THE STATE EDUCATION DEPARTMENT THE UNIVERSITY OF THE STATE OF NEW YORK ALBANY, NY 12234

OFFICE OF PROFESSIONAL DISCIPLINE
ONE PARK AVENUE NEW YORK, NEW YORK 10016-5802

September 19, 1997

Byron Major, Jr., Physician
2050 Coleman Street
Brooklyn, New York 11254

Re: License No. 121016

Dear Dr. Major:

Enclosed please find Order Nos. 16768/8608. This letter will explain when the Order regarding the above respondent goes into effect.

If the penalty imposed by the Order is an annulment, revocation, surrender, or an actual suspension (suspension which is not wholly stayed) of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter.

In the event you are personally served with the Order, the Order is effective as of the date of the personal service. In the event you are served by certified mail and are not personally served with the Order, the Order is effective five (5) days after the date of this letter. The Order will take effect as indicated in this letter, even if you fail to meet the time requirement of delivering your license and registration to this Department.

If the penalty imposed by the Order is a revocation or a surrender of your license, you may, pursuant to Rule 24.7 (b) of the Rules of the Board of Regents, a copy of which is attached, apply for restoration of your license after three years have elapsed from the effective date of the Order and the penalty. Please be advised that said application is not granted automatically.

Very truly yours,

DANIEL J. KELLEHER
Director of Investigations
By:
Gustave Martine
GUSTAVE MARTINE
Supervisor

DJK/GM/er
Attachment
CERTIFIED MAIL - RRR
cc: Robert Asher, Esq.
295 Madison Avenue, Suite 700
New York, New York 10017

The University of the State of New York

IN THE MATTER

OF

BYRON J. MAJOR, JR.
(Physician)

DUPLICATE ORIGINAL VOTE AND ORDER NOS. 16768/8608

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar Nos. 16768/8608, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (September 19, 1997): That, in the matter of BYRON J. MAJOR, JR., respondent, the recommendation of the Regents Review Committee be accepted as follows:

1. The findings of fact and the conclusions of the hearing committee on remand and the recommendation of the Commissioner of Health as to those findings and conclusions are accepted;
2. With respect to the Supplemental Statement of Charges, respondent is guilty, by a preponderance of the evidence, of unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.2(a)(2) (first specification), gross negligence (second specification), and unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.1(b)(5) (third specification), all involving respondent engaging in sexual intercourse with Patient B in his office, in the course of purportedly adjusting silicone breast implants, and while said Patient was under sedation;
3. With respect to the original Amended Statement of Charges respondent, as previously determined by the Board of

Regents, is, by a preponderance of the evidence, guilty of unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.1(b)(13), involving respondent willfully failing to comply with a request to make available certain records (eighth specification), and guilty to the extent indicated by the original hearing committee of unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.2(a)(2), involving respondent willfully abusing a patient physically and verbally (first specification), gross negligence (fifth specification), and unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.1(b)(5), involving respondent engaging in conduct in the practice of medicine which evidences moral unfitness to practice the profession insofar as the original hearing committee concluded that respondent was guilty as set forth in its conclusions regarding the first and eighth specifications (ninth specification);

4. With respect to the original Amended Statement of Charges, respondent is guilty, by a preponderance of the evidence, of negligence on more than one occasion to the extent indicated by the original hearing committee as to Patient A and as concluded by the hearing committee on remand as to Patient B (seventh specification);

5. In view of the very serious nature of the professional misconduct by respondent which has been determined herein, respondent's license to practice as a physician in New York State be revoked upon each of the specifications of the charges of which respondent was found guilty, as shown in paragraphs numbered two, three, and four above; and

6. On the reconsideration directed by the Board of Regents, respondent's application for reconsideration is denied and, upon the current record, the revocation of

respondent's license will remain in force and effect; and that the Associate Commissioner for the Professions be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and **SO ORDERED**, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Johanna Duncan-Poitier, Associate Commissioner for the Professions, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand, at the City of Albany, this 19th day of September, 1997.

Johanna Duncan-Poitier

JOHANNA DUNCAN-POITIER
ASSOCIATE COMMISSIONER
FOR THE PROFESSIONS

VOTE AND ORDER

BYRON J. MAJOR, JR.

CALENDAR NOS. 16768/8608

The University of the State of New York

IN THE MATTER

of the

Disciplinary Proceeding

against

BYRON J. MAJOR, JR. **No. 16768/8608**

who was licensed to practice as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

Respondent, Byron J. Major, Jr., has applied for reconsideration of the prior determination of the Board of Regents, rendered on July 29, 1988, revoking his license to practice as a physician in New York State. In such prior determination, under Calendar No. 8608, the Board of Regents found respondent guilty of various specifications of professional misconduct regarding Patients A and B. The charges concerning Patient B relate to allegations that, on or about December 10, 1995, respondent, in his office, in the course of purportedly adjusting silicone implants in the patient's breasts, and while she was under sedation, engaged in sexual intercourse with this patient. A copy of the original Amended Statement Of Charges is annexed hereto, made a part hereof, and marked as Exhibit "A".

While the original hearings were being held by a hearing committee of the State Board for Professional Medical Conduct between April 9, 1986 and August 20, 1987, respondent was convicted, in a separate criminal trial, of the crime of sexual assault in the first degree. Such conviction was premised on the same underlying conduct which formed the basis of the charges that respondent committed professional misconduct regarding Patient B. In the disciplinary hearing, the hearing committee expressly relied on the criminal conviction in concluding that respondent was guilty of the applicable charges of professional misconduct. The hearing committee's findings of fact, including finding 18 which showed that respondent had been found guilty of committing the above referred crime, conclusions, and recommendation to revoke respondent's license, together with the Commissioner of Health's recommendation to accept such findings of fact, conclusions, and recommendation, were accepted by the Board of Regents. A copy of the July 29, 1988 vote of the Board of Regents and the Order of the Commissioner of Education imposing disciplinary action upon respondent are annexed hereto, made a part hereof, and marked as Exhibit "B".

Subsequent to the determination of the Board of Regents, respondent's criminal conviction regarding Patient B was reversed and the criminal charges were eventually dismissed by the courts. Around July 14, 1995, respondent applied for reconsideration of the determination of the Board of Regents on the grounds that "there is

new and material evidence which was not previously available, or that circumstances have occurred subsequent to the original determination which warrant a reconsideration of the measure of discipline." The Regents Review Committee reviewed the various submissions of all parties on reconsideration and issued its report recommending, on page 7, that "respondent should not be saddled and branded with a criminal conviction which unbeknownst to the hearing committee was reversed by the courts." On April 24, 1996, the Board of Regents accepted the recommendation of the Regents Review Committee and permitted the New York State Health Department, Office of Professional Medical Conduct, the petitioner herein, to elect to re-try the disciplinary charges concerning Patient B at a de novo hearing. By this determination under Calendar No. 15686, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "C", the Board of Regents assured that respondent would not be disciplined based upon any evidence or consideration that respondent stood convicted of having committed any crime in the case of Patient B. If petitioner elected to seek a limited hearing[1] on the merits of its charges as to Patient B, petitioner would bear the burden, on remand, of proving its charges without regard to the now reversed conviction.

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[1] The hearing was limited because respondent did not advance any grounds for reconsidering the conclusions rendered regarding Patient A. In its April 24, 1996 determination, the Board of Regents clearly stated that its prior determination as to the charges concerning Patient A were not reconsidered and such prior determination as to the charges concerning Patient A remained in effect notwithstanding respondent's application for reconsideration.

The Board of Regents afforded petitioner twenty days, from April 24, 1996, to complete the three steps of: (1) electing whether to hold a limited hearing on remand; (2) filing a written notice of having made such election; and (3) preparing a supplemental statement of charges based solely upon the renumbered specifications concerning Patient B and promptly providing respondent with notice of the supplemental statement of charges. In addition, petitioner was afforded thirty days, from the filing of such written election, to begin to conduct such limited hearing on remand. We note that the findings, determination, and penalty regarding the charges concerning Patient A, the determination as to the seventh specification which related to both Patients A and B, and the penalty to be imposed upon the determination relating to the charges concerning both Patients A and B were not within the scope of the hearing on remand. On May 14, 1996, petitioner timely filed a Notice of Election and a Supplemental Statement of Charges which were provided to respondent. A copy of the Supplemental Statement of charges is annexed hereto, made a part hereof, and marked as Exhibit "D".[2]

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[2] As directed, the Supplemental Statement of charges made no reference to Patient A. Because the hearing on remand was based solely upon the charges in the one case of Patient B and was not to be influenced by other charges, and the hearing committee, in fairness to respondent, was not to be informed that respondent had been found guilty of any charges after a disciplinary hearing had been held, the Supplemental Statement of Charges called Patient B "Patient A". For the sake of clarity, we will continue to refer to this patient as Patient B and treat the Supplemental Statement of Charges as if it had designated her as Patient B.

On remand, pre-hearing conferences were held by the Administrative Officer on June 12, 1996, June 26, 1996, July 3, 1996, and July 9, 1996. Petitioner was required to appear at these conferences where various rulings were made regarding evidence and the conduct of the hearing. One such key ruling related to petitioner's motion for the Administrative Officer to receive into evidence the sworn testimony, from the prior disciplinary hearing, of both Patient B and Ms. Segal, together with all exhibits and documents previously introduced in connection therewith. By its motion, petitioner sought to utilize these transcripts and related exhibits and documents without again producing these witnesses to testify in person. In response, respondent's attorney asserted that since the Board of Regents had directed that the hearing on remand be de novo, petitioner was precluded from using the transcripts from the previous hearing as direct evidence in this matter and was required to produce these witnesses so that they can be cross-examined by respondent. See, ALJ Exhibit "8".

