



# 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*

July 19, 1995

Karen Schimke  
*Executive Deputy Commissioner*

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Daniel Guenzberger, Esq.  
NYS Dept. of Health  
5 Penn Plaza - Sixth Floor  
New York, New York 10001

James R. Slater, Esq.  
10 East 40th Street  
New York, New York 10016

Joshua L. Sternberg, M.D.  
c/o Klepfish  
1852 52nd St. #24  
Brooklyn, New York 11204

RECEIVED  
JUL 20 1995  
OFFICE OF PROFESSIONAL MEDICAL CONDUCT

**RE: In the Matter of Joshua L. Sternberg, M.D.**

Effective Date: 07/26/95

Dear Mr. Guenzberger, Mr. Slater and Dr. Sternberg :

Enclosed please find the Determination and Order (No. 95-49) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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  
Empire State Plaza  
Corning Tower, Room 438  
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.

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

Sincerely,

REDACTED  
Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:

Enclosure

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

**IN THE MATTER**

**OF**

**JOSHUA L. STERNBERG, M.D.**

**ADMINISTRATIVE  
REVIEW BOARD  
DECISION AND  
ORDER NUMBER  
ARB NO. 95-49**

The Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of **ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.** held deliberations on May 19, 1995 to review the Hearing Committee on Professional Medical Conduct's (Hearing Committee) March 8, 1995 Determination finding Dr. Joshua Sternberg (Respondent) guilty of professional misconduct. The Office of Professional Medical Conduct (Petitioner) requested the review through a Notice which the Board received on March 16, 1995. The Respondent did not file a Notice of Review. James F. Horan served as Administrative Officer to the Review Board. Daniel Guenzburger, Esq. filed a brief for the Petitioner which the Board received on April 27, 1995, and a reply brief which the Board received on April 28, 1995. James R. Slater, Esq. submitted a brief for the Respondent which the Board received on April 29, 1995 and a reply brief which the Board received on May 3, 1995.

**SCOPE OF REVIEW**

New York Public Health Law (PHL) §230(10)(i), §230-c(1) and §230-c(4)(b) provide that the Review Board shall review:

- whether or not a Hearing Committee determination and penalty are consistent with the Hearing Committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by PHL §230-a.

Public Health Law §230-c(4)(b) permits the Review Board to remand a case to the Hearing Committee for further consideration.

Public Health Law §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

### **HEARING COMMITTEE DETERMINATION**

The Petitioner brought this case pursuant to Public Health Law Section 230(10)(p) and Education Law Section 6530(9)(a)(i), which provide an expedited hearing in cases in which professional misconduct charges against a Respondent are based upon a prior criminal conviction in New York or another jurisdiction or upon a prior administrative adjudication which would amount to misconduct if committed in New York State. The expedited hearing determines the nature and severity of the penalty which the Hearing Committee will impose based upon the criminal conviction or prior administrative adjudication.

The Hearing Committee in this case found that the Petitioner had met its burden of proof in establishing that the Respondent was disciplined by the Florida Board of Medicine (Florida Board) for inadequate and inappropriate treatment of a patient, ordering excessive tests and failing to maintain adequate records. The Committee found that a fully contested hearing had determined that the Respondent inappropriately delayed performing diagnostic tests on a patient with injuries from an automobile accident, failed to perform certain tests, performed unnecessary tests, failed to diagnose a knee injury and failed to maintain an adequate record of his evaluation and treatment of the patients. In that case, the Florida Board accepted a finding that the Respondent had performed the unnecessary tests as an exploitation of the patient for the financial gain of the Respondent. The Florida Board suspended the Respondent's license for two years, imposed a Fifteen Thousand (\$15, 000.00) Dollar fine and, upon the completion of the suspension, placed the Respondent on three years probation.

