STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

March 15, 2007

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Uma Sundaram, M.D.

Redacted Address

Sanford R. Shapiro, Esq.
Boylan, Brown, Code, Vigor, et al
2400 Chase Square
Rochester, New York 14604

Michael A. Hiser, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
Corning Tower, Room 2509
Empire State Plaza
Albany, New York 12237

RE: In the Matter of Uma Sundaram, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 06-261) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

Redacted Signature

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:cah

Enclosure

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

In the Matter of

Uma Sundaram, M.D. (Respondent)

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

Administrative Review Board (ARB)

Determination and Order No. 06-261

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

For the Department of Health (Petitioner): **Michael A. Hiser, Esq.**
For the Respondent: **Sanford R. Shapiro, Esq.**

After a hearing below under the provisions in New York Public Health Law (PHL) §230(10)(McKinney Supp. 2007), a BPMC Committee determined that the Respondent committed professional misconduct in performing procedures on several patients. The Committee voted to suspend the Respondent's License to practice medicine in New York State (License) and to place the Respondent on probation for those same two years, under the terms that appear at Appendix I to the Committee's Determination. In this proceeding pursuant to PHL § 230-c (4)(a), both parties ask the ARB to nullify or modify that Determination. After reviewing the hearing record and the review submissions from the parties, the ARB affirms the Committee's findings that the Respondent engaged in professional misconduct, but we overturn the Determination that the Respondent practiced with incompetence on more than one occasion. We affirm the Determination to suspend the Respondent's License and to place the Respondent on probation, but we modify provisions relating to the suspension and probation as we indicate below.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated New York Education Law (EL) §§ 6530(2-6), 6530(20), 6530(32-33) & 6530(35) (McKinney Supp. 2007) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross incompetence,
- engaging in conduct in the practice of medicine that evidences moral unfitness,,
- failing to maintain accurate patient records,
- failing to exercise appropriate supervision, and
- ordering excessive or unwarranted tests or procedures.

The fraud and moral unfitness charges related to interviews with the Respondent by Department of Health investigators. The remaining charges concerned endoscopy procedures the Respondent performed or supervised on twelve persons (Patients A-L) at Strong Memorial Hospital in Rochester. The record refers to the Patients by initials to protect patient privacy.

The Committee sustained charges that the Respondent gave intentionally false information to representatives from the Office for Professional Medical Conduct (OPMC) during interviews concerning the Respondent's supervision over Gastroenterology Fellows in colonoscopy and enteroscopy procedures. The Committee concluded, however, that the Respondent's false statements were not intended to hide misconduct, because the actual level of supervision that the Respondent provided to the Fellows during the procedures would not have amounted to misconduct. The Committee concluded that the Respondent's statements did not constitute fraud in the practice of medicine and did not evidence moral unfitness in the practice of medicine.

The Committee determined that the Respondent failed to document adequately the medical indications for performing Endoscopic Retrograde Cannulation Procedures (ERCP) on Patients A-E. The Committee found that the failure to document amounted to practicing with negligence on more than one occasion and failing to maintain accurate records. The Committee found no misconduct in treatment to Patient F and the Petitioner withdrew the charges concerning Patient G. As to the care for Patient H, the Committee determined that the Respondent failed to address inconsistent findings from procedures on June 12 and 14, 2002. The Committee determined that the Respondent needed to make entries in the medical chart discussing and providing a possible explanation for the inconsistencies. The Committee found the inconsistencies significant and found the failure to discuss and offer an explanation constituted practice with negligence and incompetence. In the treatment for Patient I, the Committee determined that the Respondent failed to document adequately and to evaluate inconsistencies between procedures on June 18 and 19, 2002 and the Committee determined that the Respondent's failure caused confusion for the Patient's treating physician as to the Patient's actual condition. The Committee found that the failures constituted practice with negligence, gross negligence and incompetence. As to the care for Patient J, the Committee found that the Respondent failed to document the indications for a procedure on the Patient and that the Respondent's record for the Patient demonstrated carelessness. The Committee found negligence and incompetence in this case. The Committee found no misconduct in the treatment for Patient K. As to the care for Patient L, the Committee determined that the Respondent performed an enteroscopy without medical indication and that the Respondent failed to document the indications for that procedure. The Committee found that such conduct amounted to practicing with negligence and incompetence and performing excessive tests or treatments unwarranted by the Patient's condition.

