



# STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

May 1, 1997

## CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Henry Ferstenberg, M.D.  
203 Birch Drive  
New Hyde Park, New York 11040

Jeffrey C. Pollok, Esq.  
Hoffman & Pollok, P.C.  
260 Madison Avenue  
New York, New York 10016

Silvia P. Finkelstein, Esq.  
New York State Department of Health  
Bureau of Professional Medical Conduct  
5 Penn Plaza, Sixth Floor  
New York, New York 10001

RE: In the Matter of Henry Ferstenberg, M.D.

Dear Dr. Ferstenberg, Mr. Pollok and Ms. Finkelstein:

Enclosed please find the Determination and Order (No. BPMC-97-99) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

A handwritten signature in black ink, appearing to read 'T. Butler', with a long horizontal flourish extending to the right.

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:crc  
Enclosure

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

**COPY**

IN THE MATTER  
OF  
HENRY FERSTENBERG, M.D.

DETERMINATION  
AND  
ORDER

BPMC 97 - 99

THEA GRAVES PELLMAN, (Chair), HILDA RATNER, M.D., and ALVIN RUDORFER, D.O. 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 HENRY M. GREENBURG, ESQ., General Counsel, by SILVIA P. FINKELSTEIN, ESQ., Associate Counsel.

Respondent, HENRY FERSTENBERG, M.D., appeared personally and was represented by HOFFMAN & POLLOK, P.C., JEFFREY C. HOFFMAN, ESQ., of counsel.

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, pursuant to the Public Health Law and the Education Law of the State of New York.

## PROCEDURAL HISTORY

Date of Notice of Hearing:	September 6, 1996
Date of Statement of Charges:	September 12, 1996
Date of Service of Notice of Hearing and Statement of Charges:	September 25, 1996
Paragraph B.1. of Statement of Charges amended:	October 10, 1996 [P.H.T-38] <sup>1</sup>
Date of Amended Statement of Charges:	January 7, 1997
Date of Service of Amended Statement of Charges:	January 8, 1997
Date of Answer to Charges:	October 14, 1996
Date of Answer to Amended Charges:	January 8, 1997 [I.H.T-150]
Pre-Hearing Conference Held:	October 10, 1996
Hearings Held: - (First Hearing day):	October 23, 1996 November 27, 1996 December 4, 1996 December 11, 1996 December 18, 1996 January 8, 1997 January 22, 1997
Intra-Hearing Conferences Held:	October 23, 1996 November 27, 1996 December 4, 1996 December 11, 1996 January 8, 1997
Petitioner's Proposed Findings of Fact, and Conclusions of Law:	February 20, 1997
Respondent's Proposed Findings of Fact, and Conclusions of Law:	February 24, 1997

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<sup>1</sup> Numbers in brackets refer to Hearing transcript page numbers [T- ]; 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 or the Intra-Hearing transcripts but was advised of the relevant legal decisions or rulings made by the ALJ.

Witnesses called by the Petitioner,  
Department of Health:

Patient A; Patient B<sup>2</sup>

Witnesses called by the Respondent,  
Henry Ferstenberg, M.D.:

Marion Rosenberg, R.N.  
Idalia Montanez  
Mei Kong, R.N.  
Frank Chateau, P.A.  
Gerard O'Brien, P.A.  
Sonia Roman  
Lawrence Levitan, M.D.  
Minerva Dajay, R.N.  
Mary Godineaux, R.N.  
Beth Shimlock, M.D.  
Andrew Kaufman, M.D.  
Henry Ferstenberg, M.D.

Deliberations Held:

March 19, 1997<sup>3</sup>

### 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. HENRY FERSTENBERG, M.D., ("**Respondent**") is charged with eight specifications of professional misconduct, as delineated in § 6530 of the Education Law of the State of New York ("**Education Law**").

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<sup>2</sup> Patients are identified in the Appendix annexed to the Statement of Charges (Petitioner's Exhibit # 1).

<sup>3</sup> Respondent and the Department waived the 120 day requirement of P.H.L. § 230 [T-1004-1005].

Respondent is charged with willfully harassing, abusing or intimidating a patient, either physically or verbally<sup>4</sup>, and with engaging in conduct in the practice of medicine that evidences moral unfitness to practice medicine<sup>5</sup>. Respondent is also charged with practicing the profession of medicine fraudulently<sup>6</sup>. These charges stem from Respondent's alleged conduct, remarks and treatment of Patient A and alleged conduct and treatment of Patient B at his office in New York, New York.

A copy of the Statement of Charges and of the Amended Statement of Charges are attached to this Determination and Order as Appendix I and II.

Respondent admits to being licensed to practice medicine in New York and admits to having treated Patients A and B during the time period alleged. Respondent denies all other allegations and denies any improper treatments, conduct or remarks. Respondent denies any improper practice of medicine and denies all fraudulent allegations.

### **FINDINGS OF FACT**

The following Findings of Fact were made after a review of the entire record in this matter. These facts represent evidence and testimony found persuasive by the Hearing Committee in arriving at a particular finding. Where there was conflicting evidence or testimony, the Hearing Committee considered all of the evidence presented and rejected what was not relevant.

