

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ERIC BURSTEIN, M.D.,
Appellant,
vs.
OHIO STATE MEDICAL BOARD,
Appellee.

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CASE NO. 92CVF06 4558
JUDGE O'NEILL

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DECISION

Rendered this 8th day of March 1993

O'NEILL, J.

This case is before the Court on an ORC 119.12 appeal from the Decision of the Ohio State Medical Board permanently revoking Appellant's medical license in Ohio.

Appellee has filed a motion to admit "newly discovered" evidence regarding the fact that Appellant's New Mexico license has been revoked since the time of the hearing before the Board in part because of perjury committed during the Ohio hearing regarding what he had told the state board in New Mexico about why he was being investigated by the Ohio board. Since that evidence occurred after the hearing was complete in Ohio, this Court does not believe it to be "newly discovered" within the meaning of ORC 119.12 since it was not in existence at the time of the hearing. In Re Lane Nursing Home (1976), 5 Ohio Ops. 3d 146. It would be unfair for this Court to determine the merits of the Board's case against Dr. Burstein with facts that occurred subsequent to its presentation. Therefore, Appellees' Motion to Admit Additional Evidence is OVERRULED.

In addressing the merits of the case, the Court finds that Dr. Burstein engaged in sexual intercourse with Patient 1, who was his psychiatric patient, a minimum of three times. He diagnosed Patient 1 with dysthymic disorder (chronic depression) and borderline personality disorder. During the course of his treatment of her, he prescribed birth control pills for her and took some of her medication for Epstein-Barr virus which was apparently being communicated sexually between them. All of the experts agreed that a person with borderline personality disorder would have trouble with interpersonal relationships and transference, a transfer of feelings to the therapist from a past relationship or event in the patient's life. This transference could be positive or negative. The patient would have extreme difficulty accepting rejection. The Board's expert testified that the patient would be very vulnerable and unable to give the physician any meaningful consent to a sexual relationship because of the lack of parity between the two of them. Therefore a physician who does not recognize the transference and avoid the acting out of the patient's sexual fantasies (which are common toward the therapist in borderline personality disorder) takes unethical advantage of the patient's vulnerability. In this case, Patient 1 had been raped. Dr. Sharif believed that Dr. Burstein's sexual intimacy with her was a continuation of that sort of exploitation. Dr. Burstein was unable to keep his neutrality and remain objective, thereby rendering his continued treatment ineffective. Dr. Sharif felt he put his own self-interest ahead of

the patient's.

Although Dr. Sharif neither evaluated Patient 1 nor reviewed her psychological treatment before or after that of Dr. Burstein's, he did read Dr. Burstein's records pertaining to her, her deposition, and Appellant's deposition. He concluded that she was harmed by the sexual intercourse which took place between them. It was apparent in this Court's reading of the medical records that the patient began to do much worse after the entry dated June 23, 1986. The intercourse began in the Spring of 1986 and ended about a year later. Their professional relationship ended soon thereafter. Patient 1 testified that she was even more mistrustful of physicians and men than prior to her encounters with Appellant.

Dr. Litvak, who testified for Appellant, concluded that he could not tell from the records whether or not the patient had been harmed because they were incomplete. The Court certainly does not find it surprising that Appellant left out of his records any reference to their sexual relationship. Litvak also did not treat the patient or review her prior records. He acknowledged that there was a good likelihood that a borderline personality disorder individual would be harmed and that it was unethical on Dr. Burstein's part to enter into this relationship while treating her and that the doctor would have a disproportionate influence over the patient.

Probably most damaging to Dr. Burstein's case is his own testimony that in October or November 1985 there was an aborted attempt at sexual intercourse between the two of them because the

patient became too upset. He indicated that he recognized that she was scared and that he inquired whether she was afraid of him to which she responded affirmatively. Still he pursued her or allowed her to pursue him on at least three other occasions. (She testified there were approximately 30 times in all.) Yet, even after realizing that there was this fear, he indicated that he felt that she could separate the therapeutic from the personal relationship apparently because he felt he could, a conclusion which has no basis in fact. He admits that his actions were a terrible mistake and that they were unethical. He also admits giving her birth control pills although she was regularly treating with other medical doctors for physical complaints during the same period of time.

The Board found that by committing the above described acts, Appellant violated ORC 4731.22(B)(6) and (B)(18):

"(B) The board . . . shall to the extent permitted by law, limit, revoke, or suspend a certificate. . . for one or more of the following reasons:

(6) A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established.

(18) The violation of a provision of a code of ethics of a national professional organization as specified in this division. "National professional organization" means the American Medical Association. . ."

