



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., Dr.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

December 18, 2000

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Cindy Fascia, Esq.  
NYS Department of Health  
Corning Tower Room 2509  
Empire State Plaza  
Albany, New York 12237

Thomas M. Prato, Esq.  
Brown & Tarantino, LLP  
39 State Street Suite 500  
Rochester, New York 14614

George F. Walsh, M.D.  
10 Ambassador Drive  
Rochester, New York 14610

**RE: In the Matter of George Francis Walsh, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 00-255) 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.

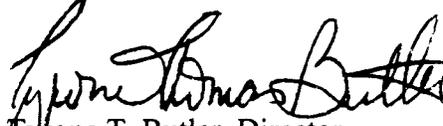
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

A handwritten signature in black ink, appearing to read "Tyrone T. Butler". The signature is written in a cursive style with a large initial "T".

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:nm

Enclosure

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

**In the Matter of**

**George Francis Walsh, M.D. (Respondent)**

**A proceeding to review a Determination by a  
Committee (Committee) from the Board for  
Professional Medical Conduct (BPMC)**

**COPY**

**Administrative Review Board (ARB)**

**Determination and Order No. 00-255**

**Before ARB Members Grossman, Pellman, Price and Briber<sup>1</sup>  
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner):  
For the Respondent:**

**Cindy M. Fascia, Esq.  
Thomas A. Prato, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent willfully abused or intimidated a patient, by attempting to kiss a patient on the mouth during an examination. The Committee voted to censure and reprimand the Respondent and the Committee placed a limitation on the Respondent's License to practice medicine in New York (License), forbidding the Respondent to perform breast or pelvic examinations without a chaperone present. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), the Petitioner asks the ARB to modify the Committee's Determination by sustaining the additional charge that the Respondent's conduct evidenced moral unfitness and by adopting additional terms concerning the chaperone's approval and responsibilities. After reviewing the record and the submissions by the parties, we reject the Petitioner's request that we sustain the moral unfitness charge. We modify the Limitation on the Respondent's License, to require a chaperone for all examinations on female patients and to adopt some additional standards concerning the chaperone's approval and responsibilities.

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<sup>1</sup> ARB Member Therese Lynch, M.D. recused herself from participating in this case. The remaining members considered the case as a four member quorum, see Matter of Wolkoff v. Chassin, 89 NY2d 250 (1996).

### **Committee Determination on the Charges**

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(20 & 31) (McKinney Supp. 2000) by committing professional misconduct under the following specifications:

- engaging in conduct that evidences moral unfitness in medical practice, and,
- willfully harassing, abusing or intimidating a patient.

The charges involved the Respondent's conduct toward a single person, Patient A. The record identifies the Patient by an initial to protect her privacy. A hearing on the charges ensued before the BPMC Committee, which rendered the Determination now on review.

The Committee found that the Respondent, an OB/GYN performed an examination on Patient A on July 19, 1996 at the Respondent's office. During that visit, the Respondent placed his hands on the Patient's thighs, leaned in close and puckered his lips, trying to kiss the Patient on the lips. The Patient leaned her face away and the Respondent's kiss landed on the Patient's cheek. In making their findings that the Respondent attempted to kiss the Patient during the examination, the Committee found testimony by the Patient credible and the Committee rejected testimony to the contrary by the Respondent. The Committee determined that such conduct by the Respondent constituted willfully harassing or abusing a patient, but the Committee rejected charges that the conduct evidenced moral unfitness in practicing medicine. The Committee voted to Censure and Reprimand the Respondent and placed an indefinite limitation on the Respondent's License forbidding the Respondent from performing pelvic or breast examinations without a chaperone present.

### **Review History and Issues**

The Committee rendered their Determination on September 20, 2000. This proceeding commenced on October 5, 2000, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the

Petitioner's brief and the Respondent's brief and response brief. The record closed when the ARB received the response brief on November 16, 2000.

The Petitioner argues that the Respondent's conduct violated the trust that the public places in the medical profession. The Petitioner asks that the ARB overrule the Committee and sustain the charge that the Respondent's conduct evidenced moral unfitness. The Petitioner argues further that the limitation on the Respondent's License, requiring a chaperone, failed to provide adequate protection for patients or adequate means to monitor the Respondent's compliance. The Petitioner asks that the ARB modify the Committee's Order and impose the specific requirements for a chaperone that appear at Attachment A to the Petitioner's brief.

In reply, the Respondent contends that the Petitioner made inaccurate references to the Committee's findings:

- by stating that the Committee found that the Respondent ... willfully harassed , abused or intimidated Patient A..." ,
- by misstating the Committee's finding on credibility, and,
- by making inflammatory use of the term sexual assault, a term Committee never used.

