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THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK

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OFFICE OF PROFESSIONAL MEDICAL CONDUCT

PUBLIC

September 28, 2004

Richard Swerdlik, Physician
774 Lanett Avenue
Far Rockaway, New York 11691

Re: Application for Restoration

Dear Dr. Swerdlik:

Enclosed please find the Commissioner's Order regarding Case No. CP-04-07 which is in reference to Calendar No. 19691. This order and any decision contained therein goes into effect five (5) days after the date of this letter.

Very truly yours,

Daniel J. Kelleher
Director of Investigations

By Gustave Martine

Gustave Martine
Supervisor

cc: Barbara A. Ryan
Aaron, Rappaport, Feinstein &
Duetsch, L.L.P.
757 Third Avenue
New York, New York 10017

The University of the State of New York
Education Department

IN THE MATTER

of the

Application of RICHARD SWERDLIK for restoration of his license to practice as a physician in the State of New York.

Case No. CP-04-07

It appearing that the license of RICHARD SWERDLIK, 774 Lanett Avenue, Far Rockaway, New York 11691, to practice as a physician in the State of New York, was revoked by the Administrative Review Board of the State Board for Professional Medical Conduct, effective March 23, 1998, and he having petitioned the Board of Regents for restoration of said license, and the Regents having given consideration to said petition and having agreed with and accepted the recommendations of the Peer Committee and the Committee on the Professions, and having accepted the amended terms of probation recommended by the Committee on the Professions, now, pursuant to action taken by the Board of Regents on May 18, 2004, it is hereby

ORDERED that the petition for restoration of License No. 166777, authorizing RICHARD SWERDLIK to practice as a physician in the State of New York, is denied, but that the Order of Revocation of said license is stayed for three years, and said RICHARD SWERDLIK is placed on probation for a period of three years under specified terms and conditions, and upon successful completion of the probationary period, his license to practice as a physician in the State of New York be fully restored.

IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 10th day of August, 2004.

Commissioner of Education

Case No. CP-04-07

It appearing that the license of RICHARD SWERDLIK, 774 Lanett Avenue, Far Rockaway, New York 11691, to practice as a physician in the State of New York, having been revoked by the Administrative Review Board of the State Board for Professional Medical Conduct, effective March 23, 1998, and he having petitioned the Board of Regents for restoration of said license, and the Regents having given consideration to said petition, and having agreed with and accepted the recommendations of the Peer Committee and the Committee on the Professions, and having accepted the amended terms of probation recommended by the Committee on the Professions, now, pursuant to action taken by the Board of Regents on May 18, 2004, it was

VOTED that the petition for restoration of License No. 166777, authorizing RICHARD SWERDLIK to practice as a physician in the State of New York, is denied, but that the Order of Revocation of his license be stayed for three years, and said RICHARD SWERDLIK be placed on probation for a period of three years under specified terms and conditions, and upon successful completion of the probationary period, his license to practice as a physician in the State of New York shall be fully restored.

Case number
CP-04-07
April 12, 2004

THE UNIVERSITY OF THE STATE OF NEW YORK
The State Education Department

Report of the Committee on the Professions
Application for Restoration of Physician License

Re: Richard Swerdlik

Attorney: Barbara A. Ryan

Richard Swerdlik, 774 Lanett Avenue, Far Rockaway, New York 11691, petitioned for restoration of his physician license. The chronology of events is as follows:

07/02/86	Issued license number 166777 to practice as a physician in New York State.
07/16/97	Charged with professional misconduct by Department of Health. (See "Disciplinary History.")
12/08/97	Hearing Committee of the State Board for Professional Medical Conduct voted to suspend license until release from incarceration and to limit practice to anesthesia in an institutional setting after the suspension.
12/30/97	Order of Hearing Committee served.
03/11/98	Administrative Review Board of the State Board for Professional Medical conduct revoked license.
03/23/98	Effective date of revocation.
03/23/01	Application for restoration submitted.
11/06/02	Peer Committee restoration review.
10/16/03	Report and recommendation of Peer Committee. (See "Report of the Peer Committee.")
12/08/03	Committee on the Professions restoration review.

04/12/04 Report and recommendation of Committee on the Professions. (See "Report of the Committee on the Professions.")

