



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

May 1, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Steven J. Masef, Esq.
Daniel J. Guenzburger, Esq.
NYS Department of Health
5 Penn Plaza – Sixth Floor
New York, New York 10001

Fred Nicolas, M.D.
903 East 85th Street
Brooklyn, New York 11236

David E. Steckler, Esq.
Lourdes Martinez, Esq.
Garfunkel, Wild & Travis, Esq.
111 Great Neck Road
Great Neck, New York 11021

RE: In the Matter of Fred Nicolas, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-128) 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.

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.

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,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

FILE NO: S-4800-S

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

COPY

-----X
:
IN THE MATTER OF FRED NICOLAS, M.D., :
:
Respondent. :
-----X

**DETERMINATION
AND ORDER**

BPMC-00-128

A Notice of Hearing and Statement of Charges, both dated July 15, 1999, were served upon the Respondent, Fred Nicolas, M.D. Gerald S. Weinberger, M.D. (Chair), Nancy J. Macintyre, RN, Ph.D. and Arthur J. Wise, Jr., M.D., duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. Edwin L. Smith, Administrative Law Judge, served as the Administrative Officer. The Department of Health appeared by Steven J. Masef, Esq. and Daniel Guenzburger, Esq., Associate Counsel. The Respondent appeared by David E. Steckler, Esq. and Lourdes Martinez, Esq. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

PROCEDURAL HISTORY

Date of Service of Notice
of Hearing and Statement
of Charges: July 15, 1999

Amended Answer to
Statement of Charges: August 12, 1999

Pre-hearing Conference: August 9, 1999

Continued Pre-hearing Conference: August 12, 1999

Dates of Hearings: August 12, 1999
September 14, 1999
September 30, 1999
November 2, 1999
December 16, 1999

Received Petitioner's
Proposed Findings of Fact,
Conclusions of Law and
Recommendation: January 13, 2000

Received Respondent's
Proposed Findings of Fact,
Conclusions of Law and
Recommendation: January 13, 2000

Witnesses for Department of
Health: Arnold Belgraiier, M.D.
Shiela J. Bradwell (rebuttal)

Witnesses for Respondent: Shiela J. Bradwell
Richard Fogler, M.D.
Gene F. Coppa, M.D.
Rochelle Perles-Schleifer
Lorie Calcaterra
Fred Nicolas, M.D.

Deliberations Held: January 18, 2000

STATEMENT OF CASE

The Petitioner has charged Respondent, Fred Nicolas, M.D., with fourteen specifications of professional misconduct. The allegations concern Respondent's medical care and treatment of Patient A, his failure to disclose pertinent information on an application for reappointment to the medical staff of a hospital and his violation of the terms of probation pursuant to a Consent

Agreement and Order (BPMC #97-269). More specifically, the Respondent is charged with gross negligence, gross incompetence, negligence on more than one occasion, incompetence on more than one occasion, failing to maintain records, three specifications of fraudulent practice, three specifications of false report, two specifications of violating Section 2805-K of the Public Health Law and one specification of violation of the terms of probation.

A copy of the Notice of Hearing and Statement of Charges is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. The numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Fred Nicolas, M.D. (hereinafter "Respondent") was authorized to practice medicine in New York State by the issuance of license number 109349 by the New York State Education Department. (Not contested.)

2. Factual allegation C2, that Respondent failed to maintain the requisite amount of medical malpractice insurance as set forth in the Terms of Probation, was withdrawn by Petitioner on September 14, 1999. (180-181)*.

Patient A

Failure to Monitor Patient A Between June 23, 1998 and July 1, 1998

3. On June 23, 1998, Patient A, an 80 year old female, was admitted to the Brookdale University Hospital and Medical Center in Brooklyn, New York. (Exhibit 2).

4. Between June 23, 1998 and August 27, 1998, Respondent was a consultant and part of a team of physicians treating Patient A. (308-309, 375).

5. Patient A was admitted to Brookdale Hospital on June 22, 1998, with a history of having fallen and a change in mental status in the nursing home where she had resided (Exhibit 2). Patient A had previously undergone a subtotal colectomy performed by Respondent. On admission, Patient A had a number of comorbidities including diabetes, dementia, chronic obstructive pulmonary disease, arteriosclerotic heart disease and deep vein thrombosis. (Exhibit 2).