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<sup>4</sup> Education Law § 6530(31) and see also First through Second Specifications of the Amended Statement of Charges (Petitioner's Exhibit # 12).

<sup>5</sup> Education Law § 6530(20) and see also Third through Fifth Specifications of the Amended Statement of Charges (Petitioner's Exhibit # 12).

<sup>6</sup> Education Law § 6530(2) and see also Sixth through Eight Specifications of the Amended Statement of Charges (Petitioner's Exhibit # 12).

believable or credible in favor of the cited evidence. The State, who has the burden of proof, was required to prove its case by a preponderance of the evidence. The Hearing Committee unanimously agreed on Findings of Fact # 1 through 19, 21-23, 27-28, 31-37, 39 and 41. The Hearing Committee voted 2 to 1 on Findings of Fact # 20, 24-26, 29-30, 38, 40 and 42. All Findings of Fact made by the Hearing Committee were established by at least a preponderance of the evidence (either unanimously or by a 2-1 vote).

1. Respondent was licensed to practice medicine in New York State on October 5, 1979 by the issuance of license number 139924 by the New York State Education Department (Petitioner's Exhibits # 1, # 2 & # 12); (Respondent's Exhibit # A)<sup>7</sup>; [P.H.T-44-45].

2. Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1995 through August 31, 1997 (Petitioner's Exhibit # 2).

3. The State Board for Professional Medical Conduct has obtained personal jurisdiction over Respondent (determination made by the Administrative Officer: Respondent had no objection regarding personal service effected on him); (P.H.L. § 230[10][d]); (Petitioner's Exhibit # 1); [P.H.T-28]; [T-1018].

4. Henry Ferstenberg graduated from the Université Libre de Bruxelles in 1977. Since 1979, Dr. Ferstenberg has been in private practice in New York, New York, with a specialty in General Surgery. He has had hospital privileges at Beth Israel Medical Center ("**Beth Israel**") since 1984. He was affiliated with the Guttman Breast Institute from 1989 through 1995. Dr. Ferstenberg testified on his own behalf as to Patients A and B (Department's Exhibit # 2); [T-849-1129].

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<sup>7</sup> Refers to exhibits in evidence submitted by the New York State Department of Health (Petitioner's or Department's Exhibit #) or by Dr. Henry Ferstenberg (Respondent's Exhibit #).



5. Andrew Kaufman is a physician who is board-certified in anesthesia and has a certificate in continuing education for pain management, a sub-certification given by the American Board of Anesthesiology. He testified as an expert witness for Respondent regarding Patient A [T-823-849].

6. Mei Kong is a registered nurse with a master's in nursing. She is in charge of the endoscopy unit at Beth Israel. She testified for Respondent regarding her experience with endoscopies and anesthesia at Beth Israel [T-648-666].

7. Frank Chateau has been working at Beth Israel for the past 20 years and is a physician's assistant. He testified for Respondent regarding his experience with endoscopies and anesthesia at Beth Israel and as a character witness [T-667-679].

8. Gerard O'Brien has been working at Beth Israel for the past 20 years and is a physician's assistant. He testified as a character witness for Respondent [T-680-694].

9. Lawrence Levitan has been a physician since 1981. He is licensed in New York State, has a private OB/GYN practice and works at Beth Israel. He and Respondent referred patients to each other. He testified as a character witness for Respondent [T-765-777].

10. Minerva Dajay is a registered nurse who works as the assistant head nurse in charge of the operating room at Beth Israel. She testified for Respondent regarding her personal experience with breast aspirations and as a character witness for Respondent [T-783-792].

11. Beth Shimlock is a practicing gynecologist. She is licensed in New York State, is part of a 5 physician OB/GYN practice and knows Respondent for almost 20 years. She testified as a character witness for Respondent [T-803-815].

12. Marion Rosenberg has been a registered nurse since 1944. She is Respondent's mother-in-law and worked for him during portions of 1993 and 1994. She testified for Respondent [T-352-418].

13. Idalia Montanez has been employed by Respondent for the past 8 years as his office manager, medical assistant and secretary. She testified for Respondent [T-493-640].

14. Sonia Roman has been as been a part-time employee of Respondent for the past 4 years. She testified for Respondent [T-700-764].

15. Mary Godineaux is employed by Beth Israel as a nurse manager on the surgical orthopedic unit. She is a registered nurse and has worked at Beth Israel for 19 years. She testified for Respondent [T-792-803].

16. Patient A and Patient B were friends in college. In 1993, Patient A recommended Respondent to Patient B [T-56-57, 220-221].

#### **PATIENT A**

17. Respondent treated Patient A from November 1, 1991 through November 18, 1994 (Petitioner's Exhibit # 3); [T-89, 892-917, 932, 935].

18. On November 12, 1994, Patient A, a 23 year old female, was seen by Respondent, at his office, complaining of abdominal pain, nausea, dyspepsia and eructation. (Petitioner's Exhibit # 3); [T-24, 454, 917].

19. On November 12, 1994, Respondent examined Patient A's abdomen and epigastrium area. Patient A had some nonspecific tenderness. As Respondent pushed a little firmer, Patient A got a little more tender. Respondent then examined Patient A's internal ring (right hip area), femoral canal and then examined her more medially at the external ring [T-921-924].