The Committee found further that, on October 2, 1993, in settlement of the fully contested action and four pending complaints, the Respondent agreed to relinquish his license in Florida and refrain from ever applying for licensure in Florida. The Committee quoted predicate facts to the

agreement which noted that each of the five complaints against the Respondent arose from and contained allegations of improper billing practices, with one of the cases initiated by a patient. The predicate facts stated further that in none of these five complaints was there an allegation that the Respondent's patients suffered physical injury as a result of visitation or treatment by the Respondent.

By a vote of 2 to 1, the Hearing Committee suspended the Respondent's license for two years, stayed the suspension, and placed the Respondent on probation. The majority of the Committee found that the Respondent provides a valuable service to the community and that the Respondent's license should not be revoked. They noted that the Respondent is currently employed by the ODA Primary Health Care Center in Brooklyn and maintains a small private practice where he sees approximately six patients a week. The Committee credited testimony by Dr. Robert Krauz, the medical director at ODA, who testified that the Respondent takes the initiative in seeking out the patient's best medical care and that the Respondent's small outside practice concerns the study and treatment of osteoporosis in holocaust survivors.

The Committee included in their terms of probation, a requirement that the Respondent's private practice be monitored by an approved internist and a requirement that the Respondent take fifty (50) hours per year, during the two year probation, of continuing medical education (CME) in general internal medicine. The Committee found that the monitoring and CME would be the appropriate sanction to protect the public.

#### **REQUESTS FOR REVIEW**

**PETITIONER:** The Petitioner contends that the Hearing Committee's Penalty is inconsistent with the Committee's findings and that the penalty is inappropriate. The Petitioner urges the Board, at a minimum, to limit the Respondent's license to practice in a supervised institutional setting where the Respondent would be a salaried employee and to require five years probation with monitoring rather than the two year period which the Hearing Committee ordered.

The Petitioner contends that the Respondent's problem in Florida occurred in a private practice and the Petitioner expresses concern over the private practice which the Respondent conducts in New York. The Petitioner argues that the evidence concerning the Respondent's work at ODA, a supervised setting, fails to support the Committee's Determination to allow the Respondent to engage in a private practice in which the performance of unnecessary tests would benefit the Respondent as it did in Florida.

In reply to the Petitioner's request for a heavier penalty, the Respondent contends that the Petitioner has failed to justify a heavier penalty. The Respondent argues that the Petitioner asks for a heavier penalty in part because a severe penalty was imposed in another jurisdiction. The Respondent asserts that the concern should not be to impose a second penalty for the same acts and questions whether the purpose of the proceeding is to impose harsh punishments or to assure the quality of medical practice in New York.

**RESPONDENT:** The Respondent raised two points in his brief.

In his Point I, the Respondent challenges the Petitioner's failure to file a stipulated record with the Respondent's brief<sup>1</sup>. The Respondent argues that PHL §230-c(4) requires the submission of a stipulated record and that the absence of a stipulated record impaired the Respondent in developing a reasonable brief on appeal. The Respondent also challenges the provisions of PHL §230-c that allow the charging party to appeal the findings of a trier of fact and that allows the appealing party thirty days to prepare a brief, but gives the other party no notice of the basis for appeal and only seven days to respond. The Respondent requests that the Petitioner's original notice of review be set aside and that the Petitioner be required to refile the Notice of Review and present a proposed record to the Respondent. The Respondent also asks that the Commissioner of Health require either party to an appeal to set forth their grounds for their appeal in the Notice of Appeal.

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<sup>1</sup>At the time our Administrative Officer acknowledges receipt of a Notice of Review he advises the parties that it is not necessary to submit a stipulated record, as PHL §230-c(4) directs, because the record from the hearing is transferred to our Administrative Officer by the Committee's Administrative Officer.

In the Respondent's Point II, although the Respondent failed to file a notice of review and has submitted no stipulated record himself, the Respondent asks that the Review Board modify the Hearing Committee's Determination and reduce the Respondent's penalty to six months probation only.