On July 3, 1996, after the Administrative Officer heard oral argument from both parties regarding petitioner's motion, took testimony from witnesses, and received documents relating to petitioner's offer of former testimony, he issued his ruling admitting the prior testimony of Patient B and Ms. Segal. In rendering this ruling, the Administrative Officer concluded that petitioner exercised diligence in attempting to obtain the testimony of these unavailable witnesses. Furthermore, the Administrative Officer indicated that petitioner had satisfied all

of the criteria under C.P.L.R. §4517 for receiving former testimony. Before the transcripts from the prior disciplinary hearing were distributed to the hearing committee, the Administrative Officer provided necessary instructions to assure compliance with the directions of the Board of Regents that prejudicial references to the criminal proceedings or conviction, or to the recommendations or determination in the disciplinary matter, not be included in the record. Respondent did not object once this ruling was rendered on July 3, 1996 and did not object, at the hearing held on July 9, 1996, to the receipt of these transcripts into the record. In fact, respondent's attorney affirmatively stated, at the time these transcripts were marked in evidence on July 9, 1997, that he had no objection to their receipt.

Prior to the holding of the first pre-hearing conference on remand, the Administrative Officer wrote to the Education Department and requested that all of the records from the original hearing be delivered to him within the next two days. Accordingly, the records from the original hearing were immediately delivered to the Health Department and placed in the custody of the Administrative Officer. In sending these records to the Administrative Officer, the Education Department requested that the records transferred for the purpose of holding a hearing on remand be fully returned to the Education Department upon the completion of such hearing.

At the hearing, respondent offered several documents into the record. He did not present any witnesses and did not attempt to produce either Patient B or Ms. Segal. In closing, respondent's attorney contended that respondent has shown that Patient B was not under the influence of sedating drugs at the time respondent had sexual intercourse with her in his office. Rather, he claimed that the incident occurred between two consenting adults.

Aside from the two portions of the transcripts from the former hearing, petitioner presented various documentary evidence. Such documentary evidence included tapes and transcripts showing incriminating statements made by respondent, in a telephone conversation after the incident in question, and a hospital chart, from an independent physician, indicating that Patient B "appeared clinically to have been drugged." Petitioner's attorney claimed that the evidence amply supported the charges concerning Patient B and that respondent's defense was incredible and unsupported by evidence.

On July 29, 1996, the hearing committee concluded that respondent was guilty of each of the charges set forth in the Supplemental Statement of Charges. Accordingly, the hearing committee found the respondent guilty of willfully abusing a patient physically (first specification); gross negligence (second specification) and engaging in conduct in the practice of medicine which evidences moral unfitness to practice the profession (third specification). The hearing committee specifically concluded that respondent, in his office and in the course of purportedly

adjusting the patient's silicone breast implants, engaged in sexual intercourse with her while she was under sedation. Hearing committee report page 6. It rejected respondent's "contention that the patient was not under sedation at the time and that the sexual intercourse was consensual" and indicated that respondent's conduct was an "egregious violation of professional trust." Hearing committee report pages 6 and 7. A copy of the report of the hearing committee on remand is annexed hereto, made a part hereof, and marked as Exhibit "E".

On September 27, 1996, the Commissioner of Health recommended that the Board of Regents accept the findings of fact and conclusions of the hearing committee on remand. A copy of the recommendation of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "F".

On December 3, 1996, a portion of the record in this matter was transmitted on behalf of the Commissioner of Health to the Education Department. As petitioner and respondent were apprised, the Education Department thereafter made several written and oral requests for the Health Department to transmit the remainder of the record in this matter. Over additional mailings ending in March 1997, the Health Department sent the Education Department other portions of the record in this matter. Both parties were then provided an opportunity to inspect the record available to this Committee and were requested to settle upon an agreed record to be reviewed by the Regents Review Committee and Board of Regents in

this matter.[3]

On May 9, 1997, respondent, his attorney, and petitioner's attorney all inspected and reviewed various boxes and files of materials and documents received by the Education Department. They also orally agreed, on that date, to settle the record to be reviewed in deciding both the issues which were the subject of the remand directed by the Board of Regents and all other issues to be resolved in this proceeding. In accordance with such agreement, a Stipulation describing the entire record was executed by the respondent and the attorneys for each of the parties. The first paragraph of the Stipulation between the parties provides that: the record described therein constitutes the complete and correct record in this matter; and the Regents Review Committee and Board of Regents may rely on the settled record in rendering the final determination in this matter. The last paragraph of the Stipulation further provides that the only documents or materials which will be included in or considered a part of the record in this matter shall be those described in the Stipulation.

[3] Both parties were offered the opportunity to reconstruct the record, if a reconstruction was considered by them to be necessary. They were requested to describe the mutually agreed upon settled record in a Stipulation to be submitted to this Committee. If the parties were unable to reach an agreement as to the record to be considered in rendering the final determination in this matter, they were directed to file a Statement indicating the efforts made to settle the record and the documents sought to be reviewed as the complete record in this matter.

By his letter dated May 21, 1997, respondent's attorney attempted to submit nine additional exhibits into the record herein. Petitioner's attorney "strongly" objected to the receipt of the nine exhibits offered by respondent's attorney. Subsequent to the receipt by our staff of the Stipulation executed by respondent's attorney and all the parties in this matter, respondent's attorney sought to revoke the Stipulation insofar as it limited his ability to submit these nine proposed additional exhibits. Such revocation was premised upon the ground that respondent's attorney was under the mistaken impression that the Stipulation would not prevent respondent from submitting these additional materials to the Regents Review Committee, even though they were not encompassed within the Stipulation. Neither respondent nor respondent's attorney objected to or attempted to revoke all the other parts of the Stipulation. Respondent and his attorney thus continue to assent to the record including the materials and documents described in the Stipulation and to the Regents Review Committee and Board of Regents relying on those materials and documents of record. Moreover, respondent and his attorney have not claimed that, aside from the nine proposed additional exhibits, the record before us was not correct and complete, and have not made any attempt to reconstruct the record. In response to the request by respondent's attorney to revoke the limitation, in the last paragraph of the Stipulation, prohibiting both parties from submitting additional materials and documents not

described in the Stipulation, petitioner's attorney requested that respondent be required to abide by all the terms of the Stipulation he and his attorney signed.

On June 19, 1997, respondent appeared before us in person and was represented by his attorney, Robert S. Asher, Esq. Terrence Sheehan, Esq., represented petitioner.

At the outset of our meeting, we announced our rulings regarding the record and the Stipulation settling the record. First, the parties, by their Stipulation, had requested our ruling as to whether the attachments to the October 20, 1995 letter from respondent's attorney would be received into the record. Such letter along with its three sets of attachments had been submitted previously by respondent's attorney in support of his claim that he had a basis for seeking reconsideration of the prior determination by the Board of Regents. In such letter, respondent contended that new evidence was available to show that respondent was not guilty of sexually abusing Patient B and the hearing committee would have made a different recommendation had it seen such new evidence.

As shown on page 4 of the Regents Review Committee report in the matter on reconsideration, both the October 20, 1995 cover letter and its attachments were previously received and considered by the Board of Regents in providing respondent with the opportunity to obtain a remand for a de novo hearing, before a new hearing committee, prior to a final determination being rendered on reconsideration. Nothing in the decision of the Board of Regents

assured respondent that any of the attachments to the October 20, 1995 cover letter would be automatically received into the hearing record by the hearing committee on remand. It was incumbent on respondent to offer, at the new hearing, the evidence he sought to be considered by the new hearing committee. The Administrative Officer, after being able to hear from both parties regarding any proffered evidence, could then rule upon the admissibility of any documents that respondent wished to be considered by the hearing committee on remand. Respondent was not permitted to bypass the hearing committee by withholding these documents from the Administrative Officer and the hearing committee on remand and, after the hearing was held on remand and the new hearing committee issued its report, first producing them for us. The available evidence which respondent had the opportunity to, but did not, offer into the hearing record on remand could not be considered by the new hearing committee in rendering its findings and conclusions regarding the charges concerning Patient B; and, thus, would not be included in the hearing record transmitted to us after the hearing was held on remand.

We ruled that the attachments to the October 29, 1995 cover letter continue to be received on reconsideration for the limited purpose of respondent attempting to support his claim that he had a basis for obtaining a new hearing. However, respondent has not demonstrated any basis for expanding this purpose and this Committee now receiving, as part of the hearing record compiled on

remand, any of the attachments which respondent chose to withhold from the hearing committee on remand.

Furthermore, respondent attempted to use the attachments to the October 20, 1995 cover letter to attack the credibility of Patient B and Ms. Segal. An essential function of the hearing committee is to weigh the credibility of the evidence before it. This matter was previously remanded for the hearing committee to assess the credibility of the evidence of record and to report its findings and conclusions. Having failed to offer the attachments at the hearing held on remand and to afford the hearing committee an opportunity to consider them in weighing the credibility of Patient B and Ms. Segal, respondent may not now offer these documents to us.

Another reason for not accepting these documents into the hearing record is that respondent has not shown that they are all relevant to the issues on remand. The newspaper article relating to G.V. and her former lawyer has no bearing on the hearing held on remand. Inasmuch as the original hearing committee based its decision on respondent's subsequently reversed conviction, we are not, in reconsidering the relevant charges based upon the current record, considering the findings, conclusions and recommendation of the original hearing committee. Therefore, respondent has no basis for offering into the hearing record on remand documents, relating to the issue of respondent's guilt as to the charges concerning Patient B, which merely seek to respond to the decision rendered

and record adduced at the original hearing. Moreover, a hospital record offered by respondent, regarding Patient B's circumstances in 1985 around the time of the relevant incident, was received into evidence at the hearing held on remand. However, we do not receive the separate medical records first offered to us by respondent relating to a different hospitalization of Patient B occurring about four years prior to the relevant incident.