The Respondent argues that the Committee acted appropriately in dismissing the moral unfitness charge and in imposing the penalty. The Respondent argues that the Petitioner introduces for the first time on review the chaperone language in Attachment A to the Petitioner's brief. The Respondent asks the ARB to affirm the Hearing Committee's Determination.

### Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination to censure and reprimand the Respondent. Neither party challenged that Determination by the Committee. We vote 4-0 to affirm the charge that the Respondent committed willful abuse and/or harassment. We vote 3-1 to affirm the Committee's Determination to dismiss the moral unfitness charge. We vote 4-0 to modify the condition that the Committee placed on the Respondent's License.

The Respondent's brief alleged that the Committee failed to find any willful conduct by the Respondent. We disagree. The Committee sustained the charge that the Respondent violated N.Y. Educ. Law § 6530(31)(McKinney Supp. 2000). That statute defines professional misconduct by a physician to include "Willfully harassing, abusing, or intimidating a patient either physically or verbally". Under the Education Law, the word "willfully" means a knowing or deliberate act, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (Third Dept. 1986). Under the Public Health Law, the Courts have defined the word "willful" to require no showing of bad intention, but simply a showing that an act is deliberate and voluntary as opposed to accidental, People v. Coe, 131 Misc. 2d 807, 501 N.Y.S.2s 997 (1986), affirmed and remitted 126 A.D.2d 436, 510 N.Y.S.2d 470, affirmed 71 N.Y.2d 852, 527 N.Y.S.2d 741. The evidence in this case showed that the Respondent engaged in voluntary, knowing conduct by attempting to kiss Patient A on the lips (Committee Finding of Fact 25) and the Committee found such conduct inappropriate and a violation of trust (Committee Determination page 12). That

evidence proved that the Respondent violated Educ. Law § 6530(31) by willfully harassing a patient.

The Petitioner asked that the ARB overturn the Committee and sustain the moral unfitness charge. Dr. Grossman, Dr. Price and Mr. Briber vote to affirm the Committee. The majority concludes that the Respondent's actions resulted from poor judgement and perhaps stupidity, but we find no predatory intent in the Respondent's conduct. Ms. Pellman would hold that the attempt to kiss a vulnerable Patient did evidence moral unfitness.

The Petitioner also asked that we modify the limitation that the Committee placed on the Respondent's practice. Although the Committee required that the Respondent may perform closed-room breast or pelvic examinations on female patients only with a chaperone in the room, the Committee provided no other directions about the chaperone arrangement. The Petitioner requested that we adopt the specific terms for a chaperone that appear in Attachment A to the Petitioner's Brief. The Petitioner contends that the terms provided a means to monitor compliance. The Respondent opposed any modification in the limitation that the Committee imposed.

Upon reviewing the Petitioner's attachment, we find some terms appropriate for the chaperone arrangement for the Respondent's practice, but other terms unnecessary. Under our authority from § Pub. Health Law 230-c(4)(a), the Review Board may substitute our judgment for that of the Committee, in deciding upon a penalty, Matter of Bogdan v. Med. Conduct Bd. 195 Ad 2d 86, 606 NYS 2d 381 (Third Dept. 1993). The ARB may also choose to substitute our judgement and amend a Committee Determination on our own motion, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). We elect to exercise our authority and to substitute our judgement in this case by amending the License limitation. On our own motion, we adopt the standards for the chaperone which appear below.

**"CHAPERONE"**

*"The Respondent shall, in the course of practicing medicine in New York State, examine and/ treat any female patient only in the presence of a chaperone. The chaperone shall be a female, proposed by Respondent and subject to the written the approval of the Director of the Office for Professional Medical Conduct (OPMC).*

*"Prior to the approval of any individual as chaperone, the Respondent shall cause the proposed chaperone to execute and submit to the Director of OPMC an acknowledgment of her agreement to undertake all of the responsibilities of the role of chaperone.*

*" The approved chaperone shall:*

- a. report within 24 hours any failure of Respondent to comply with the Order, and,*
- b. confirm the chaperone's presence at each and every examination and treatment of a female patient by Respondent, by placing her name, title and date in the patient record for each and every visit."*

On our own motion, we also amend the Committee's Determination to require that the Respondent perform no examinations on a patient without a chaperone. The Committee ordered the chaperone only for breast and pelvic examinations. We affirm the Committee's Determination to make the limitation indefinite. On our own motion, we also amend and correct the Committee Finding of Fact 12, on page 4 in the Committee's Determination. That Finding of Fact lists the date for the examination at issue in this proceeding erroneously as July 19, 1998 rather than July 19, 1996.

