



# STATE OF NEW YORK DEPARTMENT OF HEALTH

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

Mark R. Chassin, M.D., M.P.P., M.P.H.  
*Commissioner*

Paula Wilson  
*Executive Deputy Commissioner*

November 23, 1993

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

William L. Wood, Esq.  
Wood & Scher  
14 Harwood Court  
Scarsdale, New York 10583

Richard D. Salerno, M.D.  
404 North Cayuga Street  
Ithaca, New York 14850

Kevin Roe, Esq.  
New York State Department of Health  
Bureau of Professional Medical Conduct  
Corning Tower - 24th Floor  
Empire State Plaza  
Albany, New York 12237

**RE: In the Matter of RICHARD D. SALERNO, M.D.**

Dear Mr. Wood, Dr. Salerno, and Mr. Roe:

Enclosed please find the Determination and Order (No. ARB-93-126) 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.

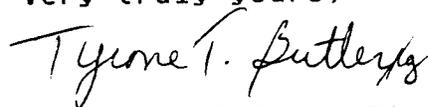
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

Office of Professional Medical Conduct  
New York State Department of Health  
Corning Tower - Fourth Floor (Room 438)  
Empire State Plaza  
Albany, New York 12237

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

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

Very truly yours,

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

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:rg  
Enclosure

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

-----X

IN THE MATTER	:	<u>ADMINISTRATIVE</u>
	:	<u>REVIEW BOARD</u>
OF	:	<u>DETERMINATION</u>
	:	<u>AND ORDER</u>
RICHARD D. SALERNO, M.D.	:	<u>ORDER NO. ARB-93-126</u>

-----X

A quorum of the Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of **ROBERT M. BRIBER, MARYCLAIRE B. SHERWIN, EDWARD C. SINNOTT, M.D., WINSTON S. PRICE, M.D.** and **WILLIAM A. STEWART, M.D.** held deliberations on November 5, 1993 to review the Hearing Committee for Professional Medical Conduct's (Hearing Committee) August 25, 1993 Determination revoking Dr. Richard Salerno's license to practice medicine in New York State. The Respondent requested the Review through a Notice filed with the Review Board on August 31, 1993. **JAMES F. HORAN, ESQ.** served as Administrative Officer to the Review Board. William L. Wood, Jr., Esq. submitted a brief on behalf of Dr. Salerno on October 1, 1993. Kevin C. Roe, Esq. submitted a response brief on behalf of the Office of Professional Medical Conduct (OPMC) on October 6, 1993.

### 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 Office of Professional Medical Conduct charged that the Respondent, who was on probation following a 1991 Consent Order with the State Board of Regents, violated the probation by wilfully harassing or abusing a patient and by committing an act which evidenced moral unfitness to practice medicine.

The Hearing Committee found that the Respondent had been placed on probation following a 1991 Consent Order through which the Respondent had admitted to inappropriately touching the penis of a teenage patient, inappropriately examining the groin area of

a patient, and inappropriately rubbing a patient's chest and abdomen and sliding a hand under the patient's belt towards the patient's groin. The Respondent was placed on five years probation, in lieu of a five year suspension, and the Respondent was required to have a monitor present at all times while the Respondent examined patients.

The Hearing Committee determined that the Respondent had violated the terms of the 1991 probation when, on February 2, 1993, the Respondent plunged his ungloved hand inside the pants and underwear of a fully clothed patient and placed the hand on the patient's penis for several seconds. The Committee determined that the Respondent's conduct evidenced moral unfitness to practice medicine and that the Respondent's conduct constituted wilful abuse, harassment or intimidation of a patient. The Committee voted to revoke the Respondent's license to practice medicine in the State of New York.

