health
145 Huguenot Street
New Rochelle, New York 10801

Roy Nemerson, Esq.
NYS Department of Health
90 Church Street – 4th Floor
New York, New York 10007-2919

RE: In the Matter of John William Smith, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 07-248) 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 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), (McKinney Supp. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "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,

Redacted Signature
James F. Horan, Acting Director
Bureau of Adjudication

JFH:cah

Enclosure

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

IN THE MATTER
OF
JOHN WILLIAM SMITH, M.D.

DETERMINATION
AND
ORDER
BPMC 07 - 248

COPY

Sheldon H. Putterman, M.D. (Chairperson), Alan Freedman, M.D., and Kenneth Kowald, J.D.¹, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to §230(10) of the Public Health Law. Marc P. Zylberberg, Esq., Administrative Law Judge, ("ALJ") served as the Administrative Officer.

The Department of Health appeared by Jean Bresler, Esq., Associate Counsel. Respondent, John William Smith, M.D. appeared personally and was represented by Wilfred T. Friedman, Esq.

Evidence was received and examined, including witnesses who were sworn or affirmed. Transcripts of the proceeding were made. After consideration of the record, the Hearing Committee issues this Determination and Order.

¹ Laurence Braunstein, D.P.M. was originally appointed to serve on the Hearing Committee and was present during 3 of the 4 Hearing days. After the last Hearing date, but before the Deliberations, Dr. Braunstein died. Mr. Kowald was appointed to serve as the third member of the Hearing Committee in accordance with Public Health Law §230.

PROCEDURAL HISTORY

Date of Notice of Hearing and Statement of Charges:	March 20, 2007
Date of Answer to Charges:	April 3, 2007
Date of Amended Statement of Charges:	submitted August 17, 2007
Pre-Hearing Conferences Held:	April 2, 2007 April 12, 2007
Hearings Held: - (First Hearing day):	April 12, 2007 May 10, 2007 May 21, 2007 July 19, 2007
Intra-Hearing Conferences Held	April 12, 2007 May 9, 2007 May 10, 2007 May 21, 2007 July 19, 2007
Location of Hearings:	Offices of New York State Department of Health 90 Church St., 4 th Floor New York, NY 10007
Witnesses called by the Petitioner, Department of Health:	Philip Carl Bonanno, M.D. Patient B ²
Witnesses called (in the order they testified) by the Respondent, John William Smith, M.D.	John William Smith, M.D. Diayo Strawder Anise Guerrier Azra Bano Rezwi, M.D. Olivia Valerio Kimlyn Long, M.D. Maribel Enriquez, R.N. Gertrude George, R.N.

² Patient A and Patient B are identified by letters to maintain patient confidentiality.

Department's Proposed Findings of Fact, and
Conclusions of Law and Penalty Recommendations:

Received September 11, 2007

Respondent's Proposed Findings of Fact and
Conclusions of Law with Recommendations and
Argument Demonstrating that the Charges of Professional
Misconduct should be Dismissed:

Received September 11, 2007

Deliberations Held: (last day of Hearing)

Tuesday, October 4, 2007

STATEMENT OF CASE

The State Board for Professional Medical Conduct is a duly authorized professional disciplinary agency of the State of New York (§230 *et seq.* of the Public Health Law of the State of New York ["P.H.L."]). This case was brought by the New York State Department of Health, Bureau of Professional Medical Conduct ("Petitioner" or "Department") pursuant to §230 of the P.H.L. John William Smith, M.D. ("Respondent") is charged with six (6) specifications of professional misconduct as set forth in §6530 of the Education Law of the State of New York ("Education Law").

Respondent is charged with professional misconduct by reason of: (1) engaging in conduct in the practice of the profession of medicine that evidences moral unfitness to practice³; (2) willfully harassing, abusing, or intimidating a patient either physically or verbally⁴; and (3) practicing the profession of medicine fraudulently⁵.

³ Education Law §6530(20) - (First and Second Specifications in the Amended Statement of Charges [Department's Exhibit # 12]).

