



STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

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

Karen Schimke
Executive Deputy Commissioner

August 26, 1996

PUBLIC

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Dianne Abeloff, Esq.
NYS Department of Health
5 Penn Plaza-Sixth Floor
New York, New York 10001

Martin I. Saperstein, Esq.
Goodman, Saperstein & Cuneo
Counsellors at Law
600 Old Country Road
Garden City, New York 11530

Warren Janus, M.D.
325 West Park Avenue
Long Beach, New York 11561

RE: In the Matter of Warren Janus, M.D.

EFFECTIVE DATE 09/02/96

Dear Ms. Abeloff, Mr. Saperstein and Dr. Janus:

Enclosed please find the Determination and Order (No.96-81) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

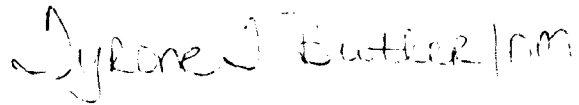
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

Office of Professional Medical Conduct
New York State Department of Health
Empire State Plaza
Corning Tower, Room 438
Albany, New York 12237

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

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

A handwritten signature in black ink that reads "Tyrone T. Butler | nm". The signature is written in a cursive style with a vertical line separating the name from the initials.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

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IN THE MATTER : ADMINISTRATIVE
: REVIEW BOARD
OF : DECISION AND
: ORDER NUMBER
WARREN JANUS, M.D. : ARB 96-81
-----X

The Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of **SUMNER SHAPIRO, ROBERT M. BRIBER, WINSTON S. PRICE, M.D., EDWARD SINNOTT, M.D.,** and **WILLIAM A. STEWART, M.D.** held deliberations on June 7, 1996 to review the Hearing Committee on Professional Medical Conduct's (hereinafter the "Hearing Committee") April 8, 1996 Determination finding Dr. Janus guilty of professional misconduct. The Petitioner requested the Review through a Notice which the Board received on April 24, 1996. Larry G. Storch served as Administrative Officer to the Review Board. Dianne Abeloff, Esq. filed a brief for the Petitioner which the Review Board received on May 24, 1996. Martin I. Saperstein, Esq. filed a reply brief for the Respondent which the Review Board received on June 4, 1996.

SCOPE OF REVIEW

New York Public Health Law (PHL) §230(10)(i), §230-c(1) and §230-c(4)(b) provide that the Review Board shall review:

- whether or not a hearing committee determination and penalty are consistent with the hearing committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by PHL §230-a.

Public Health Law §230-c(4)(b) permits the Review Board to remand a case to the Hearing Committee for further consideration.

Public Health Law §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

HEARING COMMITTEE DETERMINATION

The Petitioner charged the Respondent with eight specifications of professional misconduct, including allegations of gross negligence, negligence on more than one occasion, gross incompetence and incompetence on more than one occasion. These allegations concern the Respondent's medical care and treatment of three patients at Long Beach Memorial Hospital (hereinafter "Long Beach").

The Hearing Committee sustained one specification of professional misconduct, based upon a determination that the

Respondent was guilty of negligence on more than one occasion with regard to his medical care and treatment of two patients (Patients B and C). The Hearing Committee dismissed seven specifications of gross negligence, gross incompetence and incompetence on more than one occasion, as well as all specifications regarding Patient A.

The Hearing Committee found that Dr. Janus, a general surgeon, is a Diplomate of the American Board of Surgery and a Fellow of the American College of Surgeons. The Committee further found that Patient A, a 68 year old woman, was admitted to the Hospital by her internist on March 12, 1989. He had seen her in his office three weeks earlier because of weight loss, decreased appetite, hypertension, anxiety and a history of diarrhea reported variously as two weeks to more than two months. Examination of Patient A at the time of admission revealed occult blood in the stool and possible abdominal mass. The patient was admitted to rule out (a) a gastrointestinal malignancy and (b) sepsis of gastrointestinal origin. She was referred to a gastroenterologist, and a colonoscopy was scheduled. On March 15, a colonoscopy was performed. The colonoscope could not be passed beyond 35 centimeters because the lumen narrowed to the size of a pinhole. Multiple tissue biopsies were taken. The pathology report, dated March 16, noted no changes that would be considered characteristic of carcinoma, and recorded a diagnosis of colonic mucosa with chronic inflammation and marked glandular dysplasia.

