



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

PUBLIC

April 22, 2003

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Francis G. D'Ambrosio, M.D.
Premier Medical Group
23852 Pacific Coast Highway
Malibu, California 90265

Robert Bogan, Esq.
Paul Robert Mahar, Esq.
NYS Department of Health
433 River Street, Suite 303
Troy, New York 12180

Douglas D. Winter, Esq.
Riley & Reiner
Library Tower
633 W. Fifth Street, 70th Floor
Los Angeles, California 90071-3500

RE: In the Matter of Francis G. D'Ambrosio, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 03-03) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

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

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

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

Sincerely,

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

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

In the Matter of

Francis G. D'Ambrosio, M.D. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 03-03

COPY

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

For the Department (Petitioner): Paul Robert Maher, Esq.

For the Respondent:

Michael J. Silverberg & Douglas D. Winter, Esqs.

In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney 2003), the ARB must once again determine whether the contents from another state's disciplinary order provide sufficient grounds on which to take action against a physician's New York medical license (License). After a hearing below pursuant to N.Y. Pub. Health Law § 230(10)(p) (McKinney's Supp. 2003), a BPMC Committee dismissed charges that a Nevada disciplinary order made the Respondent liable for disciplinary action against his License under N. Y. Educ. Law § 6530(9)(d) (McKinney Supp. 2003). Following the Petitioner's request for a review, the ARB has considered the hearing record and review submissions from both parties. We vote to overturn the Committee and hold that the evidence before the Committee proved that the Respondent's conduct in Nevada would constitute professional misconduct in New York. We place the Respondent on probation for five years under the Terms that appear as the Appendix to this Determination.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law § 6530(9)(d) (McKinney Supp. 2003) by committing professional misconduct because:

- the duly authorized professional disciplinary agency from a sister state (Nevada) took action against the Respondent's License in that state, for,
- conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York.

The Nevada action resulted from an Order in which the Board of Medical Examiners of the State of Nevada (Nevada Board) accepted the Respondent's irrevocable surrender of his Medical License. The Petitioner's Statement of Charges [Petitioner Exhibit 1] alleged that the Respondent's misconduct in Nevada would constitute misconduct if committed in New York, under the following categories:

- practicing medicine with negligence on more than one occasion, a violation under N. Y. Educ. Law § 6530(3) (McKinney Supp. 2003), and,
- practicing medicine with gross negligence, a violation under N. Y. Educ. Law § 6530(4) (McKinney Supp. 2003),
- practicing medicine with incompetence on more than one occasion, a violation under N. Y. Educ. Law § 6530(5) (McKinney Supp. 2003), and,
- practicing medicine with gross incompetence, a violation under N. Y. Educ. Law § 6530(6) (McKinney Supp. 1998).

An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney Supp. 2003), before a BPMC Committee, which rendered the Determination which the ARB now reviews. The Petitioner withdrew the gross negligence and gross incompetence charges at the hearing. In such a Direct Referral Proceeding, the statute

limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The Committee dismissed the remaining charges against the Respondent, ruling that the evidence failed to support the charges. The Committee found that the Nevada Board accepted the irrevocable surrender of the Respondent's Nevada medical license, while the Respondent was subject to a complaint charging the Respondent with 1.) malpractice and with 2.) failure to use reasonable care, skill or knowledge in treating seven patients. The Committee found that the Nevada Board accepted the surrender without making any findings or conclusions on the charges. The Committee refused to make any inference that the Respondent's surrender indicated some merit to the charges. The Committee noted that the Respondent had already ceased practice in Nevada and decided against returning to Nevada practice, when he made the surrender. The Committee concluded that the Respondent executed the surrender to avoid the expense, time and effort to defend against the Nevada action. The Committee also found that the Nevada disciplinary charges failed to describe sufficiently the content or nature of the acts the Respondent allegedly committed. The Committee found that the Nevada Order failed to provide enough information for the Committee to conclude that the Respondent's conduct in Nevada would have constituted misconduct in New York.

Review History and Issues

The Committee rendered their Determination on January 6, 2003. This proceeding commenced on January 15, 2003, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's response brief. The record closed when the ARB received the response brief on February 12, 2003.

