



New York State Board for Professional Medical Conduct
433 River Street, Suite 303 • Troy, New York 12180-2299 • (518) 402-0863

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner
NYS Department of Health

Dennis P. Whalen
Executive Deputy Commissioner
NYS Department of Health

Dennis J. Graziano, Director
Office of Professional Medical Conduct

Kendrick A. Sears, M.D.
Chair

Michael A. Gonzalez, R.P.A.
Vice Chair

Ansel R. Marks, M.D., J.D.
Executive Secretary

Public

October 31, 2006

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Eric S. Berger, M.D.
330 East 38th Street
Apt. 40-0
New York, NY 10016

Re: License No. 139848

Dear Dr. Berger:

Enclosed is a copy of Order #BPMC 06-246 of the New York State Board for Professional Medical Conduct. This order and any penalty provided therein goes into effect November 7, 2006.

If the penalty imposed by this Order is a surrender, revocation or suspension, you are required to deliver your license and registration within five (5) days of receipt of this Order to the Board for Professional Medical Conduct, New York State Department of Health, Hedley Park Place, Suite 303, 433 River Street, Troy, New York 12180.

Sincerely,

Ansel R. Marks, M.D., J.D.
Executive Secretary
Board for Professional Medical Conduct

Enclosure

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

**IN THE MATTER
OF
ERIC S. BERGER, M.D.**

**CONSENT
ORDER**

BPMC No. 06-246

Upon the application of Eric S. Berger, M.D., (Respondent), in the attached Consent Agreement and Order, which is made a part of this Consent Order, it is

ORDERED, that the Consent Agreement, and its terms, are adopted and it is further

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

- by mailing of a copy of this Consent Order, either by first class mail to Respondent at the address in the attached Consent Agreement or by certified mail to Respondent's attorney, OR
- upon facsimile transmission to Respondent or Respondent's attorney, whichever is first.

SO ORDERED.

DATE: 10-30-2006



KENDRICK A. SEARS, M.D.
Chair
State Board for Professional Medical Conduct

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

**IN THE MATTER
OF
ERIC S. BERGER, M.D.**

**CONSENT
AGREEMENT
AND
ORDER**

Eric S. Berger, M.D., (Respondent), representing that all of the following statements are true, deposes and says:

That on or about October 5, 1979, I was licensed to practice as a physician in the State of New York, and issued License No. 139848 by the New York State Education Department.

My current address is 330 East 38th Street, Apt. 40-O, New York, NY10016, and I will advise the Director of the Office of Professional Medical Conduct (OPMC) of any change of address.

I understand that the New York State Board for Professional Medical Conduct has charged me with six (6) specifications of professional misconduct.

A copy of the Statement of Charges, marked as Exhibit "A", is attached to and part of this Consent Agreement.

I do not contest the Third Specification, in full satisfaction of the charges against me, and agree to the following penalty:

Pursuant to § 230-a(9) of the Public Health Law, I shall be placed on probation for a period of three (3) years, subject to the terms set forth in attached Exhibit "B."

Pursuant to §230-a(3) of the Public Health Law, following the conclusion of the probationary period set forth in this Consent

Agreement and for as long as I shall have a license to practice medicine in New York State, my license to practice medicine in the State of New York shall be limited so as to preclude the practice medicine in the field of evaluation and treatment of male sexual dysfunction, including but not limited to erectile dysfunction, premature ejaculation, and decreased libido, unless I notify the Director of OPMC at least thirty (30) days prior to resuming the practice of medicine in the field of evaluation and treatment of male sexual dysfunction.

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

That Respondent shall maintain active registration of Respondent's license with the New York State Education, Department Division of Professional Licensing Services (except during periods of actual suspension), and shall pay all registration fees. This condition shall take effect thirty days after the Consent Order's effective date and will continue so long as Respondent remains licensed in New York State; and

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

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

I stipulate that my failure to comply with any conditions of this Order shall constitute misconduct as defined by New York State Education Law § 6530(29).

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

I ask the Board to adopt this Consent Agreement.

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

I agree that, if the Board adopts this Consent Agreement, the Chair of the Board shall issue a Consent Order in accordance with its terms. I agree that this Order shall take effect upon its issuance by the Board, either by mailing of a copy of the Consent Order by first class mail to me at the address in this Consent Agreement, or to my attorney by certified mail, OR upon facsimile transmission to me or my attorney, whichever is first. The Order, this agreement, and all attached Exhibits shall be public documents, with only patient identities, if any,

redacted. As public documents, they may be posted on the Department's website.

