

Nirav R. Shah, M.D., M.P.H.
Commissioner

NEW YORK
state department of
HEALTH

Public
Sue Kelly
Executive Deputy Commissioner

May 13, 2013

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Michael Curtis Haben, M.D.
980 Westfall Road, Suite 127
Rochester, NY 14618

RE: License No. 230501

Dear Dr. Haben:

Enclosed is a copy of the New York State Board for Professional Medical Conduct (BPMC) Order No. 13-138. This Order and any penalty provided therein goes into effect May 20, 2013.

If the penalty imposed by the Order is a fine, please write the check payable to the New York State Department of Health. Noting the BPMC Order number on your remittance will assist in proper crediting. Payments should be directed to the following address:

Bureau of Accounts Management
New York State Department of Health
Corning Tower, Room 2784
Empire State Plaza
Albany, New York 12237

Please direct any questions to: Board for Professional Medical Conduct, 90 Church Street, 4th Floor, New York, NY 10007-2919, telephone # 212-417-4445.

Sincerely,

REDACTED

Katherine A. Hawkins, M.D., J.D.
Executive Secretary
Board for Professional Medical Conduct

IN THE MATTER
OF
MICHAEL CURTIS HABEN, M.D.

CONSENT
ORDER

Upon the application of (Respondent) **MICHAEL CURTIS HABEN, M.D.** in the attached Consent Agreement and Order, which is made a part of this Consent Order, it is

ORDERED, that the Consent Agreement, and its terms, are adopted and

it is further

ORDERED, that this Consent Order shall be effective upon issuance by the Board,

either

by mailing of a copy of this Consent Order, either by first class mail to Respondent at

the address in the attached Consent Agreement or by certified mail to Respondent's

attorney, OR

upon facsimile transmission to Respondent or Respondent's attorney,

whichever is first.

SO ORDERED.

DATE: 5/13/2013

REDACTED

CARMELA TORRELLI
Vice Chair
State Board for Professional Medical Conduct

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

IN THE MATTER
OF
MICHAEL HABEN, M.D.

CONSENT
AGREEMENT

MICHAEL HABEN, M.D., represents that all of the following statements are true:

That on or about November 12, 2003, I was licensed to practice as a physician in the State of New York, and issued License No. 230501 by the New York State Education Department.

My current address is 980 Westfall Road, Suite 127, Rochester, New York 14618, and I will advise the Director of the Office of Professional Medical Conduct of any change of address.

I understand that the New York State Board for Professional Medical Conduct (Board) has charged me with one or more specifications of professional misconduct, as set forth in a Statement of Charges, marked as Exhibit "A", attached to and part of this Consent Agreement.

I admit the First Specification (negligence on more than one occasion), in full satisfaction of the charges against me, and agree to the following penalty:

Pursuant to New York Pub. Health Law § 230-a(2), my license to practice medicine in New York State shall be suspended for 36 months, with the

period of actual suspension to be stayed pending my compliance with the probation terms set out in Exhibit "B".

Pursuant to New York Pub. Health Law § 230-a(9), I shall be placed on probation for 36 months, subject to the terms set forth in attached Exhibit "B."

Pursuant to N.Y. Pub. Health Law §§ 230-a(7) and (9), I shall be subject to a fine in the amount of One Hundred Thousand Dollars (\$100,000.00), to be paid as follows: Fifty Thousand Dollars (\$50,000.00), to be paid within 30 days of the effective date of this Order, and the balance of Fifty Thousand Dollars (\$50,000.00) to be paid within 120 days of the effective date of the Order. Payments must be submitted to:

Bureau of Accounts Management
New York State Department of Health
Empire State Plaza
Corning Tower, Room 2784
Albany, New York 12237

I further agree that the Consent Order shall impose the following conditions:

That Respondent shall remain in continuous compliance with all requirements of N.Y. Educ Law § 6502 including but not limited to the requirements that a licensee shall register and continue to be registered with the New York State Education Department (except during periods of actual

suspension) and that a licensee shall pay all registration fees. Respondent shall not exercise the option provided in N.Y. Educ. Law § 6502(4) to avoid registration and payment of fees. This condition shall take effect 120 days after the Consent Order's effective date and will continue so long as Respondent remains a licensee in New York State; and

That Respondent shall remain in continuous compliance with all requirements of N.Y. Pub. Health Law § 2995-a(4) and 10 NYCRR 1000.5, including but not limited to the requirements that a licensee shall : report to the department all information required by the Department to develop a public physician profile for the licensee; continue to notify the department of any change in profile information within 30 days of any change (or in the case of optional information, within 365 days of such change); and, in addition to such periodic reports and notification of any changes, update his or her profile information within six months prior to the expiration date of the licensee's registration period. Licensee shall submit changes to his or her physician profile information either electronically using the department's secure web site or on forms prescribed by the department, and licensee shall attest to the truthfulness, completeness and correctness of any changes licensee submits to the department. This condition shall take effect 30 days after the Order's effective date and shall continue so long as Respondent remains a licensee in New York State. Respondent's failure to comply with this condition, if proven and found at a hearing pursuant to N.Y. Pub. Health

Law § 230, shall constitute professional misconduct as defined in N.Y. Educ. Law § 6530(21) and N.Y. Educ. Law § 6530(29). Potential penalties for failure to comply with this condition may include all penalties for professional misconduct set forth in N.Y. Pub. Health Law §230-a, including but not limited to: revocation or suspension of license, Censure and Reprimand, probation, public service and/or fines of up to \$10,000 per specification of misconduct found; and

That Respondent shall cooperate fully with the Office of Professional Medical Conduct (OPMC) in its administration and enforcement of this Consent Order and in its investigations of matters concerning Respondent. Respondent shall respond in a timely manner to all OPMC requests for written periodic verification of Respondent's compliance with this Consent Order.

Respondent shall meet with a person designated by the Director of OPMC, as directed. Respondent shall respond promptly and provide all documents and information within Respondent's control, as directed. This condition shall take effect upon the Board's issuance of the Consent Order and will continue so long as Respondent remains licensed in New York State.

I stipulate that my failure to comply with any conditions of this Consent Order shall constitute misconduct as defined by N.Y. Educ. Law § 6530(29).

I agree that, if I am charged with professional misconduct in the future, this Consent Agreement and Order **shall** be admitted into evidence in that proceeding.

I ask the Board to adopt this Consent Agreement.

I understand that if the Board does not adopt this Consent Agreement, none of its terms shall bind me or constitute an admission of any of the acts of alleged misconduct; this Consent Agreement shall not be used against me in any way and shall be kept in strict confidence; and the Board's denial shall be without prejudice to the pending disciplinary proceeding and the Board's final determination pursuant to N.Y. Pub. Health Law.

I agree that, if the Board adopts this Consent Agreement, the Chair of the Board shall issue a Consent Order in accordance with its terms. I agree that this Consent Order shall take effect upon its issuance by the Board, either by mailing of a copy of the Consent Order by first class mail to me at the address in this Consent Agreement, or to my attorney by certified mail, OR upon facsimile transmission to me or my attorney, whichever is first. The Consent Order, this agreement, and all attached Exhibits shall be public documents, with only patient identities, if any, redacted. As public documents, they may be posted on the Department's website. OPMC shall report this action to the National Practitioner Data Bank and the Federation of State Medical Boards, and any other entities that the Director of OPMC shall deem appropriate.

I stipulate that the proposed sanction and Consent Order are authorized by N.Y. Pub. Health Law §§ 230 and 230-a, and that the Board and OPMC have the requisite powers to carry out all included terms. I ask the Board to adopt this Consent Agreement of my own free will and not under duress, compulsion or restraint. In consideration of the value to me of the Board's adoption of this Consent Agreement, allowing me to resolve this matter without the various risks and burdens of a hearing on the merits, I knowingly waive my right to contest the Consent Order for which I apply, whether administratively or judicially, I agree to be bound by the Consent Order, and I ask that the Board adopt this Consent Agreement.

I understand and agree that the attorney for the Department, the Director of OPMC and the Chair of the Board each retain complete discretion either to enter into the proposed agreement and Consent Order, based upon my application, or to decline to do so. I further understand and agree that no prior or separate written or oral communication can limit that discretion.

DATE 5-2-13

REDACTED

MICHAEL HABEN, M.D.
RESPONDENT

The undersigned agree to Respondent's attached Consent Agreement and to its proposed penalty, terms and conditions.

DATE: 5-2-13

REDACTED

RICHARD S. TUBIOLO, ESQ.
Attorney for Respondent

DATE: 5/5/13

REDACTED

MICHAEL A. HISER, ESQ.
Associate Counsel
Bureau of Professional Medical Conduct

DATE: 5/10/13

REDACTED

KEITH W. SERVIS
Director
Office of Professional Medical Conduct

IN THE MATTER

OF

MICHAEL HABEN, M.D.