Disciplinary History. (See attached disciplinary documents.) On July 16, 1997, the Department of Health charged Dr. Swerdlik with one specification of professional misconduct based on his conviction of committing an act constituting a crime under Federal law. The charges stated that on or about May 20, 1996, Dr. Swerdlik pleaded guilty to one count of Conspiracy to Commit Mail Fraud in violation of Title 18, United States Code, Section 371, and nine counts of Mail Fraud in violation of Title 18, United States Code, Section 1341, in connection with his participation in the Medicaid program. The charges stated that Dr. Swerdlik was sentenced to 46 months in prison, ordered to pay in excess of $289,000 in restitution, and upon his release from prison, ordered to be on supervised release for three years and perform 150 hours of community service. A Hearing Committee of the State Board for Professional Medical Conduct determined that he was guilty of the charge of professional misconduct and voted to suspend his license until he was released from prison. Further, the Hearing Committee voted to limit his practice to anesthesia in an institutional setting once the conditions of the suspension were satisfied. The Order of the Hearing Committee was served on December 30, 1997. The Department of Health appealed the Hearing Committee's decision to an Administrative Review Board of the State Board for Professional Medical Conduct. The Review Board sustained the determination of guilt but overturned the Hearing Committee's determination of penalty and revoked Dr. Swerdlik's license. The Review Board felt that Dr. Swerdlik violated the trust in the medical profession and lacked the integrity to practice medicine in New York. The revocation was effective March 23, 1998.

On March 23, 2001, Dr. Swerdlik submitted an application for restoration of his license.

Recommendation of the Peer Committee. (See attached "Report of the Peer Committee.") The Peer Committee (Gitman, Gujavarty, Robinson) met with Dr. Swerdlik on November 6, 2002 to review his application for restoration. In its report, dated October 16, 2003, the Committee voted unanimously to recommend that the revocation of Dr. Swerdlik's license be stayed and that he be placed on probation for three years under specified terms and conditions, including a requirement that he complete an acceptable course of retraining before resuming practice and that during the probation period he practice medicine only as a salaried physician in a hospital or other Article 28 facility.

Recommendation of the Committee on the Professions. On December 8, 2003, the Committee on the Professions (Templeman, Alexander, Porter) met with Dr. Swerdlik to review his application for restoration. Barbara A. Ryan, his attorney, accompanied him. Dr. Swerdlik presented the Committee with additional letters of support from the following:

- David Weinberger, Rabbi, Congregation Shaaray Tefila

- Audrey I. Pheffer, New York State Assemblywoman
- Malcolm A. Smith, New York State Senator

Claudia Alexander informed Dr. Swerdlik and his attorney that she had been contacted by and had conversations with New York State legislators and their staff regarding his restoration application and, therefore, felt it would be inappropriate for her to serve on the Committee reviewing this application and recused herself. Dr. Swerdlik and his attorney were informed that the meeting could continue with the two remaining Committee members with the understanding that if the members differed in their recommendations, Dr. Swerdlik could ask for a paper review by a third Committee person or ask for a new meeting with three Committee members. Dr. Swerdlik was further informed that, in the alternative, he could request that the meeting be rescheduled with three members at a later date. After conferring with her client, Ms. Ryan informed the Committee that Dr. Swerdlik was willing to proceed with the meeting with just the two Committee members present.

Ms. Ryan indicated that she was assisting Dr. Swerdlik *pro bono* because she felt that he really deserved to have his license restored. She reported that he pleaded guilty to the original criminal charges rather than face the possibility of 10 years or more in prison. She said that, with accrued interest, the amount of restitution Dr. Swerdlik was required to pay had increased to approximately $340,000 even though he had been making payments of 20 percent of his gross income until six months ago. Ms. Ryan indicated that Dr. Swerdlik had six children, lost his home about two and one-half years ago, and that he and his family were compelled to live in a friend's basement for a period of time. She reported that friends in the community recently gave Dr. Swerdlik and his family money for the down payment and closing costs on a home.

