



# STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Barbara A. DeBuono, M.D., M.P.H.  
Commissioner

May 24, 1995

RECEIVED  
MAY 24 1995  
MEDICAL CONDUCT

## CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David Alan Gilbert, M.D.  
142 West York Street  
Suite 915  
Norfolk, Virginia 23510

David Alan Gilbert, M.D.  
400 West Brambleton Avenue  
Suite 300  
Norfolk, Virginia 23510

Marcia E. Kaplan  
Associate Counsel  
NYS Department of Health  
5 pen Plaza-Sixth Floor  
New York, New York 10001

### **RE: In the Matter of David Alan Gilbert, M.D.**

EFFECTIVE DATE: 05/31/95

Dear Dr. Gilbert and Ms. Kaplan:

Enclosed please find the Determination and Order (No. 95-108) 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.

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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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  
Corning Tower - Fourth Floor (Room 438)  
Empire State Plaza  
Albany, New York 12237

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.

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.

Request for review of the Committee's determination by the Administrative Review Board stays all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

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.

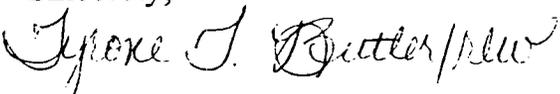
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge  
New York State Department of Health  
Bureau of Adjudication  
Empire State Plaza  
Corning Tower, Room 2503  
Albany, New York 12237-0030

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,

A handwritten signature in cursive script that reads "Tyrone T. Butler".

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:nm

Enclosure

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

**IN THE MATTER  
OF  
DAVID ALAN GILBERT, M.D.**

**DETERMINATION  
AND  
ORDER**

BPMC-95-108

HILDA RATNER, M.D., (Chair), ROBERT J. O'CONNOR, M.D. and MICHAEL A. GONZALEZ, R.P.A., duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to §230(10)(e) of the Public Health Law.

MARC P. ZYLBERBERG, ESQ., ADMINISTRATIVE LAW JUDGE, served as the Administrative Officer.

The Department of Health appeared by MARCIA E. KAPLAN, ESQ., Associate Counsel.

DAVID ALAN GILBERT, M.D., ("Respondent") appeared personally at the hearing on his own behalf and was not represented by counsel.

A hearing was held on March 21, 1995. Evidence was received, a witness was sworn or affirmed and examined. A transcript of the proceedings was made. After consideration of the entire record, the Hearing Committee issues this Determination and Order, pursuant to the Public Health Law and the Education Law of the State of New York.

## STATEMENT OF CASE

The State Board for Professional Medical Conduct is a duly authorized professional disciplinary agency of the State of New York. (§230 et seq. of the Public Health Law of the State of New York ["P.H.L."]). This case, brought pursuant to P.H.L. §230(10)(p), is also referred to as an "expedited hearing". The scope of an expedited hearing is strictly limited to evidence or sworn testimony relating to the nature and severity of the penalty to be imposed on the licensee<sup>1</sup> (Respondent).

DAVID ALAN GILBERT, M.D., is charged with professional misconduct within the meaning of §6530(9)(b) of the Education Law of the State of New York ("Education Law"), to wit: "professional misconduct ... by reason of having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state ..." (Petitioner's Exhibit # 1-A and §6530(9)(b) of the Education Law).

In order to find that Respondent committed professional misconduct, the Hearing Committee, pursuant to §6530(9)(b) of the Education Law, must determine: (1) whether Respondent was found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state and (2) whether Respondent's conduct on which the findings were based would, if committed in New York State, constitute professional misconduct under the laws of New York State.

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

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<sup>1</sup> P.H.L. §230(10)(p), fifth sentence.

## FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. These facts 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. Some evidence was rejected as irrelevant. Unless otherwise noted, all Findings and Conclusions herein were unanimous. The State, who has the burden of proof, was required to prove its case by a preponderance of the evidence. All Findings of Fact made by the Hearing Committee were established by at least a preponderance of the evidence.

1. Respondent was authorized to practice medicine in New York State on July 11, 1980 by the issuance of license number 142856 by the New York State Education Department (Petitioner's Exhibits # 1-A and # 2)<sup>2</sup>.

2. Respondent is not currently registered with the New York State Education Department. He was last registered to practice during the period ending December 31, 1981 (Petitioner's Exhibits # 1-A and # 2).