## **ORDER**

**NOW**, with this Determination as our basis, the ARB renders the following **ORDER**:

1. The ARB **AFFIRMS** the Committee's Determination to sustain the charge that the Respondent willfully abused, harassed and/or intimidated a patient and to dismiss the charge that the Respondent's conduct evidenced moral unfitness.
2. The ARB **AFFIRMS** the Committee's Determination to censure and reprimand the Respondent and to limit the Respondent's License by requiring that he perform examinations in a chaperone's presence.
3. The ARB **MODIFIES** the License Limitation to adopt additional terms, as provided in our Determination, under which the chaperone shall operate and to correct an error in the Determination.

Robert M. Briber  
Thea Graves Pellman  
Winston S. Price, M.D.  
Stanley L. Grossman, M.D.

**In the Matter of George Francis Walsh, M.D.**

**Winston S. Price, M.D.**, an ARB Member concurs in the Determination and Order in the Matter of Dr. Walsh.

Dated: 12/15, 2000

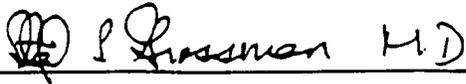
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**Winston S. Price, M.D.**

In the Matter of George Francis Walsh, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Walsh.

Dated: December 11, 2000

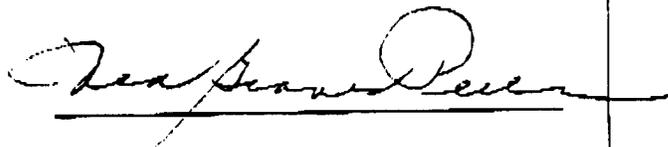
 Stanley L. Grossman M.D.

Stanley L. Grossman, M.D.

**In the Matter of George Francis Walsh, M.D.**

**Thea Graves Pellman**, an ARB Member concurs in part and dissents in part in the  
Determination and Order in the Matter of Dr. Walsh.

Dated: Dec 7, 2000

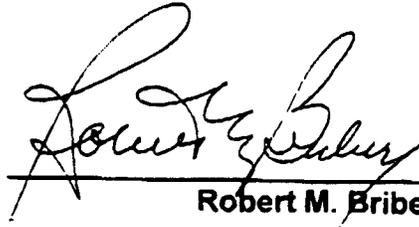
A handwritten signature in cursive script, reading "Thea Graves Pellman", written over a horizontal line.

**Thea Graves Pellman**

**In the Matter of George Francis Walsh, M.D.**

Robert M. Briber, an ARB Member, concurs in the Determination and Order in the Matter of Dr. Walsh.

**Dated: December 7, 2000**

  
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**Robert M. Briber**



# 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*

September 20, 2000

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

Ms. Cindy Fascia, Esq.  
New York State Department of Health  
Corning Tower – Room 2509  
Empire State Plaza  
Albany, New York 12237-0032

George F. Walsh, M.D.  
10 Ambassador Drive  
Rochester, New York 14610

David E. Brown, Esq.  
Brown & Tarrantino, LLP  
37 State Street, Suite 500  
Rochester, New York 14614

### **RE: In the Matter of George Francis Walsh, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 00-255) 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: sc  
Enclosure

**COPY**

IN THE MATTER  
  
OF  
  
GEORGE FRANCIS WALSH, M.D.

DETERMINATION

AND

ORDER

BPMC- 00-255

**MARGARET H. McALOON, M.D.**, Chairperson, **ALBERT ELLMAN, M.D.** and **PETER S. KOENIG, SR.**, duly designated members of the State Board of Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(1)(e) of the Public Health Law. **TIMOTHY J. TROST, ESQ.**, served as the Administrative Officer for the Hearing Committee.

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

SUMMARY OF THE PROCEEDINGS

Notice of Hearings and Statement of Charges:	May 9, 2000
Pre-hearing Conference:	June 1, 2000
Hearing Date:	June 1, 2000
Place of Hearing:	Crown Plaza Hotel 70 State Street Rochester, NY
Date of Deliberation:	July 19, 2000

Petitioner appeared by:

Cindy Fascia, Esq. Assoc. Counsel  
BPMC  
2509 Corning Tower  
Albany, NY 12237

Respondent appeared by:

David E. Brown, Esq.  
Brown & Tarrantino, LLP  
37 State Street, Suite 500  
Rochester, NY 14614