20. The examination of Patient A performed by Respondent on November 12, 1994, was in response to Patient A's complaint of abdominal pain, nausea, dyspepsia and eructation [T-917-931].

21. On November 18, 1994, Patient A arrived at Beth Israel Hospital for her previously scheduled esophagogastroduodenoscopy ("EGD" or endoscopy) at 10:25 a.m. (Petitioner's Exhibit # 5); [T-190, 934, 1064].

22. The endoscopy commenced at 11:35 a.m. with the administration of 75 mg. of Demerol and 7.5 mg of Valium, IV push (Petitioner's Exhibit # 5); [T-827]. Patient A also received 0.4 mg. of Narcan (Petitioner's Exhibit # 5); [T-828, 936-937].

23. Demerol typically lasts three and one-half hours. Valium lasts about four hours during its first cycle, and is recirculated eight hours later, and its by products can last up to ninety (90) hours. Narcan, reverses the respiratory depression effect of Demerol for a short period of time, twenty to thirty minutes [T-659, 828-830, 836, 846].

24. The side effects of Demerol consist of nausea, vomiting, dysphoria (the opposite of euphoria), hallucinations and respiratory depression. Valium side effects can produce sleepiness, nausea, hallucinations, dysphoria, and a paradoxical rage syndrome (hyperexcitment instead of sedation) [T-829-830].

25. It is not possible to predict a patient's response to these drugs and patients are advised not to make any important decisions for twenty-four hours because they may well view the situation very differently the next day [T-654, 834, 837-838].

26. During the time period that a patient's judgment and perception are affected by the drugs, the patient has no doubt about the reality of his or her altered perception [T-654, 837-838]. Some patients get amnesic effects, some think they're dreaming and some have a distortion of memory in which they believe that things occurred when in fact they did not occur [T-653-655, 672-673, 831]. For these reasons, hospitals generally require that patients be discharged with an escort [T-837-842].

27. Patient A was discharged in the company of her mother, at 1:50 p.m., two hours and fifteen minutes after the procedure (Petitioner's Exhibit # 5); [T-936].

28. On November 18, 1994, Patient A was seen by Respondent, at his office, following the endoscopy performed by him at Beth Israel Medical Center (Petitioner's Exhibits # 3 & 5); [T-193, 199, 937].

29. On November 18, 1994, while at Respondent's office, Patient A admitted feeling kind of tired and she appeared groggy. She was glassy-eyed, spoke slowly and looked a little "stoned" [T-201, 612-613, 941, 945, 1116-1117].

30. On November 18, 1994, Respondent performed a physical examination of Patient A, at his office, in response to Patient A's complaints of tenderness in her abdominal area and groin pain [T-948-953].

### **PATIENT B**

31. Respondent treated Patient B on October 6, 1993 and on March 19, 1994 (Petitioner's Exhibit # 4); [T-221-228, 877, 886-888].

32. On October 6, 1993 Patient B, a 24 year old female, was seen by Respondent, at his office, complaining of a lump in her breast, bilateral chest pains and severe back pain (Petitioner's Exhibit # 4); [T-220, 877-878].

33. During the course of the physical examination of Patient B, Respondent received a telephone call. While on the telephone Respondent continued his examination of Patient B [T-223, 268, 881-883, 1039-1042].

34. Patient B felt uncomfortable when Respondent continued his examination of her breasts while he talked on the phone [T-224, 227, 272, 279-280].

35. Respondent's examination was in response to Patient B's complaints of back and breast pain and apparent lump in her breast [T-221-224].

36. Patient B's ultrasound showed that she had fibrocystic disease and a small cyst (Petitioner's Exhibit # 4); [T-881].

37. On March 19, 1994, Patient B was examined by Respondent as a follow-up visit for lumps in her breasts and for bilateral breast pain and fibrocystic disease [T-228, 239, 276, 888].

38. Patient B's medical records show no laboratory report, no pathology report, no operative report, and no patient consent form regarding a left breast aspiration and a right breast aspiration for an office visit of March 19, 1994 (Petitioner's Exhibit # 4); [T-1094-1098].

39. Patient B's medical records reflect that a left breast aspiration and a right breast aspiration were performed at an office visit on March 19, 1994 (Petitioner's Exhibit # 4).

40. Respondent submitted a claim to Blue Cross, Blue Shield for a left breast aspiration (\$150.00) and a right breast aspiration (\$150.00) performed on Patient B at the office visit of March 19, 1994 (Petitioner's Exhibit # 4).

41. Respondent was paid \$240.00 by Blue Cross, Blue Shield for the claim submitted regarding the breast aspirations of Patient B (Petitioner's Exhibit # 4).

42. On March 19, 1994, no breast aspirations were done on Patient B [T-237, 239, 278, 282-283, 286-287].

## CONCLUSIONS OF LAW

The Hearing Committee makes the following conclusions, pursuant to the Findings of Fact listed above. All conclusions as to the allegations contained in the Statement of Charges were by a majority vote or by a unanimous vote of the Hearing Committee (as indicated).

