



# STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

January 21, 1998

## **CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Douglas Schwartz, D.O.  
210 East 86th Street - Suite 600  
New York, New York 10028

Alan Lambert, M.D., Esq.  
Lifshutz, Polland & Associates, P.C.  
675 Third Avenue - Suite 2400  
New York, New York 10017

Dianne Abeloff, Esq.  
NYS Department of Health  
Bureau of Professional Medical Conduct  
5 Penn Plaza - Sixth Floor  
New York, New York 10001

**RE: In the Matter of Douglas Schwartz, D.O.**

Dear Dr. Schwartz, Dr. Lambert and Ms. Abeloff:

Enclosed please find the Determination and Order (No. BPMC-98-12) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct  
New York State Department of Health  
Hedley Park Place  
433 River Street - Fourth Floor  
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties **other than suspension or revocation** until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

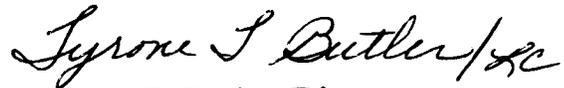
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge  
New York State Department of Health  
Bureau of Adjudication  
Hedley Park Place  
433 River Street, Fifth Floor  
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's  
Determination and Order.

Sincerely,

A handwritten signature in cursive script that reads "Tyrone T. Butler".

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:crc  
Enclosure

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

**In The Matter**

**Of**

**Douglas Schwartz, D.O. (Respondent)**

**A proceeding before a Hearing Committee (Committee) from the State Board for Professional Medical Conduct (BPMC) into charges concerning professional misconduct by a physician.**

**COPY**

**DETERMINATION  
AND ORDER  
BPMC-98-12**

**Before: Sharon C. H. Mead, M.D.,(Chair), Adel R. Abadir, M.D. and Rev. Edward J. Hayes, Hearing Committee.**

A Notice of Hearing and Statement of Charges (Appendix I) alleges that the Respondent committed professional misconduct, due to his conviction for committing a crime under New York Law. This duly designated Committee conducted a hearing into that charge, pursuant to N.Y. Pub. Health Law § 230(10)(e)(McKinney's Supp. 1997), on November 20, 1997. At that hearing, the Committee received exhibits into evidence from both the Respondent and the New York State Department of Health (Petitioner), the Petitioner and Respondent presented oral argument, the Respondent testified and a stenographic reporter recorded the proceeding. After considering the entire record from the hearing, the Committee renders this Determination that includes our Findings of Fact and Conclusions of Law. We vote unanimously to sustain the charge against the Respondent. We vote unanimously to suspend the Respondent's New York Medical License, to stay the suspension, to fine the Respondent Ten Thousand Dollars (\$10,000.00) and to order that the Respondent perform Five Hundred Hours Community Service

Administrative Law Judge (ALJ) **James F. Horan**, served as the Committee's Administrative Officer and drafted this Determination. The Petitioner appeared by **Henry M. Greenberg, General Counsel**, by **Dianne Abeloff, Esq.** of Counsel. The Respondent appeared by **Lifshutz, Polland & Associates, P.C.** by **Alan Lambert, M.D., J.D.**

## **STATEMENT OF CASE**

The Petitioner brought this case pursuant to N.Y. Pub. Health Law § 230(10)(p) (McKinney's Supp. 1997) and N. Y. Educ. Law § 6530(9)(McKinney's Supp. 1997). Those statutes provide for an expedited hearing when the case against a licensee arises solely from a prior criminal conviction in New York or another jurisdiction, or from a prior administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. In such an expedited hearing, the statutes limit the Committee to determining the nature and severity for the penalty to impose against the licensee, Matter of Wolkoff v. Chassin, 89 NY2d 250 (1996).

In this case, the Petitioner alleges that the Respondent committed professional misconduct under N.Y. Educ. Law § 6530(9)(a)(i) (McKinney's Supp. 1997), due to his conviction for Falsifying Business Records, a misdemeanor, under New York Penal Law § 175.05(1) (McKinney's Supp. 1997). The Petitioner recommended that the Committee impose a significant fine against the Respondent, impose significant community service and order a stayed revocation or stayed suspension to appear on the Respondent's License. In his answer [ALJ Exhibit I], the Respondent admits to his criminal conviction. At hearing, he asked that the Committee find a way to preserve his medical career.