The Respondent contends that a review of case law from the Third Department, concerning criteria for reviewing penalties in professional disciplinary cases, leads to the conclusion that the Hearing Committee's penalty in this case was too harsh. The Respondent also contends that the Hearing Committee failed to review thoroughly the Respondent's Affidavit and letters of support submitted with the Respondent's affidavit (Hearing Committee Exhibit A). The Petitioner contends that the Hearing Committee gave no indication whether they took into account the statement in the Final Florida Order (Hearing Committee Exhibit 10) that there was no patient harm. The Respondent's brief discusses a number of Third Department decisions, in which the Respondent contends physicians received less onerous punishments than the Respondent for more serious actions.

In reply to the Respondent's Brief, the Petitioner contends that the Respondent has no basis for asserting that he can not be sure of the content of the record and the Petitioner requests that the Board deny the relief the Respondent requested.

### **REVIEW BOARD DETERMINATION**

The Review Board has considered the record from the hearing below and the briefs which counsel have submitted. We render this Determination on the Respondent's motion to set aside the Petitioner's appeal and on both parties' request for a change in the Hearing Committee's penalty.

**RESPONDENT'S MOTION:** The Review Board denies the Respondent's request that the Petitioner refile his notice of review, set forth the reasons for the appeal and submit a stipulated record. First there is no requirement that the party seeking a review set forth the reason for review in this notice. Public Health Law §230-c already limits the Review Board's scope of authority to only considering

whether a Hearing Committee's Determination are consistent with the Committee's findings and conclusions and whether the penalty is appropriate and within the scope of penalties provided under Public Health Law §230-c, so a party's appeal is already limited to those same grounds.

As to the record, the Review Board interprets the provisions of §230-c requiring a stipulated record to mean that parties may not submit evidence to the Review Board that was not before the Hearing Committee. To assure that the parties may not submit new evidence our Administrative Officer instructs the parties by letter at the time we receive a Notice of Review that the parties may not submit evidence to the Board that was not before the Hearing Committee. The Administrative Officer also instructs the parties that the Board does not require the parties to submit the record to the Board. At the end of a hearing, the Hearing Committee's Administrative Officer is the custodian of the record and returns the hearing record to the Bureau of Adjudication in Albany, the same office in which our Administrative Officer works. At the time our Administrative Officer receives a Notice of Review, the record is already in the custody of his office. In the absence of any stipulation by the parties otherwise limiting the record for our review or any challenge by the parties to the content of the record, the Board assumes that a review involves the whole record from the hearing below.

Due to the limited scope of our review the Board has adapted simplified procedures for both parties to follow in a review. In addition to our procedure which relieves the parties from filing the record with their briefs, we have also followed a rule that either party to a review may raise issues for the Board to review, even if only one party has filed a Notice of Review. This rule works to the Respondent's benefit in this case, because Point II of the Respondent's brief asks that the Board reduce the Hearing Committee's Penalty. Due to our rule allowing either party to raise issues on review, the Board will consider the request that the Petitioner raises in his Point II, even though the Respondent did not file a Notice of Review, did not set forth the reasons for the Notice and did not submit a stipulated record to the Petitioner.

The Review Board sees no prejudice which the Respondent has suffered due to the simplified procedures which we follow. The Respondent is familiar with the record from the hearing (Hearing Committee Transcript pages 4-18), and makes reference to one of the exhibits in the record in his brief to the Review Board.

**HEARING COMMITTEE'S DETERMINATION:** The Review Board votes to sustain the Hearing Committee's Determination that the Respondent committed professional misconduct, as defined by Education Law §6509(d). The Committee's findings demonstrated that the Respondent relinquished his license to practice medicine in the State of Florida after Florida had instituted disciplinary action against the Respondent. The Committee found that Florida had filed five complaints against the Respondent and that the Respondent relinquished his license in settlement of those five complaints. The Committee also found that one of the complaints had gone to a fully contested hearing which found the Respondent guilty of inappropriately and inadequately treating a patient, ordering excessive tests and failing to maintain adequate records. The Committee found that as a result of the Hearing, the Florida Board suspended the Respondent's license for two years, fined the Respondent Fifteen Thousand (\$15,000.00) Dollars and provided that the Respondent should practice on probation for three years following the suspension. That penalty was satisfied by the Respondent's settlement relinquishing his license.