### FINDINGS OF FACT

1. Dr. Walsh is a physician licensed to practice his profession in the State of New York. He graduated from Albany Medical College in 1964, participated in a rotating internship at The Genesee Hospital (Rochester, New York) in 1965, and a residency program in obstetrics and gynecology from 1965 through 1968 at the Albany Medical Center, and he was Chief Resident in 1968 (HT p. 137, lines 5-11). From 1968 through 1970, Dr. Walsh was a lieutenant commander in the United States Navy Medical Corps as an obstetrician stationed in Guam and the Marion Islands. (HT p. 137, lines 11-13).
2. Previous to this incident, Dr. Walsh has never formally, or informally, had anyone make a complaint about him regarding improprieties or alleged improprieties. (HT p. 138, lines 16-24). Dr. Walsh testified that he has treated approximately fifty thousand patients over a thirty-year period. (HT p. 144, lines 19-21). Dr. Walsh estimated that he has approximately five thousand five hundred patient visits per year. (HT p. 189, lines 11-20).
3. Dr. Walsh has been practicing obstetric and gynecology medicine in Rochester continuously since 1970 (HT p. lines 16-17). He is in a private gynecological and obstetric practice consisting of Dr. William Robinschon, Dr. Lawrence Sternberg and Dr. Kathleen Robinschon. (HT p. 137, 138).

4. Patient A, at the time she began seeing Respondent for medical care on August 23, 1991, was a 27 year old married woman. (Pet.'s. Ex. 3, p. 2). Patient A had been diagnosed with endometriosis by her previous gynecologist, Dr. Albert Jones, and had undergone laparoscopy on July 12, 1991. (Pet.'s. Ex. 3, p. 45). After her diagnosis, Patient A looked for a physician who specialized in treatment of her condition. Respondent was recommended to the patient by her insurance company.

Respondent first performed surgery on Patient A on December 10, 1991. Respondent performed an exploratory laparotomy, an excision of a right ovarian endometrioma, lysis of adhesions and cauterization of bladder flap endometriosis. On May 31, 1994, Respondent again performed surgery, this time a right salpingo-oophorectomy, on Patient A. (Pet.'s. Ex. 3, p. 20).

5. Patient A, prior to her last visit to Respondent's office on July 19, 1996, had been very happy with Respondent's medical care: (T. 62).

6. Patient A liked and respected Respondent, and for the most part had felt comfortable with him. She believed he was a concerned and caring physician: (T. 61).

7. Patient A thought that Respondent was funny; he made jokes all the time, and made her laugh. (T. 61, 64). However, sometimes she did not think that the Respondent's jokes were appropriate. (T. 106).

8. On July 19, 1996, Patient A went to Respondent's office in Fairport, New York for medical care. (Pet's Ex. 3). Patient A's husband drove her to Respondent's office. Patient A's husband waited in the waiting room when Patient A was called into the examination area. (T. 24-25 [T. Tompkins], 69-70 [Patient A]).

9. Patient A and Respondent were always alone in the examination room during Patient A's visits. Respondent never had a nurse or a chaperone in the room when he examined Patient A. (T. 60, 71 [Patient A], 156-160 [Respondent]).

10. Respondent used chaperones in his practice for some patients. For example, if Respondent were examining a very young patient or a mentally incompetent or mentally challenged patient, he would use a chaperone. If Respondent thought a patient might misconstrue or misunderstand the examination, or be frightened by the examination, or might not be able to distinguish appropriate behavior in an examination, he would use a chaperone. If Respondent believed or was concerned for any reason that a patient would falsely accuse him of some impropriety, he would have a chaperone present. (T. 156-159 [Respondent]). Respondent never used a chaperone when he examined Patient A. (T. 160).

11. On July 19, 1996, when Respondent entered the examination room, Patient A was sitting on the examination table. She was wearing only the examining gown, and had the paper drape across her lap. (T. 70-71). Respondent entered the room alone and told Patient A that she looked "stunning," that her hair "looked stunning." Patient A had colored her hair. On that day, however, Patient A had hurriedly put her hair up, and she thought it was a mess. She said to the Respondent, "Dr. Walsh, I just woke up. It's a mess." Respondent repeated, "I said it looked stunning." Patient A said, "Okay, thank you, Dr. Walsh." Patient A thought that Respondent wanted her to acknowledge his compliment, so she did. (T. 71).

12. During the July 19, 1998 visit the Respondent asked Patient A, while performing the pelvic exam, "Do you cheat on your husband?" Patient A said no. Respondent then asked Patient A, "Does your husband cheat on you?" Patient A said, "I hope not." (T. 73).

13. Patient A stated that maybe there was a medical reason that Dr. Walsh asked her if either her or her husband were sexually active outside of their marriage. (T. p. 94, lines 9-18).