Page reference () are to Hearing Transcript

6. During the period that Respondent treated Patient A at Brookdale University Hospital, June 23 through August 27, 1998, Dr. Richard Fogler, Chairman of the Department of Surgery at Brookdale Hospital, served as Respondent's practice monitor, pursuant to the Terms of Probation in a Consent Agreement and Order (BPMC #97-269). (Exhibit 7, 306-310).

7. Respondent was originally called in as a consultant to the Patient who had been seen by several other consultants up to the point of the July 1, 1998 surgery. (Exhibit 2, 310).

8. Between June 23 and July 1, 1998, Patient A was appropriately monitored with respect to the assessment of nasogastric outputs, hydration, bowel movements and sequential abdominal x-rays. (Hydration and I & O - Exhibit 2, 18 through 20, 1432 through 1441; Dr. Coppa's testimony at 456; Dr. Fogler's testimony at 313 through 319; bowel movements - Exhibit 2, pages 70, 71, 74, 77, 78, 80, 82, 83, 85, 87, 89, 90, 91, 94, 96, 97, 100, 101, 104, 106; x-rays - Exhibit 2, pages 23 and 25, Exhibit 17 and Dr. Coppa's testimony at 459.)

9. On July 1, 1998, a colonoscopy/sigmoidoscopy was performed by Respondent on Patient A. (Exhibit 2, page 10; Dr. Fogler's testimony, pages 332-337.)

10. Patient A had a previous subtotal colectomy five years prior to the surgery. The surgery of July 1, 1998 revealed a new terminal ileum anastomosed to the distal portion of the sigmoid colon and rectum, which was diagnosed as Crohn's disease.

(Dr. Fogler's testimony at 334-337).

11. Respondent's practice monitor, Dr. Fogler, was present and participated in the July 1, 1998 surgery. (333).

12. Respondent took the appropriate steps in assessing, treating and follow-up of the small bowel obstruction at or just distal to the ileo-colic anastomosis. (Dr. Fogler's testimony, 338-340).

13. Having made a diagnosis of Crohn's disease at the time of the surgery on July 1, 1998, there was nothing more to be done at that point in time. (339).

14. During the course of the surgery of July 1, 1998, Respondent resected an anastomosis in the small bowel. (339).

15. The resection and anastomosis of the small bowel on July 1, 1998 by Respondent was appropriate. (342-342; Dr. Coppa's testimony, 386-389, 462, 463, 466 and 467).

16. A diagnosis and plan of treatment was arrived at as a result of the July 1, 1998 surgery. (343-346, 467-469, Exhibit 2, pages 110, 125, 128, 134, 135, 136, 143).

17. This was a differential diagnosis reached by the primary physician managing the Patient as well as the surgical team including Dr. Nicolas. (467).

18. On July 7, 1998, Respondent properly ordered a barium GI series for Patient A. (472-474, 532-533).

19. It was the radiologist's responsibility to assess the results of a barium GI series, not the Respondent. (501).

20. Patient A eviscerated shortly after the barium GI series, which did not leave much of an opportunity to study the results of the barium GI test. (355-356).

21. The evisceration was the result of a fresh and new tear in the bowel in an area that was adjacent to the previous area of surgery where anastomosis had been performed. There was no leak from the anastomosis, which was found to be intact. (357).

22. The Respondent appropriately performed a second anastomosis to repair the fresh and new tear in the bowel. (356-359, 476-479).

23. There was no indication of an obstruction in the distal portion of the bowel at the time the second anastomosis was performed. (360, 479-481).

24. The Respondent properly assessed and treated Patient A at the time of the anastomosis on July 11. (360, 480-481).

25. Respondent maintained an appropriate record reflecting the evaluation and treatment of Patient A. (364-366).

**Application for Reappointment to
Medical Staff of Kings Highway Hospital**

26. On or about December 27, 1996, the Respondent submitted an application for reappointment to the medical staff of Kings Highway Hospital. (Exhibit 14).

27. On or about March 25, 1996, Respondent was interviewed by OPMC with respect to the care and management of Patient MV. (649-650).

28. There was no other communication between OPMC and Respondent between March 25, 1996 until the time that Respondent submitted his recredentialing application to Kings Highway Hospital. (650).

