



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

August 25, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ann Gayle, Esq.
NYS Department of Health
5 Penn Plaza – 6th Floor
New York, New York 10001

Barry M. Fallick, Esq.
Rochman, Platzer, Fallick &
Sternheim, LLP
666 Third Avenue
New York, New York 10017

Swapnadip Lahiri, M.D.
52 Delford Avenue
Oradell, New Jersey 07649

RE: In the Matter of Swapnadip Lahiri, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-141) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
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.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Tyrone T. Butler". The signature is fluid and cursive, with the first name "Tyrone" being more prominent.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

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

In the Matter of

Swapnadip Lahiri, M.D. (Respondent)

**A proceeding to review a Determination by a
Committee (Committee) from the Board for
Professional Medical Conduct (BPMC)**

COPY

Administrative Review Board (ARB)

Determination and Order No. 00-141

**Before ARB Members Grossman, Lynch, Pellman, Price and Briber
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner):
For the Respondent:**

**Ann Gayle, Esq.
Barry M. Fallick, Esq.**

After a hearing below a BPMC Committee found that the Respondent committed fraud and engaged in conduct that evidenced moral unfitness in trying to cover-up his conduct toward a patient. The Committee found such conduct constituted professional misconduct and voted to suspend the respondent's License to practice medicine in New York (License) for three years, stayed the suspension, placed Respondent on probation and fined him Ten Thousand Dollars (\$10,000.00). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), the Petitioner asks the ARB to modify the Committee's Determination by sustaining additional charges relating to the Respondent's conduct toward the patient and by revoking the Respondent's License. After reviewing the hearing record and briefs by the parties, we hold that the Respondent willfully harassed the patient and practiced medicine with negligence on more than one occasion. We modify the Committee's Determination to place the Respondent on actual suspension for six months, to reduce the probation to thirty months and to eliminate the fine.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(2-3), (20) & (31-32) (McKinney Supp. 2000) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- engaging in conduct that evidences moral unfitness,
- willfully harassing, abusing or intimidating a patient, and,
- failing to maintain accurate records.

The charges related to the care that the Respondent provided to one person, Patient A, and to the Respondent's conduct in relation to an investigation concerning the Respondent's conduct toward Patient A. In the Statement of Charges [Committee Determination Appendix I], the Petitioner charged that the following acts constituted misconduct:

- failing to perform a necessary urinalysis on Patient A [Charge A1],
- performing an unnecessary and unwarranted pelvic examination on the Patient [Charge A2a],
- asking the Patient for date [Charge A3a & b],
- making inappropriate verbal comments to the Patient [Charge A3c],
- denying falsely asking the Patient for a date during an investigation interview with the Office for Professional Medical Conduct (OPMC) [Charge B],
- denying falsely that the Respondent altered the record for Patient A [Charge C],
- submitting the altered record to OPMC [Charge D], and,
- failing to maintain a record that reflected accurately the treatment for Patient A [Charge E].

A hearing ensued on the charges before the BPMC Committee who rendered the Determination now on review.

The Committee determined that the Respondent saw Patient A, a female, during eleven office visits, concerning a work-related injury. The Committee found that Patient A complained

to the Respondent in May 1996 about urinary frequency, that the Respondent performed a pelvic examination on the patient and ordered urine, blood and stool tests. They found further that the Respondent called the Patient and asked for dates on May 28 and June 28. The Patient refused and the Patient taped the Respondent when he called her back. The Committee also found that the Respondent made inappropriate verbal comments to the Patient that:

- she was pretty,
- she had a nice body,
- she should model,
- he could get her into modeling, and,
- he knew someone who could take pictures of her [Committee Finding of Fact (FF) 11].

In July 1996, the Patient filed a complaint against the Respondent with the Office for Professional Medical Conduct. During the investigation into that complaint, the Respondent provided OPMC with records that the Respondent certified as true, exact and accurate copies of his records regarding Patient A. Those records included a notation for March 8, 1996 noting a complaint of frequency of urination and an impression to rule out a urinary tract infection. The Respondent also provided records regarding the care for Patient A to the Worker's Compensation Board. The records to the Worker's Compensation Board contained nothing for March 8, 1996 noting a frequency of urination complaint or an impression to rule out a urinary tract infection. On June 5, 1997, the Respondent participated in an interview with OPMC. At the interview, the Respondent denied asking Patient A for a date and denied altering the record for Patient A regarding the March 8, 1996 visit. The Committee found that the Respondent altered the record [FF 14].