14. Patient A testified that she was not upset over Dr. Walsh asking her about the potential for her husband "cheating" on her, (T. p. 100, line 3) though she was, "a little shocked." (T. 102).

15. Dr. Walsh testified that at the time of Patient A's last office visit with him, there was at least a suspicion in his mind regarding the possibility that she was afflicted with a sexually transmitted disease. (T. p. 145, lines 11-15).

16. Dr. Walsh stated that when inquiring as to the possibility of a sexually transmitted disease, he asks the patient if there is anybody new in her life sexually. (T. p. 145-146, lines 23-1). He will also inquire of the patient if there is someone new in the husband's life sexually. (HT p.145, lines 146). Dr. Walsh testified that he could envision a scenario where he would have to resort to asking a woman if her husband was "cheating" on her depending on the patient's knowledge level. (T. p. 178, lines 11-23).

17. Dr. Walsh stated that he was suspicious for Patient A being afflicted with a sexually transmitted disease because of her complaints during her last two visits to his practice, one of which was with his partner, Dr. Sternberg. (T. p. 147, lines 3-21). Dr. Walsh's assumption was that Patient A might have a possible infectious process going on because of her complaint of pain beginning, after, and continuing after, her period, which was not the usual process with endometriosis. (HT p. 192, lines 10-17). His chart note for Patient A's last visit indicates that he ordered a bacterial culture looking for gonorrhea, beta strep and chlamydia. (HT p. 148, lines 1-4). Dr. Walsh also considered that Patient A could be

afflicted with endometriosis, which is not a sexually transmitted disease. (HT p. 176, lines 14-18).

18. Patient A, during the course of her medical treatment from Respondent, had two bladder infections, one after her surgery in 1991 and another in August 1993 when she went to the emergency room because she had blood in her urine. (Pet's Ex. 3). When Respondent talked about the bladder infection during a subsequent appointment in his office, he said to Patient A, "you know how you get them [bladder infections]?" Respondent then made a gesture of putting his finger in and out of a circle he made with his other hand. Patient A understood Respondent's gesture to be imitating sexual intercourse, (T. p. 66).

19. Dr. Walsh made the gesture with his finger indicating that bladder infections could be caused by sexual intercourse. (HT p. 66, lines 14-24). At the time that he used his fingers to describe one of the possible causes of bladder infections, Dr. Walsh did not come near Patient A or make an insinuation that he wanted to have sex with her. (HT p. 65, lines 4-15).

20. Patient A stated that she did not think anything of Dr. Walsh using his fingers to describe one of the processes behind bladder infections. (HT p. 67, lines 17-18).

21. Dr. Walsh testified that for thirty years he has been using that motion with his hands to explain how urinary tract infections can be caused. (HT p. 141, lines 14-23). Dr. Walsh testified that he also explains to his patients that bladder infections can be reduced by voiding after intercourse. (HT p. 142-143, lines 21-1). Dr. Walsh stated that he also informs his patients regarding hygiene and cross-contamination between the rectum and the urethra because of penile contact. (HT p. 143, lines 3-8).

22. Patient A has two tattoos, one below her belly button, and one on her foot. Patient A had been worried that Respondent would lecture her about the tattoos because he hated that she had gotten a navel ring, which kept getting infected. (T. p. 68, 109). He had "yelled

at her" about the navel ring, and she was sure that, as her physician, he would be upset about the tattoos. (T. p. 68, 109, 117-118). However, when he saw the tattoos, Respondent told Patient A "those are the sexiest tattoos I have ever seen." (T. p. 68 [Patient A]). At the time, Patient A was relieved that Respondent was not yelling at her or lecturing her about the tattoos, she was happy that he accepted and even approved of them. (T. p. 68, 109, 117-118).

23. At the end of the examination, Patient A was sitting up on the examination table. She had taken her feet out of the stirrups, and was sitting at the end of the examination table, with her legs somewhat apart. (T. p. 79, 119-121). Patient A did not put her leg totally together because she did not want the lubricant used for the examination to get all over her legs. She usually wiped herself off as soon as Respondent left the room. (T. p. 119-121).

24. Respondent talked with Patient A about the possibility that her current problem possibly was with her colon. During the examination, he had asked if her pain was located in her colon, and asked her about her bowel movements. At the conclusion of the examination, Respondent told Patient A he wanted her to have a colonoscopy or lower GI series. Patient A said she would, and asked Respondent to refer her to someone. Respondent wrote the name of a physician down for her. (T. p. 76-78). Patient A at that point fully intended to follow Respondent's recommendation, to see whomever he recommended and have the tests performed. (T. 77-78).