29. Respondent had no reason to believe that he was under investigation of OPMC at the time that he submitted his recredentialing application to Kings Highway Hospital on or about December 1996. (650-652).

30. Respondent's office staff prepared the recredentialing application to Kings Highway Hospital with instructions that it be accurate. (560-561).

31. Respondent should have checked the application before it was sent out to Kings Highway Hospital. (654-655).

32. Two medical malpractice actions were not listed on the recredentialing application submitted to Kings Highway Hospital. (Exhibit 14).

33. Respondent denies that the omission of the information relating to the pending medical malpractice settlements was done with intent to deceive and, in any event, the information was available from a central data bank that was independently available to the hospital. (655-656).

34. The recredentialing application to Kings Highway Hospital did not disclose a pending medical malpractice action styled *BG v. Fred Nicolas, M.D.* (Exhibit 14).

35. The central data bank likewise makes available information as to pending medical malpractice actions which are available to hospitals. (657).

36. Respondent concedes that it is his responsibility to check the accuracy of the recredentialing application, but denies any intent to deceive the hospital. (652-657).

37. Temporary suspension of Respondent's privileges at New York Community Hospital was a result of administrative error predicated on the mistaken belief that Respondent did not have malpractice insurance. (639-640).

Charges Relating to Probation Agreement

38. On or about November 4, 1997, Respondent executed a Consent Agreement and Order (BPMC #97-265). (Exhibit 7).

39. Respondent failed to complete the requisite Continuing Medical Education as set forth in the Terms of Probation. (Exhibit 7, paragraph 9; 263; Exhibit 11).

40. Respondent attempted to obtain preapproval of certain courses, none of which were approved by OPMC. (Exhibits 22 and 10).

41. OPMC did not timely respond to Respondent's request for preapproval of certain courses. (193, 211-213, 275-276, 597 and 758-759).

42. Respondent's conduct fully conformed with professional standards of conduct. (423 and 539).

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Hearing Committee concluded that the following Factual Allegations should be sustained. The citations in parentheses refer to the Findings of Fact which support each Factual Allegation.

A¹ ();

A1 (not sustained);

A (not sustained);

¹ Paragraphs A, B and C are prefatory to the Factual Allegations that follow and are, therefore, not separately treated.

A2a (not sustained);
A2b (not sustained);
A2c (not sustained);
A3 (not sustained);
A4 (not sustained);
A5 (not sustained);
A5a (not sustained);
A5b (not sustained);
A6 (not sustained);
B¹ ();
B1 (not sustained);
B2 (not sustained);
B2a (not sustained);
B3 (not sustained);
C¹ ();
C1 (38-39); sustained
C2 (withdrawn);
C3 (not sustained);
C4 (not sustained).

The Hearing Committee further concluded that the following Specifications should be sustained. The citations in parentheses refer to the Factual Allegations which support each Specification:

First Specification - Gross negligence as to Patient A (charges are not sustained);

Second Specification - Gross incompetence as to Patient A (charges are not sustained);

Third Specification - Negligence on more than one occasion as to Patient A (charges are not sustained);

Fourth Specification - Incompetence on more than one occasion as to Patient A (charges are not sustained);

Fifth Specification - Failing to maintain records as to Patient A (charges are not sustained);

Sixth through Eighth Specifications - Fraudulent practice (charges are not sustained);

Ninth through Eleventh Specifications - False report (charges are not sustained);

Twelfth and Thirteenth Specifications - Violations of Section 2805-K of Public Health Law (charges are not sustained);

Fourteenth Specification - Violation of probation/condition/limitation (paragraph C1; paragraph C2 was withdrawn by the Petitioner; paragraphs C3 and C4, charges are not sustained).

DISCUSSION

Respondent is charged with fourteen Specifications alleging professional misconduct within the meaning of Education Law § 6530. This statute sets forth numerous forms of conduct which constitute professional misconduct but does not provide definitions of the various types of misconduct. During the course of its deliberations on these charges, the Hearing Committee consulted a memorandum prepared by Henry M. Greenberg, Esq., General Counsel for the Department of Health, dated January 9, 1996. This document, entitled "Definitions of Professional Misconduct under the New York Education Law", sets forth suggested definitions for negligence, gross negligence, incompetence and gross incompetence.

