

THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, N.Y. 12234

OFFICE OF PROFESSIONAL DISCIPLINE
ONE PARK AVENUE, NEW YORK, NEW YORK 10016-5802

April 3, 1991

Charles Havener Kite, Physician
11 Loudon Heights South
Loudonville, N.Y. 12211

Re: License No. 139527

Dear Dr. Kite:

Enclosed please find Commissioner's Order No. 11682. This Order and any penalty contained therein goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order is a surrender, revocation or suspension of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. In such a case your penalty goes into effect five (5) days after the date of this letter even if you fail to meet the time requirement of delivering your license and registration to this Department.

Very truly yours,

DANIEL J. KELLEHER
Director of Investigations
By:

GUSTAVE MARTINE
Supervisor

DJK/GM/er
Enclosures

CERTIFIED MAIL- RRR
cc: Lawrence F. Sovik, Esq.
300 Empire Bldg.
Syracuse, N.Y. 13202

**ORDER OF THE COMMISSIONER OF
EDUCATION OF THE STATE OF NEW YORK**

CHARLES HAVENER KITE

CALENDAR NO. 11682



The University of the State of New York

IN THE MATTER

OF

CHARLES HAVENER KITE
(Physician)

DUPLICATE
ORIGINAL
VOTE AND ORDER
NO. 11682

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 11682, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (March 22, 1991): That, in the matter of CHARLES HAVENER KITE, respondent, the report of the Regents Review Committee be modified solely to the extent that 1) the sentence on the top of page 16 of the Regents Review Committee report beginning with "The..." and ending with "hearing" not be accepted and be deemed deleted, 2) the third sentence and succeeding sentences of the first paragraph of page 16 of the Regents Review Committee report beginning with "Clearly,..." and ending with "§230(10)" not be accepted and be deemed deleted, 3) the entire first paragraph of page 17 of the Regents Review Committee report beginning with "The..." and ending with "process" not be accepted and be deemed deleted, and 4) the last paragraph of page 27 of the Regents Review Committee report beginning with "Our..." and the succeeding sentences ending on the top of page 28 with "Cal. No. 8493" not be accepted and be deemed deleted. The question of the authority of the Commissioner of Health to overrule the Administrative Officer and the question of the authority of the Board of Regents regarding the considering of the imminent danger issue as set forth in the recommended deletions need not be decided under the circumstances

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of this case; and therefore, those deletions are accepted and those questions are not passed upon; that the report of the Regents Review Committee be modified to the extent that the reference on page 24 - line 15 of said report to "sixteenth" be deemed replaced by the substituted reference of "fifteenth"; that the recommendation of the Regents Review Committee be accepted as follows:

1. The findings of fact as to Patients A, B, C, D, and E of the hearing committee and the recommendation of the Commissioner of Health as to those findings of fact be accepted;
2. The conclusions of the hearing committee and Commissioner of Health as to Patients A, B, C, D, and E be modified;
3. The specifications based upon allegations concerning Patients F and G be disregarded and dismissed without prejudice;
4. Respondent is guilty, by a preponderance of the evidence, of the fifteenth specification based upon allegations B.3 and E.2 and of the sixteenth specification based upon A.1, C.1, C.2, D.1, D.2, and E.2, guilty of the fifteenth specification based upon E.3 to the extent found by the hearing committee, guilty of the sixteenth specification based upon E.3 to the extent found by the hearing committee, guilty of the sixteenth specification based upon A.2 to the extent indicated in the Regents Review Committee report, and not guilty of the remaining specifications and allegations;
5. In partial agreement with the hearing committee, the measure of discipline recommended by it be modified;
6. The measure of discipline recommended by the Commissioner of Health not be accepted; and
7. Based on the reasons indicated in the Regents Review

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Committee report, respondent's license to practice as a physician in the State of New York be suspended for four years upon each specification of the charges of which respondent was found guilty, as aforesaid, said suspensions to run concurrently, that execution of said suspension be stayed, and that respondent be placed on probation for four years under the terms of probation prescribed by the Regents Review Committee, which include requirements involving respondent obtaining additional training and working in a supervised setting;

and that the Commissioner of Education be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

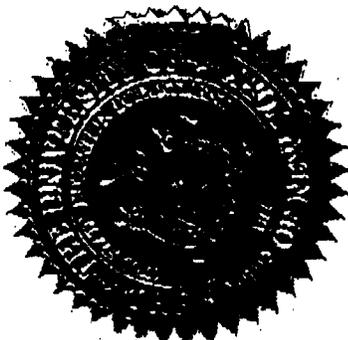
ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and **SO ORDERED**, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 27th day of

March, 1991.
Thomas Sobol

Commissioner of Education



**REPORT OF THE
REGENTS REVIEW COMMITTEE**

CHARLES HAVENER KITE

CALENDAR NO. 11682



The University of the State of New York

IN THE MATTER
of the
Disciplinary Proceeding
against

CHARLES HAVENER KITE

No. 11682

who is currently licensed to practice
as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

CHARLES HAVENER KITE, hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department.

On October 3, 1989 respondent was served with the Health Commissioner's summary suspension Order and notice of hearing together with the statement of charges dated September 28, 1989. A copy of such Order and notice of hearing relative to the summary suspension of respondent's license is annexed hereto, made a part hereof, and marked as Exhibit "A". Accordingly, this disciplinary proceeding was duly commenced.

The Commissioner of Health determined that the continued practice of medicine in the State of New York by respondent constitutes an imminent danger to the health of the people of this

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State and, pursuant to Public Health Law §230(12), that, effective immediately, respondent shall not practice medicine in the State of New York.

On October 10, 1989 and various dates thereafter, a hearing scheduled to begin before a hearing committee of the State Board for Professional Medical Conduct was adjourned by respondent. On November 13, 1989, the first hearing session held, petitioner's attorney, in his opening statement, promised to show, by virtue of all five patient cases alleged in the statement of charges, that respondent's continued practice constitutes an imminent danger to the public. This meant that petitioner would try its entire case on the merits as to the allegations concerning each of the five patients before the hearing committee would recommend whether it finds respondent to be an imminent danger. Through December 13, 1989, separate from adjournment dates, four hearing sessions were held at which petitioner presented some of its proof as to each of the five patient cases.

On December 14, 1989, an amended statement of charges was signed. That amendment, except for deleting the portion of the allegation (E.1) concerning respondent failing to obtain x-rays, contained the original charges; added subparagraph 4 to existing paragraph B; and created new paragraphs F and G, the latter paragraph including subparagraphs 1 and 2. New paragraphs F and G related to additional Patients F and G who were not the subject

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of any allegation in the original charges.

At the prehearing conference at the next session held on January 3, 1990, petitioner orally applied for leave to amend the statement of charges by submitting the amended statement of charges into the record. Respondent's attorney objected to the amendment adding two additional cases and one further charge and questioned the authority to amend charges and expand the hearing agenda in a summary suspension matter of five patient cases. He claimed that the amendments would be "very prejudicial" to respondent's right to have the matter completed within the statutory time frame while he was serving a summary suspension.

Petitioner's attorney replied that, under the "controlling" Commissioner of Health regulation, 10 N.Y.C.R.R. §51.6, any party may amend or supplement a pleading at any time prior to the submission of the hearing report to the Commissioner or the appropriate board, by leave, if there is no substantial prejudice to any other party. He claimed that there would be no substantial prejudice to respondent because the two additional patients and the one additional charge would only take three-quarters of one day to be heard. Respondent's attorney then persisted in his objection to the procedure adding "a whole new and additional subject matter, two additional causes of action, totally and completely unrelated to the pleadings as they stood before".