⁴ Education Law §6530(31) - (Third and Fourth Specifications in the Amended Statement of Charges [Department's Exhibit # 12]).

⁵ Education Law §6530(2) - (Fifth and Sixth Specifications in the Amended Statement of Charges [Department's Exhibit # 12]).

These Charges and Specifications of professional misconduct result from Respondent's alleged acts and conduct with two (2) patients (Patients A and B).

Respondent admits to examining Patient A but denies all allegations of any inappropriate conduct. Respondent admits being in the hospital room of Patient B but denies offering any inappropriate examination and denies inappropriate conduct. Respondent denies all of the Specifications of misconduct contained in the original Statement of Charges and the Amended Statement of Charges. A copy of the Amended Statement of Charges is attached to this Determination and Order as Appendix 1. A copy of Respondent's Answer is attached to this Determination and Order as Appendix 2.

FINDINGS OF FACT

The following Findings of Fact ("Findings") were made after a review of the entire record available to the Hearing Committee in this matter. These facts represent documentary evidence and testimony found persuasive by the Hearing Committee in arriving at a particular finding. Where there was conflicting evidence the Hearing Committee considered all of the evidence presented and rejected what was not relevant, believable or credible in favor of the cited evidence. The Department, which has the burden of proof, was required to prove its case by a preponderance of the evidence. The Hearing Committee unanimously agreed on all Findings of Fact. All Findings of Fact made by the Hearing Committee were established by at least a preponderance of the evidence.

1. Respondent was licensed to practice medicine in New York State on February 8, 2001 by the issuance of license number 220343 by the New York State Education Department (Department's Exhibits # 2 and # 2-A); (Respondent's Exhibit # B)⁶.

2. The State Board for Professional Medical Conduct has obtained personal jurisdiction over Respondent and has jurisdiction over Respondent's license and this disciplinary proceeding (determination made by the ALJ; Respondent had no objection regarding service effected on him); (P.H.L. §230[10][d]); [P.H.T-9-10]⁷.

Patient A

3. Patient A came under the care and treatment of Respondent from November 9, 2004 through February 17, 2005 at Respondent's office located at St. Vincent's Midtown Hospital, 419 West 51st Street, New York, N.Y. 10019 (Department's Exhibit # 3).

4. Respondent treated Patient A on four occasions for a right upper lip laceration and first degree repair. On each of the four occasions Respondent made entries in Patient A's medical record of the condition of Patient A's lip and his medical management of her scar (Department's Exhibit # 3).

5. During the office visit of February 17, 2005, Respondent touched Patient A's breast, felt for sensation in Patient A's nipples, hugged Patient A, and grabbed Patient A's butt (Department's Exhibits # 4 and # 4-A); (Respondent's Exhibits # G, # H, and # I).

⁶ Refers to exhibits in evidence submitted by the New York State Department of Health (Department's Exhibit #) or by Dr. John William Smith (Respondent's Exhibit #).

⁷ Numbers in brackets refer to Hearing transcript page numbers [T-], or to Pre-Hearing transcript page numbers [P.H.T-], or to Intra-Hearing transcript page numbers [I.H.T-]. The Hearing Committee did not review the Pre-Hearing transcripts or the Intra-Hearing transcripts but, when necessary, was advised of the relevant legal decisions or rulings made by the ALJ.

6. Patients A's medical record for the office visit of February 17, 2005 discusses scar management, states that the patient expressed interest in a tummy tuck, and that she would call to discuss follow up and future visit (Department's Exhibit # 3); (Respondent's Exhibit # I).

7. Patients A's medical record for the office visit of February 17, 2005 does not mention breast augmentation nor does it indicate any physical examination other than the lip and scar (Department's Exhibit # 3); (Respondent's Exhibit # I).

Conclusion

8. Under the guise of performing a legitimate medical examination, Respondent touched Patient A's breasts and rubbed Patient A's nipples for no legitimate medical purpose (Department's Exhibits # 3, # 4, # 4-A); (Respondent's Exhibits # G, # H, and # I).