## **EVIDENCE**

**Transcripts:** The testimony from the hearing and some legal rulings appear in the Hearing Transcript. (Tr.) pages 1-58. Additional legal arguments appear in the November 20, 1997 pre-hearing conference Transcript (PH Tr.) pages 1-22. The record in this matter closed when the ALJ received the Transcripts on December 18, 1997.

**Petitioner's Exhibits:** The Petitioner introduced four exhibits into evidence.

Petitioner's 1 - Notice of Hearing and Statement of Charges.

Petitioner's 2 - The Respondent's Licensing Documents from the New York Education

Department.

Petitioner's 3 - Indictment.

Petitioner's 4 - Minutes from the Respondent's Guilty Plea.

The Petitioner amended their Statement of Charges [Petitioner 1] without opposition. The Respondent objected to Petitioner's Exhibit 3, the seventeen count criminal Indictment, because the Respondent entered a guilty plea to no count in the Indictment, but instead entered a plea to a lesser included offense under the Indictment's Count 13. The ALJ found provisions from Indictment Count 13 relevant and received Exhibit 3 into evidence, for those provisions, but crossed out the remaining provisions from Count 13 and crossed out the information on all further counts from the Indictment. The reasons for the ALJ's decision on that issue appear at PH Tr. pages 10-11.

**Respondent's Exhibits:** The Respondent introduced four documents into evidence, with no opposition from the Petitioner:

Respondent's A - Recommendation Letters

Respondent's B - Respondent's Curriculum Vitae and Certificates

Respondent's C - Assistant Attorney General's Letter to Health Department

Respondent's D - Recommendation Letters from Department of Social Services (DSS)

The Petitioner had no objection to the Exhibits.

**ALJ Exhibits:** The ALJ received the following exhibits into evidence under his own designation:

ALJ I - Copy of New York Penal Law § 175.05(1) (McKinney's Supp. 1997)

ALJ II - November 17, 1997 Letter to Committee from ALJ

ALJ III - Respondent's Answer

The Respondent amended his Answer [ALJ III] at the hearing, with no objection from the Petitioner. The Letter that appears as ALJ II relates to the ALJ's instructions to the Committee, concerning the Respondent's objections to Petitioner 3.

**Witnesses:** The Petitioner called no witnesses. The Respondent testified on his own behalf and called a character witness, Dr. Roy DeBeer. The Respondent called an additional witness,

Attorney Kenneth Kaplan, as an expert in criminal law, to testify about negotiating a guilty plea and about the reasons that a Special Assistant Attorney General submitted a letter on the Respondent's behalf [Respondent C]. Upon the Petitioner's objection, the ALJ refused to receive Mr. Kaplan's testimony, finding that the testimony amounted to improper speculation about other matters in evidence. The reasons for that decision appear at Tr. pages 18-19.

### **SIGNIFICANT LEGAL RULINGS**

In addition to the ruling the ALJ made concerning Mr. Kaplan's testimony and the ruling concerning Petitioner 3, the ALJ refused to grant the Respondent's motion to adjourn the hearing in order to empanel a new Committee. During argument at the pre-hearing conference, concerning excluding Petitioner's 3 from the record, the ALJ informed the parties that the Committee had already received the proposed Petitioner's 3 prior to the hearing and prior to the time the ALJ learned that the Respondent objected to Petitioner's 3 entering the record. Respondent's counsel then moved for the adjournment, arguing that the Committee had a chance to review the document without any instructions to disregard unsubstantiated charges in the Indictment and arguing that the situation prejudiced his client. The ALJ denied the motion, because he concluded that he took sufficient corrective measures to prevent any prejudice to the Respondent, see Afif v. Ambach, 134 A.D.2d 679, 521 N.Y.S.2d 340 (Third Dept. 1987). As noted above, the ALJ crossed out the unsubstantiated counts from the Indictment, when he admitted Petitioner's 3 into evidence. In addition, as soon as the ALJ learned that the Respondent objected to the proposed exhibit, that the Committee had already received, he informed the Committee about the Respondent's objection and advised them to disregard the document (ALJ II). The ALJ also indicated that he would provide the Committee with further instructions on the issue. The discussion on the adjournment motion appears at PH Tr. pages 10-13.