The Administrative Officer ruled on January 3, 1990 that leave

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was granted to amend the charges and the amended statement of charges was accepted into evidence. However, on January 4, 1990, the Administrative Officer announced, at a prehearing conference, that after further consideration he had a "real problem" with amending the charges and that he could not "in good conscience" allow the addition of two patients to the charges against respondent. Accordingly, he ruled that leave would still be granted petitioner to amend allegations B.4 and E.1, but that leave would not be granted to add allegations regarding new Patients F and G. The basis for this reconsideration of part of his January 3, 1990 ruling was the addition of two patient cases to be heard in this matter would be "extremely prejudicial" to respondent, would extend the hearing which had already been conducted on five hearing sessions and had passed the 90 day statutory period, would be unfair considering petitioner would be allowed to try the entire case before a decision would be made on the imminent danger issue, and would be in conflict with 10 N.Y.C.R.R. §51.6, in view of the substantial prejudice to respondent at that time. He noted that the Department of Health had leave to bring another proceeding against respondent at any time, including the time when this hearing was proceeding, and that such a course occurred in a different matter, see, John P. v. Axelrod, 61 N.Y.2d 891 (1984).

On January 12, 1990, the Commissioner of Health signed the Amended Commissioner's Order and notice of hearing. The Amended

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Order, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "B", states that additional evidence exists as shown in the amended statement of charges and such evidence should be considered prior to the hearing committee's recommendation on the question of imminent danger. That same day, petitioner's attorney sent respondent's attorney a copy of the Health Commissioner's Amended Order, notice of hearing, and amended statement of charges. On January 23, 1990, petitioner's attorney informed the Administrative Officer that the additional evidence should be considered prior to the above recommendation. Respondent's attorney asserted that the Administrative Officer is vested with the authority to determine whether amended charges are allowed, see 10 N.Y.C.R.R. §51.6 and Public Health Law §230 (10)(e), and the Health Commissioner's Amended Order sought to "interfere" with that authority. Respondent's attorney also asserted that the Commissioner of Health should not be allowed to "step in" and "substitute" himself for the Administrative Officer in this ongoing proceeding.

The Administrative Officer then ruled that he was adhering to his January 4, 1990 ruling disallowing the proposed amendment as to Patients F and G and that he would contact the Commissioner of Health for his direction. Petitioner's attorney objected to the procedure of the Administrative Officer seeking clarification from the Commissioner of Health. Nevertheless, on January 24, 1990, the

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Administrative Officer wrote to the Commissioner of Health for clarification regarding four issues, including the Amended Order, in effect, overruling his January 4, 1990 ruling and the issue of prejudice to any final decision of the hearing committee. The Administrative Officer declared, in his memorandum to the Commissioner of Health, that he is "firmly convinced that the amendment of these charges in the manner indicated at this late date will definitely prejudice this matter for both sides".

In his February 9, 1990 memorandum responding to the Administrative Officer, the Commissioner of Health clarified that his Amended Order "does, in effect, overrule" the Administrative Officer's January 4, 1990 ruling and imposes the additional burden on respondent of his remaining out of practice for the time it takes the hearing committee to address the additional charges. He recognized that the hearing committee would be affected by the additional charges which "may now disadvantage respondent in the view of the Committee". However, the Commissioner of Health sought to utilize the hearing committee already familiar with the matter, rather than a new hearing committee, to hear the additional charges and render a "sounder judgment" on the summary suspension issue after it heard a "broader array of charges". The remedy prescribed by the Commissioner of Health for the "disadvantage" this procedure would cause respondent was "to reach the merits of the charges".

On February 12, 1990, the eighth hearing session, the

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Administrative Officer indicated that the Commissioner's February 9, 1990 memorandum, in essence, overruled his denial of petitioner's motion to amend the charges. The proceeding continued as to Patients A through E until litigation, pending in Court as to Patients F and G, was resolved.

On May 8, 1990, upon both parties completion of their proof as to Patients A through E, respondent's attorney moved for the hearing committee to deliberate immediately on the summary suspension on the basis of almost seven months of hearings. Petitioner, in opposition to the motion, sought to begin and complete its case as to Patients F and G before the hearing committee rendered its decision on the issue of imminent danger. Petitioner's attorney claimed that the "statute" required the hearing committee to consider all evidence on both sides before making a decision as to imminent danger.

The Administrative Officer granted the motion for the hearing committee to deliberate immediately. He read the part of Public Health Law §230(12) which required the hearing committee to first determine the imminent danger issue to the extent it can be proven without petitioner putting in its entire case. He further reminded petitioner's attorney that petitioner had already been allowed to put in its entire case, while respondent remained summarily suspended, as to each of the five cases upon which it had promised would prove that respondent constituted an imminent danger. The

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Administrative Officer indicated that this ruling did not foreclose the hearing committee from making any further decisions on this issue after hearing evidence as to Patients F and G.

After a ninety minute executive session on May 8, 1990, the hearing committee unanimously found that respondent "constitutes no imminent danger to the health of the people in this State" and recommended that the Commissioner of Health vacate his "Summary Order". Petitioner's attorney then requested that the Commissioner of Health reject the hearing committee's finding and recommendation as premature, remand the matter to the hearing committee for further hearings on the issue of imminent danger, and sign a proposed order he prepared.

On May 14, 1990, the Commissioner of Health ordered the matter be remanded to the hearing committee for further deliberation on the issue of imminent danger after consideration of evidence regarding B.4 as well as F, G(1), and G(2) of the amended statement of charges. As petitioner requested, the Commissioner of Health found it was premature for the hearing committee to render a recommendation without having considered all seven patient cases which formed the basis for the screening committees' recommendations for summary suspension. The May 14, 1990 Order of the Commissioner is annexed hereto, made a part hereof, and marked as Exhibit "C".

On May 29, 1990, petitioner's attorney requested and the

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Administrative Officer granted permission to substitute three pages (pages 4-6) of the amended statement of charges due to typographical error and repeating collating error. The statement of charges, amended statement of charges, and substituted three pages of the amended statement of charges are annexed hereto, made a part hereof, and marked as Exhibit "D". Respondent's attorney interposed a response to the amended charges.

After its May 8, 1990 decision, the hearing committee heard evidence as to the remaining charges over seven further sessions through July 23, 1990. On August 31, 1990, the hearing committee issued an interim report and recommended, by a two to one vote, without addressing whether and without expressly finding that respondent's continued practice of medicine constitutes an imminent danger, that the Commissioner of Health modify his "Summary Order" and allow respondent to conditionally resume his practice until a final determination is rendered by the Board of Regents.

On October 19, 1990, the Commissioner of Health ordered that his "Summary Order" shall not be modified and shall remain in effect. A copy of that Order is annexed hereto, made a part hereof, and marked as Exhibit "E". The Commissioner of Health did not accept the hearing committee's recommendation to permit respondent to resume practice except for invasive diagnostic and surgical procedures. The October 19, 1990 Order ended with the Commissioner of Health stating that he will "await the final

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report" of and a fuller explication from the hearing committee.

After completing twenty-six sessions and then deliberating on the merits on October 22, 1990, the hearing committee, on November 16, 1990, rendered a report of its findings, conclusions, and recommendation, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "F". The hearing committee found and concluded that respondent was guilty of negligence on more than one occasion three times (Patients B, E, and G), gross incompetence three times (Patients A, B, and G), and incompetence on more than one occasion seven times (all seven Patients) and not guilty of the remaining allegations. The hearing committee recommended that respondent's license to practice medicine be suspended for four years, with the suspension stayed provided respondent comply with two conditions involving neurosurgical retraining and monitoring by a neurosurgeon, and a \$30,000 fine. The hearing committee did not make any further explication or decision as to the imminent danger issue.