Secondly, we issued a ruling regarding respondent's request, shown in the May 21, 1997 letter from respondent's attorney, to include in the record nine specified additional exhibits. Even without regard to the Stipulation between the parties, those additional exhibits labelled A through E are not received into the record. Respondent now[4] seeks to add nine exhibits which he claims shed light on the "intervening" events in respondent's life after the Board of Regents had disciplined him. Contrary to respondent's claim, Exhibits A, B, C, and D in full and part of Exhibit E pre-date the July 29, 1988 determination of the Board of Regents. As asserted by petitioner's attorney, these exhibits generated long ago do not refer to current, relevant, and intervening

[4] Although respondent submitted various documents in applying for reconsideration and claiming that he had a basis for obtaining relief, he did not submit these currently proposed exhibits in his attachments to the October 20, 1995 letter or in any other submission made before the Regents remanded this matter to a new hearing committee. Therefore, respondent did not timely and properly submit to the Regents Review Committee available documents which should have been submitted to the hearing committee on remand and had not been produced before the Regents remanded this matter.

circumstances. Exhibits A and B relate to judicial decisions issued prior to both said determination and the later determination by the Regents which remanded the matter for a hearing to be held without consideration of respondent's convictions. The history of respondent's convictions and the judicial decisions regarding those criminal matters is already in the record on reconsideration.

On the other hand, Exhibits F through I are of a more recent vintage and shed some light on the issue of the penalty to be imposed upon respondent at this time. These Exhibits F through I are admitted into the record for the purpose of our consideration of such penalty. We note that petitioner opened the door to the admission of Exhibits H and I when it raised a claim on reconsideration regarding respondent's efforts at continuing education subsequent to the revocation of his license. Also, the January 24, 1997 and January 31, 1997 psychological report, shown in Exhibit F and the community service, referred to in Exhibit G and already provided by respondent as a result of the conviction which was subsequently reversed, may be received as evidence to be considered for the sole purpose of determining the penalty to be imposed. At the hearing held before the new hearing committee, respondent could not have submitted evidence regarding the issue of penalty because such issue was not within the scope of the hearing on remand.

We must next consider the parties' Stipulation settling the record in this matter. Respondent and his attorney signed this

Stipulation and forwarded it to petitioner's attorney. Once petitioner's attorney also signed the Stipulation, both parties were in agreement that the materials described in the Stipulation, except for the attachments to the October 20, 1995 letter which have been resolved by our ruling, are to be considered as the record in this matter. Aside from the question we have already resolved as to whether the record may also include the materials respondent's attorney attempted to submit with his May 21, 1997 letter, both parties have, at all times, remained in agreement that the record is as described in the Stipulation. We accept the Stipulation between the parties and their counsel, receive it into the record herein, and rely upon the agreement between the parties reflected therein in proceeding with this review.

Respondent's application to revoke the Stipulation because it limited his ability to add to the record is denied. The Stipulation in settlement of the record was designed to be used to show, in one document, the entire record to be considered herein. Respondent's attorney signed the Stipulation without affirmatively indicating that respondent was to be permitted to add to the record further documents not encompassed by the Stipulation and without obtaining petitioner's agreement to such a term. His attempt to revoke a portion of the Stipulation after it had been signed and returned by petitioner's attorney and received by our staff is ineffectual; and the objection by petitioner to this attempted revocation is sustained. The unilateral mistake claimed by

respondent's attorney does not alter our decision. It was unreasonable for this attorney to seek to undo an agreement, he signed to be submitted as an official document of record in a quasi-judicial proceeding, which he knew or should have known would settle the record in such proceeding and not leave the parties free to submit any document they wished regardless of the Stipulation.

The Stipulation did not bar the parties from submitting a brief regarding any issue and evidence relating solely to the issue of penalty. Rather, it provided for additional materials to be submitted to the Regents Review Committee and contained in Box "1A". Respondent was previously notified that, in the proceedings before the Regents Review Committee, he may attempt to submit a brief and/or certain other papers by June 5, 1997. Respondent's exhibits F through I, offered by the May 21, 1997 letter from his attorney, are encompassed within the additional materials permitted by the Stipulation to be submitted and included in Box "1A". Accordingly, such exhibits have been received into the record herein consistent with the notice previously sent to respondent in this proceeding. While respondent was not permitted to circumvent the hearing process, he was given a full opportunity to argue his defense and offer materials showing any mitigating circumstances to be considered in imposing a penalty. As will hereafter be discussed, respondent was also granted permission to directly address us himself and he spoke to us about this matter.

The Stipulation between the parties provides a separate and further basis for excluding the Exhibits A through E offered to us

by respondent's attorney. Therefore, apart from the grounds stated above for excluding these exhibits from being received into the record herein, the Stipulation bars the submission of these five exhibits which were not encompassed therein.

Petitioner's written recommendation as to the penalty to be imposed, should respondent be found guilty, was a revocation of respondent's license.

Respondent's written recommendation as to the penalty to be imposed, should respondent be found guilty, was a "revocation stayed probation".

We have reviewed the record herein, including the additional documents submitted by respondent's attorney which were accepted into the record by our ruling, as aforesaid. Neither party submitted any brief or memorandum of law to us. Also, neither party submitted the statement we requested as to the issues to be raised and the points to be addressed at this time.

At the hearing held on remand, respondent's attorney contended that, at the time Patient B consented to sexual intercourse with respondent, she was not under sedation from drugs administered to her by respondent. Hearing transcript pages 17, 20, 48, 49, and 51. In claiming that the documentary evidence "clearly" shows that Valium and Ketamine were not in Patient B's system when respondent had intercourse with her in his office, respondent's attorney acknowledged that if these drugs had been in Patient B's system at the time, it "had some effect" on her. Id. at 48. Nevertheless, at our meeting, respondent told us that he administered to Patient

B two doses of Valium followed by one dose of Ketamine. He indicated that he determined the dosage for these drugs on the basis of her weight. Respondent stated to us that Patient B was "conscious but not cognizant" after she received these drugs from him. He also informed us that Patient B "woke up within five minutes" and that one-quarter of the 20 mg. dosage he gave Patient B would usually render a patient unconscious.

We agree with the hearing committee's conclusion that Patient B was under sedation when respondent engaged in sexual intercourse with her. In support of this conclusion, the hearing committee found, in finding of fact numbered six, that when Patient B

> awakened, she realized that the Respondent's tongue was in her mouth. He removed his tongue from her mouth and started kissing her, saying you will be alright, you will be alright. He then carried her to another room, removed the rest of her clothing and had intercourse with her.

This intercourse occurred in respondent's office in the course of his purportedly adjusting silicone implants in Patient B's breasts. As petitioner's attorney argued before us, respondent's contention, that Patient B had freely consented to sexual intercourse with respondent after he had administered such an extensive amount of sedating drugs to her, was incredible and not worthy of belief. In our unanimous opinion, the hearing committee correctly rejected respondent's contentions and determined that respondent's conduct constituted "an egregious violation of professional trust." Hearing committee report pages 6 and 7.

The evidence presented by petitioner at the hearing on remand was convincing. Significantly, respondent was recorded on tape

admitting that he administered Valium and Ketamine to Patient B and that he gave her Ketamine "to put [her] to sleep." Petitioner's Exhibit 13, conversation one, page one. In another taped conversation between respondent and Patient B, respondent acknowledged that he had decided to make Patient B sleep before proceeding with her painful medical procedure. Id., conversation two, page three. These conversations show that respondent was aware, at the time of the incident, that Patient A was "under sedation". Hearing committee finding of fact numbered 12. Moreover, an independent physician, who examined Patient B in a hospital emergency room at 10:00 p.m. on the day of the incident, verified that "the patient appeared, clinically, to have been drugged." Petitioner's Exhibit 15.

At our meeting, respondent's attorney raised two issues challenging the propriety of the hearing held on remand. He asserted that: (1) respondent did not receive the timely hearing directed by the Board of Regents in that the hearing was not held within "60 days"; and (2) respondent was not provided the hearing de novo directed by the Board of Regents in that the Administrative Officer, on remand, admitted into evidence two portions of the transcript from the former disciplinary hearing. We disagree with both of these assertions.

Contrary to respondent's initial assertion, the hearing on remand was not required to be held within 60 days of the Order enforcing the determination of the Board of Regents. At our meeting, respondent did not claim that petitioner failed to comply

with the first three steps directed by the Regents requiring, within 20 days of the effective date of the determination, an election to hold a limited de novo hearing before a new hearing committee, the filing of such written election, and the preparation of a supplemental statement of charges. In our unanimous opinion, petitioner complied with these three steps as well as the fourth step which required it to begin conducting such limited hearing within 30 days after the filing of such written election. Within such 30 day period, petitioner appeared at a pre-hearing conference required by the Administrative Officer for the resolution of various hearing issues and the taking of necessary measures involving and affecting the hearing. The Board of Regents had not precluded the Administrative Officer from following this generally used procedure. It only required, and there has been no claim that this requirement has not been met, that the hearing "be completed as soon as is practical and with appropriate measures taken by the Administrative Officer to prevent" certain prejudicial references from being brought to the new hearing committee's attention.

Contrary to respondent's second assertion, the ruling by the Administrative Officer admitting former testimony into the record on remand did not deprive respondent of a de novo hearing. Both petitioner and respondent had an opportunity on remand to produce testimonial and/or documentary evidence before the hearing committee. Respondent chose not to call any witnesses for the

defense and not to testify at the hearing held on remand[5]. Both parties elected to proceed by only presenting documentary evidence at the hearing on remand. Although petitioner's documents included the transcipt containing the testimony of two of the witnesses at the original hearing, petitioner neither sought to introduce into evidence at the hearing on remand all the exhibits from the record in the original hearing or all of the transcripts from such record. Nothing in the prior decision of the Board of Regents dictated the kind of evidence to be produced at the hearing. As at other de novo hearings, the parties chose for themselves the evidence to be offered into the record and the Administrative Officer decided what evidence would be received into the record. The fact that respondent disagrees with this evidentiary ruling by the Administrative Officer, admitting former testimony into the record, does not change the character of the hearing held before the new hearing committee.