#### REQUESTS FOR REVIEW

The Respondent has asked that the Review reverse and set aside the Hearing Committee's Determination because the Determination was not consistent with the Hearing Committee's findings of fact and was not supported by the Hearing Committee's findings of fact. The Respondent contends that, although the Hearing Committee found that the Respondent had placed his fingers on the patient's penis for several seconds and applied a squeeze

which lasted several seconds, there was no finding or conclusion that the Respondent's conduct was intentional rather than inadvertent, that the conduct was outside the bounds of accepted medical care, or that the conduct was for sexual gratification rather than for a good faith medical purpose. The Respondent contends that absent such findings, the charges which the Committee sustained can not stand.

The Office of Professional Medical Conduct urges the Review Board to sustain the Hearing Committee's Determination.

#### REVIEW BOARD DETERMINATION

The Review Board has considered the entire record below and the briefs which counsel has submitted.

The Review Board votes unanimously to sustain the Hearing Committee's Determination that the Respondent violated his probation and that the Respondent was guilty of moral unfitness and of wilfully abusing, harassing or intimidating a patient. The Determination was consistent with the Committee's finding that the Respondent had plunged his ungloved hands past the pants and underwear of a fully clothed patient and touched the patient's penis for several seconds.

The Review Board votes unanimously to sustain the Hearing Committee's Determination revoking Dr. Salerno's license to practice medicine. The Respondent had already been placed on probation for similar inappropriate conduct towards his patients

and that probation has not deterred the Respondent. Further, a monitor's presence in the examining room also failed to deter the Respondent from such inappropriate conduct towards a patient. The Committee's Determination to revoke the Respondent's license is appropriate and is consistent with the Committee's findings and conclusions.

**ORDER**

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

1. The August 25, 1993 Determination by the Hearing Committee on Professional Medical Conduct, finding Dr. Richard D. Salerno guilty of professional misconduct is sustained.
  
2. The Hearing Committee's Determination revoking Dr. Salerno's license to practice medicine in New York State is sustained.

**ROBERT M. BRIBER**  
**MARYCLAIRE B. SHERWIN**  
**WINSTON S. PRICE, M.D.**  
**EDWARD C. SINNOTT, M.D.**  
**WILLIAM A. STEWART, M.D.**

**IN THE MATTER OF RICHARD D. SALERNO, 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. Salerno.

**DATED:** Albany, New York  
November 15, 1993

  
ROBERT M. BRIBER

**IN THE MATTER OF RICHARD D. SALERNO, M.D.**

**MARYCLAIRE B. SHERWIN**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Salerno.

**DATED: Albany, New York  
November 15, 1993**

*Maryclaire B. Sherwin*  
**MARYCLAIRE B. SHERWIN**

IN THE MATTER OF RICHARD D. SALERNO, 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. Salerno.

DATED: Albany, New York  
November 14, 1993



EDWARD C. SINNOTT, M.D.

**IN THE MATTER OF RICHARD D. SALERNO, 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. Salerno.

**DATED: Albany, New York**  
**November , 1993**

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

**IN THE MATTER OF RICHARD D. SALERNO, 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. Salerno.

**DATED: Brooklyn, New York  
November 23, 1993**

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



# STATE OF NEW YORK DEPARTMENT OF HEALTH

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

Mark R. Chassin, M.D., M.P.P., M.P.H.  
*Commissioner*

Paula Wilson  
*Executive Deputy Commissioner*

August 24, 1993

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Kevin C. Roe, Esq.  
NYS Department of Health  
Empire State Plaza  
Corning Tower - Room 2429  
Albany, New York 12237

**RE: In the Matter of RICHARD D. SALERNO, M.D.**

Dear Mr. Roe:

Enclosed please find the Determination and Order (No. BPMC-93-126) of the Hearing Committee 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:

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Office of Professional Medical Conduct  
Corning Tower - Fourth Floor (Room 438)  
Empire State Plaza  
Albany, New York 12237

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must than be delivered to the Office of Professional Medical Conduct in the manner noted above.

As prescribed by the New York State Public Health Law, §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "(t)he determination of a committee on professional medical conduct may be reviewed by the administrative review board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

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

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

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

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

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the  
Administrative Review Board's Determination and Order.