The Committee asked Dr. Swerdlik to describe the misconduct that led to the loss of his license. He said that after working a couple of years at Interfaith Medical Center, one of his colleagues, a fellow resident, encouraged him to get a job at a clinic. Dr. Swerdlik indicated that he was told that physician assistants actually examined the patients and all he had to do was come to the clinic periodically to review the charts. He reported that he called New York State and was informed that a physician could fulfill his obligation to supervise a physician assistant through the review of patient charts so long as the physician was available to the physician assistant for consultation as necessary. He said that he had a beeper and received calls "about half a dozen times." Dr. Swerdlik told the Committee that he went to the clinic and met the office manager and physician assistants. He indicated that he started working part time at the clinic to augment his earnings as he had only completed his residency two and one-half years earlier. He stated that he was simultaneously working as an anesthesiologist at the hospital. He said that each week he would review and approve the charts prepared by the physician assistants, thereby indicating that prescriptions and tests ordered by the physician assistants were appropriate. Dr. Swerdlik said that at the time it "seemed like the medical management was appropriate." He further indicated that none of the prescriptions he approved were for narcotics and he had no reason to suspect that fraud was occurring. He reported that he later discovered that the clinic's office manager

was in a financial partnership with the pharmacy. He also indicated that the owners of the clinic had clinics at other locations.

Dr. Swerdlik told the Committee that he now realizes he was naive as a new practitioner and that he can't be so trusting in the future. Nonetheless, he indicated that he accepts responsibility for what he did as he was the "physician of record." He said, "I never would have done it if I had known what was going on. I thought I was helping." He said that some of the patients were legitimate but that he knows that people "lost out on Medicaid monies" that were diverted by the clinic's fraudulent activities. He indicated that he was trained as an anesthesiologist and was never a businessman. He said that at the time his "moonlighting was new and foreign" to him. In response to the Committee's inquiry, Dr. Swerdlik explained that the purpose of Medicaid was to provide services to people who are not able to afford them. He indicated that his parents were immigrants to this country and as a child he went to clinics for medical assistance.

The Committee asked Dr. Swerdlik why he pleaded guilty to intentional knowledge to defraud. He explained that his trial had started and his attorney had employed professional jury watchers. He reported that his attorney told him, "They're going to find you guilty." He said that his attorney encouraged him to "take four years rather than ten." Dr. Swerdlik indicated that he had to agree to the wording of "intentional knowledge" as part of his guilty plea. Ms. Ryan indicated that another physician, Dr. W., at the clinic had already pleaded guilty and agreed to testify against Dr. Swerdlik but that the Court record indicates that before Dr. W. agreed to cooperate with the government, he stated that he did not tell the government that Dr. Swerdlik had any knowledge that any of the patients were fake. The Committee asked why Dr. Swerdlik didn't think something was wrong if he was getting paid for "just shuffling papers." Dr. Swerdlik replied that he was told by "Albany" that this was permissible as long as the supervising physician was available for consultation with the physician assistant. He said, "They were looking for someone to dupe. I was the dope that got duped."

The Committee asked Dr. Swerdlik why he failed to recognize at the time that the responsibilities of a physician involve more than just reviewing charts. He replied that it was his first experience in a general practice situation. He said, "People who know me know that I am a sincere and naïve person." Dr. Swerdlik reported that he stopped working at the clinic after he went to his accountant who told him that what he was doing "just doesn't look right." The Committee asked Dr. Swerdlik if he had any questions while reviewing the files prepared by the physician assistants. He replied, "They seemed competent. There were only relatively minor things that looked questionable." He said, "I admit that that was not the best way to practice medicine." He indicated that at the time he thought people were getting appropriate medical assistance even if it was not optimal care.

The Committee asked Dr. Swerdlik what he would do differently now were his license restored. He replied, "I've learned a lot, especially in prison." He said that he now realizes he cannot automatically trust people. He stated, "I would check more

closely before entering a new situation. I would consult an attorney." He explained that he has taken a number of continuing medical education courses, including some that explored medical legal issues. Dr. Swerdlik said, "Whatever I need to do, I will do." He explained his attempts to keep current in the profession and discussed his teaching and community service activities. He told the Committee that he is now a better person for what happened to him and relayed the steps he has taken toward rehabilitation. He said, "I have seen good things in many people." He explained how he has used his life lessons to help his children understand right from wrong and encourages them to always try their best. He told the Committee that he would be grateful for the opportunity to have his license restored and help the community.

