



***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.  
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NYS Department of Health*

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*Executive Deputy Commissioner  
NYS Department of Health*

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*Office of Professional Medical Conduct*

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*Chair*

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

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

January 29, 2003

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

Martin Malachovsky, M.D.  
412 Oak Avenue  
Ithaca, NY 14850

RE: License No. 218135

Dear Dr. Malachovsky:

Enclosed please find Order #BPMC 03-20 of the New York State Board for Professional Medical Conduct. This Order and any penalty provided therein goes into effect January 29, 2003.

If the penalty imposed by the Order is a surrender, revocation or suspension of this license, you are required to deliver to the Board the license and registration within five (5) days of receipt of the Order to 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

cc: Thomas A. Saitta  
Aswad & Ingraham  
46 Front Street  
Binghamton, NY 13905

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

IN THE MATTER  
OF  
MARTIN MALACHOVSKY, M.D.

CONSENT  
ORDER

BPMC No. 03-20

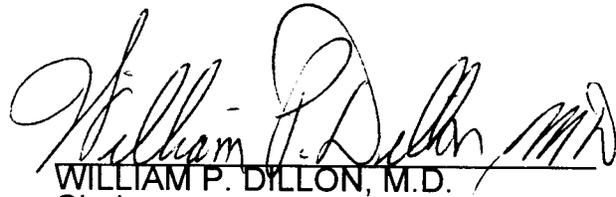
Upon the application of **Martin Malachovsky, M.D.** (Respondent), in the attached Consent Agreement, which is made a part of this Consent Order, it is

ORDERED, that the Consent Agreement, and its terms, are adopted and SO ORDERED; 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.

DATED: 1/27/03



WILLIAM P. DILLON, M.D.  
Chair  
State Board for Professional Medical Conduct

IN THE MATTER  
OF  
MARTIN MALACHOVSKY, M.D.

CONSENT  
AGREEMENT

**Martin Malachovsky, M.D.** (Respondent), representing that all of the following statements are true, deposes and says:

That on or about July 31, 1998, I was licensed to practice as a physician in the State of New York, and issued License No. ~~000754~~ <sup>218135</sup> by the New York State Education Department.

My current address is 412 Oak Avenue, Ithaca, New York 14850, and I will advise the Director of the Office of Professional Medical Conduct of any change of address.

I understand that the New York State Board for Professional Medical Conduct has charged me with one specification of professional misconduct.

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

I agree not to contest paragraphs A and A1, A and A2, A and A3, A and A4, A and A5, A and A6, A and A7, C and C1, and C and C2 of the First Specification of professional misconduct in full satisfaction of the charges against me, and agree to the following penalty:

Pursuant to §230-a(2) of the Public Health Law, my license to practice medicine in the State of New York shall be suspended for a period of forty-eight months, with the duration of said suspension to be stayed.

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

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

- a. That Respondent shall maintain current registration of licensure 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 (30) days after the Consent Order's effective date and will continue so long as Respondent remains licensed in New York State; and
- b. 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.

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.

DATED: 1/6/03

  
MARTIN MALACHOVSKY  
RESPONDENT

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

DATED: 1/6/03

  
THOMAS SAITTA, ESQ.  
Attorney for Respondent

DATED: 1/13/03

  
JEFFREY J. CONKLIN, ESQ.  
Associate Counsel  
Bureau of Professional Medical Conduct

DATED: 1/24/03

  
DENNIS J. GRAZIANO  
Director  
Office of Professional Medical Conduct

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

IN THE MATTER  
OF  
MARTIN MALACHOVSKY, M.D.

STATEMENT  
OF  
CHARGES

**Martin Malachovsky, M.D.** (Respondent), was authorized to practice medicine in New York State on or about July 31, 1998, by the issuance of license number 000754 by the New York State Education Department. *2189135*