Patient B

9. Patient B came under the care and treatment of Respondent on February 18, 2002 at the Emergency Room of St. Vincent's Midtown Hospital. Respondent admitted Patient B to the hospital, from the Emergency Room, for a cholecystectomy (surgical removal of her gall bladder) to be performed the next day by another physician with whom Respondent practiced (Department's Exhibit # 6).

10. While examining Patient B in the Emergency Room of St. Vincent's Midtown Hospital Respondent asked her what medications she was on. Patient B told him that she was on Prozac, whereupon Respondent told Patient B:

... you know, I hate to say it -- if you keep taking Prozac, you won't be "horny" anymore and your husband is going to leave you [T-137]

11. During the evening of February 18, 2002, while Patient B was confined to her bed in her hospital room, Respondent entered Patient B's hospital room, sat on her bed and told her that he had to see her nipples [T-142].

12. Patient B refused Respondent's request to see her nipples and shielded herself [T-142].

Conclusion

13. Respondent's comments to Patient B and request to see Patient B's nipples had no legitimate medical purpose [T-135-166]; (Respondent's Exhibit # J); (The Hearing Committee considered and rejected the testimony of Respondent on this issue, specifically at, T- 286-304, and 395-414).

CONCLUSIONS OF LAW

The Hearing Committee makes the conclusion, by unanimous vote, that all of the Factual Allegations contained in the Amended Statement of Charges are **SUSTAINED**.

Factual Allegations A., and A.1. of the Amended Statement of Charges are Sustained.

Factual Allegations B., B.1., and B.2. of the Amended Statement of Charges are Sustained.

Based on the above, the complete Findings of Fact and the discussion below, the Hearing Committee, by a unanimous vote, concludes:

1. The two (2) Specifications of MORAL UNFITNESS contained in the Amended Statement of Charges are **SUSTAINED**.

2. The two (2) Specifications of WILLFUL PATIENT ABUSE contained in the Amended Statement of Charges are **SUSTAINED**.

3. The two (2) Specifications of FRAUDULENT PRACTICE contained in the Amended Statement of Charges are **SUSTAINED**.

The rationale for the Hearing Committee's conclusions is set forth below.

DISCUSSION

Respondent is charged with six (6) specifications alleging professional misconduct within the meaning of §6530 of the Education Law. §6530 of the Education Law sets forth a number and variety of forms or types of conduct which constitute professional misconduct. However §6530 of the Education Law does not provide definitions or explanations of some of the misconduct charged in this matter.

The ALJ provided to the Hearing Committee certain verbal instructions and verbal definitions of medical misconduct as alleged in this proceeding. These verbal instructions and definitions were obtained from: (1) a memoranda entitled Definitions of Professional Misconduct under the New York Education Law⁸ (ALJ's Exhibit # 2); and (2) a one page document encompassing an interpretation and understanding of moral unfitness as used by previous Hearing Committees (ALJ's Exhibit # 3).

The Hearing Committee also carefully reviewed the Exhibits admitted into evidence, the transcripts of the four (4) Hearing days, the Department's Proposed Findings of Fact, and Conclusions of Law and Penalty Recommendations as well as the Respondent's Proposed Findings of Fact, and Conclusions of Law with Recommendations and Argument Demonstrating that the Charges of Professional Misconduct should be Dismissed.

During the course of its deliberations on these charges, the Hearing Committee considered the following instructions from the ALJ:

⁸ Copies of ALJ Exhibits # 2 and # 3 were provided to both parties at the Pre-Hearing conference [P.H.T-6-8]; [T-4].

1. The Committee's determination is limited to the Charges set forth in the Amended Statement of Charges.

Evidence

2. The burden of proof in this proceeding rests on the Department. The Department must establish by a fair preponderance of the credible evidence that the allegations made are true. Credible evidence means the testimony or exhibits found worthy to be believed. Preponderance of the evidence means that the allegation presented is more likely than not to have occurred (more likely true than not true). The evidence that supports the claim must appeal to the Hearing Committee as more nearly representing what took place than the evidence *opposed* to its claim. The Specifications of misconduct must be supported by the sustained or believed allegations by a preponderance of the evidence. The Hearing Committee understands that the Department must establish each and every element of the Charges by a preponderance of the evidence.