The Committee asked Dr. Swerdlik if he could provide evidence of his restitution payments and a copy of the relevant pages of Dr. W.'s testimony concerning Dr. Swerdlik's knowledge regarding the fake patients. These documents were received and considered by the Committee subsequent to the meeting.

The overarching concern in all restoration cases is public protection. Education Law §6511 gives the Board of Regents discretionary authority to make the final decision regarding applications for the restoration of a license to practice as a physician in New York State. 8NYCRR §24.7(2) charges the Committee on the Professions (COP) with submitting a recommendation to the Board of Regents on restoration applications. Although not mandated in law or regulation, the Board of Regents has instituted a process whereby a Peer Committee first meets with an applicant for restoration and provides a recommendation to the COP. A former licensee petitioning for restoration has the significant burden of satisfying the Board of Regents that there is a compelling reason that licensure should be granted in the face of misconduct so serious that it resulted in the loss of licensure. There must be clear and convincing evidence that the petitioner is fit to practice safely, that the misconduct will not recur, and that the root causes of the misconduct have been addressed and satisfactorily dealt with by the petitioner. It is not the role of the COP to merely accept, without question, the arguments presented by the petitioner but to weigh and evaluate all of the evidence submitted and to render a recommendation based upon the entire record.

The COP concurs with the conclusion of the Peer Committee that Dr. Swerdlik "has made a strong effort at reeducation and rehabilitation" and has "demonstrated sincere remorse." Dr. Swerdlik has participated in a significant number of continuing medical education courses, including courses in medical legal issues and in risk management. The Committee notes that Dr. Swerdlik has made a good faith effort at making regular monthly payments toward the restitution he owes. He was able to clearly articulate the purposes of the Medicaid program and expressed sincere remorse for the needy people who were deprived of potential medical assistance because of the fraudulent activities at the clinic. The COP found Dr. Swerdlik's responses to its questions credible and accept his explanation of naivety as plausible. While not condoning the misconduct, the Committee notes that the misconduct occurred only a few years after he started to practice and occurred only at the clinic where he was moonlighting to supplement his income at the hospital. Dr. Swerdlik delineated the steps

he has taken and will take in the future to make certain that he is fully aware of the full implications of his future activities. He described how he has tried to help his six children learn from his mistakes. The Committee likewise notes that Dr. Swerdlik continues to volunteer in the community. The COP agrees with the assessment of the Peer Committee that "the risk of future misconduct by the applicant is very low and that restoration of his license to practice medicine in New York State does not pose a risk to the public." The COP finds that Dr. Swerdlik presented a compelling case for the restoration of his license at this time. However, since Dr. Swerdlik has not practiced as an anesthesiologist for some time, the COP wants him to successfully complete a retraining course or supervised practice program in anesthesiology before being allowed to practice in that specialty area. Also, the COP agrees with the Peer Committee that Dr. Swerdlik's resumption of practice should be restricted to a supervised setting, such as an Article 28 or other facility licensed by New York State.

Therefore, after a careful review of the record and its meeting with him, the Committee on the Professions voted unanimously to recommend that the order of revocation of Dr. Swerdlik's license to practice as a physician in New York State be stayed for three years, that he be placed on probation for three years under specified terms attached to this report and labeled as Exhibit "A," and that upon satisfactory completion of the probationary period, his license be fully restored.

Leslie Templeman, Chair

Joseph B. Porter

EXHIBIT "A"

TERMS OF PROBATION
OF THE COMMITTEE ON THE PROFESSIONS

RICHARD SWERDLIK

1. That the applicant, during the period of probation, shall be in compliance with the standards of conduct prescribed by the law governing the applicant's profession;

2. That the applicant shall submit written notification to the Director, Office of Professional Medical Conduct (OPMC), New York State Department of Health, Suite 303, 4th Floor, Hedley Park Place, 433 River Street, Troy, NY 12180-2299, of any employment and/or practice, applicant's residence, telephone number, and mailing address and of any change in the applicant's employment, practice, residence, telephone number, and mailing address within or without the State of New York;