In reaching their findings, the Committee credited expert testimony by the Petitioner's expert witness, John B. Rodgers, Jr., M.D., whom the Committee found credible, objective and open-minded. The Committee noted that Dr. Rodgers was not Board Certified in Gastroenterology and that Dr. Rodgers had no experience in performing ERCPs, but the

Committee also noted that Dr. Rodgers provided exculpatory information that resulted in the withdrawal of certain allegations. The Committee found the Respondent's expert, George Triadafilopoulos, M.D., well qualified and articulate, but the Committee noted that Dr. Triadafilopoulos admitted to discussing patient care with the Respondent prior to the expert's testimony and to relying on notes that the Respondent prepared. The Committee concluded that the discussion and the reliance on the notes reduced the expert's objectivity and the weight the Committee assigned to his testimony. The Committee found the Respondent's testimony self-serving, non-responsive and non-credible. The Committee also found credible certain factual testimony from nurses and fellows at Strong Memorial.

The Committee voted to suspend the Respondent's License for two years and to place the Respondent on probation during the suspension, under the terms that appear at Appendix I to the Committee's Determination. The Committee provided that the suspension and the probation would be tolled for any period during which the Respondent does not engage in practice in New York. The Committee decided against requiring the Respondent to complete continuing medical education, because the Committee concluded from the Respondent's testimony that the Respondent possessed an adequate level of knowledge as to the actual requirements for record keeping.

Review History and Issues

The Committee rendered their Determination on November 20, 2006. This proceeding commenced on December 4 & 5, 2006, when the ARB received the Notice requesting a Review from the Respondent and then from the Petitioner. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and reply brief and the Respondent's brief and reply brief. The record closed when the ARB received the Respondent's reply brief on January 18, 2007.

The Petitioner requests two modifications in the Committee's Determination. The Petitioner asks the ARB to correct the Committee's Determination to make clear that the Committee upheld Factual Allegations E.4, I.1 and I.2., concerning documentation on procedures for Patient I and the interview with OPMC representatives. The Petitioner argues that some typographical error left doubt as to whether the Committee sustained those factual findings. The Petitioner also requested that the ARB modify the sanction the Committee imposed to remove the tolling provision on the actual suspension. The Petitioner argued that the tolling provision was unworkable. The Petitioner argued, however, that the Respondent's conduct did warrant a serious penalty.

The Respondent asks that the ARB overturn the Committee's findings on the charges and vacate the two-year suspension. The Respondent argues that the Committee's Administrative Officer erred in refusing to receive into evidence relevant medical journals and by failing to disqualify a Committee member for bias. On the negligence charges, the Respondent argued that a physician who exercises his best judgment is not negligent as long as his actions fall within one or more medically accepted treatment alternatives. On the record-keeping charges, the Respondent argued that the charges should have been dismissed, because the Committee relied on testimony that Dr. Rodgers based on less than complete medical records. As to the penalty, the Respondent argued that the two-year suspension amounted to a lifetime suspension, that the suspension was excessive and unwarranted and that the suspension exceeded the penalties in comparable cases. In response to the Petitioner's brief, the Respondent argued that the Committee's Determination was unambiguous and not subject to re-interpretation as to the Committee's conclusion on charges.

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine 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 PHL §230-a permits. The ARB may substitute our judgment 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); 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); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, 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 statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only

pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. The ARB affirms the Committee's Determination that Respondent practiced with negligence on more than one occasion, subjected a patient to unwarranted tests or treatment and failed to maintain accurate records. The ARB overturns the Committee's Determination to sustain charges that the Respondent practiced with incompetence on more than one occasion. The ARB modifies the Committee's penalty to suspend the Respondent's License immediately and to place the Respondent on probation for five years rather than two years.

The Respondent asserted that the Committee's Administrative Officer erred in refusing to recuse a Committee member for possible bias. The Respondent's brief, however, failed to cite to statutes, regulations or case law that sets standards for excluding or disqualifying Committee members. The Petitioner's brief notes that the regulations that applied to the hearing, at Title 10 NYCRR § 51.17(a), provide disqualification of a Committee member for bias due to prior knowledge of the case or predisposition in a case, among other criteria. New York State Administrative Procedure Act (SAPA) § 303 also provides for disqualification due to bias. The New York Court of Appeals has found that bias under SAPA includes advance knowledge of facts and prejudgment of the issues in a case, Matter of 1616 Second Avenue Restaurant, Inc. v. New York State Liquor Authority, 75 N.Y.2d 158 (1990). A party challenging a Committee Member or ALJ for bias, however, must provide a factual basis to show the bias other than

innuendo, Rojas v. Sobol, 167 A.D.2d 707, 563 N.Y.S.2d 284 (3rd Dept. 1990) app. den. 77 N.Y.2d 806; Wolf v. Ambach, 95 A.D.2d 877, 464 N.Y.S.2d 244 (3rd Dept. 1983). In this case, the Respondent made no factual allegations of bias, but alleged bias due to certain newspaper stories that appeared in the area in which a Committee member lived. As the Respondent failed to provide facts showing prior knowledge or prejudgment, the Respondent failed to make a case for recusal or disqualification.

