



New York State Board for Professional Medical Conduct

433 River Street, Suite 303 Troy, New York 12180-2299 • (518) 402-0863

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

Patrick F. Carone, M.D., M.P.H.
Chair
Ansel R. Marks, M.D., J.D.
Executive Secretary

July 16, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Herbert Okun, M.D.
2655 National Drive
Brooklyn, New York 11234

RE: License No. 080604

Dear Dr. Okun:

Enclosed please find Order #BPMC 97-169 of the New York State Board for Professional Medical Conduct. This Order and any penalty provided therein goes into effect upon receipt of this letter or seven (7) days after the date of this letter, whichever is earlier.

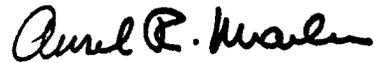
If the penalty imposed by the Order is a surrender, revocation or suspension of this license, you are required to deliver to the Board the license and registration within five (5) days of receipt of the Order.

Board for Professional Medical Conduct
New York State Department of Health
Hedley Park Place, Suite 303
433 River Street
Troy, New York 12180

If the penalty imposed by the Order is a fine, please write the check payable to the New York State Department of Health. Noting the BPMC Order number on your remittance will assist in proper crediting. Payments should be directed to the following address:

Bureau of Accounts Management
New York State Department of Health
Corning Tower, Room 1315
Empire State Plaza
Albany, New York 12237

Sincerely,

A handwritten signature in black ink, appearing to read "Ansel R. Marks". The signature is fluid and cursive, with a large initial "A" and "M".

Ansel R. Marks, M.D., J.D.
Executive Secretary
Board for Professional Medical Conduct

Enclosure

cc: T. Lawrence Tabak, Esq.
Kern & Augustine
420 Lakeville Road
Lake Success, New York 11042

David W. Smith, Esq.

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

IN THE MATTER
OF
HERBERT OKUN, M.D.

CONSENT
ORDER

BPMC #97-169

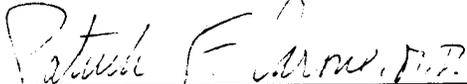
Upon the proposed agreement of HERBERT OKUN, M.D. (Respondent) for Consent Order, which application is made a part hereof, it is agreed to and

ORDERED, that the application and the provisions thereof are hereby adopted and so ORDERED, and it is further

ORDERED, that this order shall take effect as of the date of the personal service of this order upon Respondent, upon receipt by Respondent of this order via certified mail, or seven days after mailing of this order by certified mail, whichever is earliest.

SO ORDERED.

DATED: July 12, 1997


PATRICK F. CARONE, M.D., M.P.H.
Chairperson
State Board for Professional
Medical Conduct

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

IN THE MATTER
OF
HERBERT OKUN, M.D.

CONSENT
AGREEMENT
AND
ORDER

STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

HERBERT OKUN, M.D., being duly sworn, deposes and says:

That on or about March 4, 1958, I was licensed to practice as a physician in the State of New York, having been issued License No. 80604 by the New York State Education Department.

My current address is 2655 National Drive, Brooklyn, New York, and I will advise the Director of the Office of Professional Medical Conduct of any change of my address.

After hearing before a Hearing Committee ("Committee") of the State Board for Professional Medical Conduct, at which I was represented by Counsel, such Committee sustained charges against me regarding excessive testing, negligence on more than one occasion, fraudulent practice and conduct evidencing moral unfitness to practice medicine. As sanctions I received either a stayed suspension or stayed revocation, a probation unspecified in length but not to exceed five (5) years, and a fine of \$50,000.00, as is more fully set forth in Order No. BPMC 97-100 attached hereto and made a part hereof.

In exchange for (i) the agreement of the State to waive all appeals, either to the Administrative Review Board; and (ii) permission for me to pay the fine at the rate of \$10,000.00 per year for the next five (5) years, I hereby agree to the following sanctions:

- a) A three year stayed-suspension;

- b) Three year probation in accordance with the "Terms of Probation" attached as Exhibit "A" hereto;
- c) Payment of a \$50,000.00 fine at the rate of \$10,000.00 per year for five years, the first payment to be made no later than 30 days from the date of the Order approving this Agreement and each subsequent payment to be made on or before such date; and
- d) I hereby waive all appeals of Order No. BPMC 97-100 either to the Administrative Review Board or any Court of competent jurisdiction.

I further agree that the Consent Order for which I hereby apply shall impose a condition that, except during periods of actual suspension, I maintain current registration of my license with the New York State Education Department Division of Professional Licensing Services, and pay all registration fees. This condition shall be in effect beginning thirty days after the effective date of the Consent Order and continuing until the full term of the Order has run, and until any associated period of probation and all probation terms have been completed and satisfied. I hereby stipulate that any failure by me to comply with such condition shall constitute misconduct as defined by New York State Education Law §6530(29)(McKinney Supp 1997).

I agree that in the event I am charged with professional misconduct in the future, this agreement and order shall be admitted into evidence in that proceeding.

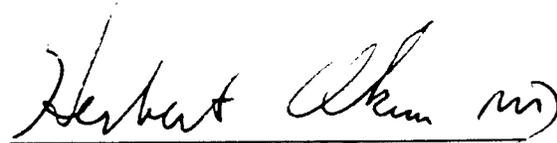
I hereby make this Application to the State Board for Professional Medical Conduct (the Board) and request that it be granted.

I understand that, in the event that this Application is not granted by the Board, nothing contained herein shall be binding upon me or construed to be an admission of any act of misconduct alleged or charged against me.

I agree that, in the event the Board grants my Application, as set forth herein, an order of the Chairperson of the Board shall be issued in accordance

with same.

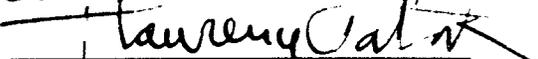
I am making this Application of my own free will and accord and not under duress, compulsion or restraint of any kind or manner. In consideration of the value to me of the acceptance by the Board of this Application, allowing me to resolve this matter without the various risks and burdens of a hearing on the merits, I knowingly waive any right I may have to contest the Consent Order for which I hereby apply, whether administratively or judicially, and ask that the Application be granted.



HERBERT OKUN, M.D.
RESPONDENT

Sworn to before me this

26th day of June, 1997


NOTARY PUBLIC

Notary Public, State of New York
No. 31-4996056
Qualified in New York County

The undersigned agree to the attached application of the Respondent and to the proposed penalty based on the terms and conditions thereof.

DATE: June 26, 1997


T. LAWRENCE TABAK, ESQ.
Attorney for Respondent

DATE: July 1, 1997


DAVID W. SMITH
Associate Counsel
Bureau of Professional
Medical Conduct

DATE: July 7, 1997

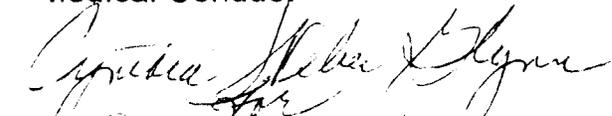
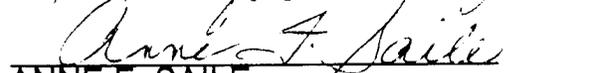

for

ANNE F. SAILE
Director
Office of Professional
Medical Conduct

EXHIBIT "A"

Terms of Probation

1. Respondent shall conduct himself/herself in all ways in a manner befitting his/her professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his/her profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director of the Office of Professional Medical Conduct, New York State Department of Health, 433 River Street, Suite 303, Troy, NY 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. Any civil penalty not paid by the date prescribed herein shall be subject to all provisions of law relating to debt collection by New York State. This includes but is not limited to the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses [Tax Law section 171(27)]; State Finance Law section 18; CPLR section 5001; Executive Law section 32].
5. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.
6. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.
7. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

8. At any time or times during the period of this Probation, the Director may, through his/her designee review the billing and billing procedures of Respondent who shall cooperate fully with such review.
9. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law. In addition, such non-compliance shall automatically convert the stayed suspension into an actual suspension for the remainder of the three year period.