The following definitions were utilized by the Hearing Committee during its deliberations:

Negligence is the failure to exercise the care that would be exercised by a reasonably prudent licensee under the circumstances.

Gross Negligence is the failure to exercise the care that would be exercised by a reasonably prudent licensee under the circumstances, and which failure is manifested by conduct that is egregious or conspicuously bad.

Incompetence is a lack of the skill or knowledge necessary to practice a profession.

Gross Incompetence is an unmitigated lack of the skill or knowledge necessary to perform an act undertaken by the licensee in the practice of a profession.

Fraudulent Practice of medicine is an intentional misrepresentation or concealment of a known fact. An individual's knowledge that he is making a misrepresentation or concealing a known fact with the intention to mislead may properly be inferred from certain facts.

Using the above-referenced definitions as a framework for its deliberations, the Hearing Committee unanimously concluded, by a preponderance of the evidence, that the Petitioner has sustained its burden of proof regarding certain charges brought against Respondent. The rationale for the Committee's conclusions is set forth below.

At the outset, the Hearing Committee made a determination as to the credibility of the various witnesses presented by the parties. The Petitioner presented one expert witness, Dr. Arnold Belgraier. Dr. Belgraier is Board certified in surgery. While the Hearing Committee considered his testimony, it gave greater credibility to the assessment and opinions expressed by Respondent's expert witnesses, Dr. Richard Fogler and Dr. Gene F. Coppa, both of whom are Board certified. Dr. Fogler is Board certified in surgery, a Fellow of the American College of Surgeons, Chairman of the Department of

Surgery at Brookdale Hospital and Associate Clinical Professor of Surgery at Health Science Center of Brooklyn, part of the State University of New York. Dr. Coppa is Board certified and is Director of Surgery at Staten Island University Hospital.

None of the witnesses has a demonstrated personal stake in the outcome of this case. However, it is noted that Dr. Fogler has been acting as the practice monitor for the Respondent under the Terms of Probation with OPMC, has known the Respondent for over twenty years and has worked closely with the Respondent in a professional setting. The Hearing Committee notes that all the expert witnesses are highly qualified in their respective areas of practice.

The Hearing Committee's determination regarding the credibility of these witnesses rested on the quality of their testimony. The Hearing Committee felt that the testimony of Drs. Fogler and Coppa was compelling. Both are Chairpersons of the surgical programs at their respective teaching hospitals and both agreed that Respondent was well supervised and acted within the standard of care with respect to the care and treatment of Patient A. While the Hearing Committee considered the testimony of Dr. Belgraier, it was of the opinion that the assessments provided by Drs. Fogler and Coppa were deserving of greater weight. Indeed, Dr. Fogler, as practice monitor of the Respondent and as Chairperson of the department where Respondent

practiced, had an opportunity to supervise and review Respondent's conduct on a daily basis and in his opinion the Respondent was a competent and professional surgeon.

The Hearing Committee was also impressed with the fact that Dr. Fogler was physically present and participated with the team of physicians in determining the course of treatment for Patient A, and was also physically present at the time of the surgeries in question. No doubt, this provided him with much greater insight and his opinions were given the appropriate consideration.

Insofar as the allegations of misrepresentation and fraud are concerned, the Hearing Committee concluded that the omissions from the recertification application to Kings Highway Hospital was a result of inadvertent administrative and clerical errors. While Respondent readily admitted that it was his responsibility to review the application prior to its being submitted, there was no credible evidence that the omissions were a result of any intent to deceive.

Moreover, the Hearing Committee did not feel that a reasonable person would have concluded that at the time the application was submitted to Kings Highway Hospital that Respondent was under an active investigation by OPMC. The time difference between the interview and the submission without any activity having been undertaken by OPMC was, in the Committee's

view, controlling. Also of import to the Hearing Committee was the fact that data relating to malpractice settlements and actions was readily available on a central data bank irrespective of its inclusion in the application. To attempt to hide this information when it is readily available would consequently appear to be a matter of inadvertence rather than design where disclosure was so easily obtainable.