3. That the applicant shall submit written proof from the Division of Professional Licensing Services (DPLS), New York State Education Department (NYSED), that the applicant has paid all registration fees due and owing to the NYSED and the applicant shall cooperate with and submit whatever papers are requested by DPLS in regard to said registration fees, said proof from DPLS to be submitted by the applicant to the Department of Health (DOH), addressed to the Director, OPMC, as aforesaid, no later than the first three months of the period of probation;

4. That the applicant shall submit written proof to the DOH, addressed to the Director, OPMC, as aforesaid, that 1) the applicant is currently registered with the NYSED, unless the applicant submits written proof that the applicant has advised DPLS, NYSED, that the applicant is not engaging in the practice of the applicant's profession in the State of New York and does not desire to register, and that 2) the applicant has paid any fines which may have previously been imposed upon the applicant by the Board of Regents or pursuant to section 230-a of the Public Health Law, said proof of the above to be submitted no later than the first two months of the period of probation;

5. That during the period of probation the applicant shall practice medicine only in a supervised setting, such as a facility licensed by New York State, where close practice oversight is available on a daily basis and where quality assurance and risk management protocols are in effect. Applicant shall not practice medicine until the supervised setting proposed by Applicant is approved, in writing, by the Director of OPMC. Applicant shall propose an appropriate supervisor or

administrator in all practice settings, who shall be subject to the written approval of the Director of OPMC and who shall submit written reports to OPMC every six months regarding Applicant's overall quality of medical practice;

6. That the applicant shall satisfactorily complete a retraining course or supervised practice program in anesthesiology before practicing in that specialty area, said course or program to be approved and monitored by the Director, OPMC;

7. That the applicant shall make quarterly visits to an employee of the OPMC, DOH, unless otherwise agreed to by said employee, for the purpose of said employee monitoring the applicant's terms of probation to assure compliance therewith, and the applicant shall cooperate with said employee, including the submission of information requested by said employee, regarding the aforesaid monitoring; and

8. That upon receipt of evidence of noncompliance with or any other violation of any of the aforementioned terms of probation, the OPMC may initiate a violation of probation proceeding.

The University of the State of New York

NEW YORK STATE EDUCATION DEPARTMENT
OFFICE OF PROFESSIONAL RESPONSIBILITY
STATE BOARD FOR MEDICINE
----------X

In the Matter of the Application of

RICHARD SWERDLIK

for the restoration of his license to practice as a physician in the State of New York.

----------X

REPORT OF THE PEER COMMITTEE
CAL. NO. 19691

The applicant was authorized to practice as a physician in the State of New York by the New York State Education Department.

PRIOR DISCIPLINE

The applicant's medical license was revoked, effective March 23, 1998, as a result of an expedited direct referral proceeding following his felony conviction for conspiracy to commit mail fraud and mail fraud in connection with his participation in the Medicaid program. The applicant pled guilty, admitting that he had agreed to commit crimes with others and that he billed for procedures that were medically unnecessary. The applicant pled that he became a

member of a conspiracy to defraud the Medicaid program of $2.5 million. The applicant's proceeds in that scheme amounted to $289, 000.00.

The Hearing Committee, finding the applicant guilty of misconduct, determined that his license should be suspended while he was in prison, with limitations on said license thereafter. In its Determination, the Administrative Review Board of the NYS Board for Professional Medical Conduct (ARB), sustained the Hearing Committee Determination finding the applicant guilty of professional misconduct, and voted unanimously to revoke his license.

The applicant served 40 months in prison and has done more than the mandated 150 hours of community service.

THE APPLICATION

On March 23, 2001 the applicant petitioned the New York State Education Department for the restoration of his license to practice as a physician in the State of New York.

Regarding his continuing medical education (CME) and how it is relevant to his prior misconduct the application states in part:

> "*The Anesthesiologist and the Law* taught me to have a heightened awareness of potential medical practice and billing problems, to avoid legal pitfalls, to confer with lawyers before getting involved in new arrangements, caution involving billing - realizing we are responsible for all billing that leaves our office. I found it all very pertinent for

me to help me avoid any future legal problems. It gave me a better understanding and enthusiasm to be more vigilant in proper medical practice."