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

IN THE MATTER

-OF-

HERBERT OKUN, M.D.

**DECISION
AND ORDER
OF THE
HEARING
COMMITTEE**

**ORDER NO.
BPMC 97-100**

The undersigned Hearing Committee consisting of **F. MICHAEL JACOBIOUS, M.D.**, Chairperson, **RICHARD ASHLEY, M.D.**, **PETER D. KUEMMEL, R.P.A.**, was duly designated and appointed by the State Board for Professional Medical Conduct. **JONATHAN M. BRANDES, ESQ.**, Administrative Law Judge, served as Administrative Officer.

The hearing was conducted pursuant to the provisions of Section 230(10) of the New York State Public Health Law and Sections 301-307 and 401 of the New York State Administrative Procedure Act to receive evidence concerning alleged violations of provisions of Section 6530 of the New York Education Law by **HERBERT OKUN, M.D.** (hereinafter referred to as "Respondent"). Witnesses were sworn or affirmed and examined. A stenographic record of the hearing was made. Exhibits were received in evidence and made a part of the record.

The Committee has considered the entire record in the above captioned matter and hereby renders its decision with regard to the charges of medical misconduct.

SUMMARY OF PROCEEDINGS

The Statement of Charges in this proceeding alleges five grounds of misconduct:

1. Respondent has committed **fraud** as set forth in N.Y. Education Law Section 6530 (2)
2. Respondent has committed **negligence on more than one occasion** as set forth in N.Y. Education Law Section 6530 (3)
3. Respondent has committed **incompetence on more than one occasion** as set forth in N.Y. Education Law Section 6530 (5)
4. Respondent has committed acts evidencing **moral unfitness** as set forth in N.Y. Education Law Section 6530 (20)
5. Respondent has performed **excessive tests** as set forth in N.Y. Education Law Section 6530 (35)

The allegations arise from treatment of five patients seen by Respondent in 1991 through 1993. The allegations are more particularly set forth in the Statement of Charges which is attached hereto as Appendix One.

Respondent entered a general denial of each of the charges.

Petitioner called one witness:

Paul Lewis Zeigler, M.D.

Expert Witness

Respondent testified and called one witness:

Robert L. Rowan, M.D.

Expert Witness

SIGNIFICANT LEGAL RULINGS

- I. The Administrative Law Judge issued instructions to the Committee with regard to the definitions of medical misconduct as alleged in this proceeding. The Administrative Law Judge instructed the panel that negligence is the failure to use that level of care and diligence expected of a prudent physician and thus consistent with accepted standards of medical practice in this state. Incompetence was defined as a failure to exhibit that level of knowledge and expertise expected of a licensed physician in this state and thus consistent with accepted standards of medical practice.

- II. With regard to the allegation of moral unfitness, the Committee was instructed that to sustain its burden of proof, the State must show Respondent committed acts which *evidence moral unfitness*. It was explained to the Committee that there is a distinction between a finding that an act *evidences moral unfitness* and a finding that a particular person is, in fact, morally unfit. Here, the Committee is asked to decide if certain specifically alleged conduct is suggestive of, or would tend to prove, moral unfitness. They were not called upon to make an overall judgement regarding Respondent's moral character. It was pointed out that an otherwise moral individual could commit an act *evidencing moral unfitness* due to a lapse in judgement or other temporary aberration.

- III. The Committee was instructed that the standard for moral unfitness in the practice of medicine is twofold: First, there may be a finding that the accused has violated the public trust which is bestowed upon one by virtue of his licensure as a physician. It was explained that patients are asked to place themselves in potentially compromising positions with physicians, such as when they disrobe for examination or treatment or when they disclose intimate details of their lives. Furthermore, by virtue of one's license and position as a physician, one is entrusted with a myriad of privileges and responsibilities that the general public does not have. For instance, a physician, by virtue of his

license and position can issue prescriptions for potentially dangerous drugs. Furthermore, physicians must file certain documents which contain extremely consequential information. In each of the instances suggested as well as others, it is expected that a physician will not violate the trust the public has bestowed upon him by virtue of his professional status. This leads to the second aspect of the standard: The Committee was instructed that moral unfitness could be seen as a violation of the moral standards of the medical community which they, as delegated members of that community, represent.

IV. With regard to the allegations of fraud, the Committee was instructed that the fraudulent practice of medicine can be sustained when it is proven that Respondent made an intentional misrepresentation or concealment of a known fact, in connection with the practice of medicine. The elements of fraudulent practice of medicine are:

- a. A false representation is made¹ by a physician or at his direction;
- b. In connection with the practice of medicine;
- c. The false representation concerns subject matter which should have been disclosed accurately;
- d. Respondent knew the representation was false;
- e. Respondent intended to mislead through the false representation;

V. Respondent's knowledge and intent may properly be inferred from facts found by the Committee, but the Committee must specifically state the inferences it is drawing regarding knowledge and intent.

VI. Finally, with regard to excessive tests, the Committee was instructed that the reasonable interpretation of the words of the allegation could be employed. As a general rule, for the

¹The falsehood can either be through direct verbal or written fabrication, or by deceptive conduct or by concealment.

performance of a test or procedure to fall within accepted standards of medicine, it must be reasonable under the circumstances. A physician must perform only those tests, studies and procedures that are rationally related to the condition of the patient or to rule out or assist in ruling out a condition that reasonable medical minds would agree is prudent.

- VII. The Committee was instructed that there are no hard and fast rules with regard to the type and frequency of various procedures. Rather, the prudent physician should be allowed to rely upon his best clinical judgment under the facts and circumstances he knows or can reasonably be expected to know.
- VIII. Where no allegations of misconduct are charged, the tests, procedures and studies performed by Respondent must be found to be appropriate. However, medicine is not performed in a vacuum. It therefore follows that activities that were performed in a prior time may, but need not, be relevant to the allegations.
- IX. The Committee was further under instructions that with regard to a finding of medical misconduct, the Committee must first assess Respondent's medical care without regard to outcome but rather as a step-by-step assessment of patient situation followed by medical response. However, where medical misconduct has been established, outcome may be, but need not be, relevant to penalty, if any. Under any circumstances, the Committee was instructed that patient harm need never be shown to establish negligence or incompetence in a proceeding before the State Board For Professional Medical Conduct.