Reasonable Inferences

3. Reasonable inferences are deductions or conclusions that reason, common sense and experience lead one to draw from the facts established by the evidence of the case. An inference must be a reasonable deduction from the facts proved. A reasonable inference cannot be a mere guess, speculation or conjecture.

Intent

4. For those charges that require a finding of intent, the Committee must determine the state of mind with which the act was done. If a person acts voluntarily with a desire to bring about a result, he is said to have intended that result. Further, although he has no desire to bring about the result, if he does the act knowing, with substantial certainty, that the result will follow, he is also said to have intended that result.

Witness Testimony

5. The Committee must determine the credibility of witnesses in weighing their testimony. When the evidence is conflicting and presents a clear-cut issue as to the veracity of the opposing witnesses, it is for the Hearing Committee to pass on the credibility of the witnesses and to base its inference on what it accepts as the truth. Where a witness's credibility is at issue, the Committee may properly credit one portion of the witness' testimony and, at the same time, reject another. The Hearing Committee understands that as the trier of fact we may accept so much of a witness' testimony as is deemed true and disregard what we find and determine to be false. In the alternative, The Hearing Committee may determine that if the testimony of a witness on a material issue is willfully false and given with an intention to deceive then The Hearing Committee may disregard all of the witness' testimony.

Practicing the Profession Fraudulently

6. Fraudulent practice of medicine is an intentional misrepresentation or concealment of a known fact in connection with the practice of medicine. An individual's knowledge that he is making a misrepresentation or concealing a known fact with the intention to mislead may properly be inferred from certain facts. In order to support the charge that medicine has been practiced fraudulently, the Department must prove by a preponderance of the evidence that (1) Dr. Smith made a false representation, whether by words, conduct, or concealment of that which should have been disclosed; (2) Dr. Smith knew that the representation was false; and (3) Dr. Smith intended to mislead through false representation. The Hearing Committee is the sole arbiter of whether fraud occurred and must base its determination on the credible facts and not on whether others believe that fraud did or did not occur.

There need not be either actual reliance on or actual injury caused by the misrepresentation to constitute the fraudulent practice of medicine. The focus is on the licensee's conduct in attempting to induce reliance, and not on whether the physician succeeds in causing reliance or whether any gain to the physician occurs to the detriment of the patient. There is no requirement that someone actually be misled, as long as the intent of the "misrepresentation or concealment of fact" is present. Fraud can also be established from evidence that a person made a statement or representation with reckless disregard as to its truth.

Moral Unfitness

7. To sustain a specification of moral unfitness, the Department must show that Respondent committed an act or acts which "evidences moral unfitness". The act or acts must be "conduct in the practice of the profession of medicine".

Moral unfitness in the practice of medicine constitutes either a violation of the public trust bestowed by virtue of the Doctor's licensure as a physician or a violation of the moral standards of the medical community.

The Hearing Committee followed ordinary English usage and vernacular for all other terms and allegations. The Hearing Committee was aware of its duty to keep an open mind regarding the allegations and testimony. With regard to the testimony presented, the Hearing Committee evaluated all the witnesses for possible bias or motive. The witnesses were also assessed according to their training, experience, credentials, demeanor, and credibility. The Hearing Committee considered whether the testimony presented by each witness was supported or contradicted by other independent objective evidence.

Credibility Determination

The Hearing Committee found the expert witness presented by the Department, Dr. Philip Carl Bonanno, provided credible information. Dr. Bonanno's testimony was subsequently supported by Respondent and by Respondent's expert, Dr. Azra B. Rezwi. In essence, all experts testified that the only applicable medical purpose for touching a patient's nipples is to determine sensation prior to breast surgery in order to make a record. Since loss of nipple sensation may be a complication of breast surgery, one should document whether the patient had sensation prior to surgery. Respondent did not record any findings regarding nipple sensation in the medical records of Patient A.