Very truly yours,

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

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:rg  
Enclosure

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

-----X  
IN THE MATTER ;  
OF ;  
RICHARD D. SALERNO, M.D. ;  
-----X

HEARING  
COMMITTEE'S  
DETERMINATION  
AND ORDER  
NO. BPMC-93-126

MS. OLIVE JACOB, Chairperson, ROBERT A. MENOTTI, M.D.  
and JAY I. POMERANTZ, M.D. duly designated members of the State  
Board for Professional Medical Conduct, appointed by the  
Commissioner of Health of the State of New York pursuant to  
Section 230(1) of the Public Health Law, served as the Hearing  
Committee in this matter pursuant to Sections 230(10)(e) and  
230(19) of the Public Health Law. BENJAMIN J. MIGLIORE, ESQ.,  
Administrative Law Judge served as the Administrative Officer for  
the Hearing Committee.

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

SUMMARY OF THE PROCEEDINGS

Notice of Violation of Probation Dated:	March 24, 1993
Pre-Hearing Conference:	April 30, 1993
Hearing Dates:	May 12, 1993 May 13, 1993 June 9, 1993
Deliberation Date:	June 30, 1993
Place of Hearing:	NYS Department of Health Corning Tower Building Albany, New York

Petitioner appeared by:

Peter J. Millock, Esq.,  
General Counsel,  
NYS Department of Health  
BY: Kevin C. Roe, Esq.  
Associate Counsel

Respondent appeared by:

William L. Wood, Jr., Esq.  
Wood & Scher  
The Harwood Bldg.  
Scarsdale, NY 10583

**WITNESSES**

**For the Petitioner:**

Patient A

William Cornwell, Senior Investigator for the Office of  
Professional Medical Conduct

Charles Woods, M.D.

Melvin J. Steinhart, M.D.

**For the Respondent:**

Richard A. Hughes, M.D.

Terry White

Barbara Eckston

Howard M. Feinstein, M.D.

Christina Salerno

Richard D. Salerno, M.D., Respondent

Charles Cummings, M.D.

**STATEMENT OF CHARGES**

A Notice of Violation of Probation was sent to  
Respondent on March 24, 1993, via Certified Mail-Return Receipt  
requested, by the Director of the Office of Professional Medical

Conduct in which it was determined that the Respondent had violated the Terms of Probation imposed by Order No. 91-02 dated October 14, 1991.

The Notice of Violation of Probation charges the Respondent with moral unfitness to practice medicine and/or willfully harassing, abusing or intimidating a patient either physically or verbally in that during a pre-operative physical examination on Patient A, without warning, explanation or unbuckling of the patient's belt, the Respondent placed his ungloved hand inside the patient's pants and grasped the patient's penis for several seconds.

The Director of the Office of Professional Medical Conduct concluded that such conduct does not conform with New York Education Law Section 6530(20) (McKinney Supp. 1993) and/or New York Education Law Section 6530(31).

The Charges are more specifically set forth in the Notice of Violation of Probation, a copy of which is attached hereto and made a part hereof.

#### **FINDINGS OF FACT**

Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Dr. Salerno was licensed to practice medicine in New York State in 1969 (Tr. 349).

2. Dr. Salerno graduated from the University of Colorado School of Medicine in 1962 and served a three year residency in the Massachusetts Eye and Ear Infirmary at Harvard Medical School (Tr. 349).

3. Dr. Salerno has conducted a solo practice as an otolaryngologist in Ithaca, New York, since 1969 (Tr. 350).

4. Dr. Salerno has maintained privileges at Tompkins Community Hospital (Tr. 350).

5. By Order No. 91-02 of the State Board for Professional Medical Conduct dated April 14, 1991, the State Board for Professional Medical Conduct accepted Respondent's Application for a Consent Order in which he admitted guilt to three specifications of engaging in conduct in the practice of the profession which evidenced a moral unfitness to practice in violation of New York Education Law Section 6509(9) and 8 NYCRR Section 21.1(b)(5). In the Application for Consent Order, Respondent admitted that he inappropriately rubbed a patient's chest and abdomen and slid his hands under the patient's belt towards his groin on or about February 5, 1990; inappropriately examined a male patient's groin area on or about February 5, 1990; and inappropriately touched the penis of a teenage male patient in 1983. Order No. 91-02 suspended Respondent's license for five years with said suspension stayed to become a period of probation under terms and conditions which required that he conduct himself

in all ways in a manner befitting his professional status and conform fully to all federal, State and local laws, rules and/or regulations regarding the practice of medicine (Pet. Ex. 3).