- X. The Committee was reminded that it has the advantage of hindsight. The Committee must be mindful that in assessing the acts of Respondent, it must base its conclusions upon what Respondent knew at the time and what he could or should have reasonably ascertained at the time.
- XI. With regard to the expert testimony herein, including Respondent's, the Committee was instructed that each witness should be evaluated for possible bias and assessed according to his or her training, experience, credentials, demeanor and credibility.
- XII. The Committee was further instructed that it is not bound to the testimony offered by an expert witness. Notwithstanding the presentation and qualification of a witness as an expert, the Committee is free to find some or all of the testimony relevant, probative, credible and persuasive. The Committee is equally free to reject some or all the expert testimony herein.
- XIII. The expert witness on behalf of petitioner, Dr. Zeigler, had ties with Group Health Insurance and previously reviewed charts of Dr. Okun on behalf of Group Health Insurance. These facts may, but need not, be considered by the Committee in assessing any possible bias of Dr. Zeigler. Likewise, the finder of fact may, but need not, consider the fact that Dr. Rowan, the expert on behalf of Dr. Okun, has previously been selected by the Petitioner as its expert.
- XIV. It is to be noted that Petitioner's Exhibit 1 contained the original Appendix II and this original Appendix II was initially revised as contained in Petitioner's Exhibit 14. It is to be further noted that over objection on behalf of Respondent, Petitioner was allowed to again amend Appendix II on the last date of the Hearing session, October 18, 1996, which resulted in the admission into evidence of Petitioner's Exhibit 15.

FINDINGS OF FACT

The findings of fact which follow, were made after review of the entire record. Evidence or testimony which conflicted with any finding of this Hearing Committee was considered and rejected. Some evidence and testimony was rejected as irrelevant. Petitioner was required to meet the burden of proof 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. Unless otherwise stated, all findings and conclusions herein were unanimous.

GENERAL FINDINGS OF FACT

1. Respondent, is a physician licensed to practice medicine in the State of New York. He was issued New York State license number 80604 by the New York State Education Department on March 4, 1958.
2. Respondent has been in the private practice of medicine in the field of urology since he finished his residency in 1962.
3. Respondent has been Board certified in the field of urology since 1971 (Transcript Page [hereinafter Tr.] 2601 and Respondent's Exhibit [hereinafter Ex.]101).
4. Bladder sonograms and renal sonograms are routinely performed by urologists (Tr. 175) There are no specific numeric standards regarding the frequency of performing bladder sonograms or renal sonograms.

**FINDINGS OF FACT
WITH REGARD TO
PATIENT A**

1. Respondent treated Patient A for elevated PSA and urinary problems between November, 1991 and March, 1993. (Tr. 19-59; Pet. Ex. 3; Resp. Ex. 103)

2. Respondent performed Urine Culture and Sensitivity tests on Patient A on the following dates: 12/10/91; 12/17/91; 03/09/92; 04/17/92; 05/27/92; 11/25/92; 01/26/93; 01/15/93; 03/24/92; 10/21/92; 03/16/93; and 03/31/93. (Tr. 34, 43, 52, 93-94; Pet. Ex. 3, 15; Resp. Ex. 103)

3. Respondent performed urinalysis on Patient A on the following dates : 01/15/92; 04/17/92; 05/27/92; 07/22/92; and 01/26/93. (Tr. 52-54; Pet. Ex. 3, 15; Resp. Ex. 103)

4. Respondent performed uroflow studies on Patient A on the following dates: 01/08/92; 04/17/92; 05/27/92; 07/22/92; and 11/25/92. (Tr. 54-55; Pet. Ex. 3, 15; Resp. Ex. 103)

5. Respondent performed sonograms on Patient A on the following dates: 03/04/92; 04/17/92; 05/27/92; 07/22/92; 11/25/92; and 03/31/93. (Tr. 55-57; Pet. Ex. 3, 15; Resp. Ex. 103)

6. Respondent billed Patient A's insurance carrier, GHI, for most of the procedures. (Pet. Ex. 4)

**CONCLUSIONS
WITH REGARD TO
PATIENT A**

The charges in this proceeding fall into a pattern: The State has alleged a number of tests or procedures were performed by Respondent on each of the patients mentioned over a period of time. The State then alleges that while the tests or procedures, in and of themselves, are within the accepted standards of medicine, the performance of a given test or procedure, repeated the number of times Respondent did them for the same patient, over the given period of time, was excessive, and not in the best interest of the patient. Therefore, alleges the State, the tests and procedures were performed too often to be within accepted standards of medicine.

The Committee, with certain exceptions which will be discussed later, agrees with the State. Respondent performed certain tests and procedures which are routine in the practice of urology and should be performed from time to time. However, Respondent performed these tests and procedures so often, over such a relatively short period of time as to render the overall care outside the scope of accepted medical practice.

Having found Respondent acted outside the scope of accepted medical standards, the question arises as to motivation: Did Respondent negligently or incompetently think that the frequency of the tests and procedures was appropriate according to accepted standards of medicine? Or, did Respondent know that the frequency was unwarranted under accepted standards of medicine and performed the tests and procedures for reasons and motivation other than patient care? Ultimately, the Committee finds the latter. Respondent had a dual goal. First, he was interested in patient care. However, beyond that, Respondent fell victim to greed. He performed unnecessary tests and procedures because it was financially favorable for him to do so, not because he was incompetent or negligent. While reasonable medical minds may differ as to how many of a given test or procedure is acceptable over a given period of time, the evidence in this proceeding is clear

and convincing² that Respondent performed the tests and procedures to be discussed far in excess of what reasonable medical minds would find acceptable.

Respondent repeatedly performed, culture and sensitivity tests, urine analyses, bladder and renal sonograms and urine flow studies within insufficient spans of time to justify the clinical worth of the procedures. Hence, the tests to be cited were excessive in that they bore little if any relation to current patient complaints, had no therapeutic value and did not lead to treatment decisions.

In so finding, the Committee agrees with the State and Respondent that there are no purely numerical standards to determine how often the tests in issue should be performed. Rather than a strict formula of repetition, the standard to be applied is one of reasonable relation to clinical benefit. That is, for a test or procedure to be reasonable, it must bare a relationship to the patient's complaint, have some therapeutic value and lead to or rule out a plan of treatment. Under this standard, the number of tests and their frequency for all five patients was excessive and unreasonable, resulting in care which did not meet minimum acceptable medical standards. The Committee rejects the position stated by Respondent's expert witness. Dr. Rowan was of the opinion that if a physician feels a test or procedure is warranted, that is a sufficient reason to perform the test or procedure. Unfortunately, this position does not account for physicians who order tests based upon negligence, incompetence or greed. As set forth by the State, the position presented by Dr. Rowan does not allow for rational examination of the basis for the physician's order. It would appear that Dr. Rowan was earnest in his belief that physicians only order tests for medically accepted reasons. However, as Respondent shows in this case, Dr Rowan's belief is not universally applicable.

Turning now specifically to Patient A, the Committee finds Respondent performed the tests set forth in Findings of Fact 2, 3, 4 and 5 above. The Committee finds that with the exception of urine analysis, the tests performed were excessive under the standards set forth above. In so finding, the Committee concludes that it is not unreasonable for a urologist to perform urine analysis routinely on patients at each visit. This seems to be the standard undertaken by Respondent. The Committee does not find that such a standard is

²That is, the evidence exceeds that level necessary to sustain a fact or allegation.

outside the realm of accepted medical practice.

Therefore,

Factual Allegation A [Respondent treated Patient A] is SUSTAINED.

Factual Allegation A (1) and A (1) (a.) [culture and sensitivity/urine analysis³] are NOT SUSTAINED.

Factual Allegation A (2) and A(2)(a) [uroflow studies] are SUSTAINED.

