



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

December 5, 1997

Dennis P. Whalen
Executive Deputy Commissioner

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David W. Smith, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

Edward Zaino, M.D.
68 Washington Avenue
Garden City, New York 11530

Shawn P. Kelly, Esq.
Kelly, Rode & Kelly
410 Park Avenue
New York, New York 10022

RE: In the Matter of Edward Zaino, M.D.

Dear Mr. Smith, Dr. Zaino and Mr. Kelly:

Enclosed please find the Determination and Order (No.97-194) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

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

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

Sincerely,

A handwritten signature in black ink that reads "Tyrone T. Butler". The signature is written in a cursive style with a large initial 'T'.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

COPY

IN THE MATTER

OF

EDWARD ZAINO, M.D. (Respondent)

**Proceeding to review a Determination by a Hearing Committee
(Committee) from Board for Professional Medical Conduct
(BPMC)**

**ADMINISTRATIVE
REVIEW BOARD
DECISION AND
ORDER NUMBER
ARB NO. 97-194**

**BEFORE: ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D.,
EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.**

After a hearing into charges that the Respondent, committed professional misconduct, a BPMC Committee sustained charges that the Respondent maintained inaccurate medical records for two patients and the Committee voted to censure and reprimand the Respondent. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997), the Respondent asks the Board to overturn the Committee's Determination on the records charges and to vacate the penalty that the Committee imposed. The New York State Department of Health (Petitioner) urges the Board to sustain the Committee's Determination and their sanction. After considering the hearing record and the parties' briefs, the Board modifies the Committee's Determination on the charges, to sustain the inaccurate records charge in one patient case and to dismiss that charge in the other case. We overturn the Committee's sanction, because we find the facts in this case would only support an administrative warning to the Respondent, rather than a penalty for misconduct.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer and drafted this Determination. **SHAWN P. KELLY** and **BRUCE M. COHN, ESQS.** represented the Respondent. **DAVID W. SMITH, ESQ.** represented the Petitioner.

COMMITTEE DETERMINATION ON CHARGES

The Petitioner filed charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530 (3-6) & (32), by committing professional misconduct under the following categories:

- practicing medicine with gross negligence;
- practicing medicine with gross incompetence;
- practicing medicine with negligence on more than one occasion;
- practicing medicine with incompetence on more than one occasion; and,
- failing to maintain accurate patient records.

The records charges and the charges involving negligence and incompetence on more than one occasion involved the care that the Respondent provided to two patients, A and B. The gross negligence and gross incompetence charges related to the care the Respondent provided to Patient B. The Petitioner withdrew the gross negligence and gross incompetence charges during the hearing [see Committee Determination page 2]. The record refers to the Patients by initials to protect their privacy.

Three BPMC Members, **ANTHONY SANTIAGO, Chair, THOMAS G. MULDOON, M.D. and NORTON SPRITZ, M.D.** comprised the Committee who conducted the hearing in this matter, pursuant to N.Y. Pub. Health Law § 230(7)(McKinney's Supp. 1997), and who rendered the Determination which the Board now reviews. Administrative Law Judge **JEFFREY W. KIMMER** served as the Board's Administrative Officer and drafted the Determination.

The Committee sustained the charges that the Respondent failed to maintain accurate records for Patients A and B and dismissed the charges relating to negligence or incompetence on more than one occasion. The Committee determined that the Respondent failed to obtain a definitive diagnosis about a mass in Patient A's right lung and failed to record his efforts to do so and failed to record whether the Patient refused medical care. The Committee found further that the Respondent prepared inadequate notes concerning his treatment to Patient B for myeloproliferative disorder. The Committee determined that the Respondent did provide adequate care, as a consultant, for Patient B. Although the Committee found that the Respondent's inadequate care for Patient A constituted negligence, they found no other negligent care and dismissed the charge that the Respondent practiced with negligence on more than one occasion. The Committee voted to censure and reprimand the Respondent. The Committee's Determination provided no explanation as to how they arrived at that penalty.

REVIEW HISTORY AND ISSUES

The Committee rendered their Determination on August 5, 1997. The Respondent then commenced this proceeding on August 20, 1997, when the Board received the Notice requesting a Review pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997). The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's reply brief. The Board received the Respondent's brief on September 24, 1997, and the Petitioner's reply on September 30, 1997.

The Respondent alleges that the Committee erred in making their findings and asks that the Board annul those findings and vacate the Committee's penalty. The Respondent contends that he prepared the treatment records for Patients A and B within the bounds of accepted medical practice and violated no statutory or regulatory mandates for preparing patient records.

The Petitioner argues that the hearing record supports the Committee's Determination on the charges and as to the sanctions.