Patient B testified as to her experience with Respondent in 2002. The Hearing Committee found Patient B to be reserved, dignified, and very credible, with a behavior and demeanor consistent with her recall of the events of five years past. Patient B had nothing to gain by reporting the incident to her husband and then to the hospital. Patient B had nothing to gain by testifying about the incident 5 years later. There was no connection between Patient A and Patient B.

Respondent has the most at stake in this proceeding. Respondent presented as a very articulate and intelligent individual. Respondent was impeccably dressed, almost overdressed for the situation and that was commented on by a number of witnesses who testified on his behalf. Respondent is not Board Certified but has taken his written Board and passed but has chosen not to take the oral portion. When queried, Respondent's response to this simple question was convoluted and did not give the Hearing Committee a sense of believability.

Respondent appears well educated but has had various personal events during his education and training which were inadequately explained. Respondent's testimony and various explanations and excuses, although pronounced distinctly and carefully, seemed concocted and not believable.

The Hearing Committee found Respondent to be a manipulative and opportunistic person. Respondent presented a set of excuses to make his behavior less unacceptable; however, the Hearing Committee came away with the distinct impression that Respondent appears to be inclined to take advantage of an individual when the opportunity presents itself. Finally, the Hearing Committee found Respondent's testimony to be evasive at times and to lack over all credibility and forthrightness.

Patient A did not testify and therefore her reputation and credibility, although energetically attacked, was not at issue. The medical records that Respondent maintained for Patient A and Respondent's own words when discussing the events with Patient A refute Respondent's subsequent attempts to explain his inappropriate conduct towards Patient A. As to Patient B, the Hearing Committee found her explanation to be more believable and convincing than Respondent's. The explanations presented by Respondent regarding his interactions between Patient B in the Emergency Room and subsequently in the semi-private hospital room defy logic, common sense and the medical history and medical records of Patient B.

Respondent presented seven (7) witnesses who spoke on his behalf. All seemed to be verbally competent people and some found it hard to believe that Respondent had the capacity to have committed the inappropriate conduct that he was charged with. None of the seven individuals were present during the interactions between Respondent and the two patients. The Hearing Committee concludes that none of the witnesses presented credible evidence which either refuted the allegations regarding Patient A and Patient B or supported Respondent's explanations.

SUMMARY

Respondent is charged with committing professional misconduct under Education Law §6530(20) by engaging in conduct in the practice of the profession of medicine that evidences moral unfitness to practice.

The Hearing Committee finds and determines that under the guise of performing a legitimate medical examination on Patient A, Respondent touched Patient A's breasts and rubbed Patient A's nipples for no legitimate medical purpose. Respondent's conduct violated the public trust granted to him as a physician. The First Specification of Charges is sustained.

The Hearing Committee finds and determines that for no legitimate medical purpose, Respondent made inappropriate comments to Patient B and made an inappropriate request of Patient B. Respondent's conduct violated the public trust granted to him as a physician. The Second Specification of Charges is sustained.

Respondent is charged with committing professional misconduct under Education Law §6530(31) by willfully harassing, abusing, or intimidating a patient either physically or verbally.

Respondent's conduct towards Patient A was willful, intentional, improper and amounted to physical maltreatment. The Hearing Committee finds and determines that Respondent's conduct towards Patient A constituted willful physical patient abuse. The Third Specification of Charges is sustained.

Respondent's conduct towards Patient B was willful, intentional, improper and amounted to mental maltreatment. The Hearing Committee finds and determines that Respondent's conduct towards Patient B constituted willful patient abuse and intimidation. The Fourth Specification of Charges is sustained.

Respondent is charged with committing professional misconduct under Education Law §6530(2) by practicing the profession of medicine fraudulently.