Patient A testified at the hearing. The Committee found Patient A credible as a witness, although the Committee found inconsistencies in her testimony. The Committee noted that the Respondent gave no testimony at the hearing and called no witnesses. The Committee drew a negative inference from the Respondent's failure to testify and the Committee found unchallenged the testimony by Patient A and by the Petitioner's other witnesses, Dr. Valery F. Lanyi and Dr. Robert Shimm.

As to the Specification charging fraud, the Committee found that the Respondent practiced fraudulently by altering the record for Patient A, by submitting the altered record to OPMC and by denying to OPMC that the Respondent asked the Patient for dates. The Committee found no fraud in the pelvic examination on the Patient, because they found the examination appropriate and within accepted medical standards. As to the negligence specification, the Committee found that the Respondent practiced negligently by failing to order a urine analysis for the Patient. The Petitioner had also charged negligence due to altering the record and failing to maintain an accurate record for the Patient. The Committee found those acts outside the definition for negligence because they constituted intentional acts rather than acts of omission. As the Committee sustained allegations as to only one negligent act, the Committee dismissed the Specification charging negligence on more than one occasion. As to the willful harassment Specification, the Committee found that the Respondent harassed Patient A by asking for dates and making inappropriate comments. The Committee found, however, that the behavior failed to rise to the level of willful harassment that would constitute misconduct under the Education Law, because the Respondent was not soliciting a sexual relationship and he made no inappropriate physical contact. As to the moral unfitness Specification, the Committee found no conduct evidencing moral unfitness in asking for dates or the inappropriate comments. The Committee came to that conclusion for the same reasons they dismissed the willful harassment Specification. The Committee did sustain the allegations that the Respondent engaged in conduct evidencing moral unfitness by altering the record for Patient A and by lying to OPMC to cover-up his underlying misdeed. As to the Specification charging failure to maintain accurate records, the Committee found that altering the Patient's record jeopardized the care for the Patient by misrepresenting the true nature of her complaints and treatment.

The Committee voted to suspend the Respondent's License for three years, to stay the suspension in full, to fine the Respondent Ten Thousand Dollars (\$10,000.00) and to place the Respondent on probation for three years under the terms the Committee specified in Appendix II to their Determination. The Committee stated that they rejected revocation as an appropriate penalty, because they found no evidence of sexual overtones in the Respondent's conduct, they found the pelvic examination appropriate and they found no inappropriate physical contact. The

Committee determined that the fine and monitoring conditions in the probation would send a sufficient message to the Respondent that the attempts to cover-up carried severe consequences.

Review History and Issues

The Committee rendered their Determination on May 4, 2000. This proceeding commenced on May 15, 2000, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's response brief. The record closed when the ARB received the response brief on June 22, 2000.

The Petitioner requests that the ARB sustain additional misconduct specifications against the Respondent and increase the penalty the Committee imposed. The Petitioner argues that the Committee erred in finding that the harassment by the Respondent failed to amount to willful harassment under the Education Law, because the harassment involved no inappropriate or sexual contact and no solicitation for a sexual relationship. The Petitioner argues that willful means only a voluntary act as opposed to accidental or involuntary. The Petitioner also asks that the ARB sustain additional charges that the Respondent committed fraud and engaged in conduct that evidenced moral unfitness concerning the pelvic examination on the Patient. The Petitioner argues that the ARB should infer that the Respondent performed an unnecessary and unwarranted examination due to the Respondent's attempts to conceal his misconduct. The Petitioner also asks that the ARB sustain the Specification that the Respondent practiced with negligence on more than one occasion. The Respondent contends that negligence constitutes a failure to meet a minimum standard of care and that the Respondent failed to satisfy the minimum standard for care on two occasions by making no order for a urine analysis on either

May 10 or May 17, 1996. Finally, the Petitioner argues that the Respondent's conduct warrants revocation and that the Respondent has failed to testify or offer any evidence that he will correct his ways.

The Respondent argues that the ARB should leave the Committee's Determination intact, because the Committee found no sexual misconduct and no inappropriate pelvic examination. The Respondent concedes that he acted improperly in inviting the Patient out, in his responses to OPMC and in his record keeping. The Respondent concedes that his conduct merits punishment, but punishment much less severe than the revocation that the Petitioner requested.

Determination

The ARB has considered the record and the parties' briefs. We reject the Petitioner's request that we sustain additional charges that the Respondent practiced fraudulently and engaged in conduct that evidenced moral unfitness. We overturn the Committee and sustain charges that the Respondent practiced with negligence on more than one occasion and willfully harassed Patient A. We vote 5-0 to modify the penalty the Committee imposed, but we reject the Petitioner's request that we revoke the Respondent's License. We suspend the Respondent's License for three years and stay the final thirty months in the suspension. We place the Respondent on probation for the thirty months under the probation terms that the Committee imposed in Appendix II in their Determination. We overturn the Committee's Determination to fine the Respondent.