The Hearing Committee further found that Dr. Janus saw

Patient A in consultation on March 15. He diagnosed the patient as suffering from obstructing carcinoma of the sigmoid colon. On March 17, 1989, Dr. Janus performed a sigmoid colectomy with primary anastomosis on Patient A. The pathology report regarding the March 17 surgery noted a diagnosis of inflammatory bowel disease.¹ There was no indication of carcinoma in the colon specimen submitted for analysis.

The Hearing Committee found that Patient A required further treatment for ulcerative colitis and diverticulitis and that beginning on March 21 the patient was experiencing liquid green stools and was anemic. Anti-diarrhea medications were prescribed, but were not effective. The Committee found that there was no entry in the patient's record which indicated that Dr. Janus considered inflammatory bowel disease as a contributing factor to the diarrhea. On or about March 31, Patient A developed peritonitis. Dr. Janus ordered a gastrografin study which indicated an anastomotic leak. He performed a transverse colostomy on Patient A on March 31, 1989. Patient A expired on April 4, 1989.

¹ The diagnosis indicated by the pathology report was Diverticulosis and diverticulitis, severe with pericolic abscesses and stenosis of the lumen. Acute and chronic colitis, severe. Eleven pericolic lymph nodes with reactive hyperplasia. margins with severe chronic inflammatory colitis. (Pet. Ex. #3, p. 125).

The Hearing Committee concluded that two of the factual allegations regarding Patient A should be sustained² and dismissed the three remaining allegations. However, the Hearing Committee further concluded that Dr. Janus's conduct with regard to Patient A did not constitute negligence or incompetence.

With regard to Patient B, the Hearing Committee found that the patient was an 87 year old male who, in July 1989, underwent surgery to address gangrene in his left foot. The surgery was performed by a Dr. Ryzoff, a vascular surgeon. Dr. Ryzoff went on vacation in early August and Respondent, although not a vascular surgeon, was authorized to cover for him under limited conditions set by the Chief of Surgery at Long Beach. Among other conditions, Dr. Ryzoff was required to stay within a 90-120 minute drive from the hospital.

The Hearing Committee further found that on the evening of August 8, 1989, Dr. Janus was contacted at home by the hospital staff and informed that a large ecchymotic area had been observed around the incision at the groin, foul-smelling material was draining from the suture line and the patient's hemoglobin

²Paragraphs A.1 and A.2 of the Statement of Charges allege:

- A.1. Respondent failed to appropriately diagnose the source of Patient A's life-threatening post-operative diarrhea.
- A.2. Respondent failed to appreciate the significance of the pathologist's findings that the tissue showed severe chronic and acute inflammation, and the clinical significance of the pus cells in the stool, without evidence of carcinoma, and act accordingly.

and hematocrit were dropping. Dr. Janus ordered a stat complete blood count and electrolytes. At the hearing, he testified that he immediately informed Dr. Ryzoff of the patient's condition and was told that Dr. Ryzoff would take care of the patient. The patient expired approximately five hours later, never having been seen by Dr. Janus or Dr. Ryzoff.

The Hearing Committee concluded that given the age and condition of the patient, Dr. Janus' failure to attend the patient on the evening of August 8 constituted negligence.

With regard to Patient C, an 82 year old woman admitted to Long Beach by her internist due to renal problems, the Hearing Committee found that Dr. Janus examined the patient and recommended a cholecystectomy when feasible. The Committee further found that on June 8, 1992, Dr. Janus commenced an exploratory laparotomy, cholecystectomy and closure of a cholecystoduodenal fistula which was revealed during surgery. The patient experienced massive hemorrhaging, and died a few hours following the surgery.