6. Under the terms of probation of the Consent Order, Dr. Salerno was required to have a monitor who would be present at all times that Dr. Salerno saw patients (Tr. 355).

7. Terry White was hired by Dr. Salerno as the OPMC approved monitor in 1992 (Tr. 185). Ms. White was instructed that her job would entail being present with Dr. Salerno for all patient contacts, whether in the office or at the hospital (Tr. 185).

8. The monitor had to be approved by OPMC and was required to provide quarterly reports to OPMC (Tr. 354, 355). Moreover, Dr. Salerno agreed not to conduct physical examinations below the waist. He agreed to conduct only regional physical examinations of his patients (Ex. 7, p. 36).

9. On February 2, 1993, Respondent saw Patient A in his office in Ithaca, New York, for a pre-operative physical examination (Tr. 28).

10. Patient A was referred to Dr. Salerno by his primary treating physician, Dr. Neal Taylor (Tr. 25). Patient A was diagnosed as having a deviated septum after examination by Dr. Salerno and that surgery would correct the deviation (Tr. 26). Patient A decided to go ahead with the surgery (Tr. 26, 27).

11. During the preoperative examination, Dr. Salerno examined Patient A's nasal passage, ears and throat. He then put

on a stethoscope, pulled up the shirt of Patient A and started to listen to the heart and lungs (Tr. 31). With Patient A, fully clothed and seated in the examination chair at a 45 degree angle, Dr. Salerno placed his ungloved hand inside Patient A's unbelted pants and underwear and placed his fingers on the patient's penis for several seconds (Tr. 33). At all times during the examination, the monitor, Terry White, was standing in the doorway of the examination room facing into the examination room (Tr. 187).

12. Patient A described the sensations he had when Dr. Salerno placed his hand in Patient A's pants as follows: "I felt his index finger and ring finger on the sides of the shaft of my penis and his middle finger on the top of the shaft of the penis." Pressure was applied from all three fingers, like a squeeze which lasted two or three seconds (Tr. 33).

13. After Respondent grasped Patient A's penis, Patient A was shocked, confused and upset (Tr. 45).

14. After the examination, Patient A and Dr. Salerno discussed the need for prescriptions, back to work schedule after surgery and Patient A's occupation (Tr. 43). Dr. Salerno was a little startled to learn that Patient A had a Ph.D. degree. Dr. Salerno had difficulty writing the word "spray" in prescribing over-the-counter products (Tr. 44-45).

15. After the examination, Patient A decided to go to see his referring physician, Dr. Neil Taylor, and explain to him what happened and get his comments (Tr. 45). With prescription in

hand, Patient A went to the pharmacy which is located in the same complex as Dr. Taylor's office, to drop off the prescription (Tr. 46). Patient A encountered two friends at the pharmacy who asked Patient A what was wrong as he looked disturbed. Patient A replied that he had an inappropriate examination by Respondent and described the examination to his friends (Tr. 46, 47). Patient A then went to the medical office of Dr. Neil Taylor, where, after a twenty minute wait, Patient A described the inappropriate grasping of his penis by the Respondent (Tr. 49).

16. The nurse monitor, Terry White, indicated that she did not see any grabbing of the penis (Tr. 196), nor could she see where Dr. Salerno's hand went inside Patient A's pants (Tr. 204-205).

17. Patient A called Tompkins Community Hospital to cancel surgery (Tr. 51).

18. Terry White called Patient A to find out why he was so upset and uncomfortable at having surgery performed by Dr. Salerno, and/or why he had cancelled surgery. Ms. White was told by Patient A that during the examination the day before, Dr. Salerno had grabbed his penis (Tr. 196).