3. John R. Burbach personally served a Notice of Referral Proceeding, a Statement of Charges and a summary of Department of Health hearing rules, on Respondent on December 21, 1994 at 400 W. Brambleton Ave., #300, Norfolk, Virginia (Petitioner's Exhibit # 1-B).

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<sup>2</sup> refers to exhibits in evidence submitted by the New York State Department of Health (Petitioner's Exhibit) or by Dr. David Alan Gilbert (Respondent's Exhibit).

4. The Virginia Board of Medicine of the Commonwealth of Virginia ("Virginia Board") is a state agency charged with regulating the practice of medicine pursuant to the Laws of the State of Virginia (Petitioner's Exhibits # 3-A, # 3-B and # 4).

5. On or about February 14, 1994, the Virginia Board issued a Consent Order, placing Respondent's license to practice medicine in Virginia on indefinite probation. The Virginia Board found that Respondent indiscriminately prescribed to a drug dependent patient an excessive number of (high abuse potential) controlled substances, contrary to sound medical judgment and without maintaining complete and adequate records (Petitioner's Exhibit # 3-A).

6. The Hearing Committee accepts the Virginia Board's findings of fact and conclusions of law and adopts same as part of its own Findings of Fact. The Virginia Board findings and conclusions are annexed hereto as appendix II and are incorporated herein (Petitioner's Exhibit # 3-A).

7. As a result of the Consent Order, Respondent's license to practice medicine in the Commonwealth of Virginia was placed on INDEFINITE PROBATION with certain terms and conditions (see Appendix II [Petitioner's Exhibit # 3-A]).

8. Respondent has complied with the terms of the Virginia Board's Order of February 14, 1994 (Respondent's Exhibits # B and # C); [T-22-T-23; T-28-29]<sup>3</sup>.

9. On March 16, 1995, the Virginia Board voted to terminate Respondent's indefinite probation and to reinstate Respondent's license to a full and unrestricted status (Respondent's Exhibit # B); [T-22, T-28].

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<sup>3</sup> Numbers in brackets refer to transcript page numbers [ T- ].

## CONCLUSIONS OF LAW

The Hearing Committee makes the following conclusions, pursuant to the Findings of Fact listed above and the record herein. All conclusions resulted from a unanimous vote of the Hearing Committee.

The Hearing Committee concludes that the Factual Allegations, from the December 1, 1994 Statement of Charges, are SUSTAINED.

The Hearing Committee further concludes that the First Specification of Charges is SUSTAINED.

The Hearing Committee concludes that the Department of Health has shown by a preponderance of the evidence that Respondent was found guilty of improper professional practice by the State of Virginia and his conduct in Virginia would constitute professional misconduct under the laws of New York State. The Department of Health has met its statutory burden of proof.

### **I Service of Charges and of Notice of Hearing.**

P.H.L. §230(10)(d) requires that the Charges and Notice of Hearing be served on the licensee personally, at least twenty (20) days before the Hearing. If personal service cannot be made, due diligence must be shown and certified under oath. After due diligence has been certified, then, the Charges and Notice of Hearing must be served by registered or certified mail to the licensee's last known address, at least fifteen (15) days before the Hearing.

From the affidavit submitted, personal service of the Notice of Referral Proceeding and the Statement of Charges on Respondent was proper and timely. In addition, Respondent appeared at the Hearing and had no objection to service of the Statement of Charges and the Notice of Referral Proceeding.

## **II Professional Misconduct under §6530(9)(b) of the Education Law.**

The Medical Board of Virginia is a duly authorized professional disciplinary agency. In 1994, said Medical Board issued a Consent Order, in which Respondent admitted to prescribing controlled substances contrary to sound medical judgment and without maintaining complete and accurate records. Respondent's acts were violations of various sections of Virginia Laws which warranted disciplinary action by the Virginia Board. The Hearing Committee finds that Respondent's conduct, by his own admissions, if committed in New York State, would constitute professional misconduct under, at least, §6530(3)<sup>4</sup>, §6530(16)<sup>5</sup>, §6530(32)<sup>6</sup> and §6530(35)<sup>7</sup> of the Education Law. Therefore, Respondent has committed professional misconduct pursuant to §6530(9)(b) of the Education Law.

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<sup>4</sup> Each of the following is professional misconduct... [P]racticing the profession with negligence on more than one occasion; ...