Regarding rehabilitation activities the application states:

"I attended a symposium on *The Anesthesiologist and the Law* (part of PGA) including a portion, *Legal Medicine: a Primer for Anesthesiologists*, another on compliance issues for anesthesiologists, and another on *Risk Management: Responding to an Adverse Event*. We were educated on the legal landscape regarding medicine. I've learned a lot from my dramatic life experience, the importance of integrity in Medicare/Medicaid and public programs. My experience has allowed me to emphatically tell other physicians the importance of practicing medicine in a lawful manner. I have been tremendously humbled by the whole experience. I anxiously look forward to the opportunity to once again practice medicine and be a benefit to society."

The cover letter accompanying the application states in part:

"With great humility, I gratefully come before the Committee on the Professions to review my application for restoration of my medical license. I approach you with a feeling of sincere remorse, remorse for my actions having caused harm to the Medicaid program, remorse for the effect my actions had on loss of valuable funds and limited resources that society could have benefited from, remorse for not doing my part to help

maintain the integrity of the Medicaid system, and remorse for the pain and suffering which my own family has endured."

"I have learned the need for physicians to be the guardians of public programs, and to be vigilant of any potential abuse."

"However, the most vivid reminder of what my actions have caused is seeing the enduring pain on the faces of my wife and children. That pain remains, and will always be a constant reminder to me of the harm my actions have caused."

"With my license restored I will be vigilant in safeguarding society's social and medical programs as well as being in contact with other physicians to promote their awareness in safeguarding the integrity of society's programs. I pledge to be a physician which society will benefit from and will be proud of."

INVESTIGATIVE INTERVIEW

On July 12, 2001 an interview was conducted by telephone with the applicant. The content of the application was reviewed.

The applicant said that subsequent to revocation, he sought employment with life insurance companies doing interviews and histories, and drawing blood. He said he was advised by the Division of Professional Licensing Services that such employment might appear to be an attempt to practice medicine without a license and might jeopardize his ever receiving his license

again. He was also offered a job working in a doctor's office drawing blood and weighing patients. He received similar advice again from the Division of Professional Licensing Services, cautioning against such employment.

The applicant said he tried getting employment with pharmaceutical and medical equipment companies, working in their sales departments, but was turned down because of his felony conviction.

He said he wanted to volunteer on an ambulance, as he is Advanced Cardiac Life Support (ACLS) certified. He said he contacted DPLS in Albany, and was advised not to volunteer, again being told this would appear as if he was trying to practice medicine without a license.

The community service that the applicant said he has been involved in since the revocation of his license includes teaching adults to read English and helping them attain their high school diplomas. He also said he volunteered teaching adults and children religious studies, as well as conducting/leading religious services. Additionally, he said he volunteers by serving meals at a local school.

The applicant stated that he had obtained 50 hours of continuing education credits since revocation. He attended the AOJS conferences, August 2000, for 8 CME credit hours, as well as the post graduate assembly-PGA-New York State Society of Anesthesiologists, December 9-13-2000 for 42 CME credit hours. During this time frame, he became ACLS certified. He also attended anesthesia simulator training; this involves administering anesthesia to a computerized

mannequin that has breath and heart sounds, reacting to the various medications administered under different surgical situations and simulating operating room conditions.

The applicant said he felt he needed to review the basics, so he has been studying *Miller's Text in Anesthesia*. In addition, he read *The New England Journal of Medicine* from the Internet. He also said he subscribes to *Practical Pain Management, American Journal of Anesthesiology News, American Journal of Pain Management,* and *Hospital Physician.*

The applicant said he has maintained the following certifications: ACLS (Advanced Cardiac Life Support) and Pain Management Certification.

THE MEETING

On November 6, 2002 this Peer Panel met to consider the application in this matter. The applicant appeared and was represented by Barbara A. Ryan, Esq. Ihenji B. Young, Esq. represented the Division of Prosecutions of the Office of Professional Discipline.

After preliminary opening remarks by the Chairperson and the parties, the applicant offered more documents which were accepted and marked as applicant's Exhibits A through H.

The applicant then called Dr. Joel Benowitz. Dr. Benowitz said that he had worked with the applicant often from 1990 through 1995 and was very impressed with the applicant's abilities. He said he was aware of the applicant's problem with Medicaid but was not aware of all the details. He said that he met the applicant again after the applicant's prison term and said that in

his discussions with the applicant regarding these problems, the applicant always took full responsibility for his actions. He said that should the applicant regain his license he would work with the applicant again, after the applicant underwent a period of retraining.