19. The nurse-monitor, Terry White, did not report the incident relating to Patient A to the State because she didn't think it was an inappropriate examination (Tr. 197). She was required to file quarterly reports with the State (Tr. 197-198).

20. Dr. Feinstein spent seventy hours treating and interviewing Dr. Salerno during the period from the summer of 1990

until present (Tr. 272-273). Dr. Feinstein made a diagnosis of major depression (Tr. 273).

21. Dr. Feinstein considered and rejected any diagnosis of sexual deviancy (Pet. Ex. 7, p. 36).

22. Dr. Steinhart interviewed Dr. Salerno in 1990 at the request of the Department of Health. A psychiatric examination was conducted after having reviewed materials that were sent to him. A report was prepared based upon the written materials and the psychiatric examination (Tr. 477).

Dr. Steinhart was asked to reevaluate Dr. Salerno approximately six months after initially seeing him (Tr. 478).

23. Dr. Steinhart made a diagnosis of paraphilia NOS (not otherwise specified) (Tr. 479). This diagnosis is also contained in a letter from Dr. Steinhart dated December 7, 1990 to Kevin C. Roe, Esq. (Pet. Ex. 11).

**CONCLUSIONS**  
**AS TO**  
**CREDIBILITY OF WITNESSES**

**PATIENT A**

Patient A was a credible witness. He has professional experience, training and education and is familiar with parts of the human body (Tr. 21). He had many previous physical examinations (eight or nine) including examinations for hernia (Tr. 24). He also is familiar with examinations of the testicles and the inguinal nodes which occurred on eight or nine previous physician examinations (Tr. 25).

Patient A was sincere and consistent in his testimony, both direct and cross-examination. No motive was revealed to fabricate his testimony. His demeanor was convincing. Even Terry White found Patient A believable (Tr. 239). Given Patient A's experience and training, it is highly unlikely that he misunderstood the nature of the physical examination conducted by Dr. Salerno.

**TERRY WHITE**

Her role as the monitor and office nurse created the potential for a conflict of interest and a very confusing situation (Tr. 203). The non-reporting of this incident to the State Health Department is troubling to the Hearing Committee (Tr. 199). Even if the incident was without merit, her role is to report to the State Health Department all complaints against Dr. Salerno.

During the examination of Patient A, Ms. White was standing in the doorway of the examination room facing into the examination room (Tr. 187). She should have placed herself in a position to observe Patient A being examined. As a monitor, her role was to observe every movement of Dr. Salerno during examinations, yet she was not sure if Dr. Salerno grasped the penis of Patient A (Tr. 196-197).

Terry White found Patient A to be a very believable young man (Tr. 223). She found him to be sincere when he complained about an improper examination (Tr. 239).

**DR. HOWARD M. FEINSTEIN**

The testimony of Dr. Feinstein was based solely on his claim that Dr. Salerno never admitted or acknowledged engaging in inappropriate sexual contact with patients (Tr. 294-295). Yet in his letter of September 27, 1990 to Dr. David Axelrod, Dr. Feinstein stated that he has "explored the range of sexually ambiguous encounters that have brought him (Dr. Salerno) to the attention of the Board" (Pet. Ex. 7; p. 9). Also, in his progress notes, Dr. Feinstein stated that Dr. Salerno admitted to him "some conflict over the impulse to touch young men" (Pet. Ex. 7; p. 4). The Hearing Committee found this to be inconsistent with Dr. Feinstein's testimony. In addition, Dr. Salerno admitted to Dr. Feinstein that he felt relieved that he could now talk about this and "that I have taken steps necessary to prevent the possibility of repeating these acts" (Pet. Ex. 7; p. 4).

Dr. Feinstein's testimony left some gaps of information which did not become apparent until after his complete medical records were supplied by the Department of Health. The Hearing Committee concluded that Dr. Feinstein's failure to provide the complete medical records and progress notes affected his credibility.