The Respondent also alleged error because the Administrative Officer failed to admit a medical text into evidence. Once again, the Respondent's brief provided no reference to statutes, regulations or court decisions on limiting evidence or admitting medical texts. Under Title 10 NYCRR §§ 51.9 (6) & (7), an administrative officer may limit repetitious, corroborative or cumulative testimony. Under SAPA § 306(1), an administrative officer may exclude repetitious evidence. In this case, the Respondent offered and the Administrative Officer allowed expert testimony by the Respondent himself and by a separate expert. The Respondent's counsel received the opportunity to cross-examine the Petitioner's expert and the Administrative Officer permitted neither party to introduce medical texts into the record. Excluding the texts fell under the Administrative Officer's authority to exclude repetitious evidence. The Respondent has failed to establish error.

The Respondent argued that the Committee should have dismissed all charges dealing with medical records, because the records before the Committee were incomplete. In reply, the Petitioner argued that the Department placed in evidence the portions from the Patient records the Petitioner felt relevant to the charges. The Petitioner contended that, if the Respondent needed additional material from Patient records, the Respondent should have subpoenaed that material and introduced the material into evidence. The Petitioner also points out that the

Respondent made no objection at hearing to material from Patient records that the Petitioner offered into evidence. The ARB agrees with the Petitioner. The medical procedures at issue in this case occurred at Strong Memorial Hospital. The records for the procedures would be at Strong or in the Respondent's office records, rather than in the hands of the Petitioner. If the Respondent felt that material at Strong, or in his office records, could have aided his defense, he should have subpoenaed and/or introduced that material. The ARB finds no basis in the Respondent's argument to dismiss the findings on failure to maintain accurate records.

The Respondent's brief argued that the Committee can not make a finding of negligence merely upon a difference of opinion between physicians over the choice of one accepted medical treatment alternative as opposed to another. The ARB finds that argument irrelevant to the Committee findings that the Respondent practiced negligently. In the cases of Patients A-E, H, I and J, the Committee found negligence because the Respondent failed to provide the indication for treatment for the Patient and because the failure could leave subsequent treating physician unable to comprehend the Respondent's treatment plan and place Patients at risk. The most egregious instances of the failure to document care occurred in the cases of Patients H and I, in which the Respondent failed to address inconsistent findings in two procedures on each Patient. In reaching their conclusions, the Committee relied on the testimony by the Petitioner's expert, Dr. Rodgers. The Respondent criticized the Committee for such reliance, but the Committee's Determination set out the Committee's reasons for rejecting explanations by the Respondent and the reasons why the Committee reduced the objectivity and weight the Committee afforded to answers by the Respondent's expert, Dr. Triadafilopoulos. The ARB defers to the Committee, as fact finder, in their conclusions on credibility. The ARB affirms the Committee's Determination on negligence.

The Committee found that the Respondent performed an enteroscopy on Patient L without medical indication, because the Respondent failed to perform a biopsy on the Patient prior to subjecting the Patient to the enteroscopy. The Committee concluded that the Respondent performed an excessive test and/or a test unwarranted by the Patient's condition. Once again, the ARB defers to the Committee in their Determination on expert credibility. The ARB affirms the finding that the Respondent subjected a patient to an unnecessary and/or unwarranted procedure .

The Respondent also challenged the Committee's findings that the Respondent practiced with incompetence on more than one occasion in treating Patients H, J and L. The ARB agrees with the Respondent that the record fails to demonstrate that the Respondent practiced with incompetence. As the Respondent's brief stated at page 60, incompetence means a lack of the skill or knowledge necessary to practice medicine safely and effectively. The Committee's Determination fails to specify any incident in which the Committee determined that an omission or error by the Respondent resulted from a lack of skill or knowledge. At page 35 in their Determination, the Committee stated that they ordered no continuing education to address the Respondent's record keeping deficiencies, because

> *" ... the Respondent's testimony demonstrated that he possesses an adequate level of knowledge as to the actual requirements for effective record keeping."*

At page 34 in their Determination, the Committee noted that the failures to address the contradictions in the procedures on Patients H and I resulted from a "sloppy and cavalier approach". The Committee also stated that the Respondent sacrificed the proper standards of medical documentation in the face of a heavy volume of procedures. These findings show that the Respondent practiced in a sloppy or careless manner in following accepted standards, rather than that the Respondent lacked knowledge about what constituted accepted standards. The ARB holds that the Committee made findings inconsistent with their conclusion that the Respondent

practiced with incompetence on more than one occasion in treating Patients. The ARB overturns the findings on incompetence.