The Hearing Committee concludes that the following Factual Allegations, in the January 7, 1997 Amended Statement of Charges are **SUSTAINED**:<sup>8</sup>

Paragraph B.2.	:	( 31, 37 - 42 )	[2-1]
Paragraph B.3	:	( 31, 37 - 42 )	[2-1]

The Hearing Committee concludes that the following Factual Allegations, in the January 7, 1997, Amended Statement of Charges, are **NOT SUSTAINED**:

Paragraph A.1.a.	:	( 17 - 20 )	[2-1]
Paragraph A.1.b.	:	( 17 - 20 )	[2-1]
Paragraph A.2.a.	:	( 17, 21 - 30 )	[2-1]
Paragraph A.2.b.	:	( 17, 21 - 30 )	[2-1]
Paragraph A.2.c.	:	( 17, 21 - 30 )	[2-1]
Paragraph A.2.d.	:	( 17, 21 - 30 )	[2-1]
Paragraph B.1.a.	:	( 31 - 36 )	[3-0]

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<sup>8</sup> The numbers in parentheses refer to the Findings of Fact previously made herein by the Hearing Committee and support each Factual Allegation contained in the Amended Statement of Charges. The numbers in the brackets refer to the vote by The Hearing Committee for each Factual Allegation.

Based on the above and the complete Findings of Fact, the Hearing Committee concludes that the following Specifications of Charges are **SUSTAINED**:<sup>9</sup>

FIFTH SPECIFICATION: (Paragraphs: B, B.2 & B.3) by a vote of 2 to 1.

EIGHTH SPECIFICATION: (Paragraphs: B, B.2 & B.3) by a vote of 2 to 1.

Based on the above and the complete Findings of Fact, the Hearing Committee concludes that the following Specifications of Charges are **NOT SUSTAINED**:

FIRST SPECIFICATION: by a vote of 2 to 1.

SECOND SPECIFICATION: by a unanimous vote.

THIRD SPECIFICATION: by a vote of 2 to 1.

FOURTH SPECIFICATION: by a unanimous vote.

SIXTH SPECIFICATION: by a vote of 2 to 1.

SEVENTH SPECIFICATION: by a unanimous vote.

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

### **DISCUSSION**

Respondent is charged with eight 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 the types of misconduct charged in this matter.

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<sup>9</sup> The citations in parentheses refer to the Factual Allegations which support each Specification.

The ALJ discussed with the Hearing Committee the definitions of medical misconduct as alleged in this proceeding. These definitions were obtained from a memorandum, prepared by Henry M. Greenberg, General Counsel for the New York State Department of Health, dated January 9, 1996<sup>10</sup>. This document, entitled: Definitions of Professional Misconduct under the New York Education Law, ("**Misconduct Memo**"), sets forth suggested definitions of practicing the profession: (1) fraudulently; (2) with negligence on more than one occasion; (3) with gross negligence; (4) with incompetence on more than one occasion and (5) with gross incompetence.

During the course of its deliberations on these charges, the Hearing Committee consulted the definition of practicing the profession fraudulently contained in the Misconduct Memo.

The Hearing Committee used ordinary English usage and understanding for all other terms, allegations and charges.

With regard to the testimony presented herein, including Respondent's, the Hearing Committee evaluated each witness for possible bias. The witnesses were also assessed according to their training, experience, credentials, demeanor and credibility.

The Hearing Committee finds [2-1] that Patient A's recounting of events was at times inconsistent and confused. The Hearing Committee believes [2-1] that Patient A's memory of events that were alleged to have occurred on November 18, 1994 was clouded by the side effects of the drugs she received at Beth Israel. These side effects include paramnesia and possibly mild hallucinations. As to the November 12, 1994 allegations, they appeared to have been fabricated or unreliable after thoughts. Therefore, the Hearing Committee finds [2-1] Patient A's testimony lacked credibility.

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<sup>10</sup> A copy was given to Respondent at the pre-hearing conference [P.H.T-5-6].



Patient B testified as to the events that transpired between her and the Respondent on October 6, 1993 and on March 19, 1994. Her testimony remained unequivocal during direct examination and cross-examination. The Hearing Committee unanimously finds Patient B's testimony to be credible, believable and reliable.

Obviously Respondent had the greatest amount of interest in the results of these proceedings. The Hearing Committee [2-1] found Respondent to have been generally truthful. However, at times, especially during cross-examination, Respondent was evasive and unresponsive. It was somewhat difficult to treat Respondent's testimony as completely "honest" memory since he admitted that everything sort of blended in together (his review of the records, discussions with his employees, listening to the testimony presented, etc. [and even his detective work]).

Dr. Andrew Kaufman as the Respondent's expert, for Patient A presented a very credible and thorough review of the effects of the drugs given to Patient A. He did not appear to have had a stake in the outcome of these proceedings and no motive for falsification or fabrication of his testimony was alleged or shown. His testimony was very direct, practical, pragmatic, helpful, forthright and convincing.

The testimony of Marion Rosenberg and Sonia Roman was collateral and was given little weight by the Hearing Committee [3-0]. The extent of the details of the testimony presented and remembered by Idalia Montanez were too incredible to be continually believable. Since the Hearing Committee [3-0] focused on the credibility of the patients and Respondent, Ms. Montanez' testimony was given very little weight. All other witnesses, including the character witnesses, were duly assessed and their testimony was considered and utilized when necessary by the Hearing Committee.