25. When Patient A was sitting at the end of the examining table, with her legs somewhat apart, Respondent got up from where he had been sitting while they were talking, and came toward her. Respondent put his hands on Patient A's thighs and leaned in very close to her, so close that Patient A had to back away from him. She saw Respondent puckering up his lips, and looking at her in an "intimate" way. Respondent came in close,

trying to kiss her on the lips, but Patient A turned her face away and Respondent's kiss landed on her cheek. (T. p. 79-81, 110).

26. After Patient A had turned her face away from him, Respondent quickly walked out of the room. (T. p. 80). Patient A thought that Respondent knew that he had shocked and upset her by his actions, by trying to kiss her. (T. p. 80). After Respondent had quickly exited the room, Patient A was in shock. She could hardly believe what had just happened. (T. p. 80).

27. Despite her shock at what had happened, Patient A knew that Respondent had tried to kiss her lips. (T. p. 81,110)

28. Patient A sat for a moment in shock and confusion. She then got dressed, but she was shaking all over. She felt like she "had to get out of there." (T. p. 83). She went out to where her husband was waiting.

29. Patient A's husband noticed how upset Patient A was. She kept saying things like "let's leave, let's get out of here." On the many other occasions he had driven his wife to Respondent's office for medical care, Patient A's husband had never seen her act like this. (T. p. 25-26). When Patient A and her husband got in their car, Patient A began to cry. Her husband kept asking why she was so upset, but Patient A would not tell him the reason why. (T. p. 25-26 [T. Tompkins], 83 [Patient A]). Patient A's husband asked Patient A if she needed more surgery because he thought that was what was upsetting her. (T. p. 83 [Patient A], 33 [T. Tompkins]).

30. Patient A did not want to tell her husband that Respondent had tried to kiss her on the lips. She was afraid that there would be a scene that her husband would get into a physical fight with Respondent and hurt him. Patient A's fear of such a scene was reasonable and based in reality. Her husband had gotten in physical fights before when other men had made passes at her. (T. p. 28, 39-41 [T. Tompkins], 85 [Patient A]). Patient

A did not want to deal with the ensuing scene. She was trying to cope with her own emotions and reactions to what Respondent had done, and didn't want to have to deal with anyone else's feelings about it. (T. p. 84 [Patient A]).

31. Patient A felt "dirty and belittled" by what Respondent had done. (T. p. 84-85). She felt ashamed and blamed herself. Patient A was angry with herself for not reacting differently when Respondent made an unwanted intimate advance.

32. For some time after Respondent's attempt to kiss her, Patient A stayed ashamed and angry with herself. She would think about going back to Respondent's office to confront him. (T. p. 132). She never wanted to see him again professionally.

33. Approximately two or three weeks after her July, 1996 office visit, Patient A told her older sister about what Respondent had done. (T. p. 48-49 [J. Smith], 85-86 [PatientA]). Eventually, Patient A told her husband as well. (T. p. 28, 29, 88).

34. Patient A's husband called his attorney. The attorney and Patient A's husband wanted Patient to go back to Respondent's office with a tape recorder, but Patient A refused. She didn't want to go near Respondent, and did not want to put herself in that position again. (T. p. 29-30 [T. Tompkins], 88, 113 [Patient A]). Patient A's husband and his attorney talked about a civil lawsuit, but Patient A was not interested. (T. p. 88,113 [Patient A], 29-30 [T. Tompkins]). Patient A was trying to cope with her feelings about what had happened. She never wanted to see Respondent again. (T. p. 88).

35. Sometime after Patient A's appointment, Patient A had a telephone conversation with her father, and she told him what had happened with Respondent. Patient A's father urged her to report Respondent's misconduct, urged her not to let Respondent get away with what he had done. (T. p. 89). After that telephone conversation, Patient A finally started to feel really mad at Respondent. She had been hurt and ashamed, and mad at herself more than anyone. She thought about other women or other patients of Respondent's. She

finally decided to do something about it. She called a woman attorney, who told her how to file a complaint and gave her the telephone number for the Office of Professional Medical Conduct (OPMC). (T. p. 89-90 [Patient A]). Patient A called OPMC, and began the process that resulted in this hearing. (T. p. 89-91).

36. Patient A never returned to Respondent's office for medical care after the July, 1996 visit. She eventually requested that her medical records be transferred. (Pet's. Ex. 3; T. p. 87 [Patient A]).

37. Respondent's misconduct had a negative impact on Patient A. She will never go to a male gynecologist again after Respondent's actions toward her. (T. p. 91 [Patient A]). Although she had previously had male physicians (Dr. Albert, Jones, and then the Respondent (See Pet's. Ex. 3), Patient A eventually transferred her care to Dr. Hoeger, a female physician. (T. p. 87, 91, 93 [Patient A]). Dr. Hoeger specializes in reproductive endocrinology and infertility. (T. p. 94).