Factual Allegation A (3) A(3)(a)[sonograms] are SUSTAINED

**FINDINGS OF FACT
WITH REGARD TO
PATIENT B**

1. Respondent treated Patient B between April, 1992 and June, 1993 for hematuria and right flank pain.
(Tr. 157-158; Pet. Ex. 5; Resp. Ex. 106)

2. Respondent performed uroflow studies on Patient B on the following dates : 04/20/92; 05/08/92; 07/09/92; 12/10/92; 01/14/93; 04/01/93; 05/28/93; and 06/22/93. (Tr. 164-165; Pet. Ex. 5, 15; Resp. Ex. 106)

3. Respondent performed cystoscopies on Patient B on the following dates: 05/08/92; 06/12/92; 07/09/92; 12/10/92; and 01/14/93. (Tr. 165-166; Pet. Ex. 5, 15; Resp. Ex. 106)

4. Respondent took renal sonograms of Patient B on the following dates: 06/12/92; 12/10/92; and 01/14/93. (Tr. 66-168; Pet. Ex. 5, 15; Resp. Ex. 106)

³Each of the Allegations fall into the same pattern: Respondent is charged with having "performed" or having "caused to be performed" enumerated tests which were "inappropriate and excessive," and done for "other than a good faith medical purpose."

5. Respondent took other sonograms of Patient B on the following dates: 05/08/92; 06/12/92; 07/09/92; 01/14/93; 04/01/93; 05/28/93; and 06/22/93. (Tr. 166-170; Pet. Ex. 5, 15; Resp. Ex. 106)
6. Patient B was a diabetic. Cystoscopies pose an elevated risk of infection. (Tr. 185-187)
7. Respondent billed Patient B's insurance carrier for most of the procedures. (Pet. Ex. 6)

**CONCLUSIONS
WITH REGARD TO
PATIENT B**

Turning now to Patient B, the Committee finds Respondent performed the tests set forth in Findings of Fact 2, 3, 4 and 5 above. The Committee finds that with the exception of urine analysis, the tests performed were excessive under the standards set forth above. In so finding, the Committee concludes that it was not unreasonable for Respondent to perform some of the sonograms, cystoscopies and renal sonograms. However, in their totality, the number of each of the procedures performed over the given period of time was excessive. To illustrate: Respondent performed sonograms (other than renal sonograms) for Patient B on May 8, 1992; June 12, 1992; July 9, 1992; January 14, 1993; April 1, 1993; May 28, 1993; and June 22, 1993. The Committee can accept some of these as warranted but not the total of seven. Under the charges of this case, it is not necessary for this body to say which of the seven would have fallen within accepted standards. For instance reasonable medical minds could accept those performed on May 8 and July 9. Likewise, those performed on June 12, and January 14 may fall within what reasonable medical minds would find to be within accepted standards. However, when one combines May 8 with June 12 and July 9 plus January 14, etc., reasonable medical minds must conclude that an excessive number of sonograms were performed for that patient over that eight month period.

Respondent would have this body approve or disapprove each and every test. Such a discussion obscures the point of this proceeding: Respondent is not cited for performing tests which are inherently irrelevant and unwarranted. Sonograms, cystoscopies and uroflow studies are routinely performed by urologists and can be important diagnostic tools. However, Respondent performed inherently proper and appropriate studies so frequently as to exceed what reasonable minds might find acceptable.

In addition to the above, in the specific case of Patient B, this Committee concludes that given the known diabetic condition of this patient, repeated cystoscopies were dangerous. Any patient can develop an infection from a cystoscopy. Diabetic patients have a higher risk of such a complication and can be more difficult to cure. Performing an unwarranted cystoscopy poses a threat to any patient. The real and added danger to Patient B arising from his diabetes makes the performance of unnecessary cystoscopies particularly serious.

Therefore,

Factual Allegation B [Respondent treated Patient B] is **SUSTAINED**.

Factual Allegation B (1) and B (1) (a), B (1) (b) and B (1) (c), [bladder sonograms and uroflow studies] are **SUSTAINED**.

Factual Allegation B (2) and B (2) (a)[cystoscopies] are **SUSTAINED**.

Factual Allegation B (3) and B(3) (a)[renal sonograms] are **SUSTAINED**.

**FINDINGS OF FACT
WITH REGARD TO
PATIENT C:**

1. Respondent treated Patient C between April, 1991 and July, 1994 for urethral stenosis. (Tr. 193-194; Pet. Ex. 7; Resp. Ex. 107)

2. Respondent performed culture and sensitivity tests on Patient C on the following dates: 04/30/91 and 07/25/91. (Tr. 201-203; Pet. Ex. 7, 15; Resp. Ex. 107)

3. Respondent took bladder sonograms of Patient C on the following dates which were unnecessary and excessive: 04/30/91; 06/06/91; 07/25/91; 09/25/91; 04/16/92; 08/13/92; 09/15/92; 06/08/93; and 08/13/93. (Tr. 202; Pet. Ex. 7, 15; Resp. Ex. 107)
4. Respondent took renal sonograms of Patient C on the following dates : 04/30/91; 07/25/91; 09/25/91; 11/30/92; 08/13/92; 01/20/93; and 06/08/93. (Tr. 198, 202-203; Pet. Ex. 7, 15; Resp. Ex. 107)
5. Respondent conducted uroflow studies on Patient C on the following dates: 12/19/91; 04/16/92; 08/13/92; 09/15/92; 10/27/92; 06/08/93; and 08/13/93. (Tr. 203; Pet. Ex. 7, 15; Resp. Ex. 107)
6. Respondent billed Patient C's insurance carrier for most of the excessive procedures he performed. (Pet. Ex. 8)

**CONCLUSIONS
WITH REGARD TO
PATIENT C**

Turning now to Patient C, the Committee finds Respondent performed the tests set forth in Findings of Fact 2, 3, 4 and 5 above. The Committee finds that with the exception of urine analysis, the tests performed were excessive under the standards set forth under conclusions with regard to Patient A and Patient B.

Therefore,

Factual Allegation C [Respondent treated Patient C] is **SUSTAINED**.
Factual Allegations C (1) and C (1) (a.) [urinalysis and cultures] are **NOT SUSTAINED**.
Factual Allegations C (2) and C (2) (a.) [bladder sonograms] are **SUSTAINED**.
Factual Allegations C (3) and C (3)(a) [renal sonograms] are **SUSTAINED**.
Factual Allegations C (4) and C (4) (a) [uroflow studies] are **SUSTAINED**.

**FINDINGS OF FACT
WITH REGARD TO
PATIENT D.**

1. Between January, 1988 and May, 1994, Respondent treated Patient D for testicular pain. (Tr. 218-219; Pet. Ex. 9; Resp. Ex. 108)

2. Respondent performed culture and sensitivity tests on Patient D on the following dates: 11/21/88; 12/06/88; 12/13/88; 12/20/88; 09/19/91; 07/19/93; 09/24/92; 04/22/93; and 10/22/93. (Tr. 226; Pet. Ex. 9, 15; Resp. Ex. 108)

3. Respondent took sonograms other than prostatic sonograms, of Patient D on the following dates: 12/06/88; 12/13/88; 06/25/92; 08/24/92; 09/24/92; 10/21/92; 02/19/93; and 10/22/93. (Tr. 226-227; Pet. Ex. 9, 15; Resp. Ex. 108)

4. Respondent performed uroflow studies Patient D on the following dates: 08/24/92; 09/24/92; 10/21/92; 07/19/93; and 10/22/93. (Tr. 227; Pet. Ex. 9, 15; Resp. Ex. 108)

5. Respondent took prostatic sonograms of Patient D on the following dates: 12/13/88; 07/23/92; 10/21/92; 12/18/92; 04/22/93; and 04/06/94. (Tr. 227; Pet. Ex. 9, 15; Resp. Ex. 108)

6. Respondent billed Patient D's insurance carrier for most of the tests he performed. (Pet. Ex. 10)

**CONCLUSIONS
WITH REGARD TO
PATIENT D**

Addressing Patient D the Committee finds Respondent performed the tests set forth in Findings of Fact 2, 3, 4 and 5 above. The Committee finds that with the exception of urine analysis, the tests performed were excessive under the standards set forth under the conclusions with regard to Patients A and B.