Dr. Feinstein in his letter to Dr. Steinhart gave assurances to both the State Department of Health and Dr. Steinhart that Dr. Salerno was limiting his physical examinations to the head and neck and then, only in the presence of a third party (Pet. Ex. 7; p. 36). This was considered misinformation provided to the State by Dr. Feinstein.

#### DR. MELVIN STEINHART

The Hearing Committee found Dr. Steinhart a credible witness. The letter dated December 7, 1990 (Pet. Ex. 11) from Dr. Steinhart, which was omitted in the original documents supplied by the Respondent was damaging to Dr. Salerno and the testimony of Dr. Feinstein. This letter uncovered inconsistencies in Dr. Feinstein's testimony including the fact that his psychiatric evaluation of Dr. Salerno was flawed in that Dr. Feinstein concluded that there was nothing wrong with Dr. Salerno sexually (Pet. Ex. 11; p. 2).

Dr. Steinhart was able to extract from Dr. Salerno his admission that "he had some leanings in that direction" meaning toucherism (Tr. 485). His diagnosis was that the behavior in

question was more likely to recur and was detrimental to Dr. Salerno's case (Tr. 516). Moreover, it was Dr. Steinhart's medical conclusion that Dr. Salerno has a level of denial that is so intense as to block recollection of an event occurring. This defense mechanism is working in where some of Dr. Salerno's fantasies are not being discussed. All this would color his responses in any treatment mode (Tr. 529-530).

In reviewing the testimony and credentials of Dr. Steinhart, the Hearing Committee concluded that his experience, demeanor and ability to point out inconsistencies in Dr. Feinstein's records and treatment notes made him a credible witness. Additionally, his role as a liaison consultant and his technique of rapid psychiatric assessments in a diverse population in every day life strengthened the quality of his testimony.

#### **DR. CHARLES CUMMINGS**

Dr. Cummings was an impressive expert witness but his credentials were not sufficient to deal with the issues at hand. He testified that he does not perform pre-operative examinations on patients but relies on his residents to do this work. The Hearing Committee concluded that he could not speak as to whether an ENT physician should examine a patient by placing his hand into the trousers to examine for hernia, the inguinal canals and nodes.

Dr. Cummings knew Dr. Salerno while they were in the residency training program at Harvard Medical School (Tr. 439).

It appeared to the Hearing Committee that such friendship from the past could taint his testimony.

**CONCLUSIONS WITH REGARD TO THE VIOLATION OF PROBATION**

The Hearing Committee unanimously concluded that the charge found in paragraph number three of the Notice of Violation of Probation dated March 24, 1993 is **sustained**. The Hearing Committee unanimously concluded that the Department of Health had met its burden of proof. The preponderance of the evidence clearly demonstrated that Respondent's conduct does not conform with New York Education Law Section 6530(20) which prohibits conduct in the practice of medicine which evidences moral unfitness to practice medicine and/or New York Education Law 6530(31) which prohibits willfully harassing, abusing or intimidating a patient either physically or verbally.

**ORDER**

Based upon the foregoing it is hereby **ORDERED**;

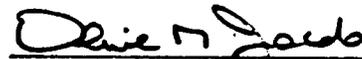
1. That the charge found in paragraph number 3 of the Notice of Violation of Probation dated March 24, 1993 is

**SUSTAINED**; and

2. Respondent's license to practice medicine in the State of New York is **REVOKED**.

DATED: Albany, New York

August 17, 1993

  
**MS. OLIVE JACOB**  
Chairperson

**ROBERT A. MENOTTI, M.D.**  
**JAY I. POMERANTZ, M.D.**

TO: Kevin C. Roe, Esq.  
NYS Department of Health  
Empire State Plaza  
Corning Tower - Room 2429  
Albany, New York 12237

William L. Wood, Esq.  
Wood & Scher  
14 Harwood Court  
Scarsdale, New York 10583

