



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

March 16, 1998

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Barbara A. Ryan, Esq.
Aaronson, Rappaport, Feinstein
& Deutsh, LLP
757 Third Avenue
New York, New York 10017

Kathleen Wasson, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

Richard Swerdlik, M.D.
Otisville Correctional Facility
P.O. Box 8
Otisville, New York 10963

RE: In the Matter of Richard Swerdlik, M.D.

Dear Ms. Ryan, Ms. Wasson and Dr. Swerdlik:

Enclosed please find the Determination and Order (No.97-305) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

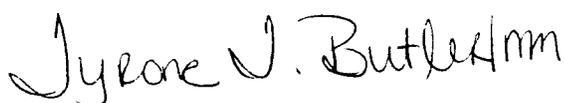
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

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

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

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

Handwritten signature of Tyrone T. Butler in black ink.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)

In The Matter Of

Richard Swerdlik, M.D. (Respondent)

**Administrative Review
Board (ARB)
Determination and
Order 97-305**

**Proceeding to review a Determination by a Hearing Committee (Committee)
from Board for Professional Medical Conduct (BPMC)**

COPY

**Before Board Members : Briber, Stewart, Sinnott, Price & Shapiro.
Administrative Law Judge James F. Horan served as the Board's Administrative Officer.**

**For the Respondent: Barbara A. Ryan, Esq.
For the Petitioner: Kathleen Wasson, Esq.**

After a hearing into charges that the Respondent committed professional misconduct due to his conviction under Federal Law for participation in a scheme to defraud the Medicaid Program, a BPMC Committee sustained the charge, suspended the Respondent's New York Medical License (License) for a limited time and limited the Respondent's License permanently following the suspension. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney Supp. 1998), the Petitioner asks the ARB to overturn the Committee's Determination and revoke the Respondent's License. After considering the hearing record and the parties' briefs, the ARB finds the Committee's Determination inconsistent with their own findings and with the hearing record. Due to the Respondent's participation in a scheme to use his License to defraud the Medicaid Program, the ARB finds that the Respondent lacks the integrity to practice medicine in New York State. We vote unanimously to revoke the Respondent's License.

COMMITTEE DETERMINATION ON CHARGES

The Petitioner filed charges with BPMC alleging that the Respondent violated N. Y. Educ. Law § 6530(9)(a)(ii)(McKinney Supp. 1998), which defines professional misconduct to include acts that result in a conviction under Federal Law. The charges alleged that the Respondent entered a guilty plea in the United States District Court for the Southern District of New York, for conspiracy to commit mail fraud (one count) and mail fraud (nine counts), arising from the Respondent's participation in a scheme to defraud the Medicaid Program for \$2.5 Million Dollars. An expedited hearing ensued pursuant to N.Y. Pub. Health Law § 230(10)(p)(McKinney Supp. 1998), before a BPMC Committee, who rendered the Determination which the ARB now reviews. In such an

expedited hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The Committee sustained the charge and found that the Federal Court sentenced the Respondent to serve forty-six months in prison, to pay Two Hundred Eighty-Nine Thousand Dollars (\$289,000.00) in restitution, to serve three years in supervised release following his incarceration and to perform One Hundred Fifty hours community service. In considering whether to impose a penalty against the Respondent's License for his criminal activity, the Committee noted their concern that the Petitioner began this proceeding while the Respondent remained incarcerated. The Committee described the proceeding as premature, because the incarceration prevented the Respondent from practicing medicine and prevented the Respondent from appearing at the hearing and explaining his motivation for the Medicaid theft. Although the Committee found the Respondent lacked scruples or honesty, the Committee noted that the Respondent functioned well as a clinical physician. The Committee voted to suspend the Respondent's License during his incarceration and to limit the Respondent's License thereafter to practicing anesthesia exclusively. The Committee felt that the License Limitation would restrict the Respondent to practice in institutions, where "he can be watched". The Committee also felt, that by allowing the Respondent to continue practicing medicine, they would be aiding the Respondent in paying the restitution that the Federal Court ordered.

REVIEW HISTORY AND ISSUES

The Committee rendered their Determination on December 23, 1997. The Petitioner then commenced this proceeding on January 5, 1998, when the ARB received the Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and Respondent's reply brief. The record closed when the ARB received the Respondent's reply brief on February 12, 1998.

The Petitioner argues that revocation constitutes the only appropriate remedy for the Respondent's misconduct and that the Committee grounded their Determination in inconsistent findings and irrelevant conclusions. The Petitioner alleges that the Committee:

- decided their sanction by considering facts outside the record;
- found improperly that evidence showing the Respondent to be a good father and doctor outweighed his dishonest and unscrupulous conduct;
- criticized the Petitioner improperly for bringing this case to hearing during the Respondent's incarceration; and,
- contradicted their Determination that the Respondent would no longer steal, by limiting the Respondent to a practice "where he can be watched".