## FINDINGS OF FACT

The Committee makes the following Findings of Fact after reviewing the record in this matter. The references in brackets following the Findings refer to the exhibits [Petitioner's/ Respondent's] or testimony from the transcript [Tr.] that the Committee found persuasive in arriving at a particular finding. If any evidence in the record appears to conflict with these findings, the Committee considered and rejected that evidence in favor of the cited evidence.

1. The New York State Education Department authorized the Respondent to practice medicine in New York State on October 12, 1990, by issuing license number 184275 [Petitioner 2].
2. Upon completing his medical training, the Respondent commenced working as an employee, on a fixed salary, for his brother Jeffrey Schwartz, M.D. [Tr. 26-27].
3. The Respondent received no direct or indirect compensation based on the services billed in the Respondent's name [Tr. 27-28].
4. His brother submitted the billings for all the medical services the Respondent provided, including the billings to the Medicaid Program, even after the Respondent received his own Medicaid provider number [Tr. 31, 43].
5. The medical services the Respondent provided included performing consultations for patients in Nursing Homes [Tr. 28].
6. The Respondent resigned from his brother's practice in April, 1996 [Tr. 45].
7. A Grand Jury in Nassau County indicted the Respondent in December 1996 on seventeen counts, including a count alleging the Respondent made a false entry in a medical record [Petitioner 3].
8. On January 28, 1997, in New York State Supreme Court for Nassau County, the Respondent entered a guilty plea to Falsifying Business Records in the Second Degree, a Class A Misdemeanor, under N. Y. Penal Law § 175.05(1)(McKinney's Supp. 1997) [ALJ I; Petitioner 4, pages 12-26].

9. In making the plea, the Respondent admitted that he knowingly signed an August 3, 1993 Nursing Home consultation report that contained incorrect information [Petitioner 4, pages 12-19, 23, 26; Tr. 28, 33].
10. The prosecutor in the criminal case, the New York Attorney General's Medicaid Fraud Control Unit, agreed to allow the Respondent to resolve his case with a guilty plea, because the Respondent had entered an agreement to cooperate with the Attorney General's investigation against the Respondent's brother, Jeffrey Schwartz, M.D. [Petitioner's 4, pages 3-6; Respondent's C].
11. Since the plea, the Respondent has cooperated fully with the Attorney General and has agreed to testify against his brother at trial [Respondent C; Tr. 34].
12. Due to the Respondent's criminal conviction, DSS informed the Respondent that DSS would exclude the Respondent as a provider from the Medicaid Program [Respondent D].
13. Following an appeal, DSS reduced the Respondent's exclusion to six months only, due to the Respondent's cooperation with the Attorney General [Petitioner D].

### **CONCLUSIONS OF LAW**

The Committee made the following conclusions pursuant to the above Findings of Fact. All conclusions resulted from a unanimous vote by the Hearing Committee.

The Hearing Committee concluded unanimously that the Petitioner sustained their burden to prove the charges. Preponderant evidence demonstrated the Respondent's conviction for a crime under New York Law. Such conviction constitutes professional misconduct under N.Y. Educ. Law § 6530(9)(a)(i) (McKinney's Supp. 1997). After sustaining the charges, the Committee then considered whether to impose any sanction against the Respondent's New York License.

## DETERMINATION AS TO PENALTY

Pursuant to the Findings of Fact and Conclusions of Law that we set forth above, the Committee votes unanimously to impose the following sanctions against the Respondent, pursuant to N. Y. Pub. Health Law §§ 230-a(2)(a), 230-a(7) & 230-a(9) (McKinney's Supp. 1997):

- a one year suspension, that the Committee stays entirely;
- a Ten Thousand Dollar (\$10,000.00) Fine; and,
- Five Hundred Hours Community Service, that the Respondent must complete within four years.