The Hearing Committee further found that the patient's renal infection appeared to be subsiding prior to the surgery and that there was an absence of other significant indicators of gall bladder disease. Consequently, the Hearing Committee concluded that Dr. Janus should not have undertaken a cholecystectomy at that time.

The Hearing Committee further found that, having encountered significant complications during the operation, Dr. Janus should have realized that a cholecystectomy could not be

successful and therefore should have performed a cholecystostomy³ instead. The Hearing Committee concluded that Dr. Janus' conduct with regard to Patient C constituted negligence.

The Committee voted to censure and reprimand Dr. Janus and ordered that his practice be monitored for a period of one year by a physician nominated by the Respondent and approved by the Office of Professional Medical Conduct.

REQUEST FOR REVIEW

PETITIONER: The Petitioner has asked that the Review Board overturn that part of the Hearing Committee's Determination and Order which did not sustain Factual Allegation A.3⁴, as well as the Hearing Committee's conclusion that the allegations of negligence concerning Dr. Janus' treatment of Patient A were not sustained. The Petitioner argues that the Hearing Committee, in its findings of fact #12 through #17, found that Dr. Janus was not aware of the pathologist's report and that he failed to consult with the patient's gastroenterologist and internist to treat her ulcerative colitis and diverticulitis.

The Petitioner further argues that the Committee found

³In a *cholecystostomy*, a tube is inserted into the gallbladder in order to remove fluid and gallstones. This is contrasted with a *cholecystectomy*, in which the gallbladder is removed.

⁴Factual Allegation A.3 states that: Respondent failed to provide appropriate post-operative medical therapy for the ulcerative colitis, which had been demonstrated on the pathology report.

that Dr. Janus failed to understand the cause of the patient's underlying pathology. The Petitioner argues that these findings of fact are not consistent with the Committee's conclusions that Dr. Janus was not negligent in his care of Patient A. The Committee's findings clearly demonstrate that Dr. Janus did not understand the underlying cause of the patient's diarrhea, and that subsequent to the first surgery, he failed to change or modify his treatment despite the fact that the patient's condition did not improve.

The Petitioner further argues that the Committee's findings of fact #13, 15 and 16 are inconsistent with the failure to sustain Allegation A.3. The Hearing Committee found that Dr. Janus was acting as a consultant rather than the primary physician. The Petitioner argues that even if the gastroenterologist and the internist had been leading the care of the patient, Dr. Janus assumed the management of the case once he terminated the antibiotics and countermanded the other physicians' orders. The Petitioner further argues that Dr. Janus' treatment of Patient A deviated from accepted medical standards and warrants a finding of negligence.

The Petitioner argues that a sanction consisting of a censure and reprimand and one year of monitoring is not sufficient given the misconduct found in the case. The Petitioner asks that the Review Board, at a minimum, suspend Dr. Janus' license to practice medicine for a period of three years, with the final 24 months of the suspension stayed and the Respondent placed on probation, monitored and retrained.

The Petitioner also notes that in the event that the Review Board decides that monitoring is appropriate, a period of probation must also be imposed pursuant to Public Health Law §230(18)(a).

RESPONDENT: In an answering brief, the Respondent moves to dismiss the Petitioner's appeal for lack of jurisdiction. The motion is based on the failure of the Petitioner to serve a notice of appeal upon the Review Board as required by law.⁵ The only writing submitted to the Review Board by the Petitioner prior to its brief, is a letter dated April 22, 1996 which states "Petitioner *intends to appeal* the Hearing Committee's decision in the Janus Matter to the Administrative Review Board." The Respondent argues that this letter represents a mere statement of future plans, rather than the notice of review required by PHL §230-c(4)(a). The failure to comply with the statute therefore deprives the Review Board of jurisdiction over this case.