<sup>5</sup> Each of the following is professional misconduct... [A] willful or grossly negligent failure to comply with substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of medicine; ...

<sup>6</sup> Each of the following is professional misconduct... [F]ailing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient. ...

<sup>7</sup> Each of the following is professional misconduct... [O]rdering of excessive ... treatment ... not warranted by the condition of the patient; ...

## DETERMINATION

The Hearing Committee, pursuant to the Findings of Fact, Conclusions of Law and Discussion set forth above, unanimously determines as follows:

1. Respondent should be strongly Censured and Reprimanded for his conduct in Virginia.

This determination is reached after due and careful consideration of the full spectrum of penalties available pursuant to P.H.L. §230-a, including:

(1) Censure and reprimand; (2) Suspension of the license, wholly or partially; (3) Limitations of the license; (4) Revocation of license; (5) Annulment of license or registration; (6) Limitations; (7) the imposition of monetary penalties; (8) a course of education or training; (9) performance of public service and (10) probation.

The Committee is bound by the documentary evidence presented by Petitioner. The record establishes that Respondent committed unprofessional conduct by repeated acts of prescribing controlled substances to one patient, in violation of the laws of Virginia.

The Hearing Committee concludes that if this case had been held in New York, on the facts presented, the negligence alleged and admitted to would have resulted in a finding that Respondent had committed professional misconduct. The acts committed by Respondent appear to have been motivated to ease the pain of Respondent's wife (the patient) and do not place in question his ability to practice medicine with skill and safety to other patients.

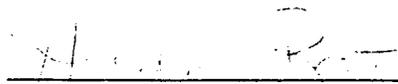
The Hearing Committee does consider Respondent's misconduct to be very serious. The Hearing Committee determines that the Virginia Board's reinstatement of Respondent's license and the terms and conditions imposed by the Virginia Board are sufficient other sanctions under the circumstances presented here. Therefore, Censure and Reprimand is the appropriate sanction for New York to impose under the circumstances presented to the Hearing Committee. The penalty given to Respondent is directly related to his credentials and forthright appearance and testimony at the Hearing.

**ORDER**

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

1. The Specification of professional misconduct contained within the Statement of Charges (Petitioner's Exhibit # 1-A) is **SUSTAINED**, and
2. Respondent is strongly **CENSURED AND REPRIMANDED** for his conduct in Virginia; and
3. Respondent must comply with the terms and conditions of the Virginia Board contained in Appendix II.

**DATED: Albany, New York  
May 1995**

  
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**HILDA RATNER, M.D., Chair**

**ROBERT J. O'CONNOR, M.D.  
MICHAEL A. GONZALEZ, R.P.A.**

To:

David Alan Gilbert, M.D.  
142 West York Street,  
Suite 915  
Norfolk, Virginia 23510

David Alan Gilbert, M.D.  
400 West Brambleton Ave.,  
Suite 300  
Norfolk, Virginia 23510

Marcia E. Kaplan  
Associate Counsel  
NYS Department of Health  
5 Penn Plaza-Sixth Floor  
New York, New York 10001

**A P P E N D I X I**

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

-----X

IN THE MATTER : STATEMENT  
OF : OF  
DAVID ALAN GILBERT, M.D. : CHARGES

-----X

DAVID ALAN GILBERT, M.D., the Respondent, was authorized to practice medicine in New York State on July 11, 1980 by the issuance of license number 142856 by the New York State Education Department. The Respondent is not currently registered with the New York State Education Department to practice medicine. He was last registered to practice from 142 West York Street, Suite 915, Norfolk, Virginia 23510 during the period ending December 31, 1981.

FIRST SPECIFICATION

HAVING BEEN FOUND GUILTY OF  
MISCONDUCT IN ANOTHER STATE

1. Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law Sec. 6530(9)(b) (McKinney Supp. 1994) in that he has been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state

where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, specifically:

On or about February 14, 1994, the Virginia Board of Medicine (Virginia Board) issued a Consent Order, placing Respondent's license on indefinite probation upon the following conditions: that Respondent must successfully complete a specified mini-residency in the prescribing of controlled substances; that Respondent is prohibited from medically treating or providing any medications to Patient A; that in one year Respondent shall appear before a committee of the Board monitoring his probation; and that Respondent shall practice in accordance with the law.