On December 26, 1990, the Commissioner of Health recommended to the Board of Regents that the findings and conclusions of the hearing committee be accepted and the recommendation of the hearing committee be modified in order to make the constraints on respondent's practice clear and workable and fully protective of the public. The Commissioner of Health recommended the penalty that respondent's license to practice medicine in the field of

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surgery be suspended until he has completed two years of training in neurosurgery and upon successful completion of such training, respondent's license to practice medicine in the field of surgery be suspended for three additional years and stayed provided respondent comply, during that period, with a condition involving monitoring by a neurosurgeon. That recommendation did not mention or address the issue of imminent danger or any hearing committee recommendation as to such issue. A copy of the recommendation of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "C".

No further Order regarding the imminent danger issue or continuing the summary suspension until the Board of Regents renders a final determination has been issued by the Commissioner of Health. See Public Health Law §230(12).

Although Public Health Law §230(10)(i) requires that the entire record be transferred by the Commissioner of Health and petitioner's attorney asked for the prehearing transcripts to be included in the record, the record transferred to us by January 2, 1991 did not include all prehearing transcripts. After a special request was made on our behalf, we received, on February 5, 1991, all prehearing transcripts.

On February 6, 1991, respondent appeared before us and was represented by Lawrence F. Sovik, Esq. Kevin C. Roe, Esq., presented oral argument on behalf of the Department of Health.

Petitioner's written recommendation as to the measure of

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discipline to be imposed, should respondent be found guilty, which is similar to the recommendation of the Commissioner of Health, was respondent's license to practice surgery be suspended until he successfully completes two years "in neurosurgery" and he thereafter be suspended for three years and that suspension be stayed on condition involving the monitoring of respondent by a neurosurgeon. Respondent's written recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was the restoration of his license to practice neurosurgery with two years of monitoring by a neurosurgeon.

We have considered the record in this matter, as transferred by the Commissioner of Health on January 2, 1991 and on February 5, 1991, including respondent's memorandum to this Committee, respondent's brief dated January 21, 1991, respondent's letter dated January 22, 1991 to respondent's attorney, and the documents from both Counsel accepted into the record as shown in the Education Department's letter dated February 14, 1991.

The hearing committee report indicates the patients to which respondent's guilt relates. However, that report does not specify a breakdown of the allegations of which respondent is guilty and is not guilty. Also, that report does not always differentiate the definition of professional misconduct which was sustained as to a particular allegation. Therefore, the hearing committee report does not clearly show its conclusions as to each specification,

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paragraph, and subparagraph of the charges. Greater specificity by the hearing committee and/or Commissioner of Health would have avoided confusion as well as our having to decipher: whether respondent was guilty of only a subparagraph relating to a particular patient or of a combination of subparagraphs; and whether the guilt as to the subparagraph or subparagraphs sustained related to only one specification and paragraph or to a combination of specifications and paragraphs.

We note that the hearing committee on page 8 of its report erroneously referred to the sixteenth specification as the fifth specification.

Based on the amended statement of charges, we interpret the hearing committee's recommended conclusions that respondent was guilty as follows:

Specification	Paragraph of the Amended Statement of Charges	Subparagraph	Patient
8	A	1	A
9	B	1	B
14	G	2 to extent of investigation	G
15	B	3	B
15	B	4	B
15	E	1	E
15	E	2	E
15	E	3	E
15	G	1	G
16	A	1	A
16	B	1	B
16	C	1	C
16	C	2	C
16	D	1	D
16	D	2	D
16	E	2	E

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Specification	Paragraph of the Amended Statement of Charges	Subparagraph	Patient
16	E	3 to extent of C6-7 foraminotomy and excise of C6-7 disc on the right	E
16	F	N/A	F
16	G	2	G

Accordingly, the hearing committee recommended the conclusions that respondent was not guilty of the remaining specifications, paragraphs, and subparagraphs.

AMENDMENT ADDING PATIENTS F AND G

The actions taken by the Commissioner of Health, in signing the Amended Commissioner's Order and Notice of Hearing, issuing his memorandum responding to the Administrative Officer, and remanding the matter to the hearing committee, were directed at the issue of imminent danger. Due to the impact of these actions on the separate issue of the merits of the charges, the crucial question presented is whether the merits of the charges concerning the cases of Patients F and G, added by the Commissioner of Health during the hearing ongoing before the hearing committee, should be considered by this Committee and the Board of Regents. In our unanimous opinion, to the extent the Commissioner of Health overruled the Administrative Officer's ruling insofar as it denied petitioner leave to amend the charges, we accept the Administrative Officer's ruling and rationale, under the circumstances, and disallow such

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amendment to the extent it adds allegations as to the merits concerning Patients F and G. See Matter of Constant, Cal. No. 7081.

In proper circumstances, charges have been amended in professional discipline proceedings or entirely new proceedings have been commenced if additional evidence of misconduct is obtained. As the Supreme Court, Albany County, in Kite v. Axelrod, Index 1114-90 (March 22, 1990), recognized, both options are generally available to the petitioner. The Supreme Court in Kite dismissed the proceeding, in the nature of prohibition brought by respondent during the pendency of the administrative proceeding, on the "narrow issue" that authority exists to issue an amended statement of charges. Although it distinguished Doe v. Axelrod, 71 N.Y.2d 484 (1988) from the facts herein, the Supreme Court did not reach either the issue remaining here of the Health Commissioner's authority to reverse, during the hearing, rulings of the Administrative Officer or the legal effect the amended Order of the Commissioner of Health had on this proceeding.

Despite the fact that, on January 23, 1990, petitioner's attorney, in agreement with respondent's attorney, conceded that it would not be proper for the Commissioner of Health to overrule the Administrative Officer by the manner of acting prior to the hearing committee issuing its recommendation, the Commissioner of Health nevertheless thereafter proceeded to, "in effect", do so.

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The Health Commissioner's actions pursuant to Public Health Law §230(12) in regard to the investigative committee's actions, do not permit the overruling of the Administrative Officer during the ongoing hearing.

In this matter, petitioner relied on the Health Commissioner's regulation for amending "a pleading". Such regulation, assuming without conceding its applicability, permits a "party" to seek leave if there is no substantial prejudice to the other party. Clearly, such regulation does not permit the party which investigates and prosecutes professional misconduct involving the medical profession, see Doe v. Axelrod, 71 N.Y.2d 484 (1988), to determine the application for leave during the hearing and to divest the neutral officer of authority to rule. Pursuant to Public Health Law §230(10)(e), the Administrative Officer and not the party has the authority to rule on the party's application. The Health Commissioner's role in this regard is to designate and not substitute himself for the independent Administrative Officer. Accordingly, such overruling of the Administrative Officer during the ongoing hearing is in conflict with the regulation of the Commissioner of Health and Public Health Law §230(10).

Other reasons support our recommendation concerning Patients F and G. Even if an interlocutory appeal to the Commissioner of Health were authorized under these circumstances, respondent was not afforded a meaningful opportunity to participate or be heard

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in this appeal. Due process is not provided by a party being able to disadvantage another party to his substantial prejudice without the prejudiced party being afforded an opportunity to be heard.

The Administrative Officer carefully exercised his independent discretion to allow some but not all of the amendments sought by petitioner. However, having made his ruling, the Administrative Officer, especially over objection, erred by including the Commissioner of Health in the hearing process.