**HEARING COMMITTEE PENALTY:** The Review Board votes 5-0 to overrule the Hearing Committee's penalty, because we do not agree that the two year monitoring and two year CME, that are at the major components of the Hearing Committee's terms of probation, are sufficient to protect the public in this case. The Review Board votes to limit the Respondent's license to restrict him to practice in a supervised setting, such as his current employment at the ODA Center, and to bar him from private practice.

The Review Board feels the Hearing Committee's penalty is not consistent with their findings concerning the Respondent's acts in Florida. The Respondent's Florida misconduct was serious in nature and the penalty does not address the serious nature of the misconduct. The Florida Board found that the Respondent had inappropriately performed tests on one patient and had performed unnecessary tests on that same patient. The Florida Board adopted a finding that the Respondent, among other acts, had performed bone and joint scans and related color computer analysis on the patient as an exploitation of the patient for the financial gain of the Respondent (Petitioner's Ex. 4, Petitioner's Ex. 3, page 9, paragraph 17). In that case, Florida suspended the Respondent's license for two years, ordered the Respondent to pay a Fifteen thousand (\$15,000.00) Dollar fine and placed the

Respondent on three years probation following the suspension. The penalty required that before the Respondent could return to practice, that the Respondent must appear before the Florida Board and demonstrate his ability to practice with skill and safety. The Respondent never appeared before the Florida Board to prove that he could practice safely, because he relinquished his license in satisfaction of that action and four pending complaints concerning his billing practices. The Review Board is troubled that the Respondent left Florida without proving to the Florida Board his ability to continue to practice in that State with skill and safety. The Respondent, instead, came to New York and began practice. In cases such as this, in which the misconduct occurs in another state, the Board worries that imposing a less severe sanction than the state where the misconduct occurs, would encourage the physician to come to New York to escape the other State's heavier penalty.

The Review Board also feels that the Committee's penalty would not be appropriate, because the penalty relies on continuing medical education to address the Respondent's misconduct. The Review Board concludes that retraining would not address the Respondent's misconduct for two reasons. First, the Review Board believes that the Respondent would not be a proper candidate for retraining because the Respondent does not have the proper insight into his problems to be a candidate for retraining. The Respondent did indicate in his affidavit to the Hearing Committee and in his testimony at the hearing<sup>2</sup>, that he would be willing to participate in an evaluation and a preceptor program at Syracuse. At other points in his testimony, however, the Respondent refused to acknowledge any errors in Florida, but rather characterized the Florida charges as billing issues and judgement calls<sup>3</sup>. The Respondent never acknowledged that he felt he should undergo retraining to correct deficiencies in his practice, and, in his appeal brief, the Respondent characterizes as excessive, the Hearing Committee's penalty, which included the requirement that the Respondent undergo one hundred hours of continuing medical education<sup>4</sup>. Second, exploiting a patient for the Respondent's gain is not a matter which can be corrected by continuing education or by a preceptorship. Such

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<sup>2</sup>Petitioner Ex A, Respondent Affidavit, paragraphs 20-22; Hearing Committee Transcript pages 52-53, 63.

<sup>3</sup>Hearing Transcript pages 50-51, 61-63, 71.

<sup>4</sup>Respondent's Brief page 6.

misconduct requires a severe penalty and would justify the revocation of the Respondent's license.

The Review Board finds several mitigating factors in this case, however, that lead us to conclude that we can protect the people of the State of New York and allow the Respondent to retain his medical license. Dr. Krauz from the O.D.A. Center indicated, in a letter and in testimony at the hearing<sup>5</sup>, that the Respondent was a competent and hardworking physician at ODA, that the Respondent has nothing to do with billing for services at O.D.A. and that the Respondent has no financial interest in reimbursement for services at O.D.A. Further, there was no evidence from the Florida action that the Respondent's conduct was repeated toward other patients. The four other Florida complaints were settled without findings. Finally, we note that the Petitioner has not asked for revocation as a penalty.