The Respondent further argues that the Review Board should not disturb the determination and penalties imposed by the Hearing Committee. In arguing that allegations A.1 and A.2 constituted negligence and that allegation A.3 should have been sustained, the Petitioner has taken liberties with the facts and

⁵Public Health Law §230-c(4)(a) provides, in pertinent part, that [a] notice of review must be served by certified mail upon the administrative review board and the adverse party within fourteen days of service of the determination of the committee on professional conduct of the state board for professional medical conduct .

the record.

The Respondent argues that he was not the sole physician treating Patient A, but was instead part of a team which also consisted of an internist and a gastroenterologist. Further, following the initial surgery, the other members of the team were primarily responsible for the management of the patient's care. The Respondent argues that the Petitioner has misperceived Respondent's role in this case. He was initially brought into the case by the other members of the team, based upon their primary diagnosis of carcinoma of the sigmoid colon. He further argues that surgeons do not practice surgery in a vacuum. They must rely on the diagnostic skills of the specialists primarily charged with the care and management of the patient. The Hearing Committee correctly found that the gastroenterologist and internist were primarily responsible for the failure to make the appropriate diagnosis and treatment decisions regarding Patient A.

The Respondent also argues that the penalty imposed by the Hearing Committee (censure and reprimand plus monitoring) should not be disturbed. A suspension for one year would be shockingly severe considering the negligent conduct found.

Moreover, the Respondent argues that the Petitioner erroneously claimed that the Hearing Committee was required to place him on probation in order to impose a monitoring requirement. PHL §230-a, which delineates the penalties for professional misconduct, allows Hearing Committees to exercise discretion, and does not bind them to the literal language of the

statute. Therefore, the Committee could legally fashion a penalty not necessarily confined to those enumerated in the statute. The mere fact that PHL§230(18)(a) permits the Director of the Office of Professional Medical Conduct to monitor physicians who have been placed on probation does not mean that only the Director can mandate such monitoring. As a result, the Hearing Committee's determination to censure and reprimand and monitor the Respondent is both legally supportable and appropriate for the misconduct found.

REVIEW BOARD DETERMINATION

The Review Board has considered the entire record below and the briefs which counsel have submitted.

MOTION TO DISMISS: The Review Board votes 5-0 to deny the Respondent's motion to dismiss the appeal for lack of jurisdiction. PHL §230-c(4)(a) does not mandate specific language which must be cited in order to perfect an appeal. The Petitioner's April 22, 1996 letter gave sufficient notice to the Review Board, and the Respondent, that an appeal was being undertaken. To hold otherwise would exalt form over substance.

HEARING COMMITTEE DETERMINATION: The Review Board votes 5-0 to sustain the Hearing Committee's Determination that the Respondent was guilty of practicing with negligence on more than one occasion with regard to Patient's B and C. This Determination

was consistent with the Committee's factual findings.

The Review Board votes 4-1 to sustain the Hearing Committee's Determination that the Respondent's failure to appropriately diagnose the patient's post-operative diarrhea did not constitute negligence (Factual Allegation A.1). The Board also votes 3-2 to sustain the Committee's Determination that the Respondent did not fail to provide appropriate post-operative therapy for the patient's ulcerative colitis (Factual Allegation A.3). These Determinations are also consistent with the Committee's findings and conclusions.

The Review Board votes 5-0 to overturn the Committee's Determination that the Respondent's failure to appreciate the significance of the pathologist's findings that the tissue specimens showed severe chronic and acute inflammation, and the clinical significance of the pus cells in the patient's stool (Factual Allegation A.2) did not constitute negligence. This Determination is not consistent with the Committee's findings of fact and conclusions of law.

The Hearing Committee found no evidence in the medical record that the Respondent ever reviewed the pathologist's report or disputed its findings (Findings of Fact #11 and 12). They further found that he should have consulted with the gastroenterologist and the internist for further treatment of the patient's ulcerative colitis and diverticulitis (Finding of Fact #13). The Committee then concluded that once the patient failed to improve and carcinoma was ruled out, the Respondent should have considered other diagnoses, such as ulcerative colitis, but

failed to do so (Determination and Order, p. 15). The Review Board agrees with the Petitioner that this failure was a deviation from accepted standards of practice and thus constitutes negligence in the practice of medicine.