REVIEW BOARD AUTHORITY

In reviewing a Committee's Determination, the Board determines: whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law, and whether the Penalty is appropriate and within the scope of penalties which the law permits [N.Y. Pub. Health Law § 230(10)(i), § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board may remand a case to the Committee for further consideration [N.Y. Pub. Health Law § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board's Determinations result from a majority concurrence among the Board's Members [N.Y. Pub. Health Law § 230-c(4)(c)(McKinney's Supp. 1997)].

The Review Board may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 Ad 2d 86, 606 NYS 2d 381 (Third Dept. 1993), in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 AD 2d 940, 613 NYS 2d 759 (Third Dept. 1994), and in determining credibility Matter of Minielly v.

REVIEW BOARD DETERMINATION

The Board has considered the record and the parties' briefs. We conducted deliberations in this case on October 17, 1997. We sustain the Committee's Determination that the Respondent failed to maintain an accurate record for Patient A, we overturn the Committee's Determination that the Respondent failed to maintain an accurate record for Patient B and we overturn the Committee's penalty.

A medical record that fails to convey objectively meaningful medical information concerning the patient treated to other physicians is inadequate, Matter of Bogdan v. State Bd. for Prof. Med. Conduct, 195 AD2d 86, 606 NYS2d 381 (Third Dept. 1993). The Committee found that the Respondent's records for Patient A failed to make adequate notes concerning a mass in the Patient's right lung and the Respondent's efforts to inform the Patient about her condition. In making their finding about inaccurate record keeping, the Committee relied on the records for Patient A and on testimony by the Petitioner's expert, Harriet Gilbert, M.D. The Respondent's contrary testimony about his standard record keeping practices merely created a fact question for the Committee to resolve. The Committee found Dr. Gilbert credible and her testimony established that the records for Patient A failed to convey meaningful medical information about the Patient's cancer.

We vote 4-1 to overturn the Committee's Determination about the record keeping involving Patient B, because we conclude that the Committee made a determination on that charge inconsistent with their findings and conclusions. The Committee found that the Respondent treated Patient B, by performing a bone marrow biopsy, in consultant status, and the Committee concluded that the Respondent reported the biopsy in Patient B's hospital record. The majority finds the Respondent's report in the hospital record to be an adequate record, considering the Respondent's consultant status in that case.

We vote 4-1 to overturn the Committee's penalty. The Committee provided no explanation as to why they censured and reprimanded the Respondent for the two record keeping violations they

sustained. The Board's majority has sustained only the violation concerning Patient A and we see no reason why a censure and reprimand would provide a proper penalty for such a violation. The majority feels that either probation or monitoring would constitute too severe a sanction for a case involving on a single inaccurate medical record. The Board concludes that a more appropriate remedy would have been an administrative warning to the Respondent by the Office for Professional Medical Conduct (OPMC) or a consultation with the Respondent by an OPMC staff physician. The Board can order neither remedy as a penalty. The majority votes, therefore, to impose no penalty against the Respondent.

ORDER

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

1. The Board **SUSTAINS** the Committee's Determination finding that the Respondent committed professional misconduct by failing to maintain an accurate patient record for Patient A.
2. The Board votes 4-1 to **OVERTURN** the Committee's Determination finding that the Respondent failed to maintain an accurate record for Patient B.
3. The Board votes 4-1 to **OVERTURN** the Committee's Determination to censure and reprimand the Respondent. The Board imposes no penalty for the Respondent's failure to maintain an accurate record for Patient A.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF EDWARD ZAINO, M.D.

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

DATED: Delmar, New York
November 26, 1997


SUMNER SHAPIRO

IN THE MATTER OF EDWARD ZAINO, M.D.

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

DATED: Roslyn, New York

Nov 27, 1997

A handwritten signature in black ink, appearing to read "Edward C. Sinnott", written over a horizontal line.

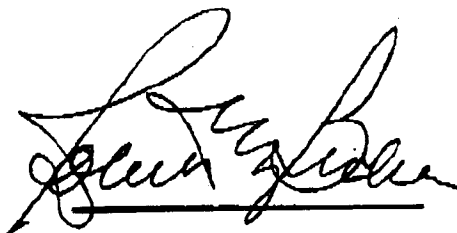
EDWARD C. SINNOTT, M.D.

IN THE MATTER OF EDWARD ZAINO, M.D.

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, affirms that this Determination and Order reflects the decision by the majority of the Board in the Matter of Dr. Zaino.

DATED: Schenectady, New York

11/28/97 , 1997

A handwritten signature in black ink, appearing to read "Robert M. Briber", written over a horizontal line.

ROBERT M. BRIBER

IN THE MATTER OF EDWARD ZAINO, M.D.

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

DATED: Syracuse, New York

1 Dec, 1997



WILLIAM A. STEWART, M.D.