The Board finds that limiting the Respondent to a supervised setting will protect the public. At either a facility operated by the State or licensed by the State, the Respondent will not have any financial incentive in the reimbursement for services, the Respondent will work under supervision and the facility will be subject to regular reviews by the State and Federal governments. The Board concludes that the Respondent will not repeat his prior misconduct if he is removed from private practice. The Respondent's misconduct in Florida involved acts in a private practice. Although the Respondent's current private practice is small, he could increase his practice in the future. The record indicates that the Respondent has obtained an expensive diagnostic machine for that practice<sup>6</sup>, which may indicate his intention to increase beyond the small practice in the future.

For the reasons stated above, we reject the Respondent's request to limit the Respondent's penalty to six months probation. We also reject the Respondent's contention that the Hearing Committee failed to review thoroughly the evidence which the Respondent offered. Clearly, the Hearing Committee was greatly influenced in coming to their conclusion on a penalty by Dr. Krauz's testimony on the Respondent's behalf, and the Committee mentioned that they were influenced in their

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<sup>5</sup>Respondent's Exhibit A; Hearing Committee Transcript pages 25, 27.

<sup>6</sup>Hearing Committee Transcript page 56.

penalty by the valuable services that the Respondent performed in the Community<sup>7</sup>. The Review Board also considered and gave great weight to Dr. Krauz's testimony and to the Community support which the Respondent received. This information aided us in concluding that the Respondent could continue to practice in New York in a supervised setting.

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<sup>7</sup>Hearing Committee Determination pages 4 and 5.

**ORDER**

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

1. The Review Board **SUSTAINS** the Hearing Committee on Professional Medical Conduct's March 8, 1995 Determination finding Dr. Joshua L. Sternberg guilty of professional misconduct.
2. The Review Board **OVERTURNS** the Hearing Committee's Determination on the penalty in this case.
3. The Review Board **LIMITS** the Respondent's license to prohibit him from private practice and **LIMITS** the Respondent to practice in a facility licensed or operated by the State of New York.

**ROBERT M. BRIBER**

**SUMNER SHAPIRO**

**WINSTON S. PRICE, M.D.**

**EDWARD SINNOTT, M.D.**

**WILLIAM A. STEWART, M.D.**

**IN THE MATTER OF JOSHUA L. STERNBERG, M.D.**

**ROBERT M. BRIBER**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Sternberg.

**DATED: Albany, New York**

6/7, 1995

REDACTED

**ROBERT M. BRIBER**

**IN THE MATTER OF JOSHUA L. STERNBERG, M.D.**

**SUMNER SHAPIRO**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Sternberg.

**DATED: Delmar, New York**

JUNE 5, 1995

REDACTED

  
**SUMNER SHAPIRO**

**IN THE MATTER OF JOSHUA L. STERNBERG, M.D.**

**WINSTON S. PRICE, M.D.**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Sternberg.

**DATED: Brooklyn, New York**

\_\_\_\_\_, 1995

REDACTED

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**WINSTON S. PRICE, M.D.**

IN THE MATTER OF JOSHUA L. STERNBERG, M.D.

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Sternberg.

DATED: Roslyn, New York

*July 18*, 1995

REDACTED

EDWARD C. SINNOTT, M.D.

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IN THE MATTER OF JOSHUA L. STERNBERG, M.D.

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Sternberg.

DATED: Roslyn, New York

*July 18*, 1995

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EDWARD C. SINNOTT, M.D.

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**IN THE MATTER OF JOSHUA L. STERNBERG, M.D.**

**WILLIAM A. STEWART, M.D.**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Sternberg.

**DATED: Syracuse, New York**

5 June, 1995

REDACTED

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**WILLIAM A. STEWART, M.D.**