The Virginia Board found the Respondent guilty of gross ignorance or carelessness in his practice, or gross malpractice, and unprofessional conduct, as follows: having prescribed or dispensed controlled substances with intent or knowledge that it will be used otherwise than medicinally, or for accepted therapeutic purposes, or with intent to evade any law with respect to the sale, use or disposition of such drug; having conducted his practice in a manner contrary to the standards of ethics of his branch of the healing arts; having conducted his practice in such a manner as to be a danger to the health and welfare of his patients or the public; and having violated provision(s) of statute or regulation, state or federal, relating to the manufacture, distribution, dispensing or administration of drugs. The Board made these findings based upon the following admissions by Respondent: that between March 1987 and September 1992, he indiscriminately prescribed to Patient A, a person he knew or should have known was drug dependent, an excessive number of specified Schedule II-VI controlled substances, most with a high abuse potential, contrary to sound medical judgment, and without maintaining

complete and adequate records; that between 1987 and 1992, he failed to maintain complete and adequate office records on Patient A, upon whom he performed five separate cosmetic and plastic surgery procedures between 1987 and 1991, in that he neglected to document the taking of a history and physical, his findings, and what medications he was prescribing for this patient and his rationale for said prescribing; and that in addition to the described abusable controlled substances, he prescribed various other specified Schedule VI controlled substances for Patient A, contrary to sound medical judgment, and without maintaining complete and adequate records.

These acts, if committed within New York State, would constitute professional misconduct under N.Y. Educ. Law Sec. 6530(2) (practicing the profession fraudulently), Sec. 6530(3) (practicing the profession with negligence on more than one occasion), 6530(4) (practicing the profession with gross negligence on a particular occasion), Sec. 6530(6) (practicing the profession with gross incompetence), Sec. 6530(16) (a willful or grossly negligent failure to comply with substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of medicine), Sec. 6530(20) (conduct in the practice of medicine which evidences moral unfitness to practice medicine), and/or Sec. 6530(35) (ordering of excessive treatment not warranted by the condition of the patient).

DATED: NEW YORK, NEW YORK

*December 1, 1994*



CHRIS STERN HYMAN  
Counsel  
Bureau of Professional  
Medical Conduct

**A P P E N D I X   I I**

PLAINTIFF'S  
DEFENDANT'S  
COMPANY'S  
DEPARTMENT'S  
~~PETITIONER'S~~ for identification  
RESPONDENT'S in evidence evidence 3/21  
DATE 3/21/95 REPORTER (M)  
STERLING REPORTING SERVICE, INC.

EXHIBIT 3-A

VIRGINIA:

BEFORE THE BOARD OF MEDICINE

IN RE: DAVID A. GILBERT, M.D.  
License No.: 0101-030832

CONSENT ORDER

Pursuant to Sections 9-6.14:11 and 54.1-2919 of the Code of Virginia (1950), as amended ("Code"), an informal conference was held with David A. Gilbert, M.D. on November 5, 1993, in Williamsburg, Virginia. Members of the Virginia Board of Medicine ("Board") serving on the informal conference committee ("Committee") were: Stephanie J. Marioneaux, M.D., Chairman; Thomas A. Wash, M.D.; and Leslie H. Vogt. Dr. Gilbert was present, but was not represented by counsel. The Board was represented by Carol R. Russek, Assistant Attorney General. The purpose of the informal conference was to inquire into allegations that Dr. Gilbert may have violated certain laws governing the practice of medicine in Virginia, as set forth in the Board's notice of informal conference dated September 27, 1993.

FINDINGS OF FACT

Now, having properly considered the evidence presented, the Committee makes the following findings of fact:

1. Between the period of March, 1987 and September, 1992, Dr. Gilbert indiscriminately prescribed to Patient A, a person he knew or should have known was drug dependent, an excessive number of Schedule II - VI controlled substances as set forth in the notice of informal conference dated September 27, 1993, most of which have a high abuse potential, contrary to sound medical judgment, and without maintaining complete and adequate records.

Patient A's physician cautioned her regarding the use of analgesics in February 1991, and referred her for substance abuse treatment in March 1992. With Dr. Gilbert's knowledge, the patient left treatment against medical advice; however, Dr. Gilbert continued to prescribe abusable medications. Furthermore, during the period from July 27, 1989 to August 16, 1992, Patient A obtained multiple controlled substances as set forth in the notice of informal conference dated September 27, 1993, from at least 17 other physicians.