The Petitioner argued that when a physician waives an adjudication on the merits in another state and stipulates to a disciplinary order, that raises an inference that the allegations are

meritorious, Herberman v. Novello, 280 A.D.2d 814, 720 N.Y.S.2d 626 (3rd Dept. 2001). The Petitioner contends that the Respondent admitted to wrongdoing in Nevada, by waiving a challenge to the Nevada charges, and that such admission binds the Respondent in this proceeding. The Respondent asks that the ARB strike the Determination by the Committee and remand to the Committee for further action.

The Respondent argued that the voluntary surrender in Nevada amounted to no disciplinary action. The Respondent also argued that New York may rely on no consent or agreed order from another state, if the respondent-physician fails to receive a full and fair opportunity to litigate all disciplinary charges in the other state, Halyakar v. Board of Regents, 72 N.Y.2d 261 (1988); Becker v. DeBuono, 239 A.D.2d 664, 657 N.Y.S.2d 471 (3rd Dept. 1997); Matter of Ikramuddin v. DeBuono, 255 A.D.2d 1039, 683 N.Y.S.2d 319 (3rd Dept. 1998). The Respondent asked that the ARB affirm the Committee in full.

Determination

The ARB has considered the record and the parties' briefs. We overturn the Committee and we sustain the misconduct charges. We vote to place the Respondent on probation for five years.

We interpret N. Y. Educ. Law § 6530(9)(d) to create a two-tier test for establishing misconduct. The Petitioner must first establish disciplinary action in another jurisdiction and then must show that the Respondent's conduct in the other jurisdiction would amount to misconduct if the Respondent had committed such conduct in New York, Matter of Herberman, ARB # 99-303, 1999 WL 561798 (NYSDOH-Admin. Rev. Bd.). The Respondent argues first that the Respondent's Nevada Surrender constituted no disciplinary action. The ARB disagrees.

The Nevada Board's Order [Petitioner Hearing Exhibit 5, 3rd page] included the Respondent's statement about his desire to surrender his Nevada license and his awareness about a pending investigation concerning violations by the Respondent under the Nevada Practice Act. We conclude that the surrender constituted a disciplinary action and that the Respondent made the surrender to avoid litigation on the charges, rather than merely due to a voluntary desire to cease practice in Nevada. The Nevada Board Order held that the Nevada Board continued to hold jurisdiction to punish violations under the Nevada Practice Statute, even when a physician failed to renew his biennial registration, as the Respondent had done [Petitioner Hearing Exhibit 5, 4th page].

The Respondent's and the Petitioner's review briefs cited several cases that interpreted the provisions under N.Y. Educ. Law § 6530(9)(d), concerning the information another state's disciplinary order must contain to prove that conduct in the other state would amount to professional misconduct under New York law. In Herberman v. Novello (supra), a physician challenged a Determination by the ARB that a disciplinary action against the physician in Texas made Dr. Herberman liable for action against his New York Medical License under N.Y. Educ. Law § 6530(9)(d). In that case, Dr. Herberman's Texas medical license had expired two years before the Texas Board of Medical Examiners brought charges against Dr. Herberman for misconduct. After the Texas Board brought the disciplinary charges against him, Dr. Herberman and the Texas Board entered into a stipulation in which Dr. Herberman surrendered his Texas License. After New York brought charges against Dr. Herberman under N.Y. Educ. Law § 6530(9)(d), Dr. Herberman argued at his New York hearing that the Texas Order provided no basis for disciplinary action in New York, because the Texas Order contained no determination of wrongdoing and no admissions of guilt. The ARB eventually held that the Texas Order did

provide a basis on which to suspend Dr. Herberman's New York License. On appeal, the Appellate Division for the Third Department sustained the ARB and ruled that when a physician waives an adjudication on the merits of a complaint and stipulates to a disciplinary order, the stipulation raises an inference that the charges in the complaint are meritorious.