The alleged breaches of the Consent Agreement and Order caused much concern among the members of the Hearing Committee. While the Hearing Committee determined that the Respondent failed to comply with Continuing Medical Education credits required under the terms of the Probation Agreement, it is also of the opinion that the present system of administering this program is in dire need of remediation. The function of the additional credit hours is to ensure that the physician receive additional training. The Hearing Committee is of the opinion that the Respondent's failure to comply was in part due to the failure on the part of OPMC to timely respond to Respondent's request for prior approval of the courses.

OPMC should be aware that in order for physicians to attend courses requires appropriate lead time in order to make necessary arrangements for transportation, housing and surgical coverage in their absence. OPMC's failure to answer Respondent's request for prior approval in a timely fashion makes it extremely

difficult for physicians, such as the Respondent, to comply. Indeed, many of the facsimile transmissions sent by Respondent's office to OPMC went unanswered because they were not delivered directly to the desk of Ms. Bradwell.

Moreover, it is the opinion of the Hearing Committee that the decision by OPMC with respect to denying in its entirety, CME credits for attending mortality and morbidity conferences would not appear to be justified.

Determination As To Penalty

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that the probationary period provided for in the Consent Agreement and Order, Exhibit 7, be extended for one year.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

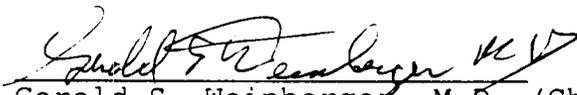
1. Paragraph C2 of the Fourteenth Specification charging respondent with committing professional misconduct for failing to complete the requisite Continuing Medical Education Credits as set forth in his Term of Probation, is **SUSTAINED**.

2. That all other Specifications of professional misconduct as set forth in the First through Fourteenth specifications are **DISMISSED**.

3. That the probationary period provided for in the Consent Agreement and Order, Department Exhibit 7, be extended for one year.

4. This Determination and Order shall be effective upon service. Service shall be either by certified mail upon Respondent at Respondent's last known address and service be effective upon receipt or seven (7) days after mailing by certified mail, whichever is earlier, or by personal service and such service shall be effective upon receipt.

Dated: Ardsley, New York
4/27, 2000


Gerald S. Weinberger, M.D. (Chair)

Nancy J. Macintyre, R.N., Ph.D.
Arthur J. Wise, M.D.

TO: STEVEN J. MASEF, ESQ.
DANIEL J. GUENZBURGER, ESQ.
Associate Counsel
New York State Department of Health
5 Penn Plaza
New York, New York 10001

FRED NICOLAS, M.D.
903 East 85th Street
Brooklyn, New York 11236

DAVID E. STECKLER, ESQ.
LOURDES MARTINEZ, ESQ.
Garfunkel, Wild & Travis, Esq.
111 Great Neck Road
Great Neck, New York 11021

APPENDIX 1

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

STATEMENT
OF
CHARGES

FRED NICOLAS, M.D., the Respondent, was authorized to practice medicine in New York State on or about July 22, 1971, by the issuance of license number 109349 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. Between in or about June 23, 1998 and August 27, 1998, Respondent treated Patient A, an 80 year old female with senile dementia at The Brookdale University Hospital and Medical Center, Brooklyn, N.Y. Respondent was initially consulted on this admission due to Patient A's abdominal distention. Respondent had performed a subtotal colectomy and splenectomy on Patient A five years earlier. (Patient A is identified in the attached Appendix) Respondent's conduct deviated from accepted medical standards in that:
1. On or about and between June 23, 1998 and July 1, 1998 Respondent failed to appropriately monitor Patient A including but not limited to adequately assessing naso-gastric outputs, hydration, bowel movements and/or sequential abdominal xrays.
 2. On or about July 1, 1998, a colonoscopy was attempted but not

completed because the endoscope reached a "blind end" at 30 cm. That afternoon, Respondent performed an exploratory laparotomy on Patient A.