The taped phone conversation between Patient A and Respondent provided no helpful, much less conclusive, information to either positions taken by the parties (Petitioner's Exhibits # 6 & 7).

Using the above information and understanding, the Hearing Committee concludes [2-1] that the Department of Health has shown by a preponderance of the evidence that Respondent's conduct in regards to the false submission of a bill to Blue Cross, Blue Shield on one occasion constituted professional misconduct under the laws of New York State.

Therefore the Department of Health has met its burden of proof only as to the Fifth and Eighth Specifications of misconduct contained in the January 7, 1997 Amended Statement of Charges.

As to all other allegations and Specifications of misconduct, the Department of Health has failed to meet its burden of proof. Therefore the First through Fourth Specifications and the Sixth through Seventh Specifications of misconduct contained in the January 7, 1997 Amended Statement of Charges are not sustained and are dismissed by the Hearing Committee [votes indicated above].

The testimony of Patient A was very disturbing to the Hearing Committee [2-1]. Patient A appeared to have numerous non-specific medical problems for a person of her age (two endoscopies within one year; stomach problems; breast pains; bulimia; pain in lymph nodes; pain in groin; etc.) . However she was somewhat cavalier about her treatments and numerous office visits with Respondent and other physicians. She was seeing at least two, and possibly three, physicians for her stomach problems at the same time. Patient A did not remember a majority of the visits she made to Respondent, what dates she went or especially the reasons she made them. Patient A did not remember a rectal exam or blood in her stool in January 1994, yet she remembered that there was no one else in the examining rooms on all occasions that she went to Respondent.

Patient A would have the Hearing Committee believe [2-1] that she is sophisticated enough to interview a couple of therapists, but not knowledgeable enough to know that date rape (on at least 12 separate occasions in a 12 month period) is wrong. The Hearing Committee believes [2-1] that all allegations regarding the November 12, 1994 visit were fabricated after the November 18, 1994 visit. Even Patient A did not believe or have specific recollection of whether an event occurred on the 12th or her visit of the 18th. On November 18, 1994 she asked Respondent to examine her mother. This is wholly inconsistent with any possibility that anything occurred on the visit of the 12th.

As to the visit of November 18, 1994, the Hearing Committee believes [2-1] that Patient A believes that what she alleges occurred. However, because of Patient A's drugged state, due to the side or after effects of the Demerol and/or Valium given less than 2 and ½ hours prior to her examination by Respondent, the Hearing Committee determines [2-1] that Patient A's testimony was inherently unreliable as to anything that occurred at Respondent's office on that date. It is clear that Patient A was still "stoned" when she appeared, for no apparent legitimate reason, at Respondent's office on November 18, 1994.

Patient A had made numerous visits to Respondent's office over the course of three years. November 18, 1994 is the only visit where Patient A's mother accompanied her to Respondent's office. It is incredulous to believe that Respondent would pick that visit to sexually abuse Patient A, knowing that Patient A's mother is sitting in the next room.

The Hearing Committee concludes [2-1] that Patient A was hallucinating or had a distortion of memory in which fantasy and objective experience were confused (paramnesia).

One dissenting member of the Hearing Committee believed that Patient A was credible and believable. Said Committee member did not believe Respondent and found his testimony to be fabricated and unreliable. Said Committee member voted to sustain all of the allegations and Charges (as to Patient A) contained in the January 7, 1997 Amended Statement of Charges.

As to Patient A, the Hearing Committee determines [2-1] that, based on the proof presented, there was a legitimate medical purpose for Respondent to perform the physical examinations that he did, both on November 12 and 18, 1994 (A.1.a. & A.2.a. not sustained).

The Hearing Committee [2-1] does not believe that any of the alleged conduct and/or remarks occurred (A.1.b., A.2.b., A.2.c. & A.2.d. not sustained). The Hearing Committee determines [2-1] that the medical treatment of Patient A by Respondent was proper.

Patient B never really indicated that Respondent individually squeezed and caressed each of her breasts with his full hand. Patient B's main complaint was that Respondent did not pay proper attention to her and she was uncomfortable with the fact that Respondent continued to examine her while he talked to someone else (on the phone). Based on the proof presented, the Hearing Committee can not conclude [3-0] that Respondent squeezed and caressed each of Patient B's breasts with his full hand. The Hearing Committee determines [3-0] that there was a legitimate medical purpose for Respondent to examine Patient B's breasts (B.1.a. not sustained). While the Hearing Committee agrees [3-0] that Respondent's behavior, in taking the phone call and continuing an examination, is not "correct" or respectful, this conduct does not rise to the level of being harassing, abusing, intimidating or moral unfitness.

Patient B's medical records show no laboratory report, no pathology report, no operative report, and no patient consent form regarding a left breast aspiration and a right breast aspiration for an office visit of March 19, 1994. Patient B strongly denied that any breast aspirations occurred on that date and that no shot or needle was inserted into either of her breasts on that date. Given Patient B's truthfulness as to being uncomfortable during the October 6, 1993 rather than believing that Respondent was performing the breast examination for his own sexual gratification, the Hearing Committee finds [2-1] no reason to disbelieve Patient B's testimony that no breast aspirations occurred on March 19, 1994.