We hold that the evidence in this case presents the exact same factual situation as in Herberman v. Novello. The Respondent here had ceased practice in Nevada prior to the Nevada disciplinary action and the Respondent entered into a voluntary surrender after he became aware of the Nevada Charges. The ARB infers that the Respondent's surrender provided a sufficient basis to prove the allegations in the Nevada complaint meritorious. We overrule the Committee's Determination to the contrary. The Committee also held that the charges in the Nevada Complaint provided no basis for the Committee to determine if the Respondent's Nevada conduct would constitute misconduct in New York. We disagree with the Committee on that holding as well.

The Nevada Complaint [Petitioner's Hearing Exhibit 5, 4th to 13th pages] contains allegations that the Respondent failed to use reasonable care, skill or knowledge in treating seven patients. The Respondent's surrender raised the inference about those charges' merits. The ARB holds that the failure to use reasonable care would amount to a failure to practice under accepted standards of care and would constitute negligence on more than one occasion under New York Law. We hold further that the failure to use skill or knowledge would demonstrate a lack of skill or knowledge necessary to practice medicine safely and would constitute incompetence on more than one occasion in New York. We determine that Nevada disciplined the Respondent for conduct that would amount to practicing with negligence on more than one occasion and incompetence on more than one occasion, if that conduct had occurred in New York. We

determine further that such conduct and the Nevada disciplinary action make the Respondent liable for disciplinary action under N.Y. Educ. Law § 6530(9)(d).

The ARB may substitute our judgement for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993) and in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994). The ARB may choose to substitute their judgement on our own motion, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The ARB overturned the Committee's Determination on the charges on a motion by the Petitioner. We reject the Petitioner's motion for a remand to the Committee for further proceedings and the ARB chooses on our own motion to consider a penalty to impose in this case. We see no reason to remand to the Committee to consider penalty, as the Committee has already held that no grounds exist to sustain the charges. We also note that the parties had a full chance at the hearing to address any possible penalty.

The ARB rejects the Petitioner's hearing request for License revocation in this case [Hearing Transcript page 41]. We note that the Respondent withdrew charges that the Respondent's Nevada conduct would constitute practice with gross negligence or gross incompetence. We vote to place the Respondent's License on probation for five years with a practice monitor, at such time as the Respondent returns to New York to practice. The five years on probation, with a monitor and pre-operative review, will allow the State to oversee the Respondent's practice to assure that the Respondent has corrected the deficiencies in his practice

that resulted in his license surrender in Nevada. The Probation terms appear at the Appendix to this Determination.

ORDER

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

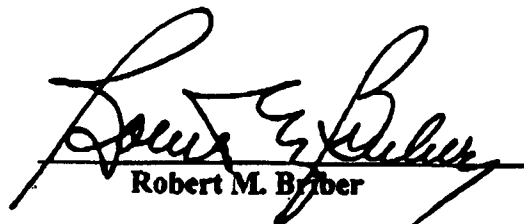
1. The ARB overturns the Committee's Determination to dismiss the charges against the Respondent.
2. The ARB sustains the charges that the Respondent's conduct in Nevada would constitute professional misconduct in New York.
3. The ARB places the Respondent's License on probation for five years, to commence at the time that the Respondent returns to practice in New York, under the Probation Terms that appear as the Appendix to this Determination.

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

In the Matter of Francis G. D'Ambrosio, M.D.

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

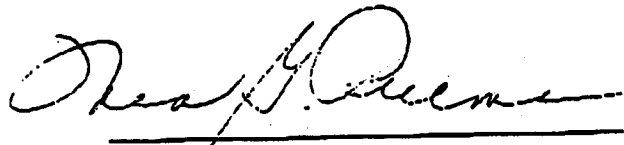
Dated: March 18, 2003


Robert M. Briber

In the Matter of Francis G. D'Ambrosio, M.D.

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

Dated: 3/18, 2003

A handwritten signature in cursive script, appearing to read 'Thea G. Pellman', written over a horizontal line.

Thea Graves Pellman

In the Matter of Francis G. D'Ambrosio, M.D.

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

Dated: 4/18, 2003

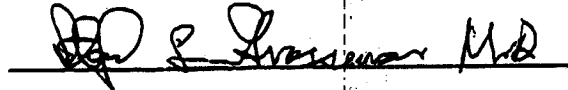
A handwritten signature in black ink, appearing to read "W. S. Price", is written over a horizontal line.