The Review Board votes 4-1 to modify the penalty imposed by the Hearing Committee to include a one year term of probation under conditions to be determined by the Director of the Office of Professional Medical Conduct, in addition to the censure and reprimand and monitoring.⁶ Public Health Law §230(18)(a) only authorizes monitoring of physicians who have been placed on probation pursuant to a determination of professional misconduct by the board. Thus, the Hearing Committee erred in imposing monitoring without probation. Moreover, the majority of the Review Board is of the opinion that a period of probation, coupled with monitoring, is the appropriate sanction, given the patterns of negligent conduct revealed by the hearing.

⁶One member of the Review Board voted to impose a two-month period of actual suspension in addition to probation and monitoring.

ORDER

NOW, based upon this Determination, the Review Board issues the following **ORDER**:

1. The Review Board **SUSTAINS** the Hearing Committee's April 8, 1996 Determination finding the Respondent guilty of professional misconduct.

2. The Review Board **MODIFIES** the Hearing Committee's Determination to include a one year term of probation under conditions to be determined by the Director of the Office of Professional Medical Conduct, in addition to the imposition of a censure and reprimand and one year period of monitoring by a physician nominated by Dr. Janus and approved by the Office of Professional Medical Conduct.

SUMNER SHAPIRO

ROBERT M. BRIBER

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

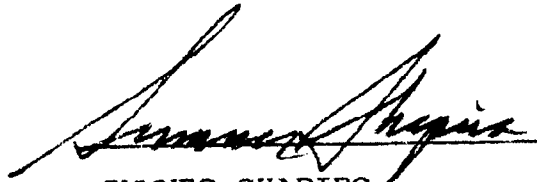
WILLIAM A. STEWART, M.D.

IN THE MATTER OF WARREN JANUS, M.D.

SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Janus.

DATED: Delmar, New York

AUG. 5, 1996



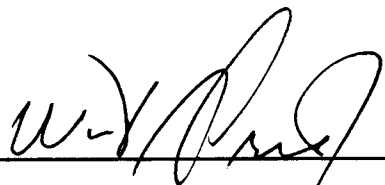
SUMNER SHAPIRO

IN THE MATTER OF WARREN JANUS, M.D.

WINSTON S. PRICE, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Janus.

DATED: Brooklyn, New York

8/7, 1996



WINSTON S. PRICE, M.D.

IN THE MATTER OF WARREN JANUS, M.D.

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Janus.

DATED: Roslyn, New York

July 5, 1996

A handwritten signature in cursive script, appearing to read "Ed C. Sinnott", written over a horizontal line. There is a small mark resembling a "4" at the end of the signature.


EDWARD C. SINNOTT, M.D.

IN THE MATTER OF WARREN JANUS, M.D.

WILLIAM A. STEWART, M.D., a member of the
Administrative Review Board for Professional Medical Conduct,
concurs in the Determination and Order in the Matter of Dr.
Janus.

DATED: Syracuse, New York

2 Aug., 1996

A handwritten signature in cursive script that reads "William A. Stewart".

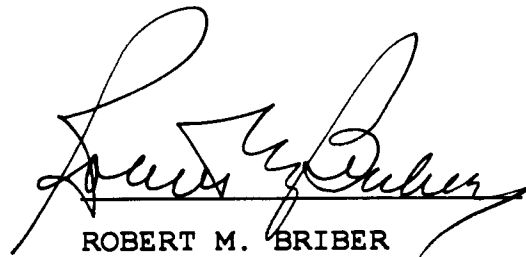
WILLIAM A. STEWART, M.D.

IN THE MATTER OF WARREN JANUS, M.D.

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Janus.

DATED: Schenectady, New York

Aug 9, 1996



ROBERT M. BRIBER