One member of the Hearing Committee (a different member than previously indicated) agreed that Patient B was credible but believed that she more likely forgot that the procedure was done. Said Committee member placed more credence on the medical records. Said Committee member voted to dismiss all of the Charges contained in the January 7, 1997 Amended Statement of Charges.

The Hearing Committee determines [2-1] that the breast aspirations did not occur and that Respondent submitted a claim to Blue Cross, Blue Shield for services not performed. The Hearing Committee must conclude [2-1] that Respondent knowingly and intentionally made entries into the medical record of Patient B to reflect a procedure which in fact did not occur.

### **DETERMINATION AS TO PENALTY**

The Hearing Committee [2-1], pursuant to the Findings of Fact, Conclusions of Law and Discussion set forth above, unanimously determines as follows:

Respondent should be **CENSURED** and **REPRIMANDED** for his misconduct in New York and a monetary fine of \$10,000.00 should be assessed against Respondent for his profit from the submission of a claim to Blue Cross, Blue Shield for services not actually performed.

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.

The Hearing Committee believes [3-0] that Respondent is capable of continuing to contribute to medicine. Therefore, the Hearing Committee determines [3-0] that license revocation would be disproportionate, inappropriate and excessive in this case. The Hearing Committee [2-1] views Respondent's act of submitting a claim to Blue Cross, Blue Shield for a procedure not performed as a singularly proven event, which the Hearing Committee expects will never reoccur. The Hearing Committee notes also that the evidence that the procedure was not performed was not overwhelming (although the Hearing Committee [2-1] does acknowledge that there was a preponderance). The Hearing Committee also notes that one member of the Hearing Committee believes that the procedure was performed and that Patient B just did not remember.

Since there was insufficient evidence regarding Respondent's practice, the Hearing Committee finds that limiting Respondent's practice is not an available penalty. The Hearing Committee does note that Respondent had a very busy practice, which at this time seems to have slowed down. The Hearing Committee [3-0] was concerned with some of Respondent's office practices, such as the failure to label specimens obtained from patients; placing the specimens on the table, side by side, until the end of the day; the failure to send items for pathology reports; and the failure to obtain informed consents from patients. However, those were not the charges against Respondent. Respondent's abilities as a surgeon have not been questioned, but his office practices definitely need improvements. Similarly, a suspension is not appropriate since the medical care and treatment provided by Respondent to his patients are not at issue.

The Hearing Committee believes that public service is not an appropriate sanction under the circumstances presented in this case. The Hearing Committee does not believe that re-training or attendance at CME seminars is appropriate because there was no evidence that Respondent lacked competence. The Hearing Committee does not believe that probation, using a practice monitor, a practice supervisor or a chaperone would be beneficial because none of the sexual charges were sustained and therefore Respondent's behavior and conduct in those areas are not an issue.

Three nurses, two physician assistants and two physicians testified regarding their knowledge of and experiences with Respondent. They indicated that they considers him a particularly good physician with patients. Some testified that this sentiment is shared among a number of Beth Israel staff members. A number of the witnesses testified that they have personally (or family members) used Respondent's services in the past and would continue to do so.

Dr. Beth Shimlock, an obstetrician-gynecologist in private practice has known Respondent since 1979. Dr. Lawrence Levitan, also a gynecologist, has known Respondent since 1981. Over the years, both Dr. Shimlock and Dr. Levitan have referred numerous female patients to Respondent. Respondent has referred patients to them for gynecological exams. Neither physician have received any complaints or negative feedback from their patients.

Respondent appears to be held in high esteem by his colleagues. They not only refer patients to him but also seek his professional advice and treatment themselves. There is nothing in his character, professional reputation and past conduct to support the charges of sexual improper conduct levied against him.

The Hearing Committee found it difficult to arrive at an appropriate penalty under the law, but believes [2-1] that the sanction imposed above is an appropriate balance between adequately safeguarding and protecting the public fisc and convincing Respondent of the need to amend his office practices and record maintenance.

It is for that reason that the Hearing Committee believes [2-1] that a censure and reprimand together with a monetary fine will help Respondent, as well as adequately safeguard and protect the public. The Hearing Committee believes [2-1] that the sanctions set forth above will send a sufficiently sobering message to Respondent and will better benefit society than revocation or any of the other penalties discussed above.

Taking all of the facts, details, circumstances and particulars in this matter into consideration, the Hearing Committee determines [2-1] that the above is the appropriate sanctions under the circumstances. The Hearing Committee concludes [2-1] that the sanctions imposed strike the appropriate balance between the need to punish Respondent, deter future misconduct, and protect the public.

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.