The Petitioner's brief notes that the courts, the ARB and other Hearing Committees have found Medicaid Fraud to constitute conduct that warrants revocation and asks the ARB to overturn the Committee and vote to revoke the Respondent's License.

In reply, the Respondent asks that the ARB sustain the Committee's Determination, due to such mitigating factors as his value to the community as a skillful and compassionate physician, his need to provide for his wife and six children and his need to provide restitution under the Federal Court's sentence. The Respondent argues that his forty-six month prison sentence will provide sufficient punishment and that he entered a guilty plea to consciously avoiding learning details about events at his clinic, rather than to knowingly defrauding the Medicaid Program. The Respondent distinguishes the cases that the Petitioner cites to support revocation, arguing that those cases involved respondents who committed intentional conduct. The Respondent contends that the cases both sides cite demonstrate that a range of penalties exist for the Respondent's misconduct, that justified the Committee in imposing a penalty to suit the specific facts in this case. The Respondent notes that, due to the Committee's Determination, the Respondent can never engage in unscrupulous billing practices again, because the Respondent can practice only in an institutional setting.

REVIEW BOARD DETERMINATION

All ARB Members participated in this case, considered the record and considered the parties' briefs. Dr. Price participated in the February 27, 1998 Deliberations by telephone. The ARB sustains the Committee's Determination finding the Respondent guilty for professional misconduct. Neither

party challenged the Committee's Determination on the charges. We overturn the Committee's penalty, because we find the Committee's Determination inconsistent with both their findings and the record, we find statements the Committee made to support their Determination and arguments the Respondent made for sustaining the Committee's Determination unconvincing and we find the Respondent's conduct warrants the most severe penalty possible. We vote to revoke the Respondent's License.

First, we find unconvincing the Committee's concern over the hearing proceeding during the Respondent's incarceration. No due process violation occurs due to an accused person's absence from a hearing, as long as the accused person has notice about the hearing and an opportunity to be heard, Matter of Sokol v. New York State Dept. of Health, 223 AD2d 774, 636 NYS2d 167 (Third Dept. 1996). The Respondent had representation by counsel at the hearing and the opportunity to present evidence. The Committee complained because they had no opportunity to examine the Respondent's penitence. Federal Judge Conti, who sentenced the Respondent, did have an opportunity to observe the Respondent and the Committee had the opportunity to read Judge Conti's comments in the sentencing minutes [Petitioner's Exhibit 4, page 28]. The Judge stated that he doubted that the Respondent accepted responsibility in the case.

In discussing their opinion that the Petitioner brought this case prematurely, the Committee noted that the Respondent posed no danger to the public health during his incarceration, because he could not practice medicine in prison, or if he could practice, he would be practicing within a criminal community. The ARB takes great offense at this statement by the Committee, that shows indifference to whether persons in prison deserve safe medical care. A physician must provide acceptable medical care to any and every person the physician serves, and neither a physician nor the medical profession can assume that any person or group in society deserves any less acceptable care than any other person or group.

The ARB finds several portions in the Committee's Determination internally inconsistent. The Committee found no problem with the quality of the Respondent's medical care, yet the Committee limited the Respondent's License to practicing anesthesiology only. In the past, the ARB and some Committees, have used license limitations to restrict a physician's practice due to concern about the care the physician rendered in a practice area, Minielly v. Comm. of Health, 222 AD2d 750, 634

NYS2d 856 (Third Dept. 1995). In addition, the Committee noted that they, as representatives of society, found no reason to believe that the Respondent would steal again, yet the Committee indicated that the Respondent should practice in an institution, "where he can be watched". Further, although the Committee's Determination provides for a limitation on the Respondent's practice, the Committee's Order makes no mention about the limitation [see Committee Determination, pages 4-6].

In addition to the internal inconsistencies, the ARB finds inconsistencies between the Committee's findings and their Determination. The Committee described the Respondent's conduct as "stealing" and the Committee described the Respondent as "being a thief". The Committee also noted that society places enormous trust in physicians, and found that the Respondent had violated that trust. The Committee also found that the Respondent lacks scruples or honesty. Despite all these findings, the Committee would allow the Respondent to retain his License, due to their conclusion that the Respondent's medical skills outweigh his criminal conduct. The ARB disagrees. We have Determined in the past, and the courts have sustained Determinations, that a Respondent's fraudulent conduct in medical practice, standing alone, provides a sufficient ground on which to revoke a physician's license, see Matter of Glassman v. Dept. of Health, 208 AD2d 1060, 617 NYS2d 413 (Third Dept. 1994).