The Petitioner requested clarification or modification in the Committee's Determination sustaining Factual Allegation E.4, I.1 and I.2., which concerned documentation on procedures for Patient I and the interview with OPMC representatives. At pages 20 and 27 in their Determination, the Committee stated clearly that they sustained Factual Allegations E.4, I.1 and I.2, but at page 36, the Committee excluded those three allegations from the list of allegations the Committee listed as sustained. The Petitioner asks the ARB to clarify that the Committee sustained those allegations. The Respondent argues that no need exists for clarification or modification, because the Committee made clear at page 36 that they sustained no allegations other than those specifically listed. The ARB agrees with the Petitioner that the Committee's conclusions at pages 20 and 27 are inconsistent with those at page 36. The ARB concludes that the Committee intended to sustain Factual Allegations E.4, I.1 and I.2 and we affirm the Committee's Determination on those Factual Allegations.

The Respondent argued that the Committee imposed an overly harsh penalty by suspending the Respondent's License for two years. Both parties challenged the provisions that the Committee imposed concerning tolling the suspension during the time the Respondent practices outside New York.

The ARB agrees with the parties that the provision for tolling the suspension constitutes both an inappropriate and impractical penalty. The Committee provided that the Respondent's License would be on suspension for two years and that the suspension would be tolled during any period the Respondent practiced outside New York State. The Respondent practices currently in West Virginia. The Respondent argued that the tolling would make the penalty a

lifetime suspension, because the suspension would not begin to run until the Respondent returns to practice and the Respondent could not practice due to the suspension. The Petitioner describes the tolling provision as legally suspect under the penalty provisions in PHL 230-a and under prior court rulings such as Daniels v. Novello, 306 A.D.2d 644 (3rd Dept. 2003) and Matter of Ostad v. New York State Department of Health, 309 A.D.2d 989 (3rd Dept. 2003). The ARB modifies the Committee's Determination to remove the tolling provision.

The ARB votes to suspend the Respondent's License for two years. The suspension shall commence immediately. The ARB agrees with the Committee that the Respondent's misconduct warrants a serious penalty. The Respondent subjected one patient to unwarranted and/or unnecessary treatment. The Respondent was careless in his practice and he showed no remorse or recognition concerning the need to change his practice. The lack of remorse or recognition leaves the Respondent at risk to repeat his misconduct. We agree with the Committee that continuing education will not aid the Respondent to improve his practice. The Respondent requires a wake up call to let him know that he needs to change his practice. The two-year suspension will provide such a wake up call. To assure that the wake up call results in an improvement in the Respondent's practice, the ARB finds it appropriate that the Respondent practice with oversight for an extended period following the suspension.

The ARB votes to place the Respondent on probation for five years following the suspension, under the probation terms that appear in Appendix I to the Committee's Determination, with the two modifications we note below. The probation terms will include a toll on the probation during anytime that the Respondent practices medicine outside New York State. We find the tolling provision appropriate for probation. We impose the probation for five years, rather than two years, because we conclude that five years will provide a better indication about

whether the Respondent has improved his practice. We modify the probation terms at the second line in paragraph 3 to substitute the word "he" for the word "she'. We modify the probation terms at the first line in paragraph 5 to the delete the words "suspension and". We affirm the remaining probation terms.

ORDER

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

1. The ARB affirms the Committee's Determination that the Respondent practiced medicine with gross negligence and with negligence on more than one occasion, that he subjected a patient to an unwarranted procedure and that he failed to maintain accurate patient records.
2. The ARB overturns the Committee's Determination that the Respondent practiced with incompetence on more than one occasion.
3. The ARB affirms the Committee's Determination to suspend the Respondent's License for two years, but we modify the Determination to place a tolling provision on the suspension.
4. The ARB affirms the Committee's Determination to place the Respondent on probation. We modify the Committee's Determination to place the Respondent on probation for five years rather than two. The Respondent shall serve the probation under the terms the Committee imposed at Appendix I to the Committee's Determination, with the modifications that the ARB noted in our Determination.

Robert M. Briber
Thea Graves Pellman
Datta G. Wagle, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Uma Sundaram, M.D.

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

Dated: March 2, 2007

Redacted Signature

Robert M. Briber

In the Matter of Uma Sundaram, M.D.

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

Dated: March 9, 2007

Redacted Signature

Thea Graves Pellman

In the Matter of Uma Sundaram, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Sundaram.

Dated: 3/13/, **2007**

Redacted Signature

Datta G. Wagle, M.D.

In the Matter of Uma Sundaram, M.D.

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

Dated: March 2, **2007**

Redacted Signature

Stanley L Grossman, M.D.

In the Matter of Uma Sundaram, M.D.

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

Dated: February 28, **2007**

Redacted Signature

Therese G. Lynch, M.D.