Notwithstanding petitioner's assurance to the contrary, the Administrative Officer was aware of the delay which would result from the proposed amendments as to Patients F and G, and was aware of the effect that those amendments would have on respondent and the hearing committee. In fact, aside from the first eighteen sessions as to Patients A through E, the seven hearing sessions concerning Patients F and G taking over two months for those allegations to be heard after the ninety day statutory period had already expired, justifies the Administrative Officer's ruling regarding new cases of respondent's treatment of different patients. Furthermore, he was aware that petitioner, having promised to prove imminent danger on the basis of Patients A through E, was already allowed to complete its entire case as to those patients before a decision as to imminent danger would be made and was allowed to amend its charges as to Patients B and E.

The Commissioner of Health, while finding the Amended Order

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imposed an additional burden on respondent to his disadvantage, did not mention whether respondent was substantially prejudiced by such Order. The Commissioner of Health has not shown that the Administrative Officer erred or abused his discretion. We find ample support for the Administrative Officer's ruling disallowing the amended charges as to patients F and G. We do not reach the question as to whether the procedural requirements contained in Public Health Law §230(10)(a) would have been satisfied as to Patients F and G in regard to the merits of the main case, as distinguished from the question of imminent danger. See, Matter of Gross, Cal. Nos. 10852/4529-6036. In any event, rulings as to the merits are nevertheless subject to review by this Committee and the Board of Regents.

We note that there was no necessity to overrule the Administrative Officer and burden the record in this matter. Respondent had already been summarily suspended. The Commissioner of Health was not bound by the hearing committee's recommendation and he could have sought to continue the summary suspension based on his view as to Patients A through E. Alternatively, he could have convened immediately another hearing committee to hear the cases concerning Patients F and G and could have summarily suspended respondent in another proceeding, if he deemed it appropriate, based on Patients F and G.

In view of the foregoing, we unanimously recommend that the

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charges concerning Patients F and G be dismissed without prejudice and that the cases relating to Patients F and G be and hereby are disregarded. Accordingly, our review of and recommendation in this matter are limited solely as to Patients A through E.

INCOMPETENCE ON MORE THAN ONE OCCASION

Based on our review of the charges and the record, we agree with the hearing committee and Commissioner of Health that respondent is guilty of the sixteenth specification of incompetence on more than one occasion as to A.1, C.1, C.2, D.1, D.2, and E.2 and is guilty of E.3 of such specification to the extent found by the hearing committee. Respondent was incompetent on more than one occasion in making preoperative diagnoses regarding herniated discs without adequate medical justification. Additionally, respondent was incompetent on more than one occasion in performing certain surgery for herniated discs without medical indication.

As the hearing committee concluded, respondent is severely lacking in his knowledge and the application of the necessary surgical skills. The cases of Patients A, C, D, and E illustrate respondent's lack of basic knowledge and skills regarding neurosurgical diagnosis and treatment. In these four cases, a competent physician would not, on the basis of the weight of the evidence available to respondent in the parameters of the patient's symptoms, physical signs, and laboratory findings, have made respondent's diagnosis and undertaken the surgical treatment

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performed by respondent due to his diagnosis. Respondent was unable, in these four cases, to make a justified diagnosis and to thereby avoid performing surgery which was not medically indicated. One of the ways respondent manifested his incompetence is in regard to his interpretations of the myelograms for Patients C, D, and E. Respondent interpreted the myelogram for Patient C as showing a defect at C5-6 (C6 nerve root) when there was no evidence of a C5-6 herniated disc, no symptoms, signs, or laboratory evidence of a C6 nerve root impingement, and the indications from the radiological studies as to C5-6 could not have been the cause of Patient C's symptoms or physical signs. Respondent interpreted the myelogram for Patient D as showing asymmetry in the filling of the nerve roots at L3-4 and at L4-5 when there was no asymmetry of the nerve roots and the weight of the evidence ruled against respondent's contention that there was disc pathology at C3-4 and L4-5. Further, respondent interpreted the myelogram for Patient E as showing a significant defect at C6-7 when the C6-7 level was normal with no evidence of disc herniation or nerve root impingement at that level.

GUILT AS TO ALLEGATION A.2

The hearing committee concluded that it could not verify the procedure, referred to in A.2, of a foraminotomy. The hearing committee did not render a conclusion regarding respondent's guilt as to the laminotomy and discectomy. While the hearing committee's

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conclusion is limited to the foraminotomy not being shown to have been performed by respondent, the hearing committee's finding of fact number 30 states, as charged, that respondent performed a left L4-5 laminotomy and discectomy. Therefore, the hearing committee should have rendered a conclusion in that regard.

The hearing committee found that the signs of radiculopathy Patient A was reported to exhibit did not implicate the L4 nerve root which should have been compressed had there been a herniated disc. The hearing committee also found that respondent's preoperative diagnosis of L4-5 disc herniation was made without adequate medical justification. Based on the entire record, the hearing committee should have, in our unanimous opinion, concluded that respondent was guilty of the sixteenth specification as to A.2 to the extent of performing the laminotomy and discectomy without medical indication. This charge together with the other charges sustained relating to the sixteenth specification constitutes respondent's incompetence on more than one occasion.

NEGLIGENCE ON MORE THAN ONE OCCASION

Based on our review of the charges and the record, we agree with the hearing committee and Commissioner of Health that respondent is guilty of the fifteenth specification of negligence on more than one occasion as to B.3 and E.2, and is guilty of E.3 of such specification to the extent found by the hearing committee.

Respondent committed negligence in operating on Patient B at

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the wrong level and excising a normal L4-5 disc. Respondent performed a laminotomy and discectomy on Patient B at what he presumed was the L5-S1 disc space. However, at surgery, respondent entered the L4-5 disc space and excised the L4-5 disc. Respondent admitted that he operated at the wrong intervertebral space, but denied that he excised a normal L4-5 disk. The hearing committee found that L4-5 disc to be normal for the patient's age and respondent's contention that there was a herniation of the L4-5 disc to be not credible.

Respondent failed to identify the correct operative level and did not obtain an intraoperative x-ray. While the hearing committee did not find respondent's method of identifying the operative level, by reduced motion of L5 spinous process and the lack of motion below it, to constitute a deviation from acceptable medical practice (see first portion of allegation B.1), the hearing committee found respondent guilty as to B.3. During the surgery, respondent did not correct himself that he was at the wrong space and proceeded to excise a normal disc. Respondent should have, but did not, recognize that he had entered, remained, and operated at the wrong space. After respondent performed this surgery, Patient B's symptoms did not improve.

With respect to Patient E and level C6-7, respondent made a preoperative diagnosis without adequate medical justification, and performed a foraminotomy and excised the disc on the right without

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adequate medical indication. Under the circumstances, such conduct by respondent regarding E.3 constitutes negligence as well as incompetence. A reasonably prudent neurosurgeon would have continued investigation before committing this conduct. A post-myelographic enhanced CT scan or other CT scan was necessary in this case prior to surgery. Respondent did not so further investigate even though he was aware of the inconsistencies in Patient B's clinical picture. The C6-7 level which was operated on was normal. Although the foraminotomy at the C5-6 level may have been indicated, the diagnosis of C6-7 disc herniation was not justified and the foraminotomy and discectomy at the C6-7 level was not indicated. Respondent's failure to perform a post-myelographic enhanced CT scan or other CT scan before committing his conduct represents a deviation from acceptable neurosurgical practice. After surgery, Patient E continued to complain of cervical and shoulder pain and headache of varying intensity.