The ARB rejects the Respondent's contention, in arguing to sustain the Committee's Determination and in arguing to distinguish his case from other disciplinary actions, that he made no plea to knowingly defrauding the Medicaid Program. The record does indicate that the Respondent made a prepared statement at his plea allocution to the effect that he avoided learning details about what happened at clinics involved in the Medicaid scheme [see Petitioner's Exhibit 3, pages 731-732]. The Respondent, however, also admitted at the plea allocution that he agreed to commit crimes with others and that he billed for procedures under his Medicaid provider number that he knew to be medically unnecessary [Petitioner's Exhibit 3, page 733]. In addition, in response to questions from Federal Judge Samuel Conti, the Respondent agreed that he knowingly became a member of a conspiracy and that he knowingly and willfully devised and participated in a scheme to defraud [Petitioner's Exhibit 3, pages 733-734]. The ARB also rejects the Respondent's contention that society's best interests require maintaining the integrity of the hearing process, by leaving the

Committee's Determination undisturbed. Society through the legislature gave the ARB the authority to determine whether the Committee imposed an appropriate penalty and that authority means that the ARB may substitute our judgement for the Committee's when imposing a penalty, Matter of Kabnick v. Chassin, 89 NY2d 828 (1996).

In voting unanimously to revoke the Respondent's License, the ARB concludes that the Respondent used his medical license to commit fraud. He admitted to billing for procedures he knew to be unnecessary. He participated in a scheme to defraud the Medicaid Program for 2.5 Million Dollars. The Respondent's proceeds in that scheme apparently amounted to Two Hundred Eighty-Nine Thousand Dollars (\$289,000.00). The Committee stated that society made a substantial investment in the Respondent. The Respondent apparently felt himself entitled to more from society and he participated in a scheme to obtain money from the funds society set apart to provide medical care to the most needy. Judge Conti noted that, at the time the Respondent committed his misconduct, the Respondent made over Three Hundred Thousand Dollars (\$300,000.00) per year, and that in six years from his criminal conduct to his sentencing, the Respondent made no attempt to repay anything that he stole [Petitioner's Exhibit 4, page 28]. We agree with the Committee that the Respondent lacks honesty and scruples. Although many people spoke or wrote on the Respondent's behalf and the Respondent has shown no deficiencies in his clinical skills, the Respondent has violated the trust in the medical profession and he has proved that he lacks the integrity to practice medicine in New York.

ORDER

NOW, based upon this Determination, the Review Board renders the following **ORDER**:

1. The ARB **SUSTAINS** the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB **OVERTURNS** the penalty that the Committee imposed for that misconduct.
3. The ARB **REVOKES** the Respondent's License to practice medicine in New York State.

Robert M. Briber

Sumner Shapiro

Winston S. Price, M.D.

Edward C. Sinnott, M.D.

William A. Stewart, M.D.

In The Matter Of Richard Swerdlik, M.D.

William A. Stewart, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Swerdlik.

Dated : 10 Mar, 1998

William A Stewart

William A. Stewart, M.D.

In The Matter Of Richard Swerdlik, M.D.

Sumner Shapiro, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Swerdlik.

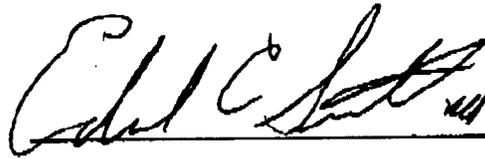
DATED: March 10, 1998


Sumner Shapiro

In The Matter Of Richard Swerdlik, M.D.

Edward C. Sinnott, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Swerdlik.

Dated : March 10, 1998

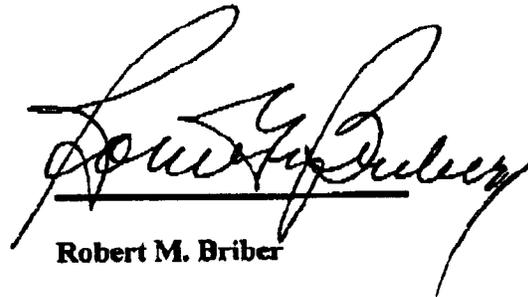
A handwritten signature in black ink, appearing to read "Edward C. Sinnott", written over a horizontal line. There are some initials or marks at the end of the signature.

Edward C. Sinnott, M.D.

In The Matter Of Richard Swerdlik, M.D.

Robert M. Briber, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Swerdlik.

Dated : 3/11/ 98



Robert M. Briber