**FACTUAL ALLEGATIONS**

- A. Respondent provided medical care to Patient A, hereinafter identified in the attached Appendix A, after his admission to The Hospital, Sidney, New York, on September 18, 1999, with complaints of chest pain, epigastric discomfort, and a two day history of nausea, vomiting and sweating. Diagnostic studies conducted of Patient's A's abdomen and pelvis documented findings suggestive of acute appendicitis, cholelithiasis and a renal cortical cyst. Patient A subsequently underwent a cholecystectomy and appendectomy. Post-operatively, Patient A became tachycardic, progressively hypotensive and oliguric, and began to hemorrhage. The Respondent, as Patient A's admitting attending physician, supervised said patient's post-operative care. Patient A's condition deteriorated and, ultimately, said patient went into irreversible shock and subsequently expired. Respondent's medical care of Patient A deviated from accepted standards of medical care in the following respects:

1. The Respondent failed to order a beta blocker post-operatively to control Patient A's heart rate, which was causing said patient's hypotension;
2. The Respondent failed to order an indicated consultation with a cardiologist post-operatively in view of Patient A's depressed ventricular function;
3. The Respondent failed to consider the possibility of acute myocardial infarction during anesthesia and surgery in view of Patient A's history of coronary artery disease and preoperative echocardiogram which had documented normal left ventricular function;
4. The Respondent failed to consider a post-operative complication as a potential cause of Patient A's hypotension and decreased urinary output, in view of said patient's history of gastrointestinal bleeding;
5. The Respondent failed to determine the amount and character of Patient A's post-operative blood drainage under the circumstances of said patient's hypotension and decreased urinary output;
6. Under the circumstances presented post-operatively, the Respondent failed to consult or otherwise communicate with the surgeon; and
7. The Respondent failed to appropriately assess the deteriorating and life-threatening nature of Patient A's condition post-operatively, and to treat said patient as was required and necessary.

B. Respondent provided medical care to patient B, hereinafter identified in the annexed Appendix A, after her admission to The Hospital on March 3, 2000, for a scheduled repeat cesarean section. The procedure was completed under spinal anesthesia without incident, and then a tubal ligation was performed under general anesthesia. Subsequently, Patient B developed a cough and began to experience breathing difficulties. The Respondent was consulted to medically manage Patient B's condition post-operatively. Over the following six days, Patient B's respiratory condition waxed and waned. Chest x-rays documented acute pulmonary edema likely complicated by adult respiratory distress syndrome (ARDS). Ultimately, the Respondent discharged Patient B from The Hospital, despite said patient being weak, and short of breath with any exertion. Thereafter, Patient B became increasingly short of breath. On March 23, 2000, Patient returned to The Hospital. Patient B was transferred to Wilson Hospital, where she remained until her death five days later. The Respondent's medical care of Patient B deviated from accepted standards of medical care in the following respects:

1. The Respondent failed to order an indicated consultation with a pulmonologist to evaluate Patient B's condition;
2. The Respondent failed to arrange for Patient B to be transferred to a facility adequately staffed and equipped to treat said patient's pulmonary condition;
3. The Respondent's authorization for Patient B's discharge from The Hospital was inappropriate in view of said patient's pulmonary status; and

4. The Respondent failed to appropriately assess Patient B's condition post-operatively and to treat said patient as was required and necessary.

C. Respondent provided medical care to Patient C, hereinafter identified in the annexed Appendix A, at his office located at 44 Pearl Street, Sidney, New York, on January 7, 1999, who presented with complaints of a two day history of itching eyes, runny nose, intermittent earache, hoarseness and cough. Patient C advised the Respondent that she had allergies to Sulfa and Codeine. The Respondent's impression of Patient C's condition was viral bronchitis. The Respondent prescribed Vicodin Tuss and Sudafed. Patient C took the medications as directed by the Respondent, and said patient experienced hearing loss, chest and nasal congestion, constricted breathing, dizziness and dry heaves. Respondent's medical care of Patient C deviated from accepted standards of medical care in the following respects:

1. The Respondent prescribed medication containing Codeine for Patient C, who was allergic to said medication, thereby exposing Patient C to a serious risk of harm; and
2. The Respondent failed to adequately review Patient C's medical chart before prescribing a medication containing Codeine, and/or failed to obtain an appropriate history of allergies from said patient.

**FIRST SPECIFICATION**

**(Negligence on More Than One Occasion)**

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

1. The facts set forth in Paragraphs A and A1; A and A2; A and A3; A and A4; A and A5; A and A6; A and A7; B and B1; B and B2; B and B3; B and B4; C and C1; and C and C2.