NOT GUILTY

We agree with the hearing committee and Commissioner of Health that respondent is not guilty of each specification of the charges which relates to A.3, B.2, and E.4 (first, second, fifth, eighth, ninth, twelfth, fifteenth, and sixteenth specifications to the extent of A.3, B.2, and E.4).

We agree with the hearing committee and Commissioner of Health that respondent is not guilty of gross negligence, gross

CHARLES HAVENER KITE (11682)

incompetence, and negligence on more than one occasion with respect to C.1, C.2, D.1, and D.2 (third, fourth, tenth, eleventh, and fifteenth specifications relating to C.1, C.2, D.1, and D.2).

We agree with the hearing committee and Commissioner of Health that respondent is not guilty of gross negligence and gross incompetence with respect to B.3, E.2, and E.3 (second, fifth, ninth, and twelfth specifications relating to B.3, E.2, and E.3).

We agree with the hearing committee and Commissioner of Health that respondent is not guilty of gross negligence, gross incompetence, and incompetence on more than one occasion with respect to B.4 and E.1 (second, fifth, ninth, twelfth, and sixteenth specifications relating to B.4 and E.1). However, we disagree with the hearing committee and Commissioner of Health that respondent is guilty of negligence on more than one occasion with respect to B.4 and E.1 (sixteenth specification with respect to B.4 and E.1).

The hearing committee and Commissioner of Health fully accepted petitioner's sole proposed finding of fact as to B.4 and only added to hearing committee finding of fact 57 that respondent's laceration of the left common iliac artery required operative repair after extensive blood loss. This finding of fact and the record as a whole is insufficient to sustain respondent's guilt as to negligence on more than one occasion with respect to B.4. No finding has been made or necessary support shown as to the

CHARLES HAVENER KITE (11682)

circumstances under which the laceration occurred and as to respondent departing from acceptable medical practice in his performance of the surgery under the circumstances. Such laceration is an unfortunate complication of lumbar surgery. Respondent does not have the burden to prove that the laceration was not the result of negligence. In our unanimous opinion, petitioner has not, by merely proving that the laceration occurred, proven its allegation, as to B.4, by a preponderance of the evidence.

Petitioner's proposed finding of fact 27 regarding E.1 was not adopted by the hearing committee and Commissioner of Health. The proposed finding would have indicated that prior to surgery a CT examination, preferably contrast enhanced, should have been performed on Patient E. Instead, the hearing committee and Commissioner of Health failed to render any finding of fact or to support their conclusion, regarding this allegation, that respondent's failure to perform a post-myelographic enhanced CT scan was a deviation from acceptable neurosurgical practice.

The allegation in E.1, as drafted, is not supported by a preponderance of the evidence nor by the findings of the hearing committee and Commissioner of Health. The conclusion to sustain E.1 as to negligence, however, is not within the scope of the original or amended charge as to E.1. First, contrary to the original charge, x-rays were taken. Second, while this conclusion

CHARLES HAVENER KITE (11682)

has a bearing on E.2 and E.3, there is no charge in E.1 that respondent's failure to perform a post-myelographic enhanced CT scan constitutes negligence. Third, although the hearing committee found in finding 96, that prior to the surgery, respondent recommended a CT scan of the cervical spine, the hearing committee's conclusion disregarded its own finding in sustaining this charge.

We agree with the hearing committee and Commissioner of Health that respondent is not guilty of gross negligence and negligence on more than one occasion with respect to A.1 and B.1 (first, second, and fifteenth specifications relating to A.1 and B.1). However, we disagree with the hearing committee and Commissioner of Health that respondent is guilty of gross incompetence with respect to A.1 and B.1 (eighth and ninth specifications relating to A.1 and B.1.).

The hearing committee and Commissioner of Health did not find that respondent's misconduct as to A.1 and B.1 was egregious and did not otherwise account for their conclusion to sustain these allegations based upon gross incompetence. Moreover, no explanation has been articulated for finding gross incompetence as to Patients A and B but not as to Patients C, D, and E. In fact, we do not view respondent's misconduct as to Patients A and B to be more serious than his misconduct as to Patients C, D, and E. In contrast to the case involving Patient C, where respondent made

CHARLES HAVENER KITE (11682)

his diagnosis and performed his surgery in spite of there being no evidence of C5-6 herniated disc and no symptoms, signs, or laboratory evidence of a C6 nerve root impingement, there was some, albeit an insufficient amount of evidence, for respondent's acts with respect to Patients A and B. There were symptoms (variable) and physical findings (inconsistent) in the case of Patient A; and there was a symptomatology which may be consistent with a diagnosis of lumbar disc herniation in the case of Patient B. In any event, we do not find that respondent's incompetence has been proven, by a preponderance of the evidence, to rise to the level of gross incompetence.

PENALTY

The penalty recommendations made to us are not acceptable. Based on our conclusions, we recommend the penalty set forth infra. Respondent's conduct warrants a lengthy probationary period during which he should be required to be retrained and during which he is supervised for the protection of the public. In our opinion, monitoring without supervision would not be sufficient to assure continuously that the misconduct does not recur.

Our authority under Education Law §6510-a does not extend, as respondent requests, to considering the imminent danger issue and his recommendation for the restoration of a license previously suspended summarily. Those issues are in the domain of the Commissioner of Health and the Courts. Examples of licenses

CHARLES HAVENER KITE (11682)

reinstated, without intervention by the Board of Regents, are Matter of Wong, Cal. Nos. 8648/7498; and Matter of Park, Cal. No. 8493. In any event, respondent's attorney wrote petitioner's attorney on October 16, 1990 and indicated that it was his considered opinion that the summary suspension Order was no longer legally in effect and that respondent may resume his practice.

The Commissioner of Health modified the hearing committee recommendation of a conditional stay of execution of a four year suspension to an indefinite suspension in the field of surgery until the completion of certain training followed by a conditional stay of execution of a three year suspension. Such conditional stays of execution are, as previously pointed out in other cases, not authorized. Furthermore, they are indefinite and not clear, workable, and fully protective of the public. We note that, before the Commissioner of Health issued his recommendation, petitioner commented, in part, that the suspension "conflicts" with the condition of the stay and should be modified to conform with Education Law §6511.

We unanimously recommend the following to the Board of Regents:

1. The findings of fact as to Patients A, B, C, D, and E of the hearing committee and the recommendation of the Commissioner of Health as to those findings of fact be accepted;

CHARLES HAVENER KITE (11682)

2. The conclusions of the hearing committee and Commissioner of Health as to Patients A, B, C, D, and E be modified;
3. The specifications based upon allegations concerning Patients F and G be disregarded and dismissed without prejudice;
4. Respondent is guilty, by a preponderance of the evidence, of the fifteenth specification based upon allegations B.3 and E.2 and of the sixteenth specification based upon A.1, C.1, C.2, D.1, D.2, and E.2, guilty of the fifteenth specification based upon E.3 to the extent found by the hearing committee, guilty of the sixteenth specification based upon E.3 to the extent found by the hearing committee, guilty of the sixteenth specification based upon A.2 to the extent indicated herein, and not guilty of the remaining specifications and allegations;
5. In partial agreement with the hearing committee, the measure of discipline recommended by it be modified;
6. The measure of discipline recommended by the Commissioner of Health not be accepted; and
7. Based on the reasons indicated herein, respondent's license to practice as a physician in the State of New York be suspended for four years upon each specification

CHARLES HAVENER KITE (11682)

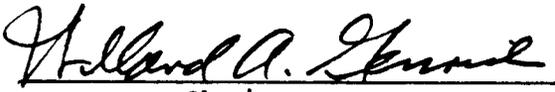
of the charges of which we recommend respondent be found guilty, as aforesaid, said suspensions to run concurrently, that execution of said suspension be stayed, and that respondent be placed on probation for four years under the terms of probation which are annexed hereto, made a part hereof, and marked as Exhibit "H", which include requirements involving respondent obtaining additional training and working in a supervised setting.