Winston S. Price, M.D.

In the Matter of Francis G. D'Ambrosio, M.D.

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

Dated: March 20, 2003

A handwritten signature in dark ink, appearing to read "Stanley L. Grossman M.D.", is written over a horizontal line.

Stanley L. Grossman, M.D.

In the Matter of Francis G. D'Ambrosio, M.D.

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

Dated: March 18, 2003

A handwritten signature in cursive script that reads "Therese G. Lynch M.D." with a stylized flourish at the end.

Therese G. Lynch, M.D.

Appendix

Terms of Probation

1. The Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.
2. The Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office for Professional Medical Conduct (OPMC), to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. The Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of the Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.
5. Respondent shall practice medicine only when monitored by a licensed physician, board certified in surgery, proposed by Respondent and subject to the written approval of the Director of OPMC.
 - a. The Practice Monitor shall review all pre-operative decisions by the Respondent. The Respondent shall make available to the monitor any and all records or access to the practice requested by the monitor, including on-site observation. The practice monitor shall also visit the Respondent's medical practice at each and every location, on a random unannounced basis at least monthly and shall examine a selection of records maintained by Respondent, including patient records, prescribing information and office records. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation of

accepted standards of medical care or refusal to cooperate with the monitor shall be reported within 24 hours to OPMC.

- b. Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the monitoring physician.
- c. Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of OPMC.
- d. Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year, in accordance with Section 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC prior to Respondent's practice after the effective date of this Order.

6. The Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

7. The Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

PUBLIC

January 6, 2003

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Francis G. D'Ambrosio, M.D.
Premier Medical Group
23852 Pacific Coast Highway
Malibu, California 90265

Douglas D. Winter, Esq.
Riley & Reiner
Library Tower
633 W. Fifth Street, 70th Flr
Los Angeles, California 90071-3500

Robert Bogan, Esq.
Paul Robert Mahar, Esq.
NYS Department of Health
Office of Professional
Medical Conduct
433 River Street, Ste 303
Troy, New York 12180

RE: In the Matter of Francis G. D'Ambrosio, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No.: BPMC 03-03) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyrone T. Butler", written over a horizontal line.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:djh
Enclosure

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

COPY

IN THE MATTER

DETERMINATION

OF

AND

FRANCIS G. D'AMBROSIO, M.D.

ORDER

BPMC No. 03-03

A hearing was held on December 19, 2002, at the offices of the New York State Department of Health ("the Petitioner"). A Notice of Referral Proceeding and a Statement of Charges, both dated September 27, 2002, were served upon the Respondent, **Francis G. D'Ambrosio, M.D.** **Arsenio G. Agopovich, M.D.**, Chairperson, **Ernst A. Kopp, M.D.**, and **Rev. Thomas Kornmeyer**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **John Wiley, Esq.**, Administrative Law Judge, served as the Administrative Officer.

The Petitioner appeared by **Donald P. Berens, Jr., Esq.**, General Counsel, by **Robert Bogan, Esq.**, and **Paul Robert Maher, Esq.**, of Counsel. The Respondent appeared in person and was represented by **Michael J. Silverberg, Esq.**, Phillips Nizer, 666 Fifth Avenue, New York, New York, 10103-0084, and **Douglas D. Winter, Esq.**, Riley & Reiner, Library Tower, 633 W. Fifth Street, 70th Floor, Los Angeles, California 90071-3500.

Evidence was received and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing when a licensee is charged solely with a violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York State or another jurisdiction, or upon a prior administrative adjudication regarding conduct that would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(d). Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix 1.

WITNESSES

For the Petitioner:

None

For the Respondent:

Francis G. D'Ambrosio, M.D.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers below in parentheses refer to exhibits, denoted by the prefix "Ex." These citations refer to 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 cited evidence. All Hearing Committee findings were unanimous.

1. Francis G. D'Ambrosio, M.D., the Respondent, was authorized to practice medicine in New York State on July 1, 1987, by the issuance of license number 170574 by the New York State Education Department (Petitioner's Ex. 4).