Dr. Joel Loewenstein was then called by the applicant. Dr. Loewenstein said that he had worked with the applicant often before the applicant lost his license and always found the applicant to be very competent. Dr. Loewenstein said that he had been made aware of the charges against the applicant and that he believes that the applicant possesses the moral character and fitness to return to the practice of medicine.

The applicant was then called and spoke on his own behalf and repeated much of what is in his application and in the investigative interview.

The applicant said that when he obtained his Medicaid provider number he never received any training regarding how to conduct his Medicaid practice so he called the New York State Licensing Department and was told that if he was working with a physician's assistant in Medicaid clinics that he need only check five to ten percent of the charts prepared by said physician's assistant. That would be enough to be in compliance with the program.

The applicant went on to say that he never knowingly committed fraud and that he pled guilty on the advise of his attorney during the criminal proceeding because if he was found guilty after a jury trial he was facing ten years in prison. A guilty plea would result in a four year sentence. He said he pled guilty for his family's sake.

The applicant's plea read in part as follows:

"When I first became associated with these clinics, I was not aware of the fraudulent nature, nor did I intend to commit a fraud or any other crime. During the period charged in the indictment, I became aware of the information that caused me to conclude that many of the patients who were coming to the clinics were not receiving proper medical treatment, but were there to obtain prescriptions for various forms of medication. I also understood that many of the tests that were performed were billed to Medicaid, even though not all were medically necessary. I consciously avoided learning the actual details of what was going on in the clinics, and I am therefore guilty of the crimes charged in the indictment."

Upon cross examination by Ms. Young the applicant agreed that his plea also included the following language:

"I agreed to commit these crimes with others. I knew some of the medical tests were billed under my provider number and I received payment in the mail for them, knowing that many of these procedures were not medically necessary. I knew the checks would be sent to me through the United States mails. I acknowledge that I received the checks referred to in Counts Two through Ten in this matter."

And,

"THE COURT: Did you, doctor, at the time you committed the acts charged in the indictment, know that it was against the law?

THE DEFENDANT: Yes.

THE COURT: You knew that at the time on each one of these counts?

THE DEFENDANT: Yes."

The applicant went on to say that the above quoted language was not the language that he wanted to use to enter his plea but it was the language he was required by the prosecutor and the court to use. Otherwise his plea would not have been accepted and he would have to go through with the trial and would then be facing ten years in prison instead of four years.

The applicant repeated that he had no knowledge of fraud and no intent to commit fraud. He stated, however, that he was responsible because he was the physician of record and responsible for whatever billing was done in his name. He said that accepting the plea language imposed upon him was the lesser of two evils.

Upon questioning by the panel, the applicant stated that he believed that because he was the physician of record he became the "target" of the investigation. He said that, from 1993 until he was indicted, he thought the Government would realize that it was all a mistake to think that he was involved in any fraudulent activity. He said that despite his plea he did not knowingly conspire with anyone to commit fraud or any other unlawful act.

The applicant went on to say that in the future, should his license he restored, he would be much more careful about who he associated with. He said he would also limit his practice to anesthesiology.

On redirect examination, Ms. Ryan directed the panel's attention to 18 NYCRR518.3 (effective June 6, 1988) and referred to page 7 of applicant's Exhibit F. Ms. Ryan said that she thought that this would explain a lot as to why the applicant become a target of this investigation.

The applicant then called Rabbi David Weinberger. Rabbi Weinberger stated that he has known the applicant for about thirteen years and has had many dealings with him and his family. He said that he is aware of the applicant's criminal history and had visited the applicant in prison a few times. He said that what the applicant regretted was that he, the applicant, had not been vigilant in his position at the clinics. He said that from the beginning, right from day one, the applicant said he was going to make any amends, or corrections in his character, that were necessary. He said that he is convinced and assured that the applicant is remorseful for the crimes against the Medicaid system.