All the physicians who testified in the case, including Appellant, agreed that Dr. Burstein's actions were unethical and in

violation of American Medical Association's "Principles of Medical Ethics". For this alone, the Board was within their authority to revoke his Ohio license. ORC 4731.22(B)(18)

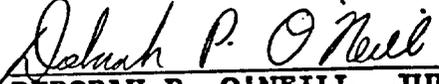
Under ORC 4731.22(B)(6) the State had no duty to prove that Patient 1 was harmed by Appellant's failure to conform to minimum standards of care within the community. The evidence revealed that all the physicians agreed that it was not within the community standard to have sexual intercourse with a patient whom a physician is treating especially in the case of a borderline personality disorder diagnosis. Whether or not the patient was harmed is irrelevant under this statute although the Court feels that the harm to this type of person would be obvious to any lay person and especially to the Medical Board.

Dr. Burstein does not really dispute that he has violated both the statutes under which he has been cited and that the record from below contains reliable, substantial, and probative evidence of those infractions. He simply argues that the Board's punishment did not fit the crime. However, once this Court has determined that the Board's finding of an infraction is supported by substantial, reliable, and probative evidence, it cannot substitute its judgment for that of the Medical Board in meting out sanctions for infractions where the sanction applied is one which is within the range of acceptable choices for the particular infraction. Hale v. Ohio State Veterinary Medical Bd. (1988), 47 Ohio App. 3d 167; University of Cincinnati v. Conrad (1980), 63 Ohio St. 2d 108. Revocation was within their authority for either or both of these

infractions under ORC 4731.22(B).

This case can easily be distinguished from that cited by Appellant in support of his position that some lesser sanction should be imposed. [Pons v. State Medical Bd. 91AP-746 (Franklin County, decided 11-14-91) and on appeal to the Ohio Supreme Court]. In that case there was a finding by the Court of Appeals that there was no evidence that Dr. Pons' treatment of his patient with whom he was having a sexual relationship was substandard. He was similarly charged under ORC 4731.22(B)(6). In the case at bar, there is no question that entering into a physical and emotional relationship with an already overly dependent personality, and then ultimately disregarding it, is substandard care. In this instance Appellant was her treating psychiatrist, a person who had tremendous power over her; whereas in Pons, supra, he was her gynecologist. There is also no question in this case, unlike in Pons, that an ethical violation occurred. It was admitted.

For the foregoing reasons, this Court is duty bound to uphold the penalty of permanent revocation imposed by the Board once substantial, reliable and probative evidence of the infractions claimed by the Board are found to be contained within the record. Having made that finding the Court finds the Order of the Medical Board to be in accordance with law and it is hereby **AFFIRMED**.

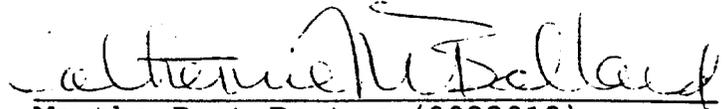

DEBORAH P. O'NEILL, JUDGE

Appearances:

MARTHA POST BAXTER, Esq.
CATHERINE M. BALLARD, Esq.
Counsel for Appellant

SUSAN C. WALKER, AAG
Counsel for Appellee

sanction was not in proportion to the evidence presented.



Martha Post Baxter (0022013)
Catherine M. Ballard (0030731)
BRICKER & ECKLER
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

Counsel for Eric Burstein, M.D.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing NOTICE OF APPEAL was filed with the Ohio State Medical Board and a copy sent by regular U.S. mail, postage prepaid, to Susan Walker, Assistant Attorney General, 30 East Broad Street, 15th Floor, Columbus, Ohio 43266-0410 on this 3rd day of June, 1992.



Catherine M. Ballard

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Eric Burstein, M.D.,

Appellant,

vs.

Ohio State Medical Board,

Appellee.

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Case No.

92CVF06-458

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COMMON PLEAS
FRANKLIN COUNTY
OHIO
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CLERK OF COURTS

MOTION OF APPELLANT ERIC BURSTEIN, M.D. FOR
SUSPENSION OF ORDER OF OHIO STATE MEDICAL BOARD

Now comes Appellant Eric Burstein, M.D., pursuant to R.C. 119.12, and moves this Court to grant a suspension of the May 21, 1992 Entry of Order of the Ohio State Medical Board ("Board"), a copy of which is attached as Exhibit A to the Notice of Appeal filed with the Court on this same date, on the grounds that (1) an unusual hardship will result to Dr. Burstein from the execution of the Board's Order pending determination of this appeal, and (2) the health, safety, and welfare of the public will not be threatened by suspension of the Board's Order.

Dr. Burstein further respectfully requests an oral hearing before the Court on this motion.

Catherine M. Ballard

Martha Post Baxter (0022013)
Catherine M. Ballard (0030731)
BRICKER & ECKLER
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

Counsel for Eric Burstein, M.D.