Respectfully submitted,

WILLARD A. GENRICH

WILLIAM M. MILES

GEORGE POSTEL


Chairperson

Dated: March 5, 1991

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

-----:

IN THE MATTER
OF
CHARLES HAVENER KITE, M.D.

: COMMISSIONER'S
: ORDER AND
: NOTICE OF HEARING

-----:

TO: CHARLES HAVENER KITE, M.D.

The undersigned, Commissioner of Health of the State of New York, after an investigation and upon the recommendation of a committee on professional medical conduct of the State Board for Professional Medical Conduct, has determined that the continued practice of medicine in the State of New York by CHARLES HAVENER KITE, M.D., the Respondent, constitutes an imminent danger to the health of the people of this state.

It is therefore:

ORDERED, pursuant to N.Y. Pub. Health Law §230(12) (McKinney Supp. 1989), that effective immediately CHARLES HAVENER KITE, M.D., Respondent, shall not practice medicine in the State of New York. This Order shall remain in effect unless modified or vacated by the Commissioner of Health pursuant to N.Y. Pub. Health Law §230(12) (McKinney Supp. 1989).

EXHIBIT vac

<i>Hearing EX 1</i>	
ID. <u> </u>	<input checked="" type="checkbox"/> EVD.
DATE <u>10-26-89</u>	
JOANNE DE STEFANO	

PLEASE TAKE NOTICE that a hearing will be held pursuant to the provisions of N.Y. Pub. Health Law §230 (McKinney Supp. 1989) and N.Y. State Admin. Proc. Act §§301-307 (McKinney 1989). The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on the 10th day of October, 1989 at 10:00 a.m. at the OGS Training Room, 39th Floor, Corning Tower, Empire State Plaza, Albany, New York 12237-0026 and at such other adjourned dates, times and places as the committee may direct. The Respondent may file an answer to the Statement of Charges with the below-named attorney for the Department of Health.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. The Respondent shall appear in person at the hearing and may be represented by counsel. The Respondent has the right to produce witnesses and evidence on his behalf, to have subpoenas issued on his behalf for the production of witnesses and documents and to cross-examine witnesses and examine evidence produced against him. A summary of the Department of Health Hearing Rules is enclosed.

The hearing will proceed whether or not the Respondent appears at the hearing. Scheduled hearing dates are considered dates certain and, therefore, adjournment requests are not routinely granted. Moreover, a request for an adjournment in this matter may be regarded as a "delay caused by the physician" within the meaning of N.Y. Pub. Health Law §230(12) (McKinney Supp. 1989) causing the Order of the Commissioner to be continued until the committee makes its recommendation to the Commissioner. Requests for adjournments must be made in writing to the Administrative Law Judge's Office, Empire State Plaza, Corning Tower Building, 25th Floor, Albany, New York 12237-0026 and by telephone (518-473-1385), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

At the conclusion of the hearing, the committee shall make a determination concerning what action should be taken with respect to Respondent's license to practice medicine in the State of New York.

BECAUSE THESE PROCEEDINGS MAY RESULT IN A
RECOMMENDATION THAT YOUR LICENSE TO
PRACTICE MEDICINE IN NEW YORK STATE BE
REVOKED OR SUSPENDED, YOU ARE URGED TO
OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS
MATTER.

DATED: Albany, New York
October 23 1989


DAVID AXELROD, M.D.
Commissioner of Health

Inquiries should be directed to:
KEVIN C. ROE
Associate Counsel
N.Y.S. Department of Health
Corning Tower Building
Room 2429
Empire State Plaza
Albany, New York 12237-0026
(518) 474-8266

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

IN THE MATTER : AMENDED
OF : COMMISSIONER'S
CHARLES HAVENER KITE, M.D. : ORDER AND
: NOTICE OF
: HEARING
-----X

The undersigned, Commissioner of Health of the State of New York, has previously determined that the continued practice of medicine in the State of New York by Charles Havener Kite, M.D., the Respondent, constitutes an imminent danger to the health of the people of this State. Now, after an investigation and upon recommendation of a committee on professional medical conduct, the undersigned has determined that additional evidence exists and should be considered prior to a committee's recommendation on the question of imminent danger. Therefore, the original Commissioner's Order and Notice of Hearing is amended to include the Amended Statement of Charges attached hereto.

DATED: January 12, 1990
Albany, New York


DAVID AXELROD, M.D.
Commissioner of Health

EXHIBIT "B"

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

IN THE MATTER :
OF : ORDER
CHARLES HAVENER KITE, M.D. :

-----X

I have reviewed the transcript pages constituting the Report of the Hearing Committee on the Issue of Imminent Danger in this matter, the Committee's finding that Charles Havener Kite, M.D., Respondent, does not present an imminent danger to the health of the people of the State of New York, and the Hearing Committee's recommended action that the Summary Order prohibiting Charles Havener Kite, M.D., from practicing medicine in the State of New York be vacated. I believe it is premature for the Hearing Committee to render a recommendation because it has not considered all of the cases which formed the basis for the screening committees' recommendations for summary suspension and my order, as amended, to that effect. Therefore, it is hereby

ORDERED that pursuant to Public Health law §230(12), the matter is remanded to the Hearing Committee for further deliberations on the issue of imminent danger after

consideration of evidence regarding the charges in paragraphs
B(4), F, G(1) and G(2) of the Amended Statement of Charges.

DATED: Albany, New York

May 14, 1990



DAVID AXELRØD, M.D.
Commissioner of Health
State of New York

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

-----X

IN THE MATTER : STATEMENT
OF : OF
CHARLES HAVENER KITE, M.D. : CHARGES

-----X

CHARLES HAVENER KITE, M.D., the Respondent, was authorized to practice medicine in New York State on August 24, 1979 by the issuance of license number 139527 by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1989 through December 31, 1991 from 632 New Scotland Avenue, Albany, New York 12208.

FACTUAL ALLEGATIONS

A. Respondent treated Patient A (patients are identified in Appendix A) from on or about April 21, 1986 to the present at Cusack Pavilion, St. Peter's Hospital, 632 New Scotland Avenue, Albany, New York (hereinafter his office). Respondent performed surgery on Patient A on January 3, 1987 at St. Peters Hospital, 315 South Manning Boulevard, Albany, New York (hereinafter St. Peters Hospital).

1. Respondent made a preoperative diagnosis of L4-5 disc herniation without adequate medical justification.

2. Respondent performed a L4-5 laminotomy, foramenotomy and diskectomy without adequate medical indication.
3. Respondent failed to identify the sacrum and/or obtain intraoperative x-rays to identify the operative level.

B. Respondent treated Patient B from on or about April 18, 1988 to on or about June 16, 1989 at his office. On January 18, 1989, Respondent performed surgery on Patient B at Albany Memorial Hospital, 600 Northern Boulevard, Albany, New York (hereinafter Memorial Hospital).

1. On January 18, 1989, Respondent performed a laminotomy for a presumptive L5-S1 disc herniation without adequate medical indication.
2. Respondent failed to identify the sacrum and/or obtain intraoperative x-rays to identify the operative level.
3. Respondent operated at the wrong level and excised a normal L4-5 disc.

C. Respondent treated Patient C from on or about March 24, 1986, to on or about January 30, 1987 at his office. Respondent performed surgery on Patient C at St. Peter's Hospital on October 8, 1986.