Therefore,

Factual Allegation D [Respondent treated Patient D] is **SUSTAINED**.
Factual Allegations D (1) and D (1) (a) [urinalysis and cultures] is **NOT SUSTAINED**
Factual Allegations D (2) and D (2) (a) [sonograms] are **SUSTAINED**.
Factual Allegations D (3) and D (3)(a) [uroflow studies] are **SUSTAINED**
Factual Allegations D (4) and D (4) (a) [prostatic sonograms] are **SUSTAINED**.

**FINDINGS OF FACT
WITH REGARD TO
PATIENT E**

1. Respondent treated Patient E between December, 1991 and June, 1992 for prostatic hypertrophic prostatism. (Tr. 121-122; Pet. Ex. 11; Resp. Ex. 105)

2. Respondent took bladder sonograms of Patient E on the following dates: 02/03/92; 10/02/92; 12/05/92; 03/30/93; and 03/03/94. (Tr. 126-128; Pet. Ex. 11, 15; Resp. Ex. 105)

3. Respondent performed uroflow studies on Patient E on the following dates: 02/03/92; 10/02/92; 12/05/92; 03/30/93; and 03/03/94. (Tr. 128; Pet. Ex. 11, 15; Resp. Ex. 105)

4. Respondent took prostatic sonograms of Patient E on the following dates: 02/05/93; 06/01/93; 12/06/93.

5. Respondent billed Patient E's insurance carrier for most of the excessive tests he performed. (Pet. Ex. 12)

**CONCLUSIONS
WITH REGARD TO
PATIENT E**

Addressing Patient E the Committee finds Respondent performed the tests set forth in Findings of Fact 2, 3, and 4 above. The Committee finds that with the exception of urine analysis, the tests performed were excessive under the standards set forth under the conclusions with regard to Patients A and B.

Therefore,

Factual Allegation E [Respondent treated Patient E] is **SUSTAINED**.
Factual Allegations E (1) and E (1) (a) [bladder sonograms] is **SUSTAINED**
Factual Allegations E (2) and E (2) (a) [uroflow studies] are **SUSTAINED**.
Factual Allegations E (3) and E (3)(a) [prostatic sonograms] are **SUSTAINED**

**CONCLUSIONS
WITH REGARD TO
THE FIRST SPECIFICATION
(NEGLIGENCE ON MORE THAN ONE OCCASION)**

The Hearing Committee hereby sustains the First Specification. The evidence presented clearly shows that with regard to each of the patients presented, Respondent repeatedly conducted various tests and studies without medical justification. The Committee finds that the performance of needless tests and procedures violates the level of care and diligence expected of a prudent physician meeting accepted standards of medicine.

Furthermore, with regard to Patient A, Respondent showed significant lapses in care and diligence by repeatedly performing unwarranted cystoscopies despite knowledge that Patient A was a diabetic. A practitioner exhibiting acceptable levels of care and diligence would not have performed the number of cystoscopies performed on Patient A due to the potential for infection and diabetic complications. A practitioner exhibiting acceptable levels of care and diligence would have been particularly attentive to the frequency of cystoscopy in this diabetic patient.

Therefore,

The **First Specification** is **SUSTAINED**.

**CONCLUSIONS
WITH REGARD TO
THE SECOND SPECIFICATION
(INCOMPETENCE ON MORE THAN ONE OCCASION)**

The Hearing Committee hereby sustains the Second Specification for essentially the same reasons as those set forth under the First Specification. The evidence presented clearly shows that with regard to each of the patients presented, Respondent repeatedly conducted various tests and studies without medical justification. The Committee finds that the performance of needless tests and procedures violates the level of knowledge and expertise expected of a competent physician meeting accepted standards of medicine. A practitioner exhibiting the level of knowledge and expertise expected of a physician would have known that it is unacceptable to perform unwarranted tests and procedures on a patient. Since Respondent performed tests and procedures far in excess of the frequency a competent physician would have performed the tests and procedures, Respondent has, by his deeds, acted in an incompetent manner.

Furthermore, with regard to Patient A, Respondent showed significant lapses in knowledge and expertise by repeatedly performing unwarranted cystoscopies despite knowledge that Patient A was a diabetic. A practitioner exhibiting acceptable levels of knowledge and expertise would have known that the number of cystoscopies performed on Patient A was dangerous due to the potential for infection and diabetic complications. Such a practitioner would have acted accordingly.

Therefore,

The **Second Specification** is **SUSTAINED**.

**CONCLUSIONS
WITH REGARD TO
THE THIRD THROUGH THE SEVENTH SPECIFICATIONS
(EXCESSIVE TESTING)**

The Committee sustains the Third through the Seventh Specifications. As has been discussed, each of the patients presented in this matter display a pattern of tests and procedures far in excess of what reasonable minds would find to be within the bounds of accepted medical practice. The Committee cites the standard set forth under the instructions. For the performance of a test or procedure to fall within accepted standards of medicine, it must be reasonable under the circumstances. Hence, a physician must perform only those tests, studies and procedures that are rationally related to the condition of the patient. The physician may employ a test, study or procedure to rule out, or assist in ruling out a condition that reasonable medical minds would agree is associated with the circumstances of the patient. The Committee was instructed that there are no hard and fast rules with regard to the type and frequency of various procedures. Rather, the prudent physician should be allowed to rely upon his best clinical judgment under the facts and circumstances he knows or can reasonably be expected to know. Where no allegations of misconduct are charged, the tests, procedures and studies performed by this or any other practitioner must be found by the trier of fact to be appropriate. However, medicine is not performed in a vacuum. It therefore follows that activities that were performed in a prior time may, but need not, be relevant to the allegations.

As was stated in reference to Patient A, Respondent repeatedly performed, culture and sensitivity tests, urine analyses, bladder and renal sonograms and urine flow studies on each of the patients presented. The Committee finds that while the tests and procedures were part of the accepted standards of medicine, the frequency of repetition by Respondent rendered them unnecessary and beyond the scope of accepted standards of medicine. The tests cited by the State were excessive in that they bore little if any relation to current patient complaints, had no therapeutic value and did not lead to treatment decisions. Reasonable clinicians may disagree as to precisely how often a given test or procedure should be performed. However, the number performed here goes beyond the frequency within reasonable clinical judgement.

In so finding, the Committee rejects the position stated by Respondent's expert witness. Dr. Rowan was of the opinion that if a physician feels a test or procedure is warranted, that is a sufficient reason to perform the test or procedure. Unfortunately, Dr. Rowan's position does not account for physicians who order tests based upon negligence, incompetence or greed. Furthermore, as set forth by the State, the position presented by Dr. Rowan does not allow for rational examination of the basis for the physician's order. It would appear that Dr. Rowan was earnest in his belief that physician's only order tests for medically accepted reasons. However, as Respondent shows in this case, Dr Rowan's belief is not universally applicable.