### DISCUSSION

This is a classic case of Doctor and patient alone in a closed room. The case turns solely on the issue of credibility. Patient A was a very credible witness. Her description of events was clear, well articulated and devoid of non-sequiturs or inconsistencies. Her reaction to the attempted kiss was a common one. Victims often replay the assault in their minds and think of other ways they could have or should have responded. They are often ashamed that, in the shock of the moment, they were paralyzed and did not react. They feel angry with themselves for this paralysis and always feel dirty, belittled and betrayed. Although she was afraid and ashamed to tell her husband on the day of the appointment, she ultimately came to tell him some weeks later and she told her sister as well. Both

Patient A's husband and sister were credible witnesses who told of consistent, believable events.

The only suggestion of a motive for Patient A to lie or exaggerate was an uncorroborated speculation that Patient A might have felt angry or betrayed when her "father figure" physician referred her off to another specialized physician for different care. This suggestion is a very far reach into the realm of possibility and not at all persuasive under the circumstances. There was no suggestion of a motive to fabricate for the husband or the sister. Much more to the point is the suggestion that if Patient A were to fabricate a story of misconduct based on her anger or dissatisfaction, the imagined misconduct could have been much more heinous.

The only minor concern about Patient A's credibility was her admitted failure or inability to completely understand the meaning of Respondent's words, so she would shrug them off. Although it is more likely than not that most of the statements were made to Patient A as she described them, there may have been some misperception on her part. Her testimony was also somewhat vague regarding the context in which the statements were made. Furthermore, some of the statements were viewed only, in retrospect, as offensive. No such doubts exist about the attempted kiss, however. Patient A's recollection was certain and complete. The preponderance of the evidence is found to favor the Petitioner.

The Respondent's testimony and demeanor were superficially or prima facie credible. He is an apparently esteemed and most experienced physician in his community. It seems unlikely that he would have precipitated such an action knowingly. However, in cases such as this it is possible that there can be momentary loss or a complete failure of Respondent's ability to control an inappropriate impulse and it may be that the Respondent has erased the memory or has built an artificial wall of denial around the incident. What

reduced the Respondent's credibility and ability to persuade the triers of fact that his version was the correct one, was his absolute denial that this event did occur or EVER COULD OCCUR. The Respondent admitted to NO possibility of human weakness, not even the most common: that of faulty memory. In other words, his denial was so adamant as to be inherently unreliable.

Furthermore, the Respondent testified that he did not remember this patient or the alleged incident but he unequivocally remembered that he did not kiss her. This statement was at best confusing and was clearly inconsistent.

In Respondent's favor, it is not certain that the attempted kiss was of a predatory sexual nature as suggested by the Petitioner, especially in this situation where Patient A professed a lack of understanding of the Respondent's behavior. It is not difficult to imagine one possible scenario where the Respondent, who had endeared himself to a much younger female patient as a "father figure" and may have felt the same relationship toward her, may have had his sense of propriety overwhelmed for a second by his mutual feeling of affection, good luck and good-bye to a daughter-like patient who underwent some substantial medical treatment under his care over a long period and whom he was now referring to a new consultant.

Even if Respondent's state of mind at the time was affectionate in a "fatherly" manner, the Respondent's action was inappropriate and violated his trust nevertheless. But, the point is that the Respondent vigorously denied any such possibility. This could NEVER have happened under any circumstances, he says. Therein lies the problem with his credibility.

In the final analysis the issue of credibility was not a close call, however. It was not so much that the Respondent lacked credibility but that Patient A was more credible. It was more likely than not that the event occurred as she remembered it.

Regarding the several instances of alleged inappropriate remarks, Patient A's testimony is not quite as compelling. Suffice it to say that although the statements were proved by a preponderance, they were not of a threatening or immoral nature (in any context) nor did Patient A view the language as such at the time. At worst, the statements were coarse and unprofessional and thus inappropriate. The statements do not rise to the level of misconduct.

Finally, on the allegation of moral unfitness, Respondent did violate his public trust and Patient A's rights. However, the uncertainty regarding the frame of mind or motive of Respondent and the relatively benign nature of the attempted assault, in itself, (whether merely affectionate or predatory) does not support a finding of moral unfitness to practice. This situation lacks any evidence of flagrant and depraved conduct and the harsh connotation, which accompanies the concept. Nor would such a finding be consistent with the Petitioner's recommended penalty of Censure and Reprimand.