As for the Community Service, the Respondent must receive approval for the Community Service from the Office for Professional Medical Conduct (OPMC). The Committee recommends strongly that the Respondent provide the community service to the elderly or to Medicaid recipients, although we decided against imposing that recommendation as an condition to the community service. The Committee decided upon this penalty after considering all the penalties available pursuant to N. Y. Pub. Health Law §§ 230-a (McKinney's Supp. 1997).

The Committee concluded that revocation would constitute too harsh a sanction under the circumstances in this case. The Respondent has cooperated with authorities in an ongoing investigation concerning fraud against the Medicaid system and the authorities have determined that his cooperation merited leniency in both his criminal sentence and his limited exclusion from the Medicaid Program. Further, the Respondent played only a limited part in the scheme to provide false billing information to Medicaid and received no direct financial benefit from the scheme. The Respondent will also have to testify in court against his own brother, a decision that has caused strain in the Respondent's relationship with his parents and other siblings [Tr. 40].

The Committee has determined, however, that the Respondent must receive a harsh penalty for using his Medical License to commit a crime. We impose a fine, in addition to the financial penalties the Respondent must satisfy from his criminal sentence, because the Respondent used his Medical License to commit his criminal conduct. We also impose a heavy community service

obligation. The Respondent admitted that he placed false information in a medical record in order to obtain payment from Medicaid, that the Respondent would be unable to obtain if he had placed the correct information in the record [Petitioner 4, pages 24-25]. Creating false records in order to obtain Medicaid reimbursement drains the already dwindling resources to provide medical care to the elderly and other Medicaid recipients. By performing community service, preferably to the elderly or other Medicaid recipients, the Respondent will be repaying his debt directly to the people who could suffer due to criminal activity such as the Respondent committed.

In addition to the other sanctions, the Committee imposes a stayed suspension, a sanction that will follow the Respondent's Medical License throughout his career. Physicians today enter practice in heavy financial debt following their educations, face high practice costs and must deal with immense paper work and other restrictions from insurers, including Medicare and Medicaid. Many might find desirable the employment relationship the Respondent had with his brother, in which the Respondent received a fixed salary and the brother's professional corporation handled all billings. The Respondent and other physicians must realize, however, that they bear the responsibility for all records and billings under their names and that their failure to exercise that responsibility can result in both criminal sanctions and in sanctions against the Respondent's Medical License. The Committee can understand that the Respondent would have greater trust in his brother, than in some other employer, but the Respondent knew better than to sign a medical record containing false information, despite his trust in his brother and despite any pressure that the brother applied.

The Committee concludes that the penalty we impose will provide the appropriate sanction for the Respondent's conduct and will deter future misconduct by other physicians, who may find themselves in a similar position.

## ORDER

Based upon the foregoing, **THE COMMITTEE ISSUES THE FOLLOWING**

### **ORDER:**

1. The Committee **SUSTAINS** the charge that the Respondent committed professional misconduct.
2. The Committee votes to **SUSPEND** the Respondent's License to practice medicine in New York State and we vote further to **STAY** the entire suspension.
3. The Respondent **SHALL COMPLETE** Five Hundred Hours Community Service.
4. The Respondent **SHALL PAY** a Ten Thousand Dollar (\$10,000.00) Fine.
5. The Respondent shall pay that sum to the Bureau of Accounts Management, New York State Department of Health, Erastus Corning Tower Building, Room 1245, Empire State Plaza, Albany, New York 12237 within thirty (30) days of the effective date of this Order.
6. Any civil penalty not paid by the prescribed date shall be subject to all provisions of law relating to debt collection by the State of New York. This includes but is 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).

7. This Order shall be effective upon service on the Respondent's or Respondent's attorney by personal service or by certified or registered mail.

Dated: Massapequa, New York  
14 January, 1998



Sharon C. H. Mead, M.D. (Chair)

Adel R. Abadir, M.D.  
Rev. Edward J. Hayes

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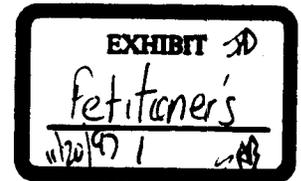
**APPENDIX I**

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

IN THE MATTER  
OF  
DOUGLAS SCHWARTZ, D.O.