Therefore,

The Third Specification is SUSTAINED.

The Fourth Specification is SUSTAINED.

The Fifth Specification is SUSTAINED.

The Sixth Specification is SUSTAINED.

and

The Seventh Specification is SUSTAINED.

**CONCLUSIONS
WITH REGARD TO
THE
EIGHTH THROUGH THE TWELFTH SPECIFICATIONS
(FRAUDULENT PRACTICE)**

To sustain the allegations of fraud, the State must show that Respondent made intentional misrepresentations or concealed known facts, in connection with the practice of medicine. This summary of the legal standards applies to this case as follows: When a physician orders a test or procedure, it is expected that the reason for the order has a basis in accepted standards of practice. In this case, Respondent ordered many tests and procedures, not for diagnosis, but rather for personal pecuniary gain. When a physician orders a test for reasons other than medical care, it is inherently fraudulent because it constitutes a false statement made within the practice of medicine about matters which warranted a truthful representation.

The difference between fraud and an honest disagreement over clinical issues is that the perpetrator of the fraud must intend to deceive. The Committee finds Respondent herein intended to deceive his patients and payment providers. The number and frequency of the tests herein is inconsistent with any legitimate clinical purpose. Therefore, Respondent must have had a purpose other than a clinical one. In performing the tests and submitting claims for payment, Respondent presented the procedures as legitimate. Since his purpose was not a legitimate one, the Committee infers that he intended to defraud his patients and the payment providers. He intended to mislead his patients and the payment providers into thinking he was merely providing thorough medical care. In fact, he was providing himself with an income supplement.

The Committee recognizes that reasonable medical minds may differ as to the appropriate frequency of a given procedure in a given case record. However, the evidence in this matter goes far beyond differences in clinical judgment. Any competent physician⁴ who ordered the tests in the pattern and frequency established in this case would have to be motivated by intentions other than clinical judgment. Respondent

⁴The Committee recognizes that it has sustained the Second Specification, incompetence on more than one occasion. The Committee finds that Respondent is an essentially competent practitioner who committed acts of incompetence out of greed.

herein, knew that he could supplement his income by performing the tests and procedures cited above. Respondent ordered excessive and unnecessary tests for pecuniary rather than medical benefit. Hence, the falsehood intentionally perpetrated by Respondent was the performance of tests and procedures for income rather than clinical study. This constitutes fraud, by any reasonable definition.

Therefore,

The **Eighth Specification** is **SUSTAINED**.

The **Ninth Specification** is **SUSTAINED**.

The **Tenth Specification** is **SUSTAINED**.

The **Eleventh Specification** is **SUSTAINED**.

and

The **Twelfth Specification** is **SUSTAINED**.

**CONCLUSIONS
WITH REGARD TO
THE THIRTEENTH THROUGH THE SEVENTEENTH SPECIFICATIONS
(MORAL UNFITNESS)**

With regard to the allegations of moral unfitness, the Committee finds that the State has shown Respondent committed acts which "evidence moral unfitness." The Committee finds that Respondent has violated both standards of moral unfitness. That is, the accused has violated the public trust which is bestowed upon him solely by virtue of his licensure as a physician. The Committee also finds Respondent has committed violations of the moral standards of the medical community which they, as delegated members of that community, represent.

In so finding, the Committee notes that as a physician, Respondent was entrusted with the privilege of ordering tests and procedures for patient benefit. Respondent herein betrayed that trust by performing tests for other than medical reasons and for submitting claims for payment. The patients relied upon Respondent to order only that which would be reasonably be expected to assist in their care. The payment providers relied

upon Respondent to submit payment requests only for services that were necessary to provide patient care. Respondent knowingly and intentionally betrayed both these trusts.

The Committee also concludes that the act of performing tests and procedures for monetary gain is a violation of the moral standards of the medical community. Physicians are granted significant privileges in order to care for patients. When a physician uses his privileges solely for personal gain, it is a perversion of the standards of the medical community.

Therefore,

The **Thirteenth Specification** is **SUSTAINED**.

The **Fourteenth Specification** is **SUSTAINED**.

The **Fifteenth Specification** is **SUSTAINED**.

The **Sixteenth Specification** is **SUSTAINED**.

and

The **Seventeenth Specification** is **SUSTAINED**.

SUMMARY OF CHARGES AND SPECIFICATIONS

<u>CHARGE</u>	<u>STATUS</u>	<u>CROSS-REFERENCE</u>
Allegation A	SUSTAINED	
A+A (1)+A (1) (a)	NOT SUSTAINED	
A+A (2) + A(2)(a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 3, 8, 13
A+A (3)+A(3)(a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 3, 8, 13
Allegation B	SUSTAINED	Factually accurate only. Does not constitute misconduct
B (1)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 4, 9, 14
B (1) (a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 4, 9, 14
B (1) (b)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 4, 9, 14
B (1) (c)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 4, 9, 14
B (2) and B (2) (a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 4, 9, 14
B (3) and B(3) (a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 4, 9, 14
Allegation C	SUSTAINED	Factually accurate only. Does not constitute misconduct
C (1) and C (1) (a.)	NOT SUSTAINED	
C (2) and C (2) (a.)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 5, 10, 15
C (3) and C (3)(a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 5, 10, 15
C (4) and C (4) (a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 5, 10, 15
Allegation D	SUSTAINED	Factually accurate only. Does not constitute misconduct
D (1) and D (1) (a)	NOT SUSTAINED	
D (2) and D (2) (a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 6, 11, 16
D (3) and D (3)(a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 6, 11, 16
D (4) and D (4) (a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 6, 11, 16
Allegation E	SUSTAINED	Factually accurate only. Does not constitute misconduct
E (1) and E (1) (a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 7, 12, 17
E (2) and E (2) (a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 7, 12, 17
E (3) and E (3)(a)	SUSTAINED	SUPPORTS SPECIFICATIONS 1, 2, 7, 12, 17

⁵Respondent treated each of the patients presented. While factually accurate, this fact does not, in and of itself, support a finding of misconduct.

⁶See Conclusions with Regard to Patient A. The Committee finds that Respondent routinely performed urinalysis. The Committee does not find routine urinalysis of all patients to constitute misconduct.

SUMMARY OF CHARGES AND SPECIFICATIONS

CHARGE	STATUS	CROSS-REFERENCE
FIRST SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
SECOND SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
THIRD SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
FOURTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
FIFTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
SIXTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
SEVENTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
EIGHTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
NINTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
TENTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
ELEVENTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
TWELFTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
THIRTEENTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
FOURTEENTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
FIFTEENTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
SIXTEENTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3
SEVENTEENTH SPECIFICATION	SUSTAINED	ALLEGATIONS A2-A3, B1-B4, C2-C4, D2-D4, E1-E3

**CONCLUSIONS
WITH REGARD TO
PENALTY**

The violations committed by Respondent are extremely serious. The acts perpetrated by Respondent amount to theft. He has stolen from his patients as well as the payment providers. Since the public ultimately pays for third party payments, one could say that all the theft was against his patients. As grave as the theft is, what is perhaps worse is the cloud that Respondent has passed over his profession. The public holds persons who steal from society in great disdain. The disdain of the public is amplified when the thief is a trusted member of the community. The misdeeds of Respondent have an effect on all physicians.