The new hearing committee started this new hearing from the beginning and did not continue the prior hearing. Respondent received a new and fresh hearing, before a new hearing committee, which was heard as if no decision had been previously rendered

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[5] Respondent has not raised any issue before us concerning the adverse inference drawn by the new hearing committee in view of respondent not testifying at the hearing on remand. Our determination would be the same whether or not an adverse inference was drawn against respondent. In any event, we have not drawn an adverse inference against respondent in rendering this recommendation and we do not rely on such inference drawn by the new hearing committee.

against him.[6] The new hearing committee only considered the record received by the Administrative Officer on remand in rendering its independent decision. Likewise, our decision regarding the issue of respondent's guilt as to the charges concerning Patient B is predicated upon the record compiled on remand. Accordingly, a de novo hearing was held when a distinct record was compiled on remand and served as the sole basis for the decision recommended by the new hearing committee. After the hearing was held on remand, the new hearing committee issued its report without regard to the separate decision previously rendered against respondent and without any knowledge of any other decision.

Without merit is respondent's contention that the use of two portions of the transcript from the previous hearing was "clearly" precluded by the Order directing the holding of a de novo hearing before the new hearing committee. See, ALJ Exhibit 8. Nothing in the prior decision and Order precluded either party from using former testimony. The decision to provide a de novo hearing was intentionally silent on this issue because the determination of whether to permit former testimony is dependent on the circumstances existing at the time of the hearing on remand, including the efforts, if any, made on remand in attempting to

[6] The hearing held on remand was not contrary to the Black's Law Dictionary definition of de novo supplied by respondent to the Administrative Officer. As shown in ALJ Exhibit 8, respondent quoted the definition in such dictionary relating to a hearing held "(A)new; afresh; a second time."

produce the witness sought to be examined, and the evidentiary ruling thereafter to be initially recommended by the Administrative Officer based upon the record adduced at the new hearing. Neither party had addressed this issue before the remand was previously ordered. At the time of such 1996 decision regarding an incident dating back to 1985, the future availability of any particular witness to testify at a hearing was not known by the Board of Regents or raised by the parties. The Regents Review Committee[7] and Board of Regents, however, were well aware of the possibility that any given witness could become unavailable on remand and understood that former testimony might be utilized, if appropriate under the circumstances, in arriving at the truth of the charges concerning Patient B.

Former testimony, like other hearsay, is generally admissible in an administrative hearing. DeBonis v. Corbisiero, 155 A.D.2d 299 (3rd Dept. 1989). Former testimony has been considered by the Court of Appeals to be trustworthy evidence which furthers the truth-finding function of the administrative tribunal. Fleury v. Edwards, 14 N.Y.2d 334 (1964) (see, both the majority and concurring decisions). Respondent, without citing any authority in support of his request to bar this evidence, would have us disregard all former testimony regardless of the impossibility of

[7] Two of the three members of this Committee also served on the Regents Review Committee which recommended the remand herein. One of these two members of the present Committee was the chairperson of such prior Regents Review Committee.

petitioner producing the testimony of a given witness and of the existence of circumstances demonstrating a proper basis for utilizing such testimony. We reject this absolute position by respondent which would take advantage of fortuitous events by prohibiting reliable evidence from being considered whenever a witness from the prior hearing becomes unavailable at the new hearing. Robert OO v. Dowling, 217 A.D.2d 785 (3rd Dept. 1995).

Former testimony is admissible in a professional discipline proceeding. Zimmerman v. Board of Regents Of the University Of the State of New York, 31 A.D.2d 560 (3rd Dept. 1968); and Bueno v. Ambach, 82 A.D.2d 935 (3rd Dept. 1981). See also, C.P.L.R. §4517[8]. Nevertheless, respondent erroneously claims that former testimony may not be received without denying him his right to cross-examine petitioner's witnesses. Respondent's attorney at the original hearing, however, was already afforded an opportunity to fully cross-examine the relevant witnesses at the original hearing. Moreover, the subsequent reversal and dismissal of the criminal charges would not have been a fair subject for new cross-examination in a hearing where references to the criminal matter were not permitted to be shown to the new hearing committee.

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[8] Under this statute, former testimony is admissible under certain conditions such as the witness is deceased, outside the jurisdiction, or not findable after diligence was exercised in seeking his or her whereabouts. Under all of the circumstances of record, including the ruling of the Administrative Officer and the positions taken and not taken by respondent, the former testimony from the prior hearing, together with all exhibits and documents introduced in connection with it, was properly admitted in this hearing regarding the same subject matter which was in issue between the same parties in the prior disciplinary hearing.

The pre-hearing conference record on remand shows that respondent knew the New York address for Patient B and made no effort to attempt to produce or subpoena her either while she was present at such address or later after she had moved without leaving her new address. Respondent insisted on petitioner obtaining her testimony for him, even though he was aware that she was unwilling to testify for petitioner on remand and had indicated that she was leaving the jurisdiction. Petitioner's attempt to subpoena her for the hearing proved unsuccessful because Patient B had moved by that time and could not again be located. Respondent could have subpoenaed Patient B if he truly sought her testimony "and to the extent he chose not to do so, he cannot now be heard to complain." Robert OO, supra. Thus, Patient B's former testimony was properly introduced into evidence as respondent's rights have not been "in any way violated" by the receipt of the relevant transcripts. Zimmerman, supra.

At the hearing held on remand, respondent conceded that "petitioner, at this point, is unable to produce" Patient B. Hearing transcript page 16. Respondent has not raised any argument before us that such witness was available for the new hearing or that any of the requirements for using former testimony have not been demonstrated. At the hearing, he did not object to the receipt of the portions of the former hearing transcript. Before the Administrative Officer issued his pre-hearing ruling on this issue, respondent had only preserved the limited arguments

discussed in this report. In our unanimous opinion, the ruling of the Administrative Officer receiving the former testimony, as redacted to avoid prejudicial references, was correct and respondent has failed to establish any infirmity in said ruling.

Furthermore, as petitioner contended, the tapes and transcription of the tapes recording respondent's incriminating statements and the independent assessment by the emergency room physician provide crucial evidence in support of the charges regarding respondent's conduct in the case of Patient B. Should any court disagree with the above analysis affirming the receipt of the former testimony into the record herein, we record our belief that, in the alternative, the record is sufficient to establish respondent's guilt in the case of Patient B, even if the former testimony had been excluded. Under this alternative theory for disposing of this matter, although the additional evidence from the transcript of the original hearing bolsters the case against respondent, it is not necessary, in view of all the other evidence of record, to rely on such evidence. See, Matter of Christina A v. Oswego County Department of Social Services, 216 A.D.2d 928 (4th Dept. 1995).

We unanimously recommend that the determination of the Board of Regents be as follows:

1. The findings of fact and the conclusions of the hearing committee on remand and the recommendation of the Commissioner of Health as to those findings and conclusions are accepted;

2. With respect to the Supplemental Statement of Charges, respondent is guilty, by a preponderance of the evidence, of unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.2(a)(2) (first specification), gross negligence (second specification), and unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.1(b)(5) (third specification), all involving respondent engaging in sexual intercourse with Patient B in his office, in the course of purportedly adjusting silicone breast implants, and while said Patient was under sedation;

3. With respect to the original Amended Statement of Charges respondent, as previously determined by the Board of Regents, is, by a preponderance of the evidence, guilty of unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.1(b)(13), involving respondent willfully failing to comply with a request to make available certain records (eighth specification), and guilty to the extent indicated by the original hearing committee of unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.2(a)(2), involving respondent willfully abusing a patient physically and verbally (first specification), gross negligence (fifth specification), and unprofessional conduct pursuant to 8 N.Y.C.R.R. §29.1(b)(5), involving respondent engaging in conduct in the practice of medicine which evidences moral unfitness

to practice the profession insofar as the original hearing committee concluded that respondent was guilty as set forth in its conclusions regarding the first and eighth specifications (ninth specification);

4. With respect to the original Amended Statement of Charges, respondent is guilty, by a preponderance of the evidence, of negligence on more than one occasion to the extent indicated by the original hearing committee as to Patient A and as concluded by the hearing committee on remand as to Patient B (seventh specification);

5. In view of the very serious nature of the professional misconduct by respondent which has been determined herein, respondent's license to practice as a physician in New York State be revoked upon each of the specifications of the charges of which respondent was found guilty, as shown in paragraphs numbered two, three, and four above; and

6. On the reconsideration directed by the Board of Regents, respondent's application for reconsideration is denied and, upon the current record, the revocation of respondent's license will remain in force and effect.

BYRON J. MAJOR, JR. (16768/8608)

Respectfully submitted,

J. EDWARD MEYER

EMLYN I. GRIFFITH

JOHN T. McKENNAN

J. Edward Meyer
Chairperson

Dated: August 20, 1997

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

IN THE MATTER OF BYRON J. MAJOR, JR., M.D.	AMENDED STATEMENT OF CHARGES

The Office of Professional Medical Conduct alleges as follows:

1. Byron J. Major, Jr. M.D., Respondent, was authorized to engage in the practice of medicine in the State of New York on July 30, 1974 by the issuance of license number 121016 by the State Education Department.

2. Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1986 through December 31, 1988 from 1000 Park Avenue, New York, N.Y. 10028.

3. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509 and/or §6509-a (McKinney 1985) as set forth in the attached Specifications.