Additional Moral Unfitness and Fraud Charges: Charge A2a alleged that the Respondent performed an inappropriate pelvic examination. The Petitioner requests that the ARB overturn the Committee and sustain that Charge and to use that sustained Charge as the basis to sustain additional Specifications that the Respondent practiced fraudulently and engaged

in conduct evidencing moral unfitness. The Committee dismissed Charge A2a upon concluding that neither the testimony by the Petitioner's expert witness, Dr. Lanyi, nor the testimony by Patient A proved the examination inappropriate. The Committee found that the examination fell within the acceptable standard for care. The Petitioner argued that the ARB should overturn that finding because the Respondent's attempts to cover-up his conduct toward Patient A proved that the Respondent made an inappropriate examination. We find that argument unconvincing.

The Committee made their finding from their assessment on testimony by witnesses. The ARB owes the Committee, as fact finder, deference in the Committee's judgements on credibility. In asking us to overturn the Committee's judgement, the Petitioner points to no testimony from the record to prove the examination unacceptable. In addition, the ARB finds no basis in the record on which to overturn the Committee.

Willful Harassment: The Committee did find that the Respondent asked the Patient out on dates and that the Respondent made inappropriate comments to the Patient [FF 9-11]. The Committee found that the Respondent did harass the Patient [Committee Determination Page 12], but they concluded the conduct fell short from willful harassment because they found no inappropriate physical or sexual contact and no solicitation for a sexual relationship. We disagree with the Committee's conclusion that the evidence fails to prove willful harassment.

Under N.Y. Educ. Law § 6530(31)(McKinney Supp. 2000), professional misconduct by a physician includes "Willfully harassing, abusing, or intimidating a patient either physically or verbally". Under the Education law, the word "willfully" means a knowing or deliberate act, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (Third Dept. 1986). Under the Public Health Law, the Courts have defined the word "willful" to require no showing of bad intention, but simply a showing that an act is deliberate and voluntary as opposed to accidental, People v. Coe, 131 Misc. 2d 807, 501 N.Y.S.2d 997 (1986), affirmed and remitted 126 A.D.2d 436, 510 N.Y.S.2d 470, affirmed 71 N.Y.2d 852, 527 N.Y.S.2d 741. To determine

willful harassment in this case, therefore, requires no showing that the Respondent intended his conduct as a solicitation for a sexual relationship. As the conduct may be verbal, it also makes no difference in this charge that the Respondent made no physical or sexual contact with the Patient.

The evidence in this case showed that the respondent engaged in voluntary, knowing verbal conduct that the Committee found to constitute harassment. That evidence proved that the Respondent violated Educ. Law § 6530(31) by willfully harassing a patient.

The Respondent's brief [page 3] argued that Patient A made allegations in her hearing testimony that appeared nowhere in her complaint against the Respondent. The ARB takes that argument as a challenge to the Patient's credibility. As we noted in the prior section, we owe the Committee deference in their role as fact finder in making credibility determinations. We also note that the Respondent had an opportunity to testify at the hearing and challenge the testimony by Patient A. The Respondent failed to do so and the Committee drew a negative inference from that failure. The ARB finds no reason to reject the Committee's finding as to Patient A's credibility. At page 3, the Respondent's brief also argued that the Respondent's lunch invitation to Patient A was unrelated to medical practice. We disagree. The Respondent knew the Patient and had access to her telephone number because he was treating her for a medical condition. The Committee also found that the Respondent's actions crossed the boundary line between physician and patient [Committee Determination page 12].

Negligence On More Than One Occasion: Under Educ. Law § 6530(3), professional misconduct includes practicing medicine with negligence on more than one occasion. Negligence means the failure to exercise the care that a reasonably prudent physician would exercise under the circumstances, Matter of Bogdan v. State. Bd. for Prof. Med. Cond., 195 A.D.2d 86, 606 N.Y.S.2d 381(3rd Dept. 1993). The Committee found that the Respondent committed a single negligent act when he failed to perform a timely, necessary urine analysis on Patient A. The Committee also found that the Respondent altered the record for Patient A and that such

alteration jeopardized the care for the patient by misrepresenting the true nature of her complaints and treatment [Committee Determination page 14]. The Committee rejected finding that the alteration constituted a second negligent act, because the alteration was an intentional act rather than an act of omission [Committee Determination page 11]. We hold that the definition for negligence that the Committee applied in that instance constituted error.