DATED: January 14, 2003  
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 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, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty (30) days of each action.
3. 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.
4. The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of thirty (30) 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 (30) day period. Respondent shall then notify the Director again at least fourteen (14) 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.
5. 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; and interviews with or periodic visits with Respondent and Respondent's staff at practice locations or OPMC offices.
6. 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.

### **PRACTICE MONITOR**

7. Within thirty days of the effective date of the order, Respondent shall practice medicine only when monitored by a licensed physician, hereinafter referred to as "practice monitor", board certified in an appropriate specialty, proposed by Respondent and subject to the written approval of the Director of OPMC.

- a. Respondent shall make available to the practice monitor any and all records or access to the practice requested by said 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 practice 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.

### **CLINICAL COMPETENCY ASSESSMENT**

8. Respondent shall obtain a clinical competency assessment performed by a program for such assessment as directed by the Director of OPMC. Respondent shall cause a written report of such assessment to be provided to the Director of OPMC within sixty (60) days of the effective date of this Order.
  - a. Respondent shall be responsible for all expenses related to the clinical competency assessment and shall provide to the Director of OPMC proof of full payment of all costs that may be charged. This term of probation shall not be satisfied in the absence of actual receipt, by the Director, of such documentation, and any failure to satisfy shall provide a basis for a Violation of Probation proceeding.
9. Within thirty (30) days of receipt of the clinical competency assessment report by OPMC, the Director shall render a decision, at said Director's sole discretion, as to whether the Respondent's practice of medicine shall remain subject to a practice monitor, as set forth in paragraph "7" herein, or be subject to a practice supervisor, as set forth in paragraph "9(a)". Additionally, the Director shall determine such other terms and/or condition of practice, if any, as may be consistent with the recommendation(s) in the clinical competency assessment report, including personalized continuing medical education, if appropriate, as set forth in paragraph "10".

## **PRACTICE SUPERVISOR**

- a. In the event the Director of OPMC determines that Respondent's practice of medicine ought to be subject to a practice supervisor, pursuant to paragraph "9" herein, within thirty (30) days of said decision, Respondent shall practice medicine only when supervised in his/her medical practice for the duration of the probationary term. The practice supervisor shall be on-site at all locations, unless determined otherwise by the Director of OPMC. The practice supervisor shall be proposed by Respondent and subject to the written approval of the Director. The practice supervisor shall not be a family member or personal friend, or be in a professional relationship which could pose a conflict with supervision responsibilities.
- b. Respondent shall ensure that the practice supervisor is familiar with the Order and terms of probation, and willing to report to OPMC. Respondent shall ensure that the practice supervisor is in a position to regularly observe and assess Respondent's medical practice. Respondent shall cause the practice supervisor to report within 24 hours any suspected impairment, inappropriate behavior, questionable medical practice or possible misconduct to OPMC.
- c. Respondent shall authorize the practice supervisor to have access to his/her patient records and to submit quarterly written reports, to the Director of OPMC, regarding Respondent's practice. These narrative reports shall address all aspects of Respondent's clinical practice including, but not limited to, the evaluation and treatment of patients, general demeanor, time and attendance, the supervisor's assessment of patient records selected for review and other such on-duty conduct as the supervisor deems appropriate to report.

## **PERSONALIZED CONTINUING MEDICAL EDUCATION**

10. Within thirty (30) days of receipt of the clinical competency assessment report by OPMC, the Director may direct that Respondent be enrolled in a course of personalized continuing medical education, which includes an assigned preceptor, preferably a physician board certified in the same specialty, to be approved, in writing, by the Director of OPMC. Respondent shall remain enrolled and shall fully participate in the program for a period of time to be determined by the Director, but in no event shall the enrollment be longer than the probationary term herein.
  - a. Respondent shall cause the preceptor to:
    1. Submit reports on a quarterly basis to OPMC certifying whether Respondent is fully participating in the personalized continuing medical education program;
    - a. Report immediately to the Director of OPMC if Respondent withdraws from the program and report promptly to OPMC any significant pattern of non-compliance by Respondent; and
    - b. At the conclusion of the program, submit to the Director of OPMC a detailed assessment of the progress made by Respondent toward remediation of all identified deficiencies.

11. 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.