2. On June 3, 2002, the Board of Medical Examiners of the State of Nevada ("the Nevada Board"), by an Order ("Nevada Order"), accepted the irrevocable surrender of the Respondent's license to practice medicine. The Respondent was under investigation by the Nevada Board at that time and was the subject of a Complaint ("Nevada Complaint") charging him with malpractice and failing "to use reasonable care, skill, or knowledge ordinarily used under similar circumstances..." in the treatment of seven patients. (Petitioner's Ex. 5).

HEARING COMMITTEE CONCLUSIONS

The Hearing Committee concludes that there is insufficient evidence in the hearing record to find that the conduct of the Respondent, had it occurred in New York State, would constitute any type of professional misconduct charged in the Statement of Charges.

VOTE OF THE HEARING COMMITTEE

SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(d) by having surrendered his license or having other disciplinary action taken after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the surrender or other disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Not Sustained (3-0)

HEARING COMMITTEE DETERMINATION

On June 3, 2002, the Respondent irrevocably surrendered his license to practice medicine in Nevada. At the time, the Respondent was the subject of a disciplinary proceeding, the subject matter of which is described in the Nevada Complaint. The

Nevada Order memorializes the surrender without making any findings or conclusions about the charges in the Nevada Complaint. The Petitioner, noting correctly that such findings or conclusions are not a prerequisite to making a finding of professional misconduct under New York Public Health Law Section 6530(9)(d), argued that this is a suitable case for making such a finding. The Hearing Committee disagrees with the Petitioner.

In some cases, it can reasonably be concluded that a physician facing disciplinary action who surrendered his license did so because he was guilty of the charges against him and knew that proceeding to a hearing would be futile and result in a decision on the merits against him. In the Respondent's case, however, the Respondent had a credible reason for surrendering his license rather than proceeding to conclusion on the merits in the Nevada disciplinary process. At the time that the Nevada disciplinary proceeding was commenced, the Respondent was no longer practicing medicine in Nevada. Furthermore, he had decided that he would never again practice medicine in Nevada. The Respondent was told, incorrectly, by his attorney that if he surrendered his Nevada license, there could be no negative consequences in the future. The Respondent, therefore, decided that it was not worth the expense, time and effort necessary to defend against the Nevada disciplinary action. He surrendered his license instead.

Another problem with the Petitioner's position is that it is based on the Nevada Complaint, a document that provides no specific description of what the Respondent allegedly did wrong. For each of the seven patients, the Nevada Complaint states the type of surgery performed by the Respondent. In four or, arguably, five of the cases, the Nevada Complaint states a complication that developed after surgery. In three of the seven cases, the Nevada Complaint states that the Respondent settled a malpractice complaint brought by the patient and lists the amount of the settlement. In all seven

cases, it is alleged that the Respondent failed to "use reasonable care, skill, or knowledge ordinarily used under similar circumstances" and that this constituted malpractice.

In the cases for which complications are listed, the Nevada Complaint states nothing about what the Respondent allegedly did wrong to cause the complications. There is no description of any procedure that should have been followed, but was not. There is no description of a practice that the Respondent used that was contraindicated for the patient. There is no description of an act performed by the Respondent carelessly or incompetently. There is no description whatever of how the Respondent allegedly caused the complication. There is only a conclusory statement that the Respondent did not exercise reasonable care, skill or knowledge and that this constituted malpractice.

In some of these cases, there is not even a statement in the Nevada Complaint that there were complications. There is simply a statement of the type of surgery performed and an accusation that reasonable care, skill or knowledge was not employed and that malpractice occurred.

Even if it could be concluded from the evidence in this hearing record that the Respondent did fail to use reasonable care, skill, or knowledge and committed malpractice as those terms are defined in Nevada, it does not follow that a professional misconduct determination under New York law can be made. Public Health Law Section 6530(9)(d) requires that for the acts at issue to constitute professional misconduct, they must be acts that would constitute professional misconduct under New York State law, had the acts been committed in New York State. Such a conclusion is impossible in this case because there is absolutely no description of those acts in the Nevada Complaint. It is impossible to determine whether acts and practices considered in Nevada to be failure to use reasonable care, skill or knowledge and to be malpractice would also meet the

definition of professional misconduct in New York State, the reason being that the Nevada Complaint is silent on those acts and practices.