Richard D. Salerno, M.D.  
404 North Cayuga Street  
Ithaca, New York 14850

APPENDIX



# STATE OF NEW YORK DEPARTMENT OF HEALTH

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

Mark R. Chassin, M.D., M.P.P., M.P.H.  
Commissioner  
Paula Wilson  
Executive Deputy Commissioner

March 24, 1993

OFFICE OF HEALTH  
SYSTEMS MANAGEMENT  
Raymond Sweeney  
Director  
Brian Hendricks  
Executive Deputy Director

## Certified Mail - Return Receipt Requested

Richard D. Salerno, M.D.  
404 North Cayuga Street  
Ithaca, New York 14850

RE: Notice of Violation of Probation

Dear Dr. Salerno:

STATE OF NEW YORK  
DEPARTMENT OF HEALTH  
DEPT. ✓ ..... RESPT ..... EXHIBIT ..... 1  
JD ✓ ..... EVD .....  
DATE 4/30/93 INITIALS MAS

As the Director of the Office of Professional Medical Conduct of the New York State Department of Health, I have determined that you have violated the terms of probation imposed upon you by Order No. 91-02 dated October 14, 1991. My determination that you have violated the terms of your probation is based on the following facts:

1. By Order No. 91-02 of the State Board for Professional Medical Conduct dated October 14, 1991, the State Board for Professional Medical Conduct accepted your Application for a Consent Order in which you admitted guilt to three specifications of engaging in conduct in the practice of the profession which evidenced a moral unfitness to practice in violation of N.Y. Educ. Law -6509(9) and 8 NYCRR 29.1(b)(5). Order No. 91-02 suspended your license for five years with said suspension stayed to become a period of probation under terms and conditions set forth therein.
2. Paragraph one of the terms of probation requires that you conduct yourself in all ways in a manner befitting your professional status and conform fully to all federal, state and local laws, rules and/or regulations regarding the practice of medicine.
3. On February 2, 1993 you saw Patient A (Patient A is identified in the attached appendix) in your office for a pre-operative physical examination. With Patient A fully clothed and seated in an examination chair and without warning, explanation or unbuckling of the patient's belt, you placed your ungloved hand inside the patient's pants and underwear and placed your fingers on his penis for several seconds. This conduct does not conform with N.Y. Education

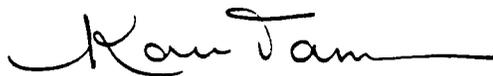
Law -6530(20) (McKinney Supp. 1993) which prohibits conduct in the practice of medicine which evidences moral unfitness to practice medicine and/or N.Y. Education Law -6530(31) (McKinney Supp. 1993) which prohibits willfully harassing, abusing or intimidating a patient either physically or verbally.

By this letter I am initiating a violation of proceeding against you pursuant to New York Public Health Law -230(19) (McKinney Supp. 1993).

Be advised that if you do not dispute the facts forming the basis of my determination within 20 days of the date of this letter, I shall submit this matter to a committee on professional conduct for its review and determination. If within 20 days of the date of this letter, you dispute the facts forming the basis of my determination, you shall be afforded a hearing before a committee on professional conduct. You have a right to such a hearing and may be represented by counsel. A stenographic record of this hearing will be made. The committee, after providing you an opportunity to be heard, shall determine whether you have violated probation and, if so, shall impose an appropriate penalty as defined in New York Public Health Law -230-a (McKinney Supp. 1993). In determining the appropriate penalty, the committee shall consider both the violation of probation and the prior adjudication of misconduct. The chairperson of the committee shall issue an order adopting the decision of the committee on professional conduct. This order may be reviewed by the Administrative Review Board for Professional Medical Conduct.

Since this violation of probation proceeding may result in a determination that your license to practice medicine in New York be revoked, I urge you to consult with an attorney. If you or your attorney wish to discuss this matter, or to request a hearing, you should call Kevin C. Roe, Associate Counsel at (518) 474-8266.

Very truly yours,



Kathleen M. Tanner  
Director  
Office of Professional  
Medical Conduct

KT/sab

cc: William L. Wood, Jr., Esq.