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ATTORNEY GENERAL'S OFFICE

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HEALTH & HUMAN
SERVICES SECTION

MEMORANDUM IN SUPPORT

R.C. 119.12 provides in pertinent part:

The filing of a notice of appeal [from the agency's order] shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms.... In the case of an appeal from the state medical board . . . , the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. (emphasis added).

By Order dated May 21, 1992, the Board permanently revoked Dr. Burstein's license to practice medicine in the State of Ohio. Prior to that date, Dr. Burstein had an unrestricted license to practice medicine in the State of Ohio. The Order provides that it shall become effective "immediately upon the mailing of notification of approval by the State Medical Board of Ohio."

Dr. Burstein completed medical school and began practicing psychiatric medicine in the State of Ohio in 1980. This case involves a single act of misconduct which occurred during an approximately one year period from early 1986 to early 1987; specifically, during this period Dr. Burstein became personally involved with one of his patients whom he had been treating since 1984 ("Patient #1"). Other than this single inappropriate act, there is absolutely no evidence that Dr. Burstein has ever been anything other than a competent, respected physician. He has not

been the subject of any other charges by the Board, no other malpractice claims have ever been brought against him,¹ and his supervisor for over seven years testified on his behalf with respect to his integrity and competency in treating patients.

In February of 1990, Dr. Burstein left the State of Ohio and began practicing psychiatric medicine in the State of New Mexico to be closer to his family. At that time, he sought licensure in the State of New Mexico, and he advised the New Mexico State Medical Board of the malpractice action which Patient #1 had brought. The Ohio State Medical Board brought the charge of inappropriate conduct with respect to Patient #1 by letter dated November 11, 1991.

Dr. Burstein requested a hearing before the Board. At that hearing, Dr. Burstein admitted that he had been involved in a sexual relationship with Patient #1 and that his actions constituted a departure from minimal standards of care and a violation of the code of ethics of the psychiatric profession. He disputed, however, the Board's claim that Patient #1 had been harmed by her relationship with Dr. Burstein. He further presented additional evidence of mitigating factors for the Board to consider in determining an appropriate sanction. The appeal in this case focuses upon these issues.

¹ Patient #1 filed a civil malpractice action against Dr. Burstein. This action was subsequently settled.

The New Mexico State Medical Board will receive a copy of the Board's Order.² The revocation Dr. Burstein's license in the State of Ohio is grounds for disciplinary action by the New Mexico State Medical Board. See, N.M. Stat. Ann. § 61-6-15 (1988). If this Court has stayed the Board's Order, there is a strong likelihood that the New Mexico State Medical Board will await a final Ohio court decision before deciding whether it should issue charges against Dr. Burstein as well. If this Court does not stay the Order, however, there is a strong likelihood that the New Mexico Board will accelerate its investigation.

Any action taken by the New Mexico State Board against Dr. Burstein will be based solely upon the proceedings which have occurred in the State of Ohio beginning with the Board's charges and ending with the final court proceedings. Dr. Burstein should not be subjected to additional disciplinary proceedings by another State until a final decision has been rendered as to whether the Ohio State Medical Board acted appropriately. To place Dr. Burstein in the position where he will be forced to defend himself in two separate forums at this time based upon the same issues would clearly result in an undue hardship. This hardship would not only be from an emotional and financial standpoint but, also, from a legal standpoint in that he would be

² The Board will submit its Order to the Federation of State Medical Boards which shares this type of information. In addition, the Board will be required to report its decision to the National Practitioner Data Bank. Health care facilities which credential Dr. Burstein and state agencies which license Dr. Burstein will be able to obtain information from this bank.

defending against the Board's decision in New Mexico while he was attacking the validity of the Board's decision in Ohio.

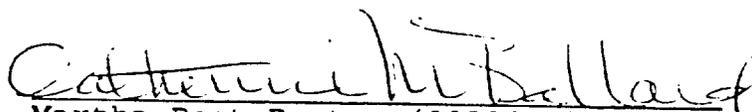
In contrast, granting such stay imposes no hardship upon the Board nor does it result in jeopardizing the health, safety, or welfare of the public. Indeed, it is illogical to argue that the public will be jeopardized if Dr. Burstein continues to practice. Dr. Burstein has been practicing for over four years (the first two and one-half in the State of Ohio) since the relationship with Patient #1 ended. Absolutely no evidence was presented nor allegation made that he has engaged in inappropriate conduct or provided anything other than proper medical care during that time.

In addition, the Board's jurisdiction does not extend beyond the State of Ohio. Dr. Burstein is not practicing in this State and, therefore, Ohio citizens are not affected by his actions. The State of New Mexico is aware of the malpractice action which was brought against Dr. Burstein and will shortly learn of the Board's decision. It is up to that State to decide what action, if any, should be taken against Dr. Burstein in the interests of the citizens of New Mexico. Finally, to allay any concerns that the Court may have with respect to this issue, Dr. Burstein would agree not to return to practice in the State of Ohio during the pendency of these proceedings.