The Petitioner noted that the three settled malpractice lawsuits were settled for large amounts of money (\$675,000.00, \$1,927,000.89, and \$3,500,000.00). The Petitioner argued that the Respondent would not have settled for such large amounts had he not committed malpractice. Even if this were true, there still is no description in the hearing record as to what the content and nature of the acts or omissions constituting malpractice were. There is no basis for concluding that such acts or omissions would constitute negligence, incompetence or any other form of professional misconduct under New York State law.

The hearing record does not permit a finding of professional misconduct against the Respondent. The charges against him must be dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. All charges and specifications in the Statement of Charges against the Respondent are dismissed.
2. This Order shall be effective upon service on the Respondent or the Respondent's attorneys by personal service or by certified or registered mail.

DATED: Troy, New York

[Signature] 3, 2003

[Signature]
Arsenio G. Agopovich, M.D.
Chairperson

Ernst A. Kopp, M.D.
Rev. Thomas Kornmeyer

ALFONSO I

ORIGINAL

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

IN THE MATTER

OF

**FRANCIS G. D'AMBROSIO, M.D.
CO-02-08-4037-A**

NOTICE OF

REFERRAL

PROCEEDING

**TO: FRANCIS G. D'AMBROSIO, M.D.
Premier Medical Group
23852 Pacific Coast Highway
Malibu, CA 90265**

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law § 230(10)(p) and N.Y. State Admin. Proc. Act Sections 301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 25th day of October 2002, at 10:00 in the forenoon of that day at the Hedley Park Place, 5th Floor, 433 River Street, Troy, New York 12180.

At the proceeding, evidence will be received concerning the allegations set forth in the attached Statement of Charges. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered that would show that the conviction would not be a crime in New York state. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 5th Floor, 433 River Street, Troy, New York, ATTENTION: HON.

TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION, (hereinafter "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before October 15, 2002.

Pursuant to the provisions of N.Y. Public Health Law §230(10)(p), you shall file a written answer to each of the Charges and Allegations in the Statement of Charges no later than ten days prior to the hearing. Any Charge of Allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such an answer. The answer shall be filed with the Bureau of Adjudication; at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. You may file a brief and affidavits with the Committee. Six copies of all such papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before October 15, 2002, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to Section 301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the Administrative Review Board for Professional Medical Conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
Sept. 27, 2002

A handwritten signature in cursive script that reads "Peter D. Van Buren". The signature is written in dark ink and is positioned above the printed name.

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Robert Bogan
Associate Counsel
New York State Department of Health
Office of Professional Medical Conduct
433 River Street – Suite 303
Troy, New York 12180
(518) 402-0828

STATE OF NEW YORK

DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

FRANCIS G. D'AMBROSIO, M.D.
CO-02-08-4037-A

STATEMENT

OF

CHARGES

FRANCIS G. D'AMBROSIO, M.D., the Respondent, was authorized to practice medicine in New York state on July 1, 1987, by the issuance of license number 170574 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about June 1, 2002, the Board of Medical Examiners of the State of Nevada, (hereinafter "Nevada Board"), by an Order (hereinafter "Nevada Order"), accepted the irrevocable surrender of Respondent's license to practice medicine while under investigation, based on failing to use reasonable care, skill, or knowledge ordinarily used under similar circumstances in treating patients.

B. The conduct resulting in the Nevada Board disciplinary action against Respondent would constitute misconduct under the laws of New York State, pursuant to the following sections of New York State law:

1. New York Education Law §6530(3) (negligence on more than one occasion);
2. New York Education Law §6530(4) (gross negligence);
3. New York Education Law §6530(5) (incompetence on more than one occasion);

and/or

4. New York Education Law §6530(6) (gross incompetence).

SPECIFICATION

Respondent violated New York Education Law §6530(9)(d) by having surrendered his license or having other disciplinary action taken after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the surrender or other disciplinary action would if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

1. The facts in Paragraphs A and/or B.

DATED: *Sept. 27*, 2002
Albany, New York


PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct