



STATE OF NEW YORK DEPARTMENT OF HEALTH

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Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

PUBLIC

March 18, 2004

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jennifer Daniels, M.D.
3100 South Salina Street
Syracuse, New York 13205

Jennifer Daniels, M.D.
256 West Newell Street
Syracuse, New York 13205

Kevin P. Donovan, Associate Counsel
NYS Department of Health
ESP-Corning Tower-Room 2509
Albany, New York 12237

Janice L. Jennings, Esq.
Tylyn Bozeman, Esq.
P.O. Box 2325
Bartow, Florida 33831

RE: In the Matter of Jennifer Daniels, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-68R) 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.

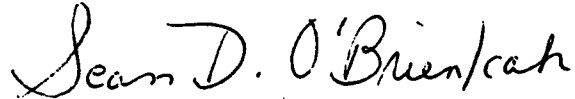
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either certified 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 cursive script that reads "Sean D. O'Brien/cak".

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:
Enclosure

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

In the Matter of

Jennifer Daniels, 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. 01-68R

COPY

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

For the Department of Health (Petitioner): Kevin P. Donovan, Esq.

For the Respondent:

Janice L. Jennings and Tylyn Bozeman, Esqs.

In this case pursuant to N. Y. Pub Health Law § 230-c (McKinney Supp. 2004), the ARB considers the penalty to impose against the Respondent's New York medical license (License) due to the Respondent's failure to comply with a comprehensive medical record review order (Review Order). After an initial administrative review, the ARB affirmed a Determination by a BPMC Hearing Committee to suspend the Respondent's License until sixty days past such time as the Respondent complied with the Review Order. The New York Supreme Court Appellate Division for the Third Department, however, found that indefinite suspension impermissible and remitted the case solely for the ARB to impose an appropriate penalty¹. After reviewing the Remittur Order and additional submissions from the parties, the ARB votes 4-1 to suspend the Respondent's License for three years, to stay the suspension and to place the Respondent on probation for three years. The Probation Terms include the requirement that the Respondent comply with the Review Order within ninety days and the requirement that the Respondent practice with a monitor.

¹ Matter of Daniels v. Novello, 306 A.D.2d 644, 762 N.Y.S.2d 141 (3rd Dept. 2003).

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(15) (McKinney Supp. 2004) by failing to comply with a Review Order for a comprehensive review of patient and/or office records. The Review Order resulted from a single patient care complaint. The Respondent objected to the Review Order on grounds that she rendered effective care in the case at issue in the complaint and that the Review would invade her other patients' privacy and burden her medical practice. A hearing ensued before the Committee that rendered the Determination now on review.

The Committee found that two BPMC investigative committees recommended comprehensive reviews on the Respondent's records to the Director of the Office of Professional Medical Conduct (OPMC). The Respondent failed to comply with those orders and informed OPMC Staff that she will not comply with such orders [Committee Findings of Fact (FF) 3, 6, 8, 10, 13]. The Committee found that OPMC possessed the authority to issue the Review Order and that the Respondent bore the obligation to comply with the Order as a condition for holding her license. The Committee also noted that the New York State Supreme Court for Onondaga County upheld the Review Order following a court challenge by the Respondent. The Committee voted to suspend the Respondent's License until sixty days past the date on which she complies with the Review Order. The Committee considered but rejected imposing a fine.

The Initial ARB Proceeding

Following the Committee's Determination, the Respondent requested administrative review. The Respondent's review brief argued that she received no opportunity to present a meaningful defense at the hearing. She raised seven issues for review.

1. The Bureau of Adjudication failed to issue a hearing officer's report and proposed order pursuant to Title 10 NYCRR §§ 51.12, 51.13 & 51.14.
2. The Respondent failed to receive a meaningful hearing because no meaningful basis exists for issuing the Review Order and the OPMC Director has failed to establish the relevance for the specific records that the Review will involve.
3. Newly discovered evidence warrants a remand and the Committee's Administrative Officer abused her discretion in refusing to admit exculpatory evidence at the hearing.
4. The Respondent maintained an accurate medical record for the Patient KM, the patient at issue in the complaint that formed the basis for the investigation into the Respondent's practice.
5. The Administrative Officer's rulings demonstrated a bias against alternative medicine and violated the 1994 Alternative Medical Practices Act (Laws of 1994, Chapter 55).
6. The Administrative Officer's rulings violated the Respondent's rights as a woman and an African-American and violated Title VI, § 601 of the Civil Rights Act of 1964.
7. The Committee imposed an excessive sanction.

The Respondent asked that the ARB annul the Committee's Determination, or in the alternative, dismiss the charge in the interests of justice, or in the alternative, remand to the Committee for further proceedings.

In response, the Petitioner argued that the Respondent's brief attempted to re-litigate the issues that the Respondent raised in a Supreme Court proceeding challenging the Review Order.

The Petitioner raised the following arguments:

- the Respondent requested relief beyond the ARB's authority;
- the Committee imposed an appropriate penalty;
- the Respondent relied on Title 10 NYCRR §§ 51.12-51.14 mistakenly, as the legislation creating the ARB process (Laws of 1991, Chapter 606) superseded those regulations;
- the Supreme Court Order sustaining the Review Order bars the Respondent from re-litigating the Order's validity before the ARB;
- the Respondent raised factually incorrect assertions about newly discovered evidence;
- the Respondent raised discrimination claims without merit;
- the Respondent's lost reputation resulted from the Respondent's own actions in disclosing the OPMC investigation to her patients; and,
- the Respondent fails to specify what mitigating evidence she sought to introduce.

In the Petitioner's main brief to the ARB, the Petitioner asked the ARB to determine that the Committee's findings support both misconduct specifications that the Petitioner charged against the Respondent [Notice of Hearing, Petitioner Hearing Exhibit 1].

In the Respondent's response to the Petitioner's main brief, the Respondent in effect repeats at Reply Issues 1 & 2, the arguments on newly discovered and mitigating evidence that the Respondent raised at Issue 3 in her main brief. At Reply Issue 5, the Respondent repeated the arguments on civil rights violations that she raised at Point 6 in the main brief. At Reply Issue 3, the Respondent argued, on information and belief, that the Petitioner's counsel relied on perjured

testimony by Patient KM in an affidavit in the Respondent's Supreme Court challenge to the Review Order. The Respondent appeared to be asking the ARB to impose disciplinary sanctions against the Petitioner's counsel. The Respondent's Reply Issue 4 made allegations about conduct by the Petitioner's counsel in a prior OPMC investigation.

After considering the hearing record and the parties' submissions, the ARB affirmed the Committee's Determination that the Respondent committed professional misconduct and affirmed the Committee's Determination to suspend the Respondent's License. We held that the case involved one charge that the Respondent failed to comply with the Review Order. The Committee determined that the Respondent failed to comply [FF 3, 6, 8, 10, 13]. Such failure constituted professional misconduct under N. Y. Educ. Law §6530(15). The findings by the Committee provided the grounds for sustaining the misconduct specification that the Petitioner charged [Petitioner Hearing Exhibit 1]. We also ruled that the Respondent's brief and response brief dealt widely with issues beyond the hearing charge and with requests for relief beyond the ARB's authority under N.Y. Pub. Health Law § 230-c. We repeat here our holdings on the Issues that the Respondent's brief and response brief raised, as the Respondent repeated those issues in her brief on Remittur.

Issue 1 in the Respondent's main brief challenged the Bureau of Adjudication's failure to issue a hearing officer's report and a proposed order under Title 10 NYCRR §§ 51.12-51.14. Those regulations applied to the OPMC process before the ARB's creation in 1991 (Laws of 1991, Chapter 606). Those regulations apparently remain on the books even though N.Y. Pub. Health Law §§ 230(10)(g-i) & 230-c now control the post hearing process in BPMC proceedings. The Respondent's brief argued that she raised her objections under Title 10 NYCRR §§ 51.12-51.14 notwithstanding the provisions under N.Y. Pub. Health Law §

230(10)(i). The ARB held that the provisions under N.Y. Pub. Health Law §§ 230(10)(g-i) & 230-c control the ARB process, however, and those statutory provisions supersede the regulations at §§ 51.12-51.14. We found that a challenge to the Committee's Determination under §§ 51.12-51.14, therefore, has no relevance in an ARB review.

The Respondent's Issue 2 argued that the OPMC Director failed to establish relevance for the specific records that the comprehensive review will involve. The Committee found that the Director possessed the authority to issue the Review Order and the Supreme Court has now affirmed the Review Order following the Respondent's challenge. We affirmed the Committee's Determination that the Director acted within proper authority in issuing the Review Order.

In Issue 3 in the Respondent's main brief and in Reply Issues 1 & 2 in the Respondent's response brief, the Respondent raised arguments about newly discovered evidence and exculpatory evidence. As to the November 6, 2000 affidavit that the Respondent classified as newly discovered evidence, the Petitioner argued that the Respondent had that evidence available before the Supreme Court challenge and before the hearing below. The ARB saw no grounds on which to remand this matter for the Committee to consider that affidavit. As to exculpatory evidence, the Respondent argued that the Committee's Administrative Officer erred by refusing to receive evidence that Patient KM failed to follow the treatment regimen that the Respondent ordered. The Committee's Administrative Officer ruled that evidence irrelevant because the charge against the Respondent dealt with non-compliance under the Review Order rather than with medical care. As we noted above, we agreed that the charges involved non-compliance only and we saw no error by the Administrative Officer's ruling.

In Issue 4, the Respondent argued that she maintained an accurate record for Patient KM, and at Issue 5, she raised an argument concerning alternative medical practice. We held that both

those arguments addressed care issues beyond the scope of the non-compliance charge and we found no validity to either charge for the review.

Issue 6 in the Respondent's main brief and Reply Issue 5 in the Respondent's response brief alleged violations of the Civil Rights Act. Reply Issue 3 argued for attorney disciplinary sanctions. We held that the ARB's authority under the provisions in N.Y. Pub. Health Law §230-c applied only to reviewing, overturning or remanding BPMC Committee Determinations. We possess no authority to enforce the Civil Rights Law or to impose attorney disciplinary sanctions as would the New York Courts. In the arguments concerning the Civil Rights Act, the Respondent argued that it is well settled that the ARB may annul decisions that result from subjective decision making without safeguards against the exercise of arbitrary power or simple unfairness. As the source for that assertion, the Respondent cited the New York Court of Appeals decisions in Matter of Nicholas v. Khan, 47 N.Y.2d 24 (1979) and Matter of Levine v. Whalen, 39 N.Y.2d 510 (1976). Neither of these cases, however, stand as authority that the ARB may annul decisions on the grounds the Respondent cites. Neither case even mentions the ARB, as the cases pre-date the ARB's legislative creation in 1991. We suggested that the Respondent should direct her civil rights and disciplinary complaints to the courts.

In Reply Issue 4 in the Respondent's response brief, she mentioned a prior OPMC investigation in which a court excluded certain information from the investigation because OPMC received the information without proper court orders. The ARB held that such case had no relevance in this matter. The Supreme Court had already upheld the Review Order in this case following the Respondent's challenge.

The Respondent's Issue 7 raised a matter clearly within the ARB's review authority, the penalty against the Respondent. The Respondent called the penalty overly harsh. In their

response, the Petitioner asked that the ARB affirm that penalty or revoke the Respondent's License. The ARB rejected both parties' requests for modifications in the penalty and we affirmed the Committee's suspension order.

Remittur Order and Proceeding

The Respondent then sought review by New York Supreme Court Appellate Division for the Third Department, under N.Y. Civ. Prac. Law and Rules Article 78. In Matter of Daniels v. Novello (supra), the Appellate Division affirmed the Determination that refusal to comply with a Review Order constituted misconduct under Educ. Law § 6530(15) and the Court rejected the Respondent's procedural challenges to the hearing. The Court stated that:

"As the only the conduct of petitioner² under review here was her failure to comply with the CMR order and such failure itself constitutes misconduct under Education Law § 6530(15) (see Public Health Law § 230[10][a][iv]), the ALJ and the Committee did not abuse their discretion in precluding evidence regarding the merits of the underlying patient care complaint as wholly irrelevant and immaterial. Regardless of the factual basis for the CMR order, petitioner's undisputed failure to comply provides a rational basis for the ARB's Determination of misconduct."

The Court, however, found the indefinite suspension an impermissible penalty under Pub. Health Law § 230-a(2). The Court remitted for the ARB to impose an appropriate penalty.

Following the Appellate Division's Remittur Order, the ARB offered the parties the opportunity to submit additional arguments. The Respondent asked that the ARB dismiss the case in the interests of justice, or remand the case to the Hearing Committee for further proceedings or limit the penalty to a censure and reprimand. In response, the Petitioner argued that the Respondent's brief repeats arguments that the ARB rejected after the initial review in this matter. The Petitioner asked that the ARB impose an actual suspension against the Respondent's

License. The Petitioner also submitted a separate letter objecting to the Respondent's brief due to Counsel Jennings' admission in Florida rather than in New York.

Final ARB Determination

First, the ARB accepts the Respondent's brief, despite the lead counsel's admission in Florida rather than New York. The provisions in N.Y. A.P.A. Article 3 (McKinney Supp 2004) control administrative proceedings in New York, such as BPMC hearings and ARB appeals. In reference to appearances in administrative hearings, A.P.A. § 501 states:

"Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency"

In Matter of the Board of Education of the Union-Endicott Central School District v. New York State Public Employment Relations Board, 233 A.D.2d 602, 649 N.Y.S.2d 523 (3rd Dept. 1996), the Appellate Division for the Third Department ruled that this statutory language meant that non-attorneys may represent parties in an administrative proceeding, without violating the proscription against unlawful practice of law that appears at N. Y. Judiciary Law § 478. Under Judiciary Law § 478, a natural person violates the statute by appearing for a person other than himself or herself in a "court of record". In Union-Endicott, the Appellate Division held that an administrative hearing is not a "court of record", but rather the hearing is an adjudicatory proceeding governed by A.P.A. § 301 *et seq.*, so that no violation occurs under Judiciary Law § 478 when a non-attorney appears for a party in an administrative hearing. The ARB holds that if a non-attorney may appear before the ARB, then an attorney from another state may appear as well.

² In the section in quotations, the Court's reference to "petitioner" means Dr. Daniels.

As to the penalty in this case, the ARB votes 4-1 to suspend the Respondent's License for three years, to stay the suspension and to place the Respondent on probation for three years under the terms that appear in the Appendix to this Determination. The Probation Terms include the requirement that the Respondent comply with the Review Order within ninety days from the time this Determination becomes effective [Paragraph 7] and the requirement that the Respondent practice with a monitor [Paragraph 8].

The Committee found that the Respondent committed professional misconduct by refusing to comply with the Review Order. Under Pub. Health Law § 230-a(9), a Committee or the ARB may impose probation as a penalty for misconduct, with or without imposing any other penalty under the statute. Under Pub. Health Law § 230(18)(a), the OPMC Director may monitor physicians on probation. The Respondent's brief at pages 4-5 cites the Appellate Division's decision in Caselova v. Dept. of Health, 251 A.D.2d 819, 677 N.Y.S.2d 182 (3rd Dept. 1998) as authority limiting the ARB's power to impose probation with monitoring. We note that the New York Court of Appeals overruled the Appellate Division's decision in that case and the Court of Appeals affirmed the ARB's statutory authority to impose probation terms with monitoring in Caselnova v. Dept. of Health, 91 N.Y.2d 441.

The Respondent's brief argued that the Appellate Division stated that the Supreme Court only could enforce Review Orders and the Respondent argued that such wording in the Appellate Division's Remittur Order meant that the ARB could impose no penalty more severe than a censure and reprimand. The Respondent also argued that censure and reprimand constitutes the preferred penalty under Pub Health Law § 230-a, because the statute lists that penalty first. The ARB rejects these arguments. We find nothing in the Court's Order that indicates that the Court intended to limit the ARB to impose any specific penalty under § 230-a. The Court found

unauthorized the conditional suspension that the ARB and Committee imposed originally. The Court indicated, however, that the ARB could have suspended the Respondent wholly or partially for a fixed period of time. We also see no preference in the statute for censure and reprimand as a penalty. Under § 230-a(9), BPMC may place a licensee on probation, with or without imposing any other penalty.

The Respondent also argued that the ARB should dismiss the charges in the interests of justice due to the harm to the Respondent from the ARB's illegal penalty. We reject that argument. The Appellate Division invalidated the ARB's previous penalty order as unauthorized. The Court's Order directed the ARB to impose an appropriate penalty. The Court's Order made no mention about any harm to the Respondent. The Respondent also requested dismissal pursuant to allegations that the Petitioner acted improperly. We note that the Respondent raised those same allegations in her response brief in the initial ARB proceeding and the ARB directed the Respondent to raise those issues with the Courts. The Appellate Division has sustained the charge concerning the Review Order, so we infer that the Court either found no validity to the allegation at issue, or the Respondent failed to raise the issue with the Court.

The Respondent also asked for a remand to the Committee to consider new evidence or exculpatory evidence on the complaint underlying the Review Order. The ARB rejected that request on the initial review. The Appellate Division also considered and rejected the Respondent's arguments about the underlying complaint and found those arguments irrelevant and immaterial. The Court remitted solely for the ARB to impose a penalty.

The ARB majority rejects the Petitioner's request that we impose an actual suspension in this case. One ARB member dissents from the Determination to place the Respondent on probation. The dissenting member would revoke the Respondent's License.

ORDER

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

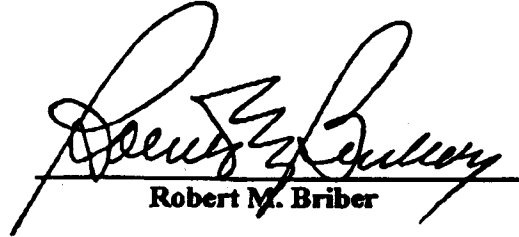
The ARB suspends the Respondent's License for three years, stays the suspension and places the Respondent on probation for three years, under the terms that appear as the Appendix to this Determination.

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 Jennifer Daniels, M.D.

Robert M. Briber, an ARB Member, affirms that he took part in the Deliberations in this case and that this Determination and Order reflects the majority's decision in the Matter of Dr. Daniels.

Dated: 3/16/04

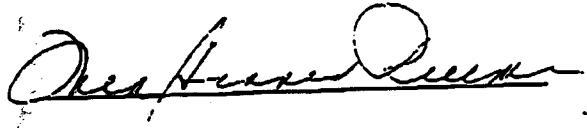


Robert M. Briber

In the Matter of Jennifer Daniels, M.D.

Thea Graves Pellman, an ARB Member affirms that she took part in the Deliberations in this case and that this Determination and Order reflects the majority's decision in the Matter of Dr. Daniels.

Dated: March 16, 2004

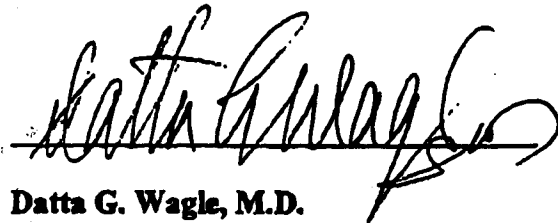


Thea Graves Pellman

In the Matter of Jennifer Daniels, M.D.

Datta G. Wagle, M.D., an ARB Member affirms that he took part in the Deliberations in this case and that this Determination and Order reflects the majority's Decision in the Matter of Dr. Daniels.

Dated: 3/16/, 2004

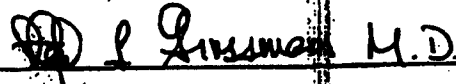

Datta G. Wagle, M.D.

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In the Matter of Jennifer Daniels, M.D.

Stanley L. Grossman, an ARB Member affirms that he participated in the Deliberations in this case and that this Determination and Order reflects the majority's decision in the Matter of Dr. Daniels.

Dated: 03/17/04, 2004

 M.D.

Stanley L. Grossman, M.D.

In the Matter of Jennifer Daniels, M.D.

Therese G. Lynch, M.D., an ARB Member affirms that she took part in the
Deliberations in this case and that this Determination and Order reflects the majority's decision
in the Matter of Dr. Daniels.

Dated: March 17, 2004

Therese G. Lynch, M.D.

Therese G. Lynch, M.D.

APPENDIX

Terms of Probation

1. Respondent shall conduct herself in all ways in a manner befitting her professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by her profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), 433 River St., 4th Floor, Troy, New York 12180; said notice is 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. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of 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's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his staff at practice locations or OPMC offices.
6. 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. Respondent shall comply with the Comprehensive Medical Records Review Order within ninety days from the effective date of the Administrative Review Board's Determination and Order in this case.
8. Respondent shall practice medicine only when monitored by a licensed physician, proposed by Respondent and subject to the written approval of the Director of OPMC.

- a. 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 visit 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.

9. 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.**