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

I understand and agree that the attorney for the Department, the Director of the Office of Professional Medical Conduct and the Chair of the State Board for Professional Medical Conduct each retain complete discretion either to enter into the proposed agreement and Order, based upon my application, or to decline to

do so. I further understand and agree that no prior or separate written or oral communication can limit that discretion.

DATE 15 September 2006


ERIC S. BERGER, M.D.
RESPONDENT

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

DATE: October 10, 2006



RICHARD J. ZAINLEUTER, ESQ.
Associate Counsel
Bureau of Professional Medical Conduct

DATE: 27 October 2006



DENNIS J. GRAZIANO
Director
Office of Professional Medical Conduct

EXHIBIT "A"

IN THE MATTER
OF
ERIC S. BERGER, M.D.

STATEMENT
OF
CHARGES

Eric S. Berger, M.D., the Respondent, was authorized to practice medicine in New York State on or about October 5, 1979, by the issuance of license number 139848 by the New York State Education Department. Respondent's current address, upon information and belief, is 578 Ridgewood Avenue, Glen Ridge, NJ 07028-1933.

FACTUAL ALLEGATIONS

- A. At a medical office known as Boston Medical, P.C., beginning on or about January 16, 2001, the Respondent evaluated Patient A¹ for a complaint of penile erectile dysfunction, and administered a test injection in connection with a form of therapy known as intra-cavernous pharmacotherapy ("ICP"). The Respondent's care of Patient A did not meet acceptable standards of medical care in that:
1. The Respondent failed to perform vital sign monitoring and other appropriate physical examinations and safeguards to protect patient health and safety, including blood pressure monitoring, before, during, or after the test injection.
 2. The Respondent failed to document adequately vital sign readings and other appropriate physical examination findings

¹To preserve privacy throughout this document, patients are referred to by letter designation. An Appendix of Patient Names (Appendix "A") is attached hereto for appropriate recipients.

EXHIBIT

2

and safeguards, including blood pressure readings, before, during, or after the test injection.

3. The Respondent failed to manage adequately the persistent erection, known as a priapism, that developed in response to the test injection.
4. The Respondent failed to document adequately the management of the priapism that developed in response to the test injection.
5. The Respondent's prescriptions for Patient A for ICP were coded or specially marked such that they could only be compounded or dispensed by Boston Medical, P.C., or a compounding pharmacy that had an arrangement or agreement with Boston Medical, P.C.
6. The Respondent's prescriptions for Patient A for ICP were not in conformance with Sections 6810(1), 6810(6), and 6810(8) of the Education Law.

B. At Boston Medical, P.C., beginning on or about April 11, 2002, the Respondent evaluated Patient B for a complaint of penile erectile dysfunction, and administered a test injection in connection with ICP. The Respondent's care of Patient B did not meet acceptable standards of medical care in that:

1. The Respondent failed to perform vital sign monitoring and other appropriate physical examinations and safeguards to protect patient health and safety, including blood pressure monitoring, before, during, or after the test injection.
2. The Respondent failed to document adequately vital sign

readings and other appropriate physical examination findings and safeguards, including blood pressure readings, before, during, or after the test injection.

3. The Respondent failed to manage adequately the priapism that developed in response to the test injection.
4. The Respondent failed to document adequately the management of the priapism that developed in response to the test injection.
5. The Respondent failed to document adequately the dose and composition of the test injection.
6. The Respondent's prescription for Patient B for ICP was coded or specially marked such that it could only be compounded or dispensed by Boston Medical, P.C., or a compounding pharmacy that had an arrangement or agreement with Boston Medical, P.C.
7. The Respondent's prescription for Patient B for ICP was not in conformance with Sections 6810(1), 6810(6), and 6810(8) of the Education Law.

C. At Boston Medical, P.C., beginning on or about April 11, 2002, the Respondent evaluated Patient C for a complaint of penile erectile dysfunction and premature or early ejaculation, and administered a test injection in connection with ICP. The Respondent's care of Patient C did not meet acceptable standards of medical care in that:

1. The Respondent failed to perform vital sign monitoring and other appropriate physical examinations and safeguards to protect patient health and safety, including blood pressure

- monitoring, before, during, or after the test injection.
2. The Respondent failed to document adequately vital sign readings and other appropriate physical examination findings and safeguards, including blood pressure readings, before, during, or after the test injection.
 3. The Respondent's prescription for Patient C for ICP was coded or specially marked such that it could only be compounded or dispensed by Boston Medical, P.C., or a compounding pharmacy that had an arrangement or agreement with Boston Medical, P.C.
 4. The Respondent's prescription for Patient C for ICP was not in conformance with Sections 6810(1), 6810(6), and 6810(8) of the Education Law.