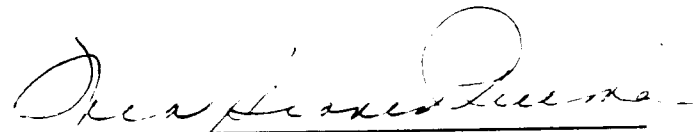


**ORDER**

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

1. The Fifth and Eighth Specifications of professional misconduct from the Amended Statement of Charges (Petitioner's Exhibit # 12) are **SUSTAINED**, and;
2. The First through Fourth Specifications of professional misconduct from the Amended Statement of Charges (Petitioner's Exhibit # 12) are **NOT SUSTAINED**, and are **DISMISSED**. and;
3. The Sixth and through Seventh Specifications of professional misconduct from the Amended Statement of Charges (Petitioner's Exhibit # 12) are **NOT SUSTAINED**, and are **DISMISSED**; and;
4. Respondent is **CENSURED** and **REPRIMANDED** for his misconduct in New York; and;
5. Respondent is assessed a fine of **Ten Thousand (\$10,000.00) Dollars**. payable within 30 days from the effective date of this Order; and
6. Any civil penalty not paid by the date prescribed herein shall be subject to all provisions of law relating to debt collection by the State of New York. This includes but is not limited to the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses (Tax Law § 171(27); State Finance Law § 18; CPLR § 5001; Executive Law § 32); and
7. Payments must be submitted to: Bureau of Accounts Management, New York State Department of Health, Empire State Plaza, Corning Tower, Room 1245, Albany, NY 12237.

**DATED: Albany, New York**  
**April, 28 1997**



**THEA GRAVES PELLMAN, (Chair),**

**HILDA RATNER, M.D.,**

**ALVIN RUDORFER, D.O.**

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To:

Henry Ferstenberg, M.D.,  
203 Birch Drive  
New Hyde Park, NY 11040

Hoffman & Pollok, P.C.  
BY: Jeffrey C. Hoffman, Esq.  
Attorneys for Respondent  
260 Madison Avenue  
New York, NY 10016

Silvia P. Finkelstein, Esq.  
Associate Counsel  
New York State Department of Health  
Bureau of Professional Medical Conduct  
5 Penn Plaza, Suite 601  
New York, New York 10001

A P P E N D I X I

IN THE MATTER  
OF  
HENRY FERSTENBERG, M.D.

STATEMENT  
OF  
CHARGES

HENRY FERSTENBERG, M.D., the Respondent, was authorized to practice medicine in New York State on or about October 5, 1979, by the issuance of license number 139924 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. At all times herein mentioned, Respondent was a surgeon with offices located at 329 East 18th Street, New York, New York and a consultant with the Guttman Breast Diagnostic Institute, located at 55 Fifth Avenue, New York, New York. Respondent treated Patient A from on or about November 1, 1991 through November 1994. (Patient A and all patients are identified in the annexed Appendix).
1. On or about November 12, 1994, Patient A, a 20 year old female, was seen by Respondent complaining of abdominal pain, nausea, dyspepsia and eructation. In the course of performing a physical examination, but not for a legitimate medical purpose, Respondent engaged in conduct as follows:
    - a. Respondent placed his hand under the waist of Patient A's pants and underwear and touched

Patient A's vaginal and pubic area.

- b. Respondent told Patient A that her pain was caused by "playing with herself".

2. On or about November 18, 1994, Patient A, was seen by Respondent following an endoscopy performed by him. In the course of purportedly performing a physical examination, but not for a legitimate medical purpose, Respondent engaged in conduct as follows:

- a. As Patient A was laying back on the examining table Respondent raised her skirt and pulled down her underwear.
- b. Respondent told Patient A he was not wearing gloves so that she could feel what it was like to have something inside her vagina. Respondent rubbed with two fingers, first outside, then inside Patient A's vagina.
- c. Respondent told Patient A her opening was small and he could help make it bigger. Respondent then told Patient A that he was going to make her wet and that if she had an orgasm she should just enjoy it
- d. Respondent manipulated the outside and inside of Patient A's vaginal area for a long period of time.

B. Respondent treated Patient B, a 24 year old female, from on or about October 6, 1993 through on or about March 19, 1994, at his office.

1. On or about October 6, 1994, in the course of performing a physical examination, but not for a legitimate medical purpose, Respondent engaged in conduct as follows:

a. During the course of the physical examination, Respondent received a telephone call, while Respondent was on the telephone, he individually squeezed and caressed each of Patient B's breasts with his full hand.

## SPECIFICATION OF CHARGES

### FIRST THROUGH SECOND SPECIFICATIONS

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

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(31)(McKinney Supp. 1996) by willfully harassing, abusing or intimidating a patient either physically or verbally, as alleged in the facts of:

1. Paragraph A, A.1, A.1.a, A.1.b, A.2, A.2.a, A.2.b, A.2.c and/or A.2.d.
2. Paragraph B, B.1, and B.1.a.

### THIRD THROUGH FOURTH SPECIFICATIONS

#### **MORAL UNFITNESS**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(20)(McKinney Supp. 1996) 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:

3. Paragraph A, A.1, A.1.a, A.1.b, A.2, A.2.a, A.2.b, A.2.c and/or A.2.d.
4. Paragraph B, B.1, and B.1.a.

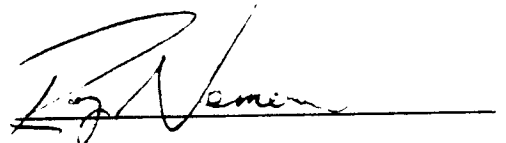
**FIFTH THROUGH SIXTH SPECIFICATIONS**

**FRAUDULENT PRACTICE**

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law §6530(2)(McKinney Supp. 1996) by practicing the profession of medicine fraudulently as alleged in the facts of the following:

5. Paragraph A, A.1, A.1.a, A.1.b, A.2, A.2.a, A.2.b, A.2.c and/or A.2.d.
6. Paragraph B, B.1, and B.1.a.

DATED: September 11, 1996  
New York, New York



ROY NEMERSON  
Deputy Counsel  
Bureau of Professional  
Medical Conduct



APPENDIX II

AMENDED  
STATEMENT  
OF  
CHARGES

IN THE MATTER  
OF  
HENRY FERSTENBERG, M.D.