EXHIBIT "A"

FIRST AND SECOND SPECIFICATION

4. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9)(McKinney 1985), in that he engaged in unprofessional conduct within the meaning of 8 N.Y.C.R.R. 29.2(a)(2)(1981) by willfully abusing a patient physically and verbally, specifically:

amended to Feb 22, and Feb 23, 1982

A. On or about February 27, 1982, in the emergency room of Coney Island Hospital, Brooklyn, N.Y., Respondent, in the course of treating Patient A, (whose name together with the name of Patient B is contained in the Appendix):

i. Placed the tip of a scissors under Patient A's eye and threatened to cut out Patient A's eyes.

ii. Stabbed Patient A in the mouth with a pair of scissors.

iii. Referred to Patient A as a "fucking scumbag" and advised the supervising emergency room nurse that she should have let Patient A "bleed to death".

B. On or about December 10, 1985, in Respondent's office at 1000 Park Avenue, New York, N.Y., Respondent, in the course of purportedly adjusting silicone implants in Patient B's breasts, and while Patient B was under sedation, engaged in sexual intercourse with Patient B.

THIRD SPECIFICATION

5. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9)(McKinney 1985), in that he engaged

in unprofessional conduct within the meaning of 8 N.Y.C.R.R. 29.2(a)(2)(1981) by willfully harassing a patient, specifically:

In or about 1983, in Respondent's office at 1000 Park Avenue, New York, N.Y., Respondent, after treating an injury Patient C had sustained to her leg, engaged in sexual intercourse with Patient C.

FOURTH SPECIFICATION

6. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(5)(a)(i) (McKinney 1985) in that he was convicted of an act constituting a crime, specifically:

On or about February 29, 1984, in Kings County Supreme Court, Respondent pled guilty and was convicted of the crime of Assault in the Third Degree. Respondent's conviction was for having stabbed Patient A in the mouth with scissors.

FIFTH AND SIXTH SPECIFICATION

7. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(2)(McKinney 1985) in that he practiced the profession with gross negligence, specifically:

Petitioner repeats the allegations set forth in the First and Second Specification of this Statement of Charges.

SEVENTH SPECIFICATION

8. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(2)(McKinney 1985) in that he practiced the profession with negligence on more than one occasion, specifically:

Petitioner repeats the allegations set forth in the First and Second Specification of this Statement of Charges.

EIGHTH SPECIFICATION

9. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9) (McKinney 1985) in that he committed unprofessional conduct within the meaning of 8. N.Y.C.R.R. 29.1(b)(13)(1984) by his willful failure to comply with a request by the N.Y.S. Department of Health, Office of Professional Medical Conduct to make available certain of his patient medical records, specifically:

amended to February 1986

On or about February 25, 1985, Petitioner served Respondent with a subpoena which called for the production of his office chart of Patient A. To date, Respondent has not complied with said subpoena.

NINTH SPECIFICATION

10. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9)(McKinney 1985) in that he engaged in

unprofessional conduct within the meaning of 8 N.Y.C.R.R. 29.1(b)(5)(1984) by engaging in conduct in the practice of medicine which evidences moral unfitness to practice the profession, specifically:

Petitioner repeats the allegations set forth in the First through Eighth Specifications of this Statement of Charges.

Kathleen M. Tanner
Director
Office of Professional
Medical Conduct

Dated: April 7, 1986
N.Y., New York

Approved July 29, 1988

No. 8608

Upon the report of the Regents Review Committee, under Calendar No. 8608, the record herein, and in accordance with the provisions of Title VIII of the Education Law, it was

Voted:* That, in the matter of BYRON J. MAJOR, JR., M.D., respondent, in agreement with the Regents Review Committee with respect to not drawing an adverse inference, the evidence, and the record, as indicated at page 3 of the report of the Regents Review Committee, the findings of fact of the Hearing Committee of the State Board for Professional Medical Conduct be accepted; that the conclusions of the Hearing Committee as to the question of guilt of the respondent be accepted; that the recommendation of the Hearing Committee as to the measure of discipline be accepted; that the recommendation of the Commissioner of Health as to the findings of fact of the Hearing Committee be accepted; that the recommendation of the Commissioner of Health as to the conclusions of the Hearing Committee as to the question of guilt of the respondent be accepted; that the recommendation of the Commissioner of Health as to the measure of discipline recommended by the Hearing Committee be accepted; that the recommendations of the Regents Review Committee be accepted; that respondent is guilty, by a preponderance of the evidence, of the second and eighth specifications and the first, fifth, sixth, seventh, and ninth specifications to the extent indicated in the report of the hearing committee and not guilty of the remaining specifications;

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*Regent Lustig abstained

EXHIBIT "B"

that respondent's license to practice as a physician in the State of New York be revoked upon each specification of the charges of which respondent was found guilty; that respondent may, pursuant to Rule 24.7(b) of the Rules of the Board of Regents, apply for restoration of said license after one year has elapsed from the effective date of the service of the order of the Commissioner of Education to be issued herein, but said application shall not be granted automatically; and that the Commissioner of Education be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote.

The University of the State of New York

IN THE MATTER

OF

BYRON J. MAJOR, JR., M.D.
(Physician)

DUPLICATE
ORIGINAL ORDER
NO. 8608

Upon the report of the Regents Review Committee, under Calendar No. 8608, the record herein, the vote of the Board of Regents on July 29, 1988, and in accordance with the provisions of Title VIII of the Education Law, which report and vote are incorporated herein and made a part hereof, it is

ORDERED that, in the matter of BYRON J. MAJOR, JR., M.D., respondent, in agreement with the Regents Review Committee with respect to not drawing an adverse inference, the evidence, and the record, as indicated at page 3 of the report of the Regents Review Committee, the findings of fact of the Hearing Committee of the State Board for Professional Medical Conduct be accepted; that the conclusions of the Hearing Committee as to the question of guilt of the respondent be accepted; that the recommendation of the Hearing Committee as to the measure of discipline be accepted; that the recommendation of the Commissioner of Health as to the findings of fact of the Hearing Committee be accepted; that the recommendation of the Commissioner of Health as to the conclusions of the Hearing Committee as to the question of guilt of the

respondent be accepted; that the recommendation of the Commissioner of Health as to the measure of discipline recommended by the Hearing Committee be accepted; that the recommendations of the Regents Review Committee be accepted; that respondent is guilty, by a preponderance of the evidence, of the second and eighth specifications and the first, fifth, sixth, seventh, and ninth specifications to the extent indicated in the report of the hearing committee and not guilty of the remaining specifications; that respondent's license to practice as a physician in the State of New York be revoked upon each specification of the charges of which respondent was found guilty; and that respondent may, pursuant to Rule 24.7(b) of the Rules of the Board of Regents, apply for restoration of said license after one year has elapsed from the effective date of the service of this order, but said application shall not be granted automatically.

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 24th day of August, 1988.

Thomas Sobol

Commissioner of Education

The University of the State of New York

IN THE MATTER

OF

BYRON MAJOR, JR.
(Physician)

DUPLICATE ORIGINAL VOTE AND ORDER NO. 15686

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 15686, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (April 24, 1996): That, in the matter of BYRON MAJOR, JR., respondent, the recommended granting, by the Regents Review Committee, of the application for reconsideration is accepted as so recommended to the extent and as set forth by the Regents Review Committee in its report; and that the Acting Associate Commissioner for the Professions be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and **SO ORDERED**, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

EXHIBIT "C"

BYRON MAJOR, JR. (15686)

IN WITNESS WHEREOF, I, Johanna Duncan-Poitier, Acting Associate Commissioner for the Professions, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand, at the City of Albany, this 24th day of April, 1996.

JOHANNA DUNCAN-POITIER
ACTING ASSOCIATE COMMISSIONER
FOR THE PROFESSIONS

The University of the State of New York

IN THE MATTER

of the

Disciplinary Proceeding

against

BYRON MAJOR, JR.

No. 15686
APPLICATION
FOR
RECONSIDERATION

who was licensed to practice as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

BYRON MAJOR, JR., hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department.

Ten specifications of charges were brought against respondent in a disciplinary proceeding under Calendar No. 8608. The March 2, 1986 statement of charges was amended by an amended statement of charges dated April 7, 1986, which were further amended at the hearing before the hearing committee. The charges, relating to three patients, concern respondent's alleged conduct in the case of Patient A on February 27, 1982, in the case of Patient C in or about 1983, and in the case of Patient B on December 10, 1985. This proceeding was commenced shortly after the alleged December 10, 1985 incident between respondent and Patient B.

The hearing in this matter was conducted on 15 dates between

April 9, 1986 and August 20, 1987. By its report dated January 10, 1988, the hearing committee rendered recommended findings of fact, conclusions, and a penalty based upon its conclusions that: respondent was guilty of the second and eighth specifications; guilty to the extent indicated in its report of the first, fifth, sixth, seventh and ninth specifications; and not guilty of the third, fourth and tenth specifications. The hearing committee recommended the penalty that respondent's license to practice medicine be revoked. The hearing committee thus sustained various charges regarding Patients A and B, but not regarding Patient C.

Following recommendations by the Commissioner of Health and the Regents Review Committee to accept the findings, conclusions, and recommendation of the hearing committee, the Board of Regents voted, on July 29, 1988, to accept the findings, conclusions, and recommendation of the hearing committee. Thereafter, the Commissioner of Education issued an Order, dated August 24, 1988, effectuating the determination of the Board of Regents to revoke respondent's license to practice as a physician in New York State.

More than six years[1] after the determination revoking respondent's license, respondent applied, around July 14, 1995, for reconsideration of said determination on the grounds that "there is

[1]Respondent was summarily suspended from the practice of his profession by Order of the Commissioner of Health dated March 28, 1988. That Order, issued more than eight years before respondent applied for reconsideration, continued in effect pursuant to the June 13, 1986 report of the hearing committee and July 3, 1986 Order of the Commissioner of Health.

new and material evidence which was not previously available, or that circumstances have occurred subsequent to the original determination which warrant a reconsideration of the measure of discipline." In his application for reconsideration, respondent seeks either a remand to the hearing committee for a hearing de novo or, in the interests of justice, for a reversal and a commutation of the penalty imposed to time served.