On the other hand, the Committee was favorably impressed with the clinical skills of Respondent. The Committee could not have found fraud if Respondent had not knowingly performed excessive tests. This knowledge translates into the potential for patient care within accepted standards of medicine.

In imposing a penalty, the Committee had decided to balance protection of the public and setting an appropriate example while on the other hand holding on to Respondent as a medical resource for the community. The Order which follows is designed to accomplish each of those goals. Respondent's license will be suspended and he will be required to pay a civil penalty of fifty thousand dollars (\$50,000). This will protect the public and send a very strong message that the theft of insurance funds will not be tolerated by the medical community. In addition, Respondent's suspension will be stayed pending successful completion of five years of probation. During the said five years, Respondent will be monitored to avoid billing irregularities. Upon successful completion of the term of probation, Respondent's license will be fully restored. In this way, Respondent can continue to serve the community but the community is protected. If Respondent can establish that he has been rehabilitated, through the successful completion of the terms of probation, he will be re-established in the medical community.

As a final thought, the Committee wishes to make it clear that any one of the specifications in this proceeding, under the facts adduced would be sufficient to warrant the penalty set forth above. While the totality of the charges certainly mitigates in favor of stringent punishment, any one of the specifications would warrant suspension, probation and a significant civil penalty.

ORDER

WHEREFORE, Based upon the foregoing facts and conclusions.

It is hereby **ORDERED** that:

1. The following Factual Allegations found in the Statement of charges (Appendix One) A. A(2) and A(2)(a), A(3) and A(3)(a), B (1) (b), B (1) (c), B (2) and B (2) (a), B (3) and B(3) (a), Allegation C, C (2) and C (2) (a.), C (3) and C (3)(a), C (4) and C (4) (a), Allegation D. D (2) and D (2) (a), D (3) and D (3)(a), D (4) and D (4) (a), Allegation E. E (1) and E (1) (a), E (2) and E (2) (a), E (3) and E (3)(a) are **SUSTAINED**

Furthermore, it is hereby **ORDERED** that:

2. Factual Allegations A(1)and A(1)(a), C(1) and C(1)(a), and D(1) and D(1)(a) are **NOT SUSTAINED**

Furthermore, it is hereby **ORDERED** that:

3. The Specifications of Misconduct contained within the Statement of Charges (Appendix One) are **SUSTAINED**;

Furthermore, it is hereby **ORDERED** that:

4. The license of Respondent to practice medicine in the State of New York is **REVOKED**

Furthermore, it is hereby **ORDERED** that:

5. The said **REVOCATION** shall be **TEMPORARILY STAYED** on the following conditions:

- i. timely payment of a **CIVIL PENALTY** set forth below
- ii. during the completion of a period of **PROBATION** not to exceed five years and according to the terms set forth below.

Furthermore, it is hereby **ORDERED** that;

6. The said **REVOCATION** shall be **PERMANENTLY STAYED** on the following conditions:

- i. timely payment of a **CIVIL PENALTY** set forth below
- ii. successful completion of a period of **PROBATION** not to exceed five years and according to the terms set forth below.

Furthermore, it is hereby **ORDERED** that;

7. Respondent shall be on probation subject to the **FOLLOWING TERMS OF PROBATION:**

- i. The director of the office of professional medical conduct or his or her designee (hereinafter referred to collectively as "the director") shall review the professional performance of the Respondent by randomly selecting office records, patient records and hospital charts;
- ii. The director shall have the authority require an audit of the Respondents billings for services rendered during probation;

iii. Any other terms or conditions which The director in his or her sole discretion shall have the authority to impose to carry out the terms and intent of this probation and Order;

Furthermore, it is hereby **ORDERED** that;

8. Respondent shall, within thirty days of the effective date of this Order, pay a **CIVIL PENALTY OF \$50,000 (FIFTY THOUSAND DOLLARS)**;

Furthermore, it is hereby **ORDERED** that;

9. **That any civil penalty not paid by the date prescribed herein shall be subject to all provisions of law relating to debt collection by the State of New York. This includes but is not limited to the imposition of interest, late payment charges and collection fees; and non-renewal of permits or licenses (Tax Law , section 171(27); State Finance Law, section 18; CPLR, section 5001; Executive Law, section 32);**

Furthermore, it is hereby **ORDERED** that;

10. This order shall take effect **UPON RECEIPT** by Respondent or his Attorney or **SEVEN (7) DAYS** after mailing of this order by Certified Mail.

Dated:
North Salem, New York

April 21 1997



F. MICHAEL JACOBIOUS, M.D., Chairperson,
RICHARD ASHLEY, M.D.
PETER D. KUEMMEL, R.P.A.

TO:

DAVID W. SMITH, ESQ.
Associate Counsel
Bureau of Professional Medical Conduct
New York State Department of Health
5 Penn Plaza
New York, New York 10001

T. LAWRENCE TABAK, ESQ.
Kern Augustine Conroy & Schepman, P.C.
420 Lakeville RD
Lake Success NY 11042

HERBERT OKUN
2655 National Drive
Brooklyn, New York

MAIL PAYMENT TO:

New York State Department of
Health
Bureau of Accounts Management
Corning Tower Building --Room
1245
Empire State Plaza
Albany, N.Y. 12237

APPENDIX ONE

IN THE MATTER
OF
HERBERT OKUN, M.D.

STATEMENT
OF
CHARGES

HERBERT OKUN, M.D., the Respondent, was authorized to practice medicine in New York State on or about March 4, 1958, by the issuance of license number 80604 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. Between in or about November, 1991, and in or about March, 1993, Respondent performed two transurethral resections on Patient A (All patients are identified in Appendix I attached hereto) and treated him at his office at 2655 National Drive, Brooklyn, New York.
1. Between November, 1991 and March, 1993, Patient A visited Respondent sixteen times. At each visit Respondent caused a Culture and Sensitivity Study and/or urine culture to be performed of which those done on the dates listed in Appendix II were inappropriate and excessive.
 - a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

2. Throughout the period, Respondent performed or caused to be performed uroflow studies on Patient A of which those performed on the dates listed in Appendix II were inappropriate and excessive.

a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

3. Throughout the period, Respondent caused sonograms to be taken of which those done on the dates listed in Appendix II were inappropriate and excessive.

a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

B. Between in or about April, 1992 and June, 1993, Respondent treated Patient B for cystitis and other medical conditions at his office at 2655 National Drive, Brooklyn, New York.

1. Respondent took or caused to be taken ten bladder sonograms of which those done on the dates listed in Appendix II were inappropriate and excessive.

- a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.
 - b. Respondent caused nine uroflow studies to be done of which those done on the dates listed in Appendix II were inappropriate and excessive.
 - c. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.
2. Respondent caused six cystoscopies to be done of which those done on the dates listed in Appendix II were inappropriate and excessive.
- a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.
3. Respondent caused four renal sonograms to be taken of which those done on the dates listed in Appendix II were inappropriate and excessive.
- a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or

caused to be performed by Respondent for other than a good faith medical purpose.

C. Between in or about April, 1991 and July, 1994, Respondent treated Patient C for urethral stenosis and other medical conditions at his office at 2655 National Drive, Brooklyn, New York.