D. At Boston Medical, P.C., beginning on or about April 11, 2002, the Respondent evaluated Patient D for a complaint of penile erectile dysfunction and premature or early ejaculation, and administered a test injection in connection with ICP. The Respondent's care of Patient D did not meet acceptable standards of medical care in that:

1. The Respondent failed to perform vital sign monitoring and other appropriate physical examinations and safeguards to protect patient health and safety, including blood pressure monitoring, before, during, or after the test injection.
2. The Respondent failed to document adequately vital sign readings and other appropriate physical examination findings and safeguards, including blood pressure readings, before, during, or after the test injection.

3. The Respondent's prescriptions for Patient D for ICP were coded or specially marked such that they could only be compounded or dispensed by Boston Medical, P.C., or a compounding pharmacy that had an arrangement or agreement with Boston Medical, P.C.
4. The Respondent's prescriptions for Patient D for ICP were not in conformance with Sections 6810(1), 6810(6), and 6810(8) of the Education Law.

E. At Boston Medical, P.C., beginning on or about October 19, 2001, the Respondent evaluated Patient E for a complaint of premature or early ejaculation, and administered a test injection in connection with ICP. The Respondent's care of Patient E did not meet acceptable standards of medical care in that:

1. The Respondent failed to perform vital sign monitoring and other appropriate physical examinations and safeguards to protect patient health and safety, including blood pressure monitoring, before, during, or after the test injection.
2. The Respondent failed to document adequately vital sign readings and other appropriate physical examination findings and safeguards, including blood pressure readings, before, during, or after the test injection.
3. The Respondent treated Patient E with ICP even though ICP is not indicated for the treatment of premature or early ejaculation.

F. At Boston Medical, P.C., beginning on or about April 11, 2002, the Respondent evaluated Patient F for a complaint of premature or early ejaculation, and administered a test injection in connection with ICP. The Respondent's care of Patient F did not meet acceptable standards of medical care in that:

1. The Respondent failed to perform vital sign monitoring and other appropriate physical examinations and safeguards to protect patient health and safety, including blood pressure monitoring, before, during, or after the test injection.
2. The Respondent failed to document adequately vital sign readings and other appropriate physical examination findings and safeguards, including blood pressure readings, before, during, or after the test injection.
3. The Respondent treated Patient F with ICP even though ICP is not indicated for the treatment of premature or early ejaculation.
4. The Respondent's prescription for Patient F for ICP was coded or specially marked such that it could only be compounded or dispensed by Boston Medical, P.C., or a compounding pharmacy that had an arrangement or agreement with Boston Medical, P.C.
5. The Respondent's prescription for Patient F for ICP was not in conformance with Sections 6810(1), 6810(6), and 6810(8) of the Education Law.

- G. At Boston Medical, P.C., beginning on or about April 11, 2002, the Respondent evaluated Patient G for a complaint of premature or early ejaculation, and administered a test injection in connection with ICP. The Respondent's care of Patient G did not meet acceptable standards of medical care in that:
1. The Respondent failed to perform vital sign monitoring and other appropriate physical examinations and safeguards to protect patient health and safety, including blood pressure monitoring, before, during, or after the test injection.
 2. The Respondent failed to document adequately vital sign readings and other appropriate physical examination findings and safeguards, including blood pressure readings, before, during, or after the test injection.
 3. The Respondent treated Patient G with ICP even though ICP is not indicated for the treatment of premature or early ejaculation.

SPECIFICATIONS OF MISCONDUCT

FIRST SPECIFICATION (NEGLIGENCE ON MORE THAN ONE OCCASION)

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

1. The factual allegations in paragraphs A, A(1), A(3), B, B(1), B(3), C, C(1), D, D(1), E, E(1), E(3), F, F(1), F(3), G, G(1), and/or G(3).

SECOND SPECIFICATION (INCOMPETENCE ON MORE THAN ONE OCCASION)

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(5) by practicing the profession of medicine with incompetence on more than one occasion as alleged in two or more of the following:

2. The factual allegations in paragraphs A, A(1), A(3), B, B(1), B(3), C, C(1), D, D(1), E, E(1), E(3), F, F(1), F(3), G, G(1) and/or G(3).

**THIRD SPECIFICATION
(FAILING TO MAINTAIN RECORDS)**

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

3. The factual allegations in paragraphs A, A(2), A(4), A(5), A(6), B, B(2), B(4), B(5), B(6), B(7), C, C(2), C(3), C(4), D, D(2), D(3), D(4), E, E(2), F, F(2), F(4), F(5), G, and/or G(2).