On August 15, 1995, the Executive Director of the Office of Professional Discipline, pursuant to 8 N.Y.C.R.R. §3.3(f), referred respondent's application for reconsideration to the Board of Regents for its determination. The Department of Health, the petitioner in the disciplinary proceeding, was afforded an opportunity to submit a recommendation by the Commissioner of Health, answering affidavits, brief, and supporting documents.

Subsequent to the time its submission was due, petitioner's attorney submitted a letter dated September 12, 1995. In his letter, petitioner's attorney contended that, under the circumstances, petitioner should not be precluded from being heard on reconsideration and that respondent's application for reconsideration is "unserious and frivolous", "specious", and "flimsy". Accordingly, petitioner recommended that, because there is "no reason to modify the penalty of license revocation", respondent's application be denied.

Respondent objected to the consideration of petitioner's September 12, 1995 letter on the ground that it was not submitted

in a timely manner and petitioner had not requested an extension of time. Alternatively, respondent requested additional time to respond to petitioner's submission. This Committee ruled, and the parties were notified by letter dated October 3, 1995 of the ruling, that petitioner's September 12, 1995 letter was received into the record on reconsideration and that respondent was thereafter permitted to submit a response. Respondent then submitted, and we received, both a letter dated October 20, 1995 in response to petitioner's letter and the attachments accompanying respondent's letter.

We have reviewed and considered the entire record upon reconsideration.

Petitioner asserts that respondent is a "sexual predator" whose license should be revoked. The sole allegations of sexual misconduct which were sustained by the hearing committee and Board of Regents are based upon the charges concerning Patient B. It is those charges involving the alleged incident regarding Patient B which immediately preceded the commencement of the disciplinary proceeding and the imposition of the summary suspension of respondent's license.

The second and sixth specifications in full (willfully abusing a patient physically and gross negligence, respectively) and the seventh and ninth specifications in part (negligence on more than one occasion and moral unfitness, respectively) each allege that respondent engaged in sexual intercourse with Patient B while she

was under sedation in respondent's office for the purported adjustment of silicone implants in Patient B's breast. During the hearing, petitioner offered evidence that respondent had been found guilty by a jury of the crime of Sexual Abuse in the First Degree, a Class D felony, regarding the subject incident with Patient B. Such evidence was received into the record and read, reviewed, and considered by the entire hearing committee. See, petitioner's exhibit 20 and hearing committee report page 6. Said report, on page 21, refers to this conviction of the crime of Sexual Abuse in the First Degree in describing the allegations that respondent committed professional misconduct in the case of Patient B.

Subsequent to both the recommendation of the hearing committee and the determination by the Board of Regents, the Appellate Division, First Department, on October 3, 1989, reversed the judgment convicting respondent of a crime and remanded the matter for a new trial. Thereafter, the Supreme Court, on July 26, 1990, dismissed the criminal charge against respondent. Accordingly, respondent no longer stands convicted of any crime relating to his conduct in the case of Patient B.

The hearing committee report shows, on page 21, that the charges concerning Patient B were expressly understood by the hearing committee to relate to the same incident for which respondent had been convicted in New York County Supreme Court of the crime, constituting a Class D felony, of Sexual Abuse in the First Degree. Once petitioner placed the evidence of said

conviction into the record in this matter, the hearing committee, Regents Review Committee, and Board of Regents were informed and considered that respondent was found guilty by a jury of the criminal charge arising from the incident in question concerning Patient B.

Petitioner nevertheless claims that the hearing committee, which considered the evidence it presented, did not "at all" rely on this criminal conviction in reaching its decision. We disagree. The hearing committee expressly found, in its finding of fact 18, that respondent was found guilty by a jury of the above referred crime constituting a class D felony and cited petitioner's exhibit 20 as proof of such crime concerning Patient B. Contrary to petitioner's claim, the criminal conviction of record was clearly and expressly relied upon by the hearing committee. The Board of Regents unmistakingly accepted the hearing committee's finding of fact 18 in concluding that respondent was guilty of several specifications of professional misconduct relating to Patient B.

Even if the hearing committee had not supported its decision by specifically mentioning the criminal conviction, we would be concerned about the effect such evidence would have had in the decision-making process. The evidence, later proven to be untrue, that respondent had committed a crime involving sexual contact with Patient B, was undoubtedly very persuasive in demonstrating the guilt found by the hearing committee regarding the same incident between respondent and Patient B. After the hearing committee

considered that respondent's guilt had been established based upon the higher criminal law standard and that he was sentenced for having committed such crime, respondent's denial of professional misconduct would most likely not have been viewed as credible and the hearing committee would be greatly influenced in merely applying the lower standard applicable in this proceeding.

In any event, neither the hearing committee nor the Board of Regents indicated what determination they would have reached regarding the charges as to Patient B if the evidence of respondent's criminal conviction (petitioner's exhibit 20) had not been considered. The hearing committee was divided and, by a vote of 4-1, determined the extent of respondent's conduct in the case of Patient B. In fairness, with respect to the charges concerning Patient B, respondent should not be saddled and branded with a criminal conviction which unbeknownst to the hearing committee was reversed by the courts. For these serious charges concerning Patient B to be sustained and respondent's license to practice his profession be revoked, petitioner, on remand, should bear the burden of proving its charges as to Patient B without having the benefit of this evidence documenting that respondent stands convicted regarding the incident in dispute[2].

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[2]In Afif v. Ambach, 134 A.D.2d 340 (3rd Dept. 1987), the Appellate Division stated that the reference to criminal proceedings, in that matter involving alleged sexual abuse of a patient, tends to bolster the patient's allegations and give them veracity. Therefore, the court held that, out of fairness, the matter needed to be reheard before a new hearing committee.

Based upon all the foregoing, we unanimously conclude that reconsideration of the original determination is warranted to the extent indicated hereafter. We turn next to the issue of the appropriate remedy.

Respondent seeks the remedy of either a remand for a hearing de novo or a reversal which commutes the penalty imposed upon respondent to time served.

No grounds for reconsideration have been advanced which involve or affect the determination insofar as respondent was found guilty with respect to various charges concerning Patient A. Moreover, petitioner's exhibit 20 has no bearing on the charges concerning Patient A. Even if we had disregarded and not considered the conviction regarding the incident relating to Patient B, we would have sustained the separate charges as to Patient A. Accordingly, the prior determination as to Patient A, that respondent is guilty of unprofessional conduct and gross negligence as indicated in the report of the hearing committee, is not reconsidered and remains in effect.

The fact that respondent is and remains guilty with respect to various charges concerning Patient A raises a question, not raised or asserted by petitioner, as to whether a revocation of licensure would be the appropriate penalty to impose on respondent, regardless of his guilt or innocence of the charges relating to Patient B.

As will be shown, we take a very serious view of respondent's

misconduct regarding Patient A. Nevertheless, for all of the following reasons, a revocation is, in our opinion, not warranted based solely on the guilt found as to respondent's conduct in the case of Patient A. First, no allegation of sexual abuse or contact is raised in the case of Patient A. Second, respondent was found not guilty by the hearing committee of the glaring allegation charged in paragraph 4(A)(ii) of the first specification. Third, unlike the case of Patient B, the hearing committee found respondent not guilty of having been convicted, as set forth in the fourth specification, of an act constituting a crime in the case of Patient A. Fourth, with respect to respondent's guilt involving the underlying conduct alleged in the first, fifth, and ninth specifications, the hearing committee only considered, in the case of Patient A, the crime of which respondent remains convicted. Unlike the case of Patient B, said crime regarding Patient A was a misdemeanor and not a felony. Fifth, the hearing committee found that respondent lost his temper when Patient A was belligerent, required mechanical and staff assistance to be subdued, and was under police guard. Standing alone, respondent's misconduct in the case of Patient A was an isolated event occurring on one occasion. Sixth, respondent's conduct in the case of Patient A occurred in 1982 over four years before this proceeding was commenced.

In assessing an appropriate penalty to be imposed based solely upon respondent's deplorable conduct in the case of Patient A, we have reviewed the record existing at this time when respondent

presented new evidence. Currently, respondent has been out of the practice of medicine for many years. Respondent has not presented any evidence whatsoever describing his activities since either his summary suspension or later revocation. The practice of medicine has changed greatly from the time respondent last practiced his profession. Therefore, a retraining program is needed to be completed by respondent in order to protect the public. The penalty we recommend, based on the guilt already established, provides respondent with the opportunity to be retrained, in a program approved by the Department of Health, prior to his return to the practice of medicine. The terms of probation we recommend require respondent, among other things, to complete the retraining program before returning to the practice of the profession and to be subject to a further proceeding, initiated by the Department of Health, if he does not comply with the final determination in this matter.

We are hereby providing the Department of Health with a specific opportunity to elect to retry the charges concerning Patient B. Should the Department of Health choose to provide an expedited hearing in full accordance with our decision, this matter would be remanded for the limited purposes set forth in our recommendation. Otherwise, if no new hearing is afforded to respondent, a penalty would be assessed now solely upon the basis of respondent's guilt, as previously determined, regarding Patient

A[3] and regarding the eighth specification[4]. However, in this event, respondent would be found not guilty of the seventh specification of negligence on more than one occasion, as charged, because only one occasion of negligence would be established relating to Patient A. Should a remand occur, the Regents Review Committee can, following the transmittal of the hearing committee report and Commissioner of Health recommendation on remand, render a conclusion as to the seventh specification of negligence on more than one occasion regarding both Patients A and B.