STATEMENT

OF

CHARGES

MICHAEL HABEN, M.D., the Respondent, was authorized to practice medicine in New York State on or about November 12, 2003, by the issuance of license number 230501 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. Respondent, between January 2007 and November 2008, provided medical care in the form of laryngeal surgeries on patients known as Patients A through E, respectively (names of patients are provided on the attached Appendix "A"). Respondent performed endoscopic procedures on each patient, described as such in his operative notes. An endoscopy procedure of the type performed by Respondent would properly be assigned an "American Medical Association Common Procedural Terminology" ("CPT") Code of "31541" for billing purposes.
1. Respondent in submitting billing codes for each patient's procedure under the AMA CPT Code, assigned a CPT code for a so-called "open procedure" [that is, non-endoscopic]. In each instance, the open procedure CPT code used by the Respondent was reimbursed at a higher rate than the properly coded procedure would have been. Respondent knew or should have known that he had assigned an incorrect CPT code to describe the procedures done for each patient.
- B. Respondent, between October 2008 and June 2009, provided medical care in the form of flexible fiber optic laryngoscopic procedures on patients known as Patients

F through H, respectively. Respondent performed flexible fiber optic laryngoscope procedures on each patient, described as such in his operative notes. A procedure of the type performed by Respondent would properly be assigned an AMA CPT Code of "31575" or "31576" (if biopsy was taken) for billing purposes.

1. Respondent in submitting billing codes for each patient under the AMA CPT Code, inaccurately assigned a CPT code for each procedure that purported to use equipment (a rigid laryngoscope) that was not in fact available at the location the procedure was done. In each instance, the CPT code used by the Respondent was reimbursed at a higher rate than the properly coded procedure would have been. Respondent knew or should have known that he had assigned the incorrect CPT code to describe the procedures done for each patient.

C. Respondent, between February 2005 and December 2007, provided medical care that included a tracheostomy on patients known as Patients I and J, respectively. Respondent performed non-permanent tracheostomy fenestration procedures on each patient, described as such in his operative notes. A procedure of the type performed by Respondent would properly be assigned an AMA CPT Code of "31600" for billing purposes.

1. Respondent in submitting billing codes for each patient under the AMA CPT Code, inaccurately assigned a CPT code for a procedure involving the creation of a more permanent tracheostomy stoma. In each instance, the permanent stoma based procedure CPT code used by the Respondent was reimbursed at a higher rate than the properly coded procedure would have been. Respondent knew or should have known that he had assigned an incorrect CPT code to describe the procedures done for each patient.

D. Respondent, between January 2007 and November 2008, provided medical care that included injections to the vocal cords to patients known as Patients A through D, respectively. Respondent injected non-therapeutic saline into the vocal cords of each patient, described as such in his operative notes.

1. Respondent, in submitting billing codes for each patient under the AMA CPT Code, inaccurately assigned a CPT code for a procedure that used a therapeutic injection into the vocal cords. In each instance, the CPT code used by the Respondent was reimbursed at a higher rate than the properly coded procedure would have been. Respondent knew or should have known that he had assigned an incorrect CPT code to describe the procedures done for each patient.
- E. Respondent, between 2004 and 2009, treated patients with Botox injections into their vocal cords at the University of Rochester otolaryngology clinic or Strong Memorial Hospital. Respondent billed for the use of more than 20,600 units of Botox for such patients. This amount, purporting to be the total units of Botox Respondent used in therapy and wasted, was significantly larger than the amount of Botox that the relevant University of Rochester clinic and pharmacy had available to it for Respondent's use. Respondent knew or should have known that his billing for the Botox was inaccurate.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(3) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of:

1. The facts of paragraph A and A.1 relating to Patient A, A and A.1 relating to Patient B, A and A.1 relating to Patient C, A and A.1 relating to Patient D, A and A.1 relating to Patient E, B and B.1 relating to Patient F, B and B.1 relating to Patient G, B and B.1 relating to Patient H, C and C.1 relating to Patient I, C and C.1 relating to Patient J, D and D.1 relating to Patient A, D

and D.1 relating to Patient B, D and D.1 relating to Patient C, D and D.1 relating to Patient D, and/or the facts of paragraph E.

SECOND SPECIFICATION

FRAUDULENT PRACTICE

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law § 6530(2) by practicing the profession of medicine fraudulently as alleged in the facts of the following:

2. The facts of paragraph A and A.1 relating to Patient A, A and A.1 relating to Patient B, A and A.1 relating to Patient C, A and A.1 relating to Patient D, A and A.1 relating to Patient E, B and B.1 relating to Patient F, B and B.1 relating to Patient G, B and B.1 relating to Patient H, C and C.1 relating to Patient I, C and C.1 relating to Patient J, D and D.1 relating to Patient A, D and D.1 relating to Patient B, D and D.1 relating to Patient C, D and D.1 relating to Patient D, and/or the facts of paragraph E.