- a. Respondent ignored and/or failed to take appropriate steps to properly assess, treat and/or followup on indications of a small bowel obstruction at or just distal to the ileo-colic anastomosis.
 - b. Respondent inappropriately resected and anastomosed the small bowel notwithstanding the distended distal portion and other indications of an obstruction in the distal portion of the bowel.
 - c. Respondent failed to form any firm diagnosis or plan of treatment for Patient A.
3. On July 7, 1998 Respondent improperly ordered a Barium G.I. series for Patient A;
 4. Respondent failed to appropriately assess the results of the Barium G.I. series.
 5. Patient A eviscerated on July 11, 1998 and was returned to the operating room where an anastomotic breakdown was found with gross fecal spillage.
 - a. Respondent inappropriately performed a second anastomosis

of the small bowel notwithstanding indications of an obstruction in the distal portion of the bowel;

b. At this second operation, Respondent failed to properly assess and treat continued indications of an obstruction at the distal portion of the small bowel;

6. Respondent failed to maintain a record which accurately reflects the evaluation and treatment of Patient A.

B. On or about December 27, 1996 Respondent submitted an application for reappointment to the medical staff of Kings Highway Hospital (The Hospital).

1. Respondent knowingly, falsely and with intent to deceive, represented that he was not under investigation with regard to his medical license, when, in fact, Respondent knew that he was the subject of such an investigation by the New York State Department of Health, Office of Professional Medical Conduct.

2. Respondent failed to disclose the settlements of two medical malpractice actions brought against him and entitled

Christopher Benjamin v. Dr. Fred Nicolas, et. al.,

which settled for \$1,000,000.00, and

Marion Ventrice v. Fred Nicolas, M.D., et. al.

which settled for \$920,000.00.

- a. Respondent concealed this information with the intent to deceive Kings Highway Hospital.
3. Respondent failed to disclose a pending medical malpractice action entitled Belinda Gilmore v. Fred Nicolas, M.D. et. al.
 - a. Respondent concealed this information with the intent to deceive Kings Highway Hospital.
- C. On or about October 23, 1997, the Respondent executed a Consent Agreement and Order (BPMC No. 97-269) wherein Respondent agreed to a three year period of probation.
1. Respondent failed to complete the requisite Continuing Medical Education as set forth in his Terms of probation;
 2. Respondent failed to maintain the requisite amount of medical malpractice insurance as set forth in the Terms of Probation;
 3. Respondent failed to provide notification to the New York State Department of Health of the suspension of his privileges from New York Community Hospital, as required by his Terms of Probation.
 4. Respondent failed to conduct himself in a manner befitting his professional status, to conform fully to moral and professional standards of conduct and obligation as required by his Terms of Probation.

W. J. Johnson
9/14/99

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

GROSS NEGLIGENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(4)(McKinney Supp. 1999) by practicing the profession of medicine with gross negligence as alleged in the facts of the following:

1. Paragraphs A and A(1), A(2), A(2)a through A(2)c, A(3), A(4) and/or A(5), A(5)a and A(5)b.

SECOND SPECIFICATION

GROSS INCOMPETENCE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(6)(McKinney Supp. 1999) by practicing the profession of medicine with gross incompetence as alleged in the facts of the following:

2. Paragraphs A and A(1), A(2), A(2)a through A(2)c, A(3), A(4) and/or A(5), A(5)a and A(5)b.

THIRD SPECIFICATION

NEGLECT ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(3)(McKinney Supp. 1999) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of two or more of the following:

3. Paragraphs A and A(1), A(2), A(2)a through A(2)c, A(3), A(4) and/or

A(5), A(5)a and A(5)b;

FOURTH SPECIFICATION

INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(5)(McKinney Supp. 1999) by practicing the profession of medicine with incompetence on more than one occasion as alleged in the facts of two or more of the following:

4. Paragraphs A and A(1), A(2), A(2)a through A(2)c, A(3), A(4) and/or A(5), A(5)a and A(5)b;

FIFTH SPECIFICATION

FAILING TO MAINTAIN RECORDS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(32)(McKinney Supp. 1999) by failing to maintain a record which accurately reflects the evaluation and treatment of the Patient as alleged in the facts of the following:

5. Paragraphs A and A(6).

SIXTH THROUGH EIGHTH SPECIFICATIONS

FRAUDULENT PRACTICE

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law §6530(2)(McKinney Supp. 1999) by practicing the profession of medicine fraudulently as alleged in the facts of the following:

6. Paragraphs B and B(1);
7. Paragraphs B and B(2) and B(2)a;
8. Paragraphs B and B(3) and B(3)a.

NINTH THROUGH ELEVENTH SPECIFICATIONS

FALSE REPORT

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(21)(McKinney Supp. 1998) by willfully making or filing a false report, or failing to file a report required by law or by the department of health, or the education department, or willfully impeding or obstructing such filing, or inducing another person to do so as alleged in the facts of the following:

9. Paragraphs B and B(1);
10. Paragraphs B and B(2) and B(2)a;
11. Paragraphs B and B(3) and B(3)a.

TWELFTH AND THIRTEENTH SPECIFICATIONS

VIOLATION OF §2805-k of Public Health Law

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(14)(McKinney Supp. 1999) by violating §2805-k of the Public Health Law, as alleged in the facts of:

12. Paragraphs B and B(2);
13. Paragraphs B and B(3).

FOURTEENTH SPECIFICATION

VIOLATION OF PROBATION/CONDITION/LIMITATION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(29)(McKinney Supp. 1999) by violating any term of probation or condition or limitation imposed on the licensee pursuant to section two hundred thirty of the Public Health Law, as alleged in the facts of:

14. Paragraphs C and C(1) through C(4).

*C(2) withdrawn
8/14/99*

DATED: July , 1999
New York, New York

ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

APPENDIX 2

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

-----X
In the Matter of:

FRED NICOLAS, M.D.,

Respondent.

**AMENDED
ANSWER**

-----X
Respondent, Fred Nicolas, M.D., by his attorneys, Garfunkel, Wild & Travis, P.C., for his answer to the Statement of Charges, dated July 15, 1999, alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph A of the Statement of Charges, except admits that respondent performed surgery on Patient A at the Brookdale Hospital Medical Center and admits that respondent had performed surgery on Patient A years earlier.

2. Denies the allegations contained in Paragraph A(1) of the Statement of Charges.

3. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph A(2) of the Statement of Charges, except admits that respondent performed surgery on Patient A.

4. Denies the allegations contained in Paragraph A(2)(a), A(2)(b), and A(2)(c) of the Statement of Charges.

5. Denies the allegations contained in Paragraph A(3) of the Statement of Charges.

6. Denies the allegations contained in Paragraph A(4) of the Statement of Charges.

7. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph A(5) of the Statement of Charges.

8. Denies the allegations in Paragraph A(5)(a) and A(5)(b) of the Statement of Charges.

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9. Denies the allegations in Paragraph A(6) of the Statement of Charges.
10. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph B of the Statement of Charges.
11. Denies the allegations contained in Paragraph B(1) of the Statement of Charges.
12. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph B(2) of the Statement of Charges.
13. Denies the allegations contained in Paragraph B(2)(a) of the Statement of Charges.
14. Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph B(3) of the Statement of Charges.
15. Denies the allegations contained in Paragraph B(3)(a) of the Statement of Charges.
16. Admits the allegations contained in Paragraph C of the Statement of Charges.
17. Denies the allegations contained in Paragraph C(1), C(2), C(3) and C(4) of the Statement of Charges.
18. As to the Specification of Charges contained in the Statement of Charges, Respondent denies that he committed any alleged act of Professional Misconduct.

AFFIRMATIVE DEFENSES

The State breached the covenant of good faith and fair dealing regarding its obligations under Respondent's probation agreement, and thereby breached its contract with Respondent.

The State acted with institutional bad faith regarding its investigation and prosecution of Respondent, in that its conduct amounts to selective prosecution and a violation of the Probation

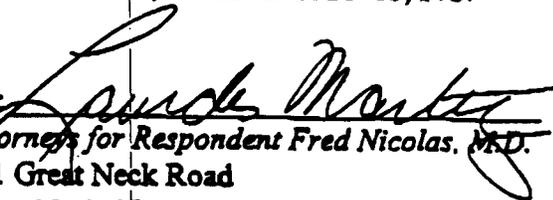
Agreement, as set forth above, and a violation of Respondent's procedural and substantial due process rights.

Respondent reserves all rights regarding claims, causes of action and remedies which cannot be pursued in this Administrative Proceeding.

WHEREFORE, respondent respectfully requests that the State Board for Professional Medical Conduct dismiss the Statement of Charges in their entirety with prejudice.

Dated: Great Neck, New York
August 10, 1999

GARFUNKEL, WILD & TRAVIS, P.C.

By: 
Attorney for Respondent Fred Nicolas, M.D.
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