In sum, the alternatives we are providing allow for a remedy by which a fair hearing on the merits of the charges concerning respondent's alleged conduct in 1985 in the case of Patient B will be held prior to the eventual review and recommendation of the Regents Review Committee and Board of Regents final determination in this matter; or, if such hearing is not timely elected and commenced, that respondent be afforded the opportunity to be retrained, as hereafter set forth, before he attempts to return to his profession upon the completion or termination of his suspension from the practice of medicine in New York State. Thus, the penalty previously imposed upon the respondent will only be modified, at

[3]Respondent's guilt as to Patient A thus relates to the first and fifth specifications to the extent indicated in the report of the hearing committee and to the ninth specification to the extent that it repeats the first and fifth specifications.

[4]The criminal conviction in evidence before the hearing committee did not affect or influence the conclusion that respondent was guilty of willfully failing to comply with a request to produce respondent's office chart for Patient B.

the time of this determination, if the Health Department does not timely elect and commence such hearing. We emphasize that, if the Health Department timely elects to hold such hearing, the revocation of respondent's license currently in effect shall remain in effect at this time and throughout all of the proceedings on remand unless and until a further order directs otherwise following the final determination to be rendered by the Board of Regents. We note that whichever alternative remedy eventuates, the independent prior determination of respondent's guilt as to the charges concerning Patient A will not be affected and will not be the subject of the proceedings on remand.

Accordingly, we unanimously recommend that, provided that the New York State Health Department does not elect to hold a hearing, as hereafter set forth, respondent's application for reconsideration be granted to the extent that the determination of the Board of Regents, under Calendar No. 8608, be modified and respondent shall, on the thirtieth day following the effective date of the determination of the Board of Regents upon reconsideration herein, [1] be suspended for ten years upon each of the first, fifth, eighth, and ninth specifications of the charges, as indicated by this Regents Review Committee report upon reconsideration, upon which he is and has been found guilty, said suspensions to be served concurrently and to be retroactive to the effective date of the original order under Calendar No. 8608, [2] be placed on probation immediately for the remaining portion

of said ten year period under the terms annexed hereto, made a part hereof, and marked as Exhibit "A", and [3] granted leave to apply to the Executive Director of the Office of Professional Discipline of the New York State Education Department for early termination of said suspension upon submission of written proof, satisfactory to said Executive Director, of the successful completion of a retraining program, said course to be selected by the supervisor respondent appoints pursuant to the terms of probation and to be previously approved by the Office of Professional Medical Conduct of the New York State Health Department; provided however, and as an alternative to the above recommendation, should the New York State Health Department elect to hold a limited hearing, it shall, within 20 days of the effective date of the determination of the Board of Regents upon reconsideration herein, complete each of the following three steps: [1] elects, in writing, to hold before a new hearing committee a de novo hearing limited to the question of whether respondent is guilty or not guilty of certain charges concerning Patient B; [2] files with the aforesaid Executive Director of the Office of Professional Discipline, the written election to hold such limited hearing and provides respondent with a copy of such written election; and [3] prepares a supplemental statement of charges, based solely upon the specifications concerning Patient B, which alleges for the first specification, the charge currently numbered as the second specification, for the second specification, the charge currently

numbered as the sixth specification, and for the third specification, the charge insofar as the currently numbered ninth specification repeats the allegations currently set forth in the second and sixth specifications and promptly provides respondent with notice of the supplemental statement of charges; and, within 30 days after the filing of such written election, in addition to the first three steps, [4] petitioner begins to conduct such limited hearing which shall be completed as soon as is practical and with appropriate measures taken by the Administrative Officer to prevent prejudicial references to a) the criminal proceedings and the criminal conviction regarding Patient B, b) the findings, conclusions, and recommendation of both the prior hearing committee and Commissioner of Health, and c) the prior determination of the Board of Regents under Calendar No. 8608; and, only in the event the New York State Department of Health timely elects in writing to hold a limited hearing before a new hearing committee, respondent's application for reconsideration is granted to the extent that:

[a] the charges concerning Patient B referred to in step 3 above are remanded to a new hearing committee, consisting of different members for a hearing de novo limited to the question of whether respondent is guilty or not guilty of any of such charges concerning Patient B in accordance with all of the instructions provided in this report;

[b] upon the conclusion of the hearing on remand, the hearing committee shall issue a report thereon of its findings

and conclusions; and said report shall not be inconsistent with the decision and order remanding this matter;

[c] the Commissioner of Health shall thereafter render her recommendation as to the findings and conclusions of the hearing committee on remand;

[d] inasmuch as the limited remand concerns only the findings and conclusions to be rendered as to certain charges involving Patient B and does not concern Patient A, the conclusion to be rendered as to the seventh specification regarding both Patients A and B, or the penalty to be imposed in view of the guilt already established as to Patient A, the issue of the penalty to be imposed on respondent is not within the scope of the proceedings on remand;

[e] any matters not remanded to the hearing committee, including the questions of whether respondent is guilty of the seventh specification and of the penalty to be imposed upon respondent shall all be held in abeyance; and

[f] this matter shall be reviewed by a Regents Review Committee which may consist of different members which shall render a written report of its review, including a recommended penalty to be imposed upon respondent based upon the guilt already established as to Patient A, the

eighth specification in full, and the ninth specification insofar as it repeats the eighth specification as to Patient B, and upon any other guilt which may be established after the remand.

We further unanimously recommend that, in the event petitioner does not elect to hold a limited hearing de novo, as aforesaid, petitioner be directed to notify, in writing, the Executive Director of the Office of Professional Discipline, of the fact that petitioner does not elect to hold such hearing, said written notification to be forwarded to the Executive Director no later than 20 days after the effective date of the determination of the Board of Regents upon reconsideration herein.

EMLYN I. GRIFFITH

JANE M. BOLIN

JOHN T. McKENNAN

Emlyn I. Griffith
Chairperson

Dated: 3/22/96

EXHIBIT "A"

TERMS OF PROBATION
OF THE REGENTS REVIEW COMMITTEE

BYRON MAJOR, JR.

CALENDAR NO. 15686

1. That, during the period of the suspension of respondent's license, respondent shall not practice, offer to practice, or hold himself out as being able to practice as a physician in the State of New York;

2. That, during the first four months of the period of probation, respondent shall, at respondent's expense, enroll in a course of re-training in medicine, patient care, and ethics, said course to be selected by a New York State licensed physician who shall be respondent's supervisor chosen by respondent, said course and supervisor to be previously approved, in writing by the Director of the Office of Professional Medical Conduct, New York State Deapartment of Health, Empire State Plaza, Albany, New York 12234, and, during the first 16 months of the period of probation, respondent shall diligently pursue and successfully complete said course of re-training and submit to the Director of the Office of Professional Medical Conduct such proof, as said Director, in his or her discretion, considered sufficient to establish that respondent has successfully and timely completed said course of training;

3. That, upon the termination of the suspension of respondent's license, respondent shall only practice as a physician in the State of New York under the supervision of said supervising physician referred to in term 2 above;

4. That, upon the termination of the suspension of respondent's license, respondent shall have quarterly performance reports submitted to the Director of the Office of Professional Medical Conduct from his supervisor referred to in term 2 above, evaluating his performance as a physician, said reports to be prepared by respondent's supervisor;

5. That, upon the termination of the suspension of respondent's license, respondent shall make quarterly visits to an employee of and selected by the Office of Professional Medical Conduct, unless said employee agrees otherwise as to said visits, for the purpose of determining whether respondent is in compliance with the following:

a. That respondent shall be in compliance with the standards of conduct prescribed by the law governing respondent's profession;

b. That respondent shall submit written notification to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, Empire State Plaza, Albany, NY 12234 of any employment and/or practice, respondent's residence, telephone number, or mailing address, and of any change in respondent's employment, practice, residence, telephone number, or mailing address within or without the State of New York;

c. That respondent shall submit written proof from the Division of Professional Licensing Services (DPLS), New York State Education Department (NYSED), that respondent has paid all registration fees due and owing to the NYSED and respondent shall cooperate with and submit whatever papers are requested by DPLS in regard to said registration fees, said proof from DPLS to be submitted by respondent to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, as aforesaid, no later than the first three months of the period of probation;

d. That respondent shall submit written proof to the New York State Department of Health, addressed to the Director, Office of Professional Medical Conduct, as aforesaid, that respondent has paid any fines which may have previously been imposed upon respondent by the Board of Regents; said proof of the above to be submitted no later than the first two months of the period of probation;

6. That, upon the termination of the suspension of respondent's license, respondent shall make the quarterly visits referred to in term 5 above for the additional purpose of the employee of the Office of Professional Medical Conduct reviewing respondent's professional performance; and

7. If the Director of the Office of Professional Medical Conduct determines that respondent may have violated probation, the Department of Health may initiate a violation of probation proceeding and/or such other proceedings pursuant to the Public Health Law, Education Law, and/or Rules of the Board of Regents.

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

IN THE MATTER
OF
BYRON J. MAJOR, JR.

SUPPLEMENTAL

STATEMENT

OF

CHARGES

BYRON J. MAJOR, JR., the Respondent, was authorized to practice medicine in New York State on or about July 30, 1974 , by the issuance of license number 121016 by the New York State Education Department.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

1. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9) (McKinney 1985) [currently N.Y. Educ. Law §6530(31)], in that he engaged in unprofessional conduct within the meaning of 8 N.Y.C.R.R. 29.2(a)(2)(1981) by willfully abusing a patient physically, specifically:

   On or about December 10, 1985, in Respondent's office at 1000 Park Avenue, New York, N.Y., Respondent, in the

EXHIBIT "D"

EXHIBIT
Petitioner-1
6-12-96 mp

course of purportedly adjusting silicone implants in Patient A's breasts, and while Patient A was under sedation , engaged in sexual intercourse with Patient A.

SECOND SPECIFICATION

2. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(2) (McKinney 1985) [currently N.Y. Educ. Law §6530(4)] in that he practiced the profession with gross negligence, specifically:

Petitioner repeats the allegations set forth in the First Specification of this Statement of Charges.