THIRD SPECIFICATION

FAILURE TO MAINTAIN RECORDS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(32) by failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient, as alleged in the facts of:

3. The facts of paragraph A and A.1 relating to Patient A, A and A.1 relating to Patient B, A and A.1 relating to Patient C, A and A.1 relating to Patient D, A and A.1 relating to Patient E, B and B.1 relating to Patient F, B and B.1 relating to Patient G, B and B.1 relating to Patient H, C and C.1 relating to Patient I, C and C.1 relating to Patient J, D and D.1 relating to Patient A, D and D.1 relating to Patient B, D and D.1 relating to Patient C, D and D.1 relating to Patient D, and/or the facts of paragraph E.

DATE: May 8, 2013
Albany, New York

REDACTED

Peter D. Van Buren
Deputy Counsel
Bureau of Professional Medical Conduct

EXHIBIT "B"

Terms of Probation

- 1) Respondent's conduct shall conform to moral and professional standards of conduct and governing law. Any act of professional misconduct by Respondent as defined by N.Y. Educ. Law §§ 6530 or 6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to N.Y. Pub. Health Law § 230(19).
- 2) Respondent shall maintain active registration of Respondent's license (except during periods of actual suspension) with the New York State Education Department Division of Professional Licensing Services, and shall pay all registration fees.
- 3) Respondent shall provide the Director, Office of Professional Medical Conduct (OPMC), Riverview Center, 150 Broadway, Suite 355, Albany, New York 12204-2719, with the following information, in writing, and ensure that this information is kept current: a full description of Respondent's employment and practice; all professional and residential addresses and telephone numbers within and outside New York State; and all investigations, arrests, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility. Respondent shall notify OPMC, in writing, within 30 days of any additions to or changes in the required information.
- 4) Respondent shall cooperate fully with, and respond in a timely manner to, OPMC requests to provide written periodic verification of Respondent's compliance with the terms of this Consent Order. Upon the Director of OPMC's request, Respondent shall meet in person with the Director's designee.
- 5) Respondent's failure to pay any monetary penalty by the prescribed date shall subject Respondent to all provisions of law relating to debt collection by New York State, including but not limited to: the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses [Tax Law § 171(27); State Finance Law § 18; CPLR § 5001; Executive Law § 32].
- 6) The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of 30 consecutive days or more. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive 30 day period. Respondent shall then notify the Director again at least 14 days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period shall resume and Respondent shall fulfill any unfulfilled probation terms and such additional

requirements as the Director may impose as reasonably relate to the matters set forth in Exhibit "A" or as are necessary to protect the public health.

- 7) The Director of OPMC may review Respondent's professional performance. This review may include but shall not be limited to: a review of office records, patient records, hospital charts, and/or electronic records; and interviews with or periodic visits with Respondent and staff at practice locations or OPMC offices.
- 8) Respondent shall adhere to federal and state guidelines and professional standards of care with respect to infection control practices. Respondent shall ensure education, training and oversight of all office personnel involved in medical care, with respect to these practices.
- 9) Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients and contain all information required by State rules and regulations concerning controlled substances.
- 10) Respondent shall make available for review by a third party billing monitor any and all office and accounts records, as directed by OPMC. Such billing monitor shall be proposed by Respondent and approved, in writing, by the Director, OPMC. Respondent shall fully cooperate in the review process. The review will determine whether the Respondent's medical billing and related documentation practices are conducted in a manner that complies with all Federal, State, and local statutes and regulations regarding billing for medical services and is accurate, under all relevant circumstances, as to services rendered and the clinical bases for those services.
 - A. Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the billing monitor.
 - B. Respondent shall cause the billing monitor to report quarterly, in writing, to the Director of OPMC.
 - C. Any perceived deviation from proper billing practices or refusal to cooperate with the billing monitor shall be reported within 24 hours to OPMC.
- 11) Respondent shall enroll in and successfully complete a continuing education program in the area of ethics. This continuing education program is subject to the Director of OPMC's prior written approval and shall be successfully completed within the first 90 days of the probation period.
- 12) Respondent shall comply with this Consent Order and all its terms, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with, or a violation of, these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding, and/or any other such proceeding authorized by law, against Respondent.