2. Between 1987 and 1991, Patient A underwent 5 separate cosmetic and plastic surgery procedures, all of which were performed by Dr. Gilbert. However, between 1987 and September, 1992, Dr. Gilbert failed to maintain complete and adequate office records on this patient, in that he neglected to document the taking of a history and physical, his findings, and what medications he was prescribing for this patient and his rationale for said prescribing.

3. In addition to the above described abusable controlled substances, Dr. Gilbert prescribed various Schedule VI controlled substances as set forth in the notice of informal conference dated September 27, 1993, for Patient A, contrary to sound medical judgement, and without maintaining complete and adequate records.

### CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Committee concludes that Dr. Gilbert has violated Section 54.1-2915.A(4) and (3) as further defined in Section 54.1-2914.A(3), (9), (10) and (14) of the Code and Sections 54.1-3303 and 54.1-3808 of the Drug Control Act.

### CONSENT

I, David A. Gilbert, M.D. by affixing my signature hereto, acknowledge that:

1. I have been specifically advised to seek the advice of counsel prior to signing this document;
2. I am aware that without my consent, no legal action can be taken against me, except pursuant to the Virginia Administrative Process Act, Section 9-6.14:1 et seq., of the Code;
3. I have the following rights, among others: the right to a formal fact finding hearing before the Board, to reasonable notice of said hearing, to representation by counsel, and to cross-examine witnesses against me;
4. I waive all such rights to a formal hearing;
5. I admit to the foregoing Findings of Fact; and

6. I consent to the entry of this Consent Order affecting my license to practice medicine in the Commonwealth of Virginia.

ORDER

WHEREFORE, it is hereby ORDERED that the license of David A. Gilbert, M.D. to practice medicine in the Commonwealth of Virginia be placed on INDEFINITE PROBATION upon the following terms and conditions:

1. Within one year of the entry of this Consent Order, Dr. Gilbert shall attend and successfully pass the mini-residency entitled "The Proper Prescribing of Controlled Dangerous Substances" sponsored by the Robert Wood Johnson Medical School of the University of Medicine and Dentistry of New Jersey.

2. Dr. Gilbert is prohibited from medically treating Patient A.

3. Dr. Gilbert is prohibited from prescribing, administering or dispensing any medications to Patient A.

4. Dr. Gilbert shall appear before an informal conference committee of the Board in one year. Such Committee shall monitor Dr. Gilbert's indefinite probation, determine the frequency of further appearances before it, and shall serve as an instrument of the Board responsible for approving and reviewing all information relative to the terms and conditions of this Consent Order.

5. Dr. Gilbert shall maintain a course of conduct in his practice of medicine commensurate with the requirements of Chapter 29, Title 54.1 of the Code.

Violation of this Consent Order shall constitute grounds for the revocation of the license of David A. Gilbert, M.D. In the event Dr. Gilbert violates any of the terms and conditions of this Consent Order, a formal administrative hearing shall be convened to determine whether the license of David A. Gilbert, M.D. shall be revoked.

Pursuant to Section 9-6.14:14 of the Code, the signed original of this Consent Order shall remain in the custody of the Department of Health Professions as a public record and shall be made available for public inspection and copying upon request.

FOR THE BOARD:

Hilary H. Connor  
Hilary H. Connor, M.D.  
Executive Director  
Virginia Board of Medicine

ENTERED: 2-14-94

SEEN AND AGREED TO:

David A. Gilbert M.D.  
David A. Gilbert, M.D.

COMMONWEALTH OF VIRGINIA  
COUNTY/CITY OF Norfolk, to wit:

Subscribed and sworn to before me, the undersigned Notary Public, in and for the Commonwealth of Virginia at large, this 26<sup>th</sup> day of FEB., 1994 by David A. Gilbert, M.D.

Deedee W. Merritt  
Notary Public

My commission expires: 5-31-95

RECEIVED: February 17, 1994

Bernard L. Henderson, Jr.  
Bernard L. Henderson, Jr., Director  
Department of Health Professions

KTM:KB110801:ORDERS

A TRUE COPY TESTE:  
Karen W. Perrine  
KAREN W. PERRINE, DEPUTY EXECUTIVE DIRECTOR  
VIRGINIA BOARD OF MEDICINE