1. Respondent made a preoperative diagnosis of C5-6 disc herniation and nerve root impingement without adequate medical justification.
2. Respondent performed bilateral C5-6 laminotomies, foraminotomies and excision of the C5-6 disc on the left without adequate medical indication.

D. Respondent treated Patient D from on or about August 6, 1984 to on or about February 6, 1989 at his office. Respondent performed surgery on Patient D on January 23, 1987 at Memorial Hospital.

1. Respondent made a preoperative diagnosis of herniated discs at L3-4 and L4-5 without adequate medical justification.
2. On January 23, 1987, Respondent performed a laminotomy with excision of the left L3-4 and L4-5 discs through a fusion on the left, with lateral decompression at L4-5, without adequate medical indication.

E. Respondent treated Patient E from on or about April 11, 1986 to on or about January 11, 1988 at his office. Respondent performed surgery on Patient E on March 6, 1987 at Memorial Hospital.

1. Respondent failed to obtain a CT scan and/or x-rays of the cervical spine prior to surgery.
2. Respondent made a preoperative diagnosis of bilateral C6-7 disc herniation without adequate medical justification.
3. Respondent performed foraminotomies at C5-6 and C6-7 and excised the C6-7 disc on the right without adequate medical indication.
4. Respondent failed to obtain intraoperative x-rays to verify the operative level.
5. Respondent planned and carried out a posterior approach to the March 6, 1987 surgery exposing the patient to an undue risk of nerve root and/or spinal cord damage.

SPECIFICATIONS

FIRST THROUGH FIFTH SPECIFICATIONS

GROSS NEGLIGENCE

Respondent is charged with practicing the profession with gross negligence under N.Y. Educ. Law §6509(2) (McKinney 1985), in that, Petitioner charges:

1. The facts in paragraphs A and A.1, A.2 and/or A.3.
2. The facts in paragraphs B and B.1, B.2 and/or B.3.
3. The facts in paragraphs C and C.1 and/or C.2.
4. The facts in paragraphs D and D.1 and/or D.2.
5. The facts in paragraphs E and E.1, E.2, E.3, E.4 and/or E.5.

SIXTH THROUGH TENTH SPECIFICATIONS

GROSS INCOMPETENCE

Respondent is charged with practicing the profession with gross incompetence under N.Y. Educ. Law §6509(2) (McKinney 1985), in that, Petitioner charges:

6. The facts in paragraphs A and A.1, A.2 and/or A.3
7. The facts in paragraphs B and B.1, B.2 and/or B.3.
8. The facts in paragraphs C and C.1 and/or C.2.
9. The facts in paragraphs D and D.1 and/or D.2.
10. The facts in paragraphs E and E.1, E.2, E.3, E.4 and/or E.5.

ELEVENTH SPECIFICATION

NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with professional misconduct by practicing the profession with negligence on more than one occasion under N.Y. Educ. Law §6509(2) (McKinney 1985), in that, Petitioner charges that Respondent committed two or more of the following:

11. The facts in paragraphs A and A.1, A.2 and/or A.3; B and B.1, B.2 and/or B.3; C and C.1 and/or C.2; D and D.1 and/or D.2; and/or E and E.1, E.2, E.3, E.4 and/or E.5.

TWELFTH SPECIFICATION

INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with professional misconduct by reason of practicing the profession with incompetence on more than one occasion under N.Y. Educ. Law §6509(2) (McKinney 1985), in that, Petitioner charges that Respondent committed two or more of the following:

12. The facts in paragraphs A and A.1, A.2 and/or A.3; B and B.1, B.2 and/or B.3; C and C.1 and/or C.2; D and D.1 and/or D.2; and/or E and E.1, E.2, E.3, E.4 and/or E.5.

DATED: Albany, New York
September 28, 1957

Peter D. Van Buren

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

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

-----X
: AMENDED
IN THE MATTER : STATEMENT
OF : OF
CHARLES HAVENER KITE, M.D. : CHARGES
-----X

CHARLES HAVENER KITE, M.D., the Respondent, was authorized to practice medicine in New York State on August 24, 1979 by the issuance of license number 139527 by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1989 through December 31, 1991 from 632 New Scotland Avenue, Albany, New York 12208.

FACTUAL ALLEGATIONS

A. Respondent treated Patient A (patients are identified in Appendix A) from on or about April 21, 1986 to the present at Cusack Pavilion, St. Peter's Hospital, 632 New Scotland Avenue, Albany, New York (hereinafter his office). Respondent performed surgery on Patient A on January 3, 1987 at St. Peters Hospital, 315 South Manning Boulevard, Albany, New York (hereinafter St. Peters Hospital).

EXHIBIT "D"

1. Respondent made a preoperative diagnosis of L4-5 disc herniation without adequate medical justification.
2. Respondent performed a L4-5 laminotomy, foramenotomy and diskectomy without adequate medical indication.
3. Respondent failed to identify the sacrum and/or obtain intraoperative x-rays to identify the operative level.

B. Respondent treated Patient B from on or about April 18, 1988 to on or about June 16, 1989 at his office. On January 18, 1989, Respondent performed surgery on Patient B at Albany Memorial Hospital, 600 Northern Boulevard, Albany, New York (hereinafter Memorial Hospital).

1. On January 18, 1989, Respondent performed a laminotomy for a presumptive L5-S1 disc herniation without adequate medical indication.
2. Respondent failed to identify the sacrum and/or obtain intraoperative x-rays to identify the operative level.
3. Respondent operated at the wrong level and excised a normal L4-5 disc.
4. Respondent lacerated the common iliac artery during surgery.

C. Respondent treated Patient C from on or about March 24, 1986, to on or about January 30, 1987 at his office. Respondent performed surgery on Patient C at St. Peter's Hospital on October 8, 1986.

1. Respondent made a preoperative diagnosis of C5-6 disc herniation and nerve root impingement without adequate medical justification.

2. Respondent performed bilateral C5-6 laminotomies, foraminotomies and excision of the C5-6 disc on the left without adequate medical indication.

D. Respondent treated Patient D from on or about August 6, 1984 to on or about February 6, 1989 at his office. Respondent performed surgery on Patient D on January 23, 1987 at Memorial Hospital.

1. Respondent made a preoperative diagnosis of herniated discs at L3-4 and L4-5 without adequate medical justification.
2. On January 23, 1987, Respondent performed a laminotomy with excision of the left L3-4 and L4-5 discs through a fusion on the left, with lateral decompression at L4-5, without adequate medical indication.

E. Respondent treated Patient E from on or about April 11, 1986 to on or about January 11, 1988 at his office. Respondent performed surgery on Patient E on March 6, 1987 at Memorial Hospital.

1. Respondent failed to obtain a CT scan of the cervical spine prior to surgery.
2. Respondent made a preoperative diagnosis of bilateral C6-7 disc herniation without adequate medical justification.
3. Respondent performed foraminotomies at C5-6 and C6-7 and excised the C6-7 disc on the right without adequate medical indication.
4. Respondent failed to obtain intraoperative x-rays to verify the operative level.

5. Respondent planned and carried out a posterior approach to the March 6, 1987 surgery exposing the patient to an undue risk of nerve root and/or spinal cord damage.

F. Respondent treated Patient F from on or about September 9, 1986 to on or about October 3, 1989. Respondent performed surgery on Patient F on September 6, 1989 at the Albany Medical Center Hospital, Albany, New York. Respondent performed bilateral disc excisions at L4-5 without adequate medical indication.