THIRD SPECIFICATION

3. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6509(9) (McKinney 1985) [currently N.Y. Educ. Law §6530(20)] in that he engaged in unprofessional conduct within the meaning of 8 N.Y.C.R.R. 29.1(b)(5)(1984) by engaging in conduct in the practice of medicine which evidences moral unfitness to practice the profession, specifically:

Petitioner repeats the allegations set forth in the First and

Second Specification of this Statement of Charges.

DATED: May 14, 1996
New York, New York

ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

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

IN THE MATTER

OF

BYRON J. MAJOR, JR., M.D.

REPORT OF THE HEARING COMMITTEE

BPMC-96-183

ORIGINAL

TO: Barbara A. DeBuono, M.D., M.P.H.
Commissioner of Health

THEA GRAVES PELLMAN, Chairperson, **RALPH LUCARIELLO, M.D., STEVEN E. KATZ, M.D., ARTHUR J. WISE, M.D.** and **DANIEL A. SHERBER, M.D.**, duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York, pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Sections 230(10)(3) of the Public Health Law. **MICHAEL P. McDERMOTT, ESQ.**, Administrative Law Judge, served as Administrative Officer for the Hearing Committee.

This hearing was held pursuant to Order No. 15686 of the Board of Regents.

After consideration of the entire record, the Hearing Committee submits this report.

SUMMARY OF PROCEEDINGS

Supplemental Statement of Charges:	May 14, 1996
Prehearing Conference:	June 12, 1996 June 26, 1996 July 3, 1996 July 9, 1996
Hearing Date:	July 9, 1996

EXHIBIT "B"

Place of Hearing:	NYS Department of Health 5 Penn Plaza New York, New York
Date of Deliberations:	July 9, 1996
Petitioner appeared by:	Robert S. Asher, Esq. 295 Madison Avenue, Suite 700 New York, New York 10017
Respondent appeared by:	Henry M. Greenberg, General Counsel NYS Department of Health BY: Terrence Sheehan, Esq., of Counsel

STATEMENT OF CHARGES

The Statement of Charges alleges that, "On or about December 10, 1985, in Respondent's office at 1000 Park Avenue, New York, New York, Respondent, in the course of purportedly adjusting silicone implants in Patient A's breasts, and while Patient A was under sedation, engaged in sexual intercourse with Patient A."

The charges are more specifically set forth in the Statement of Charges, a copy of which is attached hereto and made a part of this report.

WITNESSES

For the Petitioner:	NONE
For the Respondent:	NONE

NOTE: Patient A's prior sworn testimony, given before a Hearing Committee of the Board for Professional Medical Conduct was received in evidence as Petitioner's Exhibit 11, and Marilyn Segal's prior sworn testimony given before the same Hearing Committee of the Board for Professional Medical Conduct was received in evidence as Petitioner's Exhibit 10. (See CPLR Sec. 4517)

INSTRUCTION: The Respondent was not present at the hearing. The Administrative Officer instructed the Hearing Committee that the failure of the Respondent to testify does not permit the trier of fact to speculate about what his testimony might have been nor does it require an adverse inference. It does, however, allow the trier of fact to draw the strongest inference against him that the opposing evidence in the record permits.

FINDINGS OF FACT

Numbers in parenthesis refer to transcript pages or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the evidence cited. All Hearing Committee findings were unanimous unless otherwise specified.

GENERAL FINDINGS

1. Byron J. Major, Jr., the Respondent, was authorized to practice medicine in the State of New York on or about July 30, 1974, by the issuance of license number 121016 by the New York State Education Department (Petitioner's Exhibit 1).

FINDINGS AS TO PATIENT A

2. On December 10, 1985, Patient A went to the Respondent's office at 1000 Park Avenue, New York, New York to relieve increased hardness to both breasts which resulted from a prior breast implantation. (Petitioner's Exhibit 11, p. 1821)

3. Patient A was directed to an examining room by the receptionist/nurse. She was given a white paper gown and was told to remove her dress and bra. (Petitioner's Exhibit 11, pp. 1834-1835)

4. When the Respondent arrived at the examining room, Patient A told him what her problem was, and he examined her breasts with his hands. (Petitioner's Exhibit 11, pp. 1835-1836)

5 The Respondent gave Patient A two injections of medication in the left arm. He told her that the medication would make her relax.

In a subsequent telephone conversation with Patient A, later the same day, December 10, 1985, the Respondent identified the medications as Valium and Ketamine (Petitioner's Exhibit 11, pp. 1836-1841, Petitioner's Exhibit 13, p. 1).

6. When Patient A awakened, she realized that the Respondent's tongue was in her mouth. He removed his tongue from her mouth and started kissing her, saying you will be alright, you will be alright. He then carried her to another room, removed the rest of her clothing and had intercourse with her. (Petitioner's Exhibit 11, p. 1841)

7. Patient A then got dressed and the Respondent took her home. (Petitioner's Exhibit 11, p 1848-1850)

8. At 8:45 P.M. that evening, Patient A went to the Lenox Hill Hospital Emergency Room where she was examined gynecologically and treated by Dr. Pedro Segarra, Jr. (Petitioner's Exhibit 8, p. 10; Respondent's Exhibit A, p. 6)

9 At 10:00 P.M. that evening, Patient A was still at the Lenox Hill Hospital Emergency Room and was seen by Dr. Peter A. Douvres, Jr., who performed a general medical examination. (Petitioner's Exhibit 11, p. 2066-2067; Petitioner's Exhibit 15)

10. Patient A returned to her apartment, and at approximately 11:00 P.M., she received a return telephone call for the Respondent. Patient A's friend, Marilyn Segal, was present at the time and the telephone conversation between Patient A and the Respondent was recorded. During the conversation, Patient A expressed concern that she might get pregnant. The Respondent told Patient A that he did not climax but that he would prescribe a high dose of birth control "just to be a thousand percent sure." (Petitioner's Exhibit 10, p. 225-227; Petitioner's Exhibit 11, p. 2077-2078, 2083-2089; Petitioner's Exhibit 12; Petitioner's Exhibit 13)

11 On the next day, December 11, 1985, the Respondent personally hand delivered an envelope with medication to Patient A's apartment. Marilyn Segal took the envelope from the Respondent because Patient A did not want to see him. The instructions as to how to take the medication were written on one of the Respondent's prescription forms. (Petitioner's Exhibit 10, pp. 231-234; Petitioner's Exhibit 14)

12. Also on December 11, 1985, the Respondent returned a telephone call from Patient A and their conversation was recorded. During the conversation, the Respondent acknowledged that Patient A was under sedation at the time of the incident in his office on the previous day. (Petitioner's Exhibit 12; Petitioner's Exhibit 13)

HEARING COMMITTEE CONCLUSIONS

The fact that the Respondent engaged in sexual intercourse with Patient A at the time in question is not disputed.

The Respondent's attorney acknowledged on the record that the Respondent did in fact have sexual intercourse with Patient A, but contends that Patient A was not under sedation at the time and that it was consensual.

After a review of the entire record in this matter, the Hearing Committee rejects the contention that Patient A was not under sedation at the time and that the sexual intercourse was consensual.

The Hearing Committee concludes that on or about December 10, 1985, in the Respondent's office at 1000 Park Avenue, New York, New York, the Respondent, in the course of purportedly adjusting silicone implants in Patient A's breasts, and while Patient A was under sedation, engaged in sexual intercourse with Patient A.

VOTE OF THE HEARING COMMITTEE

(All votes were unanimous)

FIRST SPECIFICATION: Willfully abusing a patient physically

SUSTAINED

SECOND SPECIFICATION: Practicing the profession with gross negligence

SUSTAINED

THIRD SPECIFICATION: Engaging in conduct in the practice of medicine which evidences moral unfitness to practice the profession

SUSTAINED

RECOMMENDATION OF THE HEARING COMMITTEE

Ordinarily, the Hearing Committee would recommend that the Respondent's license to practice medicine in the State of New York be **REVOKED** for such an egregious violation of professional trust.

However, in its Report, the Board of Regents Review Committee has directed, "the issue of penalty to be imposed on the Respondent is not within the scope of the proceedings on remand."

Accordingly, we make no recommendation.

DATED: Albany, New York
, 1996

Respectfully submitted,

THEA GRAVES PELLMAN, Chairperson

RALPH LUCARIELLO, M.D.
STEVEN E. KATZ, M.D.
ARTHUR J. WISE, M.D.
DANIEL A. SHERBER, M.D.

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

ORIGINAL

IN THE MATTER

OF

BYRON J. MAJOR, M.D.

COMMISSIONER'S RECOMMENDATION

TO: Board of Regents
New York State Education Department
State Education Building
Albany, New York

A hearing in the above-entitled proceeding was held on July 9, 1996. Respondent, **BYRON J. MAJOR, M.D.**, appeared by **ROBERT S. ASHER, ESQ**. The evidence in support of the charges against the Respondent was presented by **HENRY M. GREENBERG, General Counsel,** by **TERRENCE SHEEHAN, ESQ.**, of counsel.

NOW, on reading and filing the transcript of the hearing, the exhibits and other evidence, and the findings and conclusions of the Committee,

I hereby, make the following recommendation to the Board of Regents:

A. The Findings of Fact and Conclusions of the Committee should be accepted in full; and

B. The Board of Regents should issue an order adopting and incorporating the Findings of Fact and Conclusions.

Exhibit "F"

The entire record of the within proceeding is transmitted with this Recommendation.

DATED: Albany, New York
27 Sept, 1996

Barbara A. DeBuono MD

BARBARA A. DeBUONO, M.D., M.P.H.,
Commissioner of Health
New York State Department of Health

REPORT OF THE
REGENTS REVIEW COMMITTEE

BYRON J. MAJOR, JR.

CALENDAR NO. 16768/8608