Respondent touched Patient A's breasts and rubbed Patient A's nipples during an office visit for medical care. This was done for Respondent's own satisfaction and not for a legitimate medical reason. This conduct was a false representation by Respondent to Patient A that he was providing medical care to her. Respondent knew that his representation was false and he misled Patient A by trying to convince her that he was providing medical care by touching her breasts and rubbing her nipples. The Hearing Committee finds and determines that Respondent's conduct towards Patient A constituted the fraudulent practice of medicine. The Fifth Specification of Charges is sustained.

Respondent saw an opportunity and attempted to examine Patient B's breasts for his own satisfaction and not for a legitimate medical reason. Patient B did not need a medical breast examination and Respondent knew that she did not. Respondent attempted to mislead Patient B by trying to convince her that he was providing medical care. The Hearing Committee finds and determines that Respondent's conduct towards Patient B constituted the fraudulent practice of medicine. The Sixth Specification of Charges is sustained.

DETERMINATION AS TO PENALTY

After a full and complete review of all of the evidence presented and pursuant to the Findings of Fact, Conclusions of Law, Discussion, and Summary set forth above, the Hearing Committee unanimously determines that Respondent's license to practice medicine in New York State should be **SUSPENDED** until July 1, 2008.

Respondent should attend a program dealing with sexual behavior and a training course on the prevention of sexual harassment (VOTE 3 to 0). Respondent should be on five (5) years of

probation (VOTE 3 to 0) and a permanent limitation should be placed on Respondent's license which would require that a chaperone be present during all patient interactions, at all times (VOTE 2 to 1)⁹. During Respondent's probationary period the chaperone should report to the Department on a regular basis (at least quarterly) and immediately if there is any observation or report of inappropriate conduct by Respondent (see terms of probation annexed as Appendix 3) (VOTE 3 to 0).

This determination is reached after due and careful consideration of the full spectrum of penalties available pursuant to P.H.L. §230-a, including: (1) Censure and reprimand; (2) Suspension of the license, wholly or partially; (3) Limitations of the license; (4) Revocation of license; (5) Annulment of license or registration; (6) Limitations; (7) the imposition of monetary penalties; (8) a course of education or training; (9) performance of public service; and (10) probation.

Respondent appears to have a flaw in his character which we believe cannot be corrected or remedied by a censure or a reprimand, by performance of public service, or by medical retraining. The Hearing Committee believes that Respondent has psychological/sexual and denial issues which he needs to address. It is believed that the penalty imposed will help Respondent in the long run.

The Hearing Committee seriously considered revoking Respondent's license but believes that the length of suspension will jolt Respondent to amend his conduct. The Hearing Committee also believes that the sexual awareness, and sexual harassment training, together with the requirement for a chaperone and the term of probation will result in altering Respondent's behavior.

⁹ One of the Hearing Committee member was of the opinion that this limitation should be applicable to female patients only. The other two Hearing Committee members were concerned with Respondent's opportunistic tendencies and ability to approach a patient who is not really his patient and therefore believes that Respondent should be chaperoned for all patient interactions.

We found Respondent to be generally under control with momentary lapses in judgment. We believe that Respondent should have one last opportunity to practice medicine and we are comfortable that the protections we have chosen to impose are adequate to protect the public, while at the same time help Respondent deal with his behavior and still adequately punish Respondent for his conduct.

Taking all of the facts, details, circumstances, and particulars in this matter into consideration, the Hearing Committee determines that the above is the appropriate action under the circumstances. All other issues raised by both parties have been duly considered by the Hearing Committee and would not justify a change in the Findings, Conclusions or Determination contained herein.

By execution of this Determination and Order, all members of the Hearing Committee certify that they have read and considered the complete record of this proceeding.