NOTICE  
OF  
HEARING

TO: DOUGLAS SCHWARTZ, D.O.  
210 East 86th Street - Suite 600  
N.Y., N.Y. 10028



**PLEASE TAKE NOTICE:**

A hearing will be held pursuant to the provisions of N.Y. Pub. Health Law §230 (McKinney 1990 and Supp. 1997) and N.Y. State Admin. Proc. Act §§301-307 and 401 (McKinney 1984 and Supp. 1997). The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on October 21, 1997, at 10:00 a.m., at the Offices of the New York State Department of Health, 5 Penn Plaza, Sixth Floor, New York, New York, and at such other adjourned dates, times and places as the committee may direct.

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. You shall appear in person at the hearing and may be represented by counsel. You have the right to produce witnesses and evidence on your behalf, to issue or have subpoenas issued on your behalf in order to require the production of witnesses and documents, and you may cross-examine witnesses and examine evidence produced against you. A summary of the Department of Health Hearing Rules is enclosed.

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF

ADJUDICATION, (henceforth "Bureau of Adjudication"), (Telephone: (518-402-0748), 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.

Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law §230(10)(c), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. Pursuant to §301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person. Pursuant to the terms of N.Y. State Admin. Proc. Act §401 (McKinney Supp. 1997) and 10 N.Y.C.R.R. §51.8(b), the Petitioner hereby demands disclosure of the evidence that the Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence and a description of physical or other evidence which cannot be photocopied.

At the conclusion of the hearing, the committee shall make findings of fact, conclusions concerning the charges sustained or dismissed, and in the event any of the charges are sustained, a determination of the penalty to be imposed or appropriate action to be taken. Such determination may be reviewed by the Administrative Review Board for Professional Medical Conduct.

THESE PROCEEDINGS MAY RESULT IN A

DETERMINATION THAT YOUR LICENSE TO PRACTICE  
MEDICINE IN NEW YORK STATE BE REVOKED OR  
SUSPENDED, AND/OR THAT YOU BE FINED OR  
SUBJECT TO OTHER SANCTIONS SET OUT IN NEW  
YORK PUBLIC HEALTH LAW §§230-a (McKinney Supp.  
1997). YOU ARE URGED TO OBTAIN AN ATTORNEY TO  
REPRESENT YOU IN THIS MATTER.

DATED: New York, New York  
September 16, 1997



ROY NEMERSON  
Deputy Counsel  
Bureau of Professional  
Medical Conduct

Inquiries should be directed to: Dianne Abeloff  
Associate Counsel  
Bureau of Professional  
Medical Conduct  
5 Penn Plaza, Suite 601  
New York, New York 10001  
(212) 613-2615

IN THE MATTER  
OF  
DOUGLAS SCHWARTZ, D.O.

STATEMENT  
OF  
CHARGES

DOUGLAS SCHWARTZ, D.O., the Respondent, was authorized to practice medicine in New York State on or about October 12, 1990, by the issuance of license number 184275 by the New York State Education Department.

**FACTUAL ALLEGATIONS**

- A. On or about January 28, 1997, Respondent pled guilty and was convicted of one count of falsifying business records, in violation of §175.01(1) of the New York State Penal Law, in that Respondent prepared a consultation report and his brother billed Medicaid or Medicare for the consultation when Respondent knew that he did not perform the consultation. Respondent has agreed to make restitution in the amount of \$15,019.40.

**FIRST SPECIFICATION**

**CRIMINAL CONVICTION (N.Y.S.)**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(9)(a)(i)(McKinney Supp. 1997) by having been convicted of committing an act constituting a crime under New York state law as alleged in the facts of the following:

1. Paragraph A.

DATED: September 16, 1997  
New York, New York

A handwritten signature in black ink, appearing to read "R. Nemerson", written over a horizontal line.

ROY NEMERSON  
Deputy Counsel  
Bureau of Professional  
Medical Conduct