The failure to maintain objectively meaningful information in medical records constitutes negligence when there is relationship between the inadequate records and patient treatment, Matter of Schoebach v. DeBuono, 262 A.D.2d 820, 692 N.Y.S.2d 208 (3rd Dept. 1999), lv. den. 94 N.Y.2d 756. Here the Committee found specifically that the alteration in the records jeopardized patient care. We hold that the alteration amounted to second instance of negligent practice. We vote to sustain the Specification that charged that the Respondent violated Educ. Law § 6530(30) by practicing medicine with negligence on more than one occasion.

Penalty: The Respondent's comments constituted verbal harassment against a Patient and the Respondent practiced medicine negligently. The Respondent then compounded his misconduct by committing fraud to cover-up his conduct. We agree with the Committee that such conduct warrants a sanction that will deter the Respondent and others from such conduct in the future and which will assure that the Respondent has corrected the problems in his practice. We agree with the Committee that time on probation will assure that the Respondent has corrected the deficiencies in his practice. We also agree with the Committee that revocation would constitute an overly harsh penalty in this case. The Committee found no inappropriate physical contact or sexual contact by the Respondent. Although we held that finding constituted no defense on the willful harassment charge, we consider the finding mitigation in assessing a penalty.

The Committee felt apparently that they could deter further misconduct by fining the Respondent and the Committee chose to stay the entire three year suspension they imposed. We

hold that the Respondent's conduct warrants an actual period on suspension, during which the Respondent should contemplate his actions and realize that any further such conduct could result in his separation from medical practice permanently. We vote to suspend the Respondent from practice for three years and to stay the penalty for the final thirty months. We reduce the period for the probation from three years to the thirty months period of the stayed suspension. We retain the same probation terms as the Committee specified in Appendix II to their Determination. We hold that the six-month actual suspension will result in a sufficiently heavy financial burden upon the Respondent, so we overturn the Committee and remove the monetary fine the Committee imposed.

ORDER

NOW, with this Determination as our basis, the ARB renders the following **ORDER**:

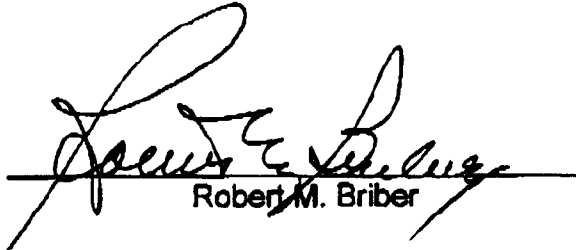
1. The ARB **AFFIRMS** the Committee's Determination that the Respondent practiced medicine fraudulently and engaged in conduct that evidenced moral unfitness.
2. The ARB **OVERTURNS** the Committee and sustains additional charges that the Respondent practiced medicine with negligence on more than one occasion and willfully harassed a patient.
3. The ARB **AFFIRMS** the Committee's Determination to suspend the Respondent's License for three years. We **OVERTURN** the Committee's Determination to stay the suspension entirely. We **STAY** the suspension for the final thirty months.
4. We **AFFIRM** the Committee's Determination to place the Respondent on probation under the terms the Committee specified at Appendix II in their Determination. We **REDUCE** the probation from three years to the thirty-month period for the stayed suspension.
5. We **OVERTURN** the Committee's Determination to fine the Respondent Ten Thousand Dollars (\$10,000.00).

**Robert M. Briber
Thea Graves Pellman
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.**

In the Matter of Swapnádip Lahiri, M.D.

Robert M. Briber, an ARB Member, concurs in the Determination and Order in the Matter of Dr. Lahiri.

Dated: August 14, 2000



Robert M. Briber

FROM : Sylvia and Bob Briber

PHONE NO. : 518 377 0469

Aug. 15 2000 10:23AM P1

In the Matter of Swapnadip Lahiri, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Lahiri.

Dated: Aug 15, 2000



Thea Graves Pellman

In the Matter of Swapnadip Lahiri, M.D.

Winston S. Price, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Lahiri..

Dated: 8/25, 2000

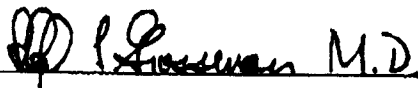
A handwritten signature in dark ink, appearing to read "Winston S. Price", is written over a horizontal line.

Winston S. Price, M.D.

In the Matter of Swannadip Lahiri, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Lahiri.

Dated: August 14, 2000

 M.D.

Stanley L. Grossman, M.D.

In the Matter of Swapnadiq Lahiri, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in
the Matter of Dr. Lahiri.

Dated: August 14, 2000

Therese G. Lynch M.D.

Therese G. Lynch, M.D.