ORDER

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

1. The **FIRST** through **SIXTH SPECIFICATIONS** contained in the Amended Statement of Charges (Department's Exhibit # 12) are **SUSTAINED**; and
2. All **Factual Allegations** contained in the Amended Statement of Charges (Department's Exhibit # 12) are **SUSTAINED**; and
3. Respondent's license to practice medicine in the State of New York is **SUSPENDED** until July 1, 2008; and

4. Respondent must attend a program dealing with sexual sensitivity and behavior and a training course on the prevention of sexual harassment; and

5. Respondent shall be on **PROBATION for FIVE (5) YEARS**, effective July 1, 2008, as indicated in the annexed terms of probation (Appendix 3) which terms are fully incorporated in this Determination and Order; and

6. Respondent shall have a **PERMANENT LIMITATION** on his license which requires that a chaperone be present during all patient interactions, at all times ; and

7. During Respondent's probationary period the chaperone will report to the Department of Health, Office of Professional Medical Conduct, on a regular basis (at least quarterly) and immediately if there is any observation or report of inappropriate conduct by Respondent (see Appendix 3); and

8. This Order shall be effective on personal service on the Respondent or seven (7) days after the date of mailing of a copy to Respondent by certified mail or as provided by P.H.L. §230(10)(h).

DATED: New York
November, 5 2007

Redacted Signature

SHELDON H. PUTTERMAN, M.D. (CHAIR)
ALAN FREEDMAN, M.D.
KENNETH KOWALD, J.D.¹⁰

¹⁰ Public Health Law §230(10)(f) "... In the event of a member's death or incapacity to serve on the committee, a member shall be appointed immediately by the chairperson of the board. The member shall affirm in writing that he or she has read and considered evidence and transcripts of the prior proceedings. ..." Mr. Kowald's has submitted the aforementioned affirmation. Dr. Freedman has also submitted an affirmation because he missed approximately five (5) minutes on May 21, 2007 and approximately one hour and fifteen (1:15) minutes on July 19, 2007.

John William Smith, M.D.

Redacted Address

1

Wilfred T. Friedman, Esq.

The Bar Building

36 West 44th Street - Suite 1205

New York, NY 10036

Jean Bresler, Esq.

Associate Counsel

New York State Department of Health

Bureau of Professional Medical Conduct

145 Huguenot Street

New Rochelle, NY 10801

Roy Nemerson, Esq.

New York State Department of Health

Bureau of Professional Medical Conduct

90 Church Street, 4th Floor

New York, NY 10007-2919

APPENDIX 1

IN THE MATTER
OF
JOHN WILLIAM SMITH, M.D.

AMENDED
STATEMENT
OF
CHARGES

JOHN WILLIAM SMITH, M.D., the Respondent, was authorized to practice medicine in New York State on or about February 8, 2001, by the issuance of license number 220343 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. Patient A came under the care and treatment of Respondent from on or about November 9, 2004, through on or about February 17, 2005, at his office located at St. Vincent's Midtown Hospital, 419 West 51st Street, New York, N.Y. 10019, (SVMH) for evaluation of a right upper lip laceration and first degree repair. During the office visit of on or about February 17, 2005, Respondent:
1. Under the guise of performing a legitimate medical examination, touched and/or squeezed both of Patient A's breasts and/or rubbed the nipples of her breasts for no legitimate medical purpose.
- B. Patient B came under the care and treatment of Respondent on or about February 18, 2002 at the emergency room of SVMH. Respondent admitted Patient B to the hospital, from the emergency room, for a cholecystectomy to be performed the next day by another physician with whom Respondent practiced. Between at or about 9:00pm and 11:00pm, on or about February

18, 2002, while Patient B was in her bed in her hospital room, Respondent entered Patient B's hospital room, and with no legitimate medical purpose or cause:

1. Sat down on Patient B's bed, in close proximity to her, and informed Patient B that he needed to exam her breasts and/or nipples.
2. Respondent, knowing that she was taking Prozac, stated to Patient B, "You're not going to get horny if you continue with this medication and your husband is going to leave you," or words to that effect.