### **CONCLUSIONS AS TO SPECIFICATION ONE**

The Respondent is guilty of misconduct in that he approached Patient A as she was seated on the examination table and attempted to kiss her. The comments alleged at A1(a), (6), (C) and 2(a) and (6) do not constitute professional misconduct.

**CONCLUSION AS TO SPECIFICATION TWO**

There is insufficient evidence to support the charge of moral unfitness to practice medicine.

**VOTE OF THE HEARING COMMITTEE**

(All Votes are unanimous unless otherwise indicated)

**SPECIFICATION ONE  
SPECIFICATION TWO**

**SUSTAINED  
NOT SUSTAINED**

**DETERMINATION OF THE HEARING COMMITTEE**

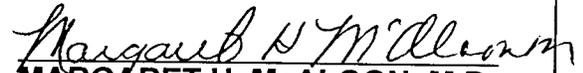
The Respondent should receive a Censure and Reprimand. For the protection of the public and his own reputation the Respondent should not conduct pelvic examinations or breast examinations in a closed examination room unless a chaperone is present. Said chaperone shall be provided by the Respondent.

ORDER

It is hereby ORDERED that: a Censure and Reprimand is issued to the Respondent. The Respondent shall not conduct a pelvic examination or breast examination on a female patient in a closed examination room without the presence of a chaperone. Respondent shall provide the chaperone. The duration of this Order shall be indefinite.

Any single failure to comply with this Order shall constitute professional misconduct subject to investigation and review by the Board of Professional Medical Conduct in the same manner as a violation of the terms of probation.

DATED: Sept 15, 2000  
Buffalo, New York

  
MARGARET H. McALOON, M.D.

ALBERT ELLMAN, M.D.  
PETER S. KOENIG, SR.

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

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IN THE MATTER  
OF  
GEORGE FRANCIS WALSH, M.D.,  
Respondent

RULING

Counsel for the Respondent has objected to the testimony of four of the five witnesses which the State intended to call in this proceeding. The grounds for the objection is "hearsay" and that the proffered testimony does not meet the requirements of the "prompt outcry" hearsay exception. It appears that the Patient's husband, sister and mother will offer testimony that approximately three weeks after Patient's last office visit to the Respondent in November '95 she revealed to these respective witnesses a description of the alleged inappropriate conduct and contact which she experienced by the Respondent.

The "hearsay" rule of evidence does not apply to administrative proceedings although the reason for the rule pervades all testimonial proceedings. Therefore, caution is required even in administrative proceedings when assessing the reliability of such statements. The issue of fairness is paramount in the determination of whether to allow hearsay evidence at all.

In this case the testimony of the Patient's family members is material and pertinent. This testimony will be allowed, including how the Patient described the Respondent's conduct. The Panel will be instructed at deliberation time as to the legally suspect nature of the testimony. It is also expected that the Respondent will raise the issue of "interest" in the written closing argument.

The evidence offered here is deemed more reliable than just any hearsay because it either fulfills or comes very close to meeting the requirements of the "prompt outcry" exception to the "hearsay" rule. This exception is considered here not based on its technical terms (lest it be said that if "hearsay" were allowed then using the exception would be inapposite).

Rather, setting aside the "rules" of evidence one would nevertheless draw upon that body of knowledge and precedent to assist in the assessment of reliability in determining whether the admission of this relevant testimony meets a reasonable standard of fairness.

Although the cases seem to say that perhaps a three week period between event and outcry would not meet the "technical" standard of promptness, it is not clear when the Patient's first appropriate opportunity to speak arose.

Furthermore, the feeling of shame, which seems to infect victims in all sexual misconduct cases, from the most heinous to a peck on the cheek, acts as a very strong deterrent to talking about an incident with anyone.

Therefore, the fact that the "outcry" did not occur until three weeks after the event would only slightly diminish the reliability of the evidence.

Another circumstance which precludes this evidence from being unfairly prejudicial to the Respondent is the fact that both parties to the conversation will be in court and will be sequestered.

On the other hand, the testimony of the Patient's physician, with whom she treated next after the incident with the Respondent, will not be allowed because it lacks probity. The only document before me on this subject is the report of an interview of 10/1/98 with Patient A. The elapsed time between the incident and the new appointment was not mentioned in the interview but counsel alleges the period to be five months. This is not so prompt an outcry as to act as a support to the reliability problem. Furthermore, the Patient did not make the statement, her mother did. Most likely, this evidence will come in anyway from the lips of the Patient and her mother. The mother may have told ten to twenty people. This does not prove the point.

  
Timothy J. Trost  
Administrative Law Judge