**FOURTH SPECIFICATION
(CODED OR SPECIALLY MARKED PRESCRIPTIONS)**

Respondent is charged with professional misconduct by reason of ENTERING INTO AN ARRANGEMENT OR AGREEMENT WITH A PHARMACY FOR THE COMPOUNDING AND/OR DISPENSING OF CODED OR SPECIALLY MARKED PRESCRIPTIONS in violation of New York Education Law § 6530(38), in that Petitioner charges:

4. The factual allegations in paragraphs A, A(5), B, B(6), C, C(3), D, D(3), F, and/or F(4).

FIFTH SPECIFICATION
(PRESCRIPTIONS VIOLATING EDUCATION LAW SECTION 6810)

Respondent is charged with professional misconduct by reason of A WILLFUL OR GROSSLY NEGLIGENT FAILURE TO COMPLY WITH SUBSTANTIAL PROVISIONS OF STATE LAWS GOVERNING THE PRACTICE OF MEDICINE in violation of New York Education Law §6530(16) and §6810, in that Petitioner charges:

5. The factual allegations in paragraphs A, A(6), B, B(7), C, C(4), D, D(4), F, and/or F(5).

SIXTH SPECIFICATION
(UNDUE INFLUENCE ON PATIENTS)

Respondent is charged with professional misconduct by reason of EXERCISING UNDUE INFLUENCE ON PATIENTS, INCLUDING THE PROMOTION OF THE SALE OF SERVICES, GOODS, APPLIANCES, OR DRUGS TO EXPLOIT PATIENTS FOR FINANCIAL GAIN OF THE LICENSEE OR OF A THIRD PARTY in violation of New York Education Law §6530(17), in that Petitioner charges:

6. The factual allegations in paragraphs A, A(5), A(6), B, B(6), B(7), C, C(3), C(4), D, D(3), D(4), F, F(4), and/or F(5).

DATED:

June 28, 2006
Albany, New York



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

EXHIBIT "B"

Terms of Probation

1. Respondent's conduct shall conform to moral and professional standards of conduct and governing law. Any act of professional misconduct by Respondent as defined by New York State Education Law § 6530 or § 6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to New York State Public Health Law § 230(19).
2. Respondent shall maintain active registration of Respondent's license (except during periods of actual suspension) with the New York State Education Department Division of Professional Licensing Services, and shall pay all registration fees.
3. Respondent shall provide the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299 with the following information, in writing, and ensure that such information is kept current: a full description of Respondent's employment and practice; all professional and residential addresses and telephone numbers within and outside New York State; and all investigations, arrests, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
4. Respondent shall cooperate fully with, and respond in a timely manner to, OPMC requests to provide written periodic verification of Respondent's compliance with the terms of this Consent Order. Upon the Director of OPMC's request, Respondent shall meet in person with the Director's designee.
5. Respondent's failure to pay any monetary penalty by the prescribed date shall subject Respondent to all provisions of law relating to debt collection by New York State, including but not limited to: the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses [Tax Law § 171(27)]; State Finance Law § 18; CPLR § 5001; Executive Law § 32].
6. The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of thirty consecutive days or more. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive thirty day period. Respondent shall then notify the Director again at least fourteen days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period will resume and Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose as reasonably relate to the matters set forth in Exhibit "A" or are necessary to protect the public health.
7. The Director of OPMC may review Respondent's professional performance. This review may include but shall not be limited to: a review of office records, patient records and/or hospital charts; electronic records; and interviews with or periodic visits with Respondent and staff at practice locations or OPMC offices.

8. Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients and contain all information required by State rules and regulations concerning controlled substances.
9. Respondent shall enroll in and complete a continuing medical education program in the areas of ethics and record keeping. This continuing education program is subject to the Director of OPMC's prior written approval and shall be completed within the first year of the probation period.
10. Respondent's practice of medicine is restricted to prohibit practice in the area of evaluation and treatment of male sexual dysfunction, including but not limited to erectile dysfunction, premature ejaculation, and decreased libido until such time as Respondent has completed probation.

Respondent shall attest to compliance with the prescribed practice restriction by signing and submitting to the Director of OPMC a Practice Restriction Declaration, as directed by the Director.

Respondent shall cause the administrator(s) of all hospitals and other health care facilities or practices with which Respondent is affiliated to submit a letter to the Director of OPMC attesting to Respondent's compliance with the specified restriction at each location.

11. Within thirty days of the effective date of the order, and during the two years following the effective date of the order, Respondent shall practice medicine only when monitored by a licensed physician, board certified in an appropriate specialty, ("practice monitor"), 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 (no fewer than 20) 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.

12. Respondent shall comply with this Order and all its terms, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with, or violation of, these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding, and/or any other such proceeding authorized by law, against Respondent.