HENRY FERSTENBERG, M.D., the Respondent, was authorized to practice medicine in New York State on or about October 5, 1979, by the issuance of license number 139924 by the New York State Education Department.

FACTUAL ALLEGATIONS

FILED	<i>BMC Ferstenberg</i>
DATE	<i>1/8/97</i>
ACCUSED	<i>BE REPORTING</i>
NO.	<i>12</i>
BY	<i>M. Ward</i>

A. At all times herein mentioned, Respondent was a surgeon with offices located at 329 East 18th Street, New York, New York and a consultant with the Guttman Breast Diagnostic Institute, located at 55 Fifth Avenue, New York, New York. Respondent treated Patient A from on or about November 1, 1991 through November 1994. (Patient A and all patients are identified in the annexed Appendix).

1. On or about November 12, 1994, Patient A, a 20 year old female, was seen by Respondent complaining of abdominal pain, nausea, dyspepsia and eructation. In the course of performing a physical examination, but not for a legitimate medical purpose, Respondent engaged in conduct as follows:
  - a. Respondent placed his hand under the waist of Patient A's pants and underwear and touched

Patient A's vaginal and pubic area.

- b. Respondent told Patient A that her pain was caused by "playing with herself".

2. On or about November 18, 1994, Patient A, was seen by Respondent following an endoscopy performed by him. In the course of purportedly performing a physical examination, but not for a legitimate medical purpose, Respondent engaged in conduct as follows:

- a. As Patient A was laying back on the examining table Respondent raised her skirt and pulled down her underwear.
- b. Respondent told Patient A he was not wearing gloves so that she could feel what it was like to have something inside her vagina. Respondent rubbed with two fingers, first outside, then inside Patient A's vagina.
- c. Respondent told Patient A her opening was small and he could help make it bigger. Respondent then told Patient A that he was going to make her wet and that if she had an orgasm she should just enjoy it
- d. Respondent manipulated the outside and inside of Patient A's vaginal area for a long period of time.

B. Respondent treated Patient B, a 24 year old female, from on or about October 6, 1993 through on or about March 19, 1994, at his office.

1. On or about October 6, 1993, in the course of performing a physical examination, but not for a legitimate medical purpose, Respondent engaged in conduct as follows:

a. During the course of the physical examination, Respondent received a telephone call, while Respondent was on the telephone, he individually squeezed and caressed each of Patient B's breasts with his full hand.

2. Respondent knowingly and intentionally submitted a bill to Blue Cross Blue Shield for services rendered to Patient B on March 19, 1994 including left breast aspiration (\$150.00) and right breast aspiration (\$150.00), when in fact no such services were performed.

3. Respondent knowingly and intentionally made entries in the medical record maintained for Patient B to reflect the above procedures, which in fact were not performed on Patient B.

## **SPECIFICATION OF CHARGES**

### **FIRST THROUGH SECOND SPECIFICATIONS**

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

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(31)(McKinney Supp. 1997) by willfully harassing, abusing or intimidating a patient either physically or verbally, as alleged in the facts of:

1. Paragraph A, A.1, A.1.a, A.1.b, A.2, A.2.a, A.2.b, A.2.c and/or A.2.d.
2. Paragraph B, B.1, and B.1.a.

### **THIRD THROUGH FIFTH SPECIFICATIONS**

#### **MORAL UNFITNESS**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(20)(McKinney Supp. 1997) 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:

3. Paragraph A, A.1, A.1.a, A.1.b, A.2, A.2.a, A.2.b, A.2.c and/or A.2.d.
4. Paragraph B, B.1, and B.1.a.

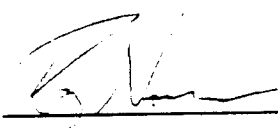
5. Paragraph B, B.2 and B.3

**SIXTH THROUGH EIGHTH SPECIFICATIONS**  
**FRAUDULENT PRACTICE**

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law §6530(2)(McKinney Supp. 1997) by practicing the profession of medicine fraudulently as alleged in the facts of the following:

6. Paragraph A, A.1, A.1.a, A.1.b, A.2, A.2.a, A.2.b, A.2.c and/or A.2.d.
7. Paragraph B, B.1, and B.1.a.
8. Paragraph B, B.2 and B.3.

DATED: January 7, 1997  
New York, New York

  
\_\_\_\_\_  
ROY NEMERSON  
Deputy Counsel  
Bureau of Professional  
Medical Conduct