1. During this period, Patient C visited Respondent twenty times for medical reasons. Respondent caused to be performed twenty urinalyses and cultures, of which those done on the dates listed in Appendix II were inappropriate and excessive.

a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

2. Throughout the period, Respondent caused fourteen bladder sonograms to be taken of which those performed on the dates listed in Appendix II were inappropriate and excessive.

a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

3. Throughout the period, Respondent caused a number of renal sonograms to be taken of which those done on the dates listed in Appendix II were inappropriate and excessive.

a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

4. Throughout the period, Respondent caused seven uroflow studies to be done of which those done on the dates listed in Appendix II were inappropriate and excessive.

a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

D. Between in or about January, 1988 and May, 1994, Respondent treated Patient D for testicular pain and other medical conditions at his office at 2655 National Drive, Brooklyn, New York.

1. Throughout the period, Patient D visited Respondent twenty-four times for medical reasons. Respondent caused twenty-four culture and sensitivity tests to be done, of which those done on the dates listed in Appendix II were inappropriate and excessive.

- a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.
2. Respondent caused to be taken a number of sonograms of Patient D of which those done on the dates listed in Appendix II were inappropriate and excessive.
 - a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.
3. Respondent caused twelve uroflow studies to be done of which those done on the dates listed in Appendix II were inappropriate and excessive.
 - a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.
4. Throughout the period, Respondent caused seven prostatic sonograms to be taken of which those done on the dates listed in Appendix II were inappropriate and excessive.

a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

E. Between in or about December, 1991, and June, 1992, Respondent treated Patient E for benign prostatic hypertrophy and other medical conditions at his office at 2655 National Drive, Brooklyn, New York.

1. Throughout the period, Patient E visited Respondent sixteen times for medical reasons. Respondent caused nine bladder sonograms to be taken of which those done on the dates listed in Appendix II were inappropriate and excessive.

a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

2. Throughout the period, Respondent caused eight uroflow studies to be done of which those done on the dates listed in Appendix II were inappropriate and excessive.

a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

3. Throughout the period, Respondent caused five prostatic sonograms to be taken of which those done on the dates listed in Appendix II were inappropriate and excessive.
 - a. The tests, studies and/or analyses described in the preceding paragraph were intentionally performed or caused to be performed by Respondent for other than a good faith medical purpose.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

NEGLIGENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(3)(McKinney Supp. 1996) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts of two or more of the following:

1. Paragraphs A and A1-3; B and B1-4; C and C1-4; D and D1-4; and/or E and E1-3.

SECOND SPECIFICATION

INCOMPETENCE ON MORE THAN ONE OCCASION

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(5)(McKinney Supp. 1996) by practicing the profession of medicine with incompetence on more than one occasion as alleged in the facts of two or more of the following:

2. Paragraphs A and A1-3; B and B1-4; C and C1-4; D and D1-4; and/or E and E1-3.

THIRD THROUGH SEVENTH SPECIFICATIONS

EXCESSIVE TESTING

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(35)(McKinney Supp. 1996) by the ordering of excessive tests, treatment or use of treatment facilities not warranted by the condition of the patient as alleged in the facts of the following:

3. Paragraphs A and A1-3
4. Paragraphs B and B1-4.
5. Paragraphs C and C1-4.
6. Paragraphs D and D1-4.
7. Paragraphs E and E1-3.

EIGHTH THROUGH TWELFTH SPECIFICATIONS

FRAUDULENT PRACTICE

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law §6530(2) (McKinney Supp. 1996) by practicing the profession fraudulently as alleged in the facts of the following:

8. Paragraphs A and A1-3 and all subparagraphs thereafter.
9. Paragraphs B and B1-4 and all subparagraphs thereafter.
10. Paragraphs C and C1-4 and all subparagraphs thereafter.
11. Paragraphs D and D1-4 and all subparagraphs thereafter.
12. Paragraphs E and E1-3 and all subparagraphs thereafter.

THIRTEENTH THROUGH SEVENTEENTH SPECIFICATIONS
MORAL UNFITNESS

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(20)(McKinney Supp. 1996) by engaging in conduct in the practice of the profession of medicine that evidences moral unfitness to practice as alleged in the facts of the following:

13. Paragraphs A and A1-3 and all subparagraphs thereafter.
14. Paragraphs B and B1-4 and all subparagraphs thereafter.
15. Paragraphs C and C1-4 and all subparagraphs thereafter.
16. Paragraphs D and D1-4 and all subparagraphs thereafter.
17. Paragraphs E and E1-3 and all subparagraphs thereafter.

DATED: April 15, 1996
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

HERBERT OKUN, M.D.

REVISED APPENDIX II

PATIENT A:

PARAGRAPH A1: Excessive Urine Sensitivity Cultures:

12/10/91; 12/17/91; 03/09/92; 04/17/92; 05/27/92;
11/25/92; 01/26/93; 01/15/92; 03/24/92; 10/21/92;
03/16/93; 03/31/93.

Excessive Urine Analysis:

01/15/92; 04/17/92; 05/27/92; 07/22/92; 01/26/93.

A2: Excessive Uroflow Studies:

01/08/92; 04/17/92; 05/27/92; 07/22/92; 11/25/92.

A3: Excessive Sonograms:

03/04/92; 04/17/92; 05/27/92; 07/22/92; 11/25/92;
03/31/93.

PATIENT B:

PARAGRAPH B1: Excessive Sonograms:

05/08/92; 06/12/92; 07/09/92; 01/14/93; 04/01/93;
05/28/93; 06/22/93.

B2: Excessive Flow Studies:

04/20/92; 05/08/92; 07/09/92; 12/10/92; 01/14/93;
04/01/93; 05/28/93; 06/22/93.

B3: Excessive Cystoscopies:

05/08/92; 06/12/92; 07/09/92; 12/10/92; 01/14/93.

B4: Excessive Renal Sonograms:

06/12/92; 12/10/92; 01/14/93.



PATIENT C:

- PARAGRAPH C1: Excessive Cultures and Sensitivity:
04/30/91; 07/25/91.
- C2: Excessive Bladder Sonograms:
04/30/91; 06/06/91; 07/25/91; 09/25/91; 04/16/92;
08/13/92; 09/15/92; 06/08/93; 08/13/93.
- C3: Excessive Renal Sonograms:
04/30/91; 07/25/91; 09/25/91; 11/30/92; 08/13/92;
01/20/93; 06/08/93.
- C4: Excessive Uroflow Studies:
12/19/91; 04/16/92; 08/13/92; 09/15/92' 10/27/92;
06/08/93; 08/13/93.

PATIENT D:

- PARAGRAPH D1: Excessive Cultures:
11/21/88; 12/06/88; 12/13/88; 12/20/88; 09/19/91;
07/19/93; 09/24/92; 04/22/93; 10/22/93.
- D2: Excessive Sonograms:
12/06/88; 12/13/88; 06/25/92; 08/24/92; 09/24/92;
10/21/92; 02/19/93; 10/22/93.
- D3: Excessive Flow Studies:
08/24/92; 09/24/92; 10/21/92; 07/19/93; 10/22/93.
- D4: Excessive Prostatic Sonograms:
12/13/88; 07/23/92; 10/21/92; 12/18/92; 04/22/93;
04/06/94.

PATIENT E:

PARAGRAPH E1: Bladder Sonograms:

02/03/92; 10/02/92; 12/05/92; 03/30/93; 03/03/94.

E2: Excessive Uroflow Studies:

02/03/92; 10/02/92; 12/05/92; 03/30/93; 03/03/94.

E3: Excessive Prostatic Sonograms:

02/05/93; 06/01/93; 12/06/93.