Dr. Mordechi Bluth was then called by the applicant. Dr. Bluth stated that he has known the applicant since 1988 and worked with him for many years. Dr. Bluth stated that from 1973 to 1998 he has been involved in peer review committees or quality assurance committees at individual hospitals and on a statewide basis. When asked about his opinion of the applicant's ability as an anesthesiologist he said that he chose the applicant to anesthetize him when he

needed an operation. He said he believes the applicant's abilities as an anesthesiologist to be superlative.

Dr. Bluth went on to say that he was aware of the applicant's criminal background and believes the applicant to be remorseful for what happened, especially for what happened to his family.

Dr. Bluth stated that the applicant's criminal history does not change his opinion as to the applicant's skills and that he thinks the applicant, with refresher training in anesthesiology, would be able to return to practice. He said he would hire him. He said he knows several other surgeons who feel the same way.

Ingrid Davis, RN. was then called by the applicant. Ms. Davis said that she had worked with the applicant at least one to two days a week for ten years and always found him to be highly qualified, very professional and very kind to patients. She said that she was aware of his criminal problems with Medicaid but believes that, with refresher training, he would be able to return to practice.

Dr. Jay Fenster was then called by the applicant. Dr. Fenster said that he has known the applicant for eleven years and had worked with him and believes him to be a superb anesthesiologist. He stated that he is aware of the applicant's criminal background and had visited him in prison. He said that he thought that the applicant's problems with Medicaid were completely out of character and that with proper retraining the applicant could return to practice

and that he would hire the applicant. He said he absolutely believes the applicant possesses the moral character required of a physician.

Victoria Swerdlick, the applicant's wife, was then called by the applicant. She said that she has been married to the applicant for twenty years and they have six children. She went on to say that her husband was horrified by the charges against him and remorseful on a daily basis that he could ever have been involved in something, or been used for something, that would have in any way harmed an entitlement program for people to receive medical care. She said she visited her husband in prison as often as allowed, which was once a week, and that he was in daily contact with their children by telephone and letter while imprisoned. She said the family was devastated by all of this. She went on to say that one of the reasons her husband pled guilty was because his attorney had professional jury watchers in the trial and they said that the jury had absolutely decided that her husband was guilty.

The applicant then offered additional materials which were accepted and marked as Exhibits I through O.

The parties then made closing statements.

Ms. Young closed by saying that there is a contradiction between the applicant's plea of guilty and his position during this proceeding. She said this seems to demonstrate a lack of remorse and rehabilitation and therefore the Department opposes this application for restoration of licensure.

Ms. Ryan closed by saying that the applicant explained why he had pled guilty and that he has suffered enough in this community and in this society. She said the application for restoration should be granted.

RECOMMENDATION

We unanimously recommend that the application herein be granted and that the revocation of the applicant's license to practice medicine in the State of New York be stayed. The applicant has made a strong effort at reeducation and rehabilitation through his CME courses, his reading of medical journals, his teaching and his other involvement in community service.

The applicant has also demonstrated sincere remorse before this Panel. The Panel strongly believes this based on our observation of the applicant's demeanor before us throughout this proceeding. The applicant has taken responsibility for these crimes having taken place while he should have known it was going on. He said he should have been more diligent toward his obligations as the physician of record.

We believe the applicant has been punished enough. He spent forty months in prison, lost physical contract with his family during that time, lost his home and his practice.

The Panel believes the risk of future misconduct by the applicant is very low and that restoration of his license to practice medicine in New York State does not pose a risk to the public and that such restoration is in the public interest.

We further unanimously recommend that the applicant be placed on probation for three years under the standard terms of probation plus the following terms of probation:

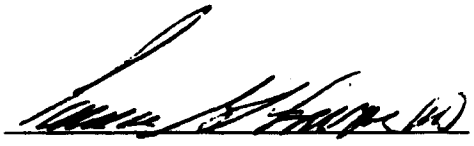
- That before the applicant is allowed to resume the practice of medicine he must undergo a course of retraining and must submit satisfactory proof of said retraining to the Department of Health.
- That during the period of probation, the applicant shall practice medicine only as a salaried physician in a hospital or other Article 28 facility.

Respectfully submitted,

Paul Gitman, MD, Chairperson

Krishnareddy Gujavarty, MD

Benjamin Robinson, Public Member



10/16/03

Chairperson Dated