SPECIFICATION OF CHARGES

FIRST AND SECOND SPECIFICATIONS

MORAL UNFITNESS

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

1. Paragraphs A, and A.1.
2. Paragraphs B, B.1 and or B.2.

THIRD AND FOURTH SPECIFICATIONS

WILLFUL PATIENT ABUSE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(31) by willfully harassing, abusing, or intimidating a patient either physically or verbally as alleged in the facts of the following:

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

FIFTH AND SIXTH SPECIFICATIONS
FRAUDULENT PRACTICE

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

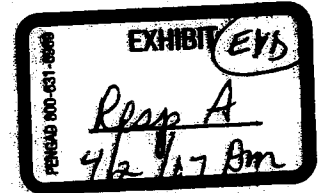
5. The facts of paragraphs A, and A.1
6. Paragraphs B, B.1 through B.2.

DATED: August 2007
New York, New York

Redacted Signature

Roy Nemerson
Deputy Counsel
Bureau of Professional
Medical Conduct

APPENDIX 2



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

IN THE MATTER
OF **ANSWER**
JOHN WILLIAM SMITH, MD.,
Respondent

Respondent, John William Smith, M.D., by his attorney, Wilfred T. Friedman, P.C., as and for his answer says:

1. Respondent admits that he examined Patient A at the place and on the date alleged, but that in addition to the treatment and advice by Respondent to Patient A with regard to the right upper lip laceration, the patient specifically requested and Respondent offered brief explanation and brief examination to Patient A regarding two other surgical procedures in which the said Patient A professed to have an interest, an abdominoplasty and a breast augmentation; but specifically denies allegations designated A1, A2 and A3 or that he acted in an inappropriate manner or made any improper remarks or inappropriately examined Patient A.

2. Respondent admits that Patient B, a patient of Jose Corvalan, MD, Chief of the Department of Surgery at St. Vincent's Midtown Hospital, was examined by him in the emergency room of the said hospital and that thereafter, during the evening of that same day while in the course of pursuing his duties as a general surgery hospitalist, Patient B, as Respondent passed Patient B's semi-private room in the said hospital, motioned to or called to Respondent to enter her room whereupon he did so enter.

3. Respondent admits that he sat on Patient B's bed but except as so admitted, specifically denies each and every allegation pleaded as B1 and B2, denying specifically any inappropriate or wrongful conduct, inappropriate words particularly as alleged, and denies offering any inappropriate examination to Patient B.

4. Respondent repeats, reiterates and realleges the answers set forth above in answer to the allegations, as his responses to the First, Second, Third, Fourth, Fifth and Sixth specifications of the Statement of Charges, each of which is specifically denied.

Dated: New York, New York
April 3, 2007

Yours truly,

Redacted Signature

Wilfred T. Friedman

WILFRED T. FRIEDMAN, P.C.
Attorney for Respondent
The Bar Building
36 West 44 Street
New York, New York 10036
212 302-0100

Claudia Bloch, Associate Counsel

Hon. Marc P. Zylberberg, ALJ

Bureau of Adjudication

APPENDIX 3

Terms of Probation for John William Smith, M.D.

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.

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

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

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

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

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

7. Respondent shall enroll in and successfully complete programs dealing with sexual sensitivity and behavior and training courses on the prevention of sexual harassment. Said programs shall be subject to the prior written approval of the Director of OPMC and must begin as soon as possible but not later than the first year of probation.

8. Respondent shall, in the course of practicing medicine in New York State, examine and/or treat and/or interact with any patient only in the presence of a chaperone. The chaperone shall be a licensed or registered health care professional or other health care worker, shall not be a family member, personal friend, or in a professional relationship with Respondent which could pose a conflict with the chaperone's responsibilities. The chaperone shall be proposed by Respondent and subject to the written approval of the Director of OPMC.

9. Prior to the approval of any individual as chaperone, Respondent shall cause the proposed chaperone to execute and submit to the Director of OPMC an acknowledgment of his/her agreement to undertake all of the responsibilities of the role of chaperone. Said acknowledgment shall be made on a form provided by and acceptable to the Director. Respondent shall provide the chaperone with a copy of the Order and all of its attachments and shall, without fail, cause the approved chaperone to:

(a) Report quarterly to OPMC regarding the chaperoning of Respondent's practice; and

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

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

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

10. Respondent shall be solely responsible for all expenses associated with the chaperone.

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