G. Respondent treated Patient G from on or about October 29, 1987 to on or about June 9, 1988. Respondent performed surgery on Patient G on December 12, 1987 at Albany Memorial Hospital, Albany, New York.

1. Respondent lacerated the common iliac artery and iliac vein during surgery creating an arteriovenous fistula.
2. Respondent failed to obtain a surgical consultation or investigate the patient's intraoperative hemorrhage and hypotension with an arteriogram.

SPECIFICATIONS

FIRST THROUGH SEVENTH SPECIFICATIONS

GROSS NEGLIGENCE

Respondent is charged with practicing the profession with

gross negligence under N.Y. Educ. Law §6509(2) (McKinney 1985),
in that, Petitioner charges:

1. The facts in paragraphs A and A.1, A.2 and/or A.3.
2. The facts in paragraphs B and B.1, B.2 and/or B.3.
3. The facts in paragraphs C and C.1 and/or C.2.
4. The facts in paragraphs D and D.1 and/or D.2.
5. The facts in paragraphs E and E.1, E.2, E.3, E.4 and/or E.5.
6. The facts in paragraphs F.
7. The facts in paragraphs G and G.1 and/or G.2.

EIGHTH THROUGH TWELFTH SPECIFICATIONS

GROSS INCOMPETENCE

Respondent is charged with practicing the profession with
gross incompetence under N.Y. Educ. Law §6509(2) (McKinney 1985),
in that, Petitioner charges:

8. The facts in paragraphs A and A.1, A.2 and/or A.3
9. The facts in paragraphs B and B.1, B.2 and/or B.3.
10. The facts in paragraphs C and C.1 and/or C.2.
11. The facts in paragraphs D and D.1 and/or D.2.
12. The facts in paragraphs E and E.1, E.2, E.3, E.4 and/or E.5.
13. The facts in paragraphs F.
14. The facts in paragraphs G and G.1 and/or G.2.

FIFTEENTH SPECIFICATION

NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with professional misconduct by practicing the profession with negligence on more than one occasion under N.Y. Educ. Law §6509(2) (McKinney 1985), in that, Petitioner charges that Respondent committed two or more of the following:

15. The facts in paragraphs A and A.1, A.2 and/or A.3; B and B.1, B.2 and/or B.3; C and C.1 and/or C.2; D and D.1 and/or D.2; E and E.1, E.2, E.3, E.4 and/or E.5; F; and/or G and G.1 and G.2.

SIXTEENTH SPECIFICATION

INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with professional misconduct by reason of practicing the profession with incompetence on more than one occasion under N.Y. Educ. Law §6509(2) (McKinney 1985), in that, Petitioner charges that Respondent committed two or more of the following:

16. The facts in paragraphs A and A.1, A.2 and/or A.3; B and B.1, B.2 and/or B.3; C and C.1 and/or C.2; D and D.1 and/or D.2; E and E.1, E.2, E.3, E.4 and/or E.5; F; and/or G and G.1 and G.2.

DATED: Albany, New York
December 14, 1989

Peter D. Van Buren

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



STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

David Axelrod, M.D.
Commissioner

May 29, 1990

Tyrone T. Butler, Esq.
Administrative Law Judge
NYS Department of Health
Corning Tower, 25th Floor
Empire State Plaza
Albany, NY 12237

Lawrence F. Sovik, Esq.
Smith, Sovik, Kendrick, Schwarzer & Sugnet, P.C.
300 Empire Building
472 S. Salina Street
Syracuse, NY 13202-2473

RE: Matter of Kite

Dear Judge Butler and Mr. Sovik:

The Amended Statement of Charges presently contains one typographical error and one collating error which is repeated four times. On page 4 in paragraph G, the date December 12, 1987 should be December 2, 1987. On pages 5 and 6, Specifications Two, Nine, Fifteen and Sixteen should read: "...paragraphs B and B.1, B.2, B.3, and/or B.4."

Enclosed are pages 4, 5 and 6 reflecting the above changes. I request that these pages be substituted to reflect the necessary corrections.

Very truly yours,

Kevin C. Roe
Associate Counsel

cc

Enclosure

RECEIVED
MAY 31 1990
NYS DEPT OF HEALTH
DIVISION OF LEGAL AFFAIRS

EXHIBIT 107

5. Respondent planned and carried out a posterior approach to the March 6, 1987 surgery exposing the patient to an undue risk of nerve root and/or spinal cord damage.

F. Respondent treated Patient F from on or about September 9, 1986 to on or about October 3, 1989. Respondent performed surgery on Patient F on September 6, 1989 at the Albany Medical Center Hospital, Albany, New York. Respondent performed bilateral disc excisions at L4-5 without adequate medical indication.

G. Respondent treated Patient G from on or about October 29, 1987 to on or about June 9, 1988. Respondent performed surgery on Patient G on December 2, 1987 at Albany Memorial Hospital, Albany, New York.

1. Respondent lacerated the common iliac artery and iliac vein during surgery creating an arteriovenous fistula.
2. Respondent failed to obtain a surgical consultation or investigate the patient's intraoperative hemorrhage and hypotension with an arteriogram.

SPECIFICATIONS

FIRST THROUGH SEVENTH SPECIFICATIONS

GROSS NEGLIGENCE

Respondent is charged with practicing the profession with

gross negligence under N.Y. Educ. Law §6509(2) (McKinney 1985),
in that, Petitioner charges:

1. The facts in paragraphs A and A.1, A.2 and/or A.3.
2. The facts in paragraphs B and B.1, B.2, B.3, and/or B.4.
3. The facts in paragraphs C and C.1 and/or C.2.
4. The facts in paragraphs D and D.1 and/or D.2.
5. The facts in paragraphs E and E.1, E.2, E.3, E.4 and/or E.5.
6. The facts in paragraphs F.
7. The facts in paragraphs G and G.1 and/or G.2.

EIGHTH THROUGH TWELFTH SPECIFICATIONS

GROSS INCOMPETENCE

Respondent is charged with practicing the profession with
gross incompetence under N.Y. Educ. Law §6509(2) (McKinney 1985),
in that, Petitioner charges:

8. The facts in paragraphs A and A.1, A.2 and/or A.3
9. The facts in paragraphs B and B.1, B.2, B.3, and/or B.4.
10. The facts in paragraphs C and C.1 and/or C.2.
11. The facts in paragraphs D and D.1 and/or D.2.
12. The facts in paragraphs E and E.1, E.2, E.3, E.4 and/or E.5.
13. The facts in paragraphs F.
14. The facts in paragraphs G and G.1 and/or G.2.

FIFTEENTH SPECIFICATION

NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with professional misconduct by practicing the profession with negligence on more than one occasion under N.Y. Educ. Law §6509(2) (McKinney 1985), in that, Petitioner charges that Respondent committed two or more of the following:

15. The facts in paragraphs A and A.1, A.2 and/or A.3; B and B.1, B.2, B.3 and/or B.4; C and C.1 and/or C.2; D and D.1 and/or D.2; E and E.1, E.2, E.3, E.4 and/or E.5; F; and/or G and G.1 and G.2.

SIXTEENTH SPECIFICATION

INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with professional misconduct by reason of practicing the profession with incompetence on more than one occasion under N.Y. Educ. Law §6509(2) (McKinney 1985), in that, Petitioner charges that Respondent committed two or more of the following:

16. The facts in paragraphs A and A.1, A.2 and/or A.3; B and B.1, B.2, B.3 and/or B.4; C and C.1 and/or C.2; D and D.1 and/or D.2; E and E.1, E.2, E.3, E.4 and/or E.5; F; and/or G and G.1 and G.2.