Dr. Burstein has repeatedly stated that he regrets that the relationship with Patient #1 ever occurred. He also strongly believes, however, that the Board's decision is arbitrary,

capricious, and not in accordance with recent Ohio case decisions or basic concepts of due process. Dr. Burstein appeared before the Board believing that he would receive a fair consideration of the facts of his case. He now comes before the Court seeking to rectify an injustice.

Given the undue hardship which Dr. Burstein may readily face if the Board's Order is not stayed as balanced against the lack of any harm to the public in this case, Dr. Burstein urges this Court to issue a stay pending this appeal. A proposed Order setting forth the requested relief is attached hereto for this Court's consideration.



Martha Post Baxter (0022013)
Catherine M. Ballard (0030731)
BRICKER & ECKLER
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

Counsel for Eric Burstein, M.D.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing MOTION OF APPELLANT ERIC BURSTEIN, M.D. FOR SUSPENSION OF ORDER OF OHIO STATE MEDICAL BOARD was sent by regular U.S. mail, postage prepaid, to Susan Walker, Assistant Attorney General, 30 East Broad Street, 15th Floor, Columbus, Ohio 43266-0410 on this 3rd day of June, 1992.



Catherine M. Ballard

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Eric Burstein, M.D., :
Appellant, :
vs. : Case No.
Ohio State Medical Board, :
Appellee. :

ORDER

Upon motion of Appellant Eric Burstein, M.D. for a suspension of the Ohio State Medical Board's Order dated May 21, 1992, and for good cause shown, it appearing to this Court that Appellant has met his burden of establishing that he will suffer an undue hardship by imposition of the Board's Order pending appeal and that the health, safety, and welfare of the public will not be threatened by suspension of the Board's Order, it is hereby

ORDERED, that the Ohio State Medical Board's Order dated May 21, 1992 be suspended in its entirety; and it is further

ORDERED that Appellant be enjoined during the pendency of this appeal from practicing medicine in the State of Ohio.

Date

Judge



STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

May 15, 1992

Eric Burstein, M.D.
6409 Turnberry Lane, N.E.
Albuquerque, NM 87111

Dear Doctor Burstein:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Kevin P. Byers, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of the Minutes of the State Medical Board, meeting in regular session on May 13, 1992, including Motions approving and confirming the Report and Recommendation as the Findings and Order of the State Medical Board of Ohio.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal may be taken to the Franklin County Court of Common Pleas only.

Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of a Notice of Appeal with the State Medical Board of Ohio and the Franklin County Court of Common Pleas within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12 of the Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO

Carla S. O'Day, M.D.
Secretary

CSO:em

Enclosures

CERTIFIED MAIL RECEIPT NO. P 741 123 742
RETURN RECEIPT REQUESTED

cc: Martha Post Baxter, Esq.
Catherine M. Ballard, Esq.

CERTIFIED MAIL RECEIPT NO. P 741 123 743
RETURN RECEIPT REQUESTED

Mailed 5/21/92



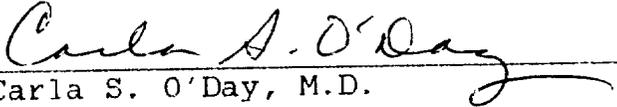
STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

CERTIFICATION

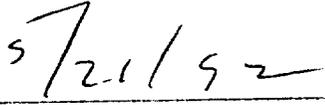
I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; attached copy of the Report and Recommendation of Kevin P. Byers, Attorney Hearing Examiner, State Medical Board; and an excerpt of Minutes of the State Medical Board, meeting in regular session on May 13, 1992, including a Motion approving and confirming the Report and Recommendation as the Findings and Order of the State Medical Board, constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Eric Burstein, M.D., as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.



Carla S. O'Day, M.D.
Secretary

(SEAL)



Date



STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

ERIC BURSTEIN, M.D.

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio the 13th day of May, 1992.

Upon the Report and Recommendation of Kevin P. Byers, Hearing Examiner, Medical Board, in this matter designated pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board for the above date.

It is hereby ORDERED that the certificate of Eric Burstein, M.D., to practice medicine and surgery in Ohio is permanently REVOKED.

This Order shall become effective immediately upon the mailing of notification of approval by the State Medical Board of Ohio.

Carla S. O'Day

Carla S. O'Day, M.D.
Secretary

(SEAL)

5/21/92
Date

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REPORT AND RECOMMENDATION
IN THE MATTER OF ERIC BURSTEIN, M.D.

On March 2, 1992 the Matter of Eric Burstein, M.D., came on for hearing before Kevin P. Byers, Attorney Hearing Examiner for the State Medical Board of Ohio.

INTRODUCTION AND SUMMARY OF EVIDENCE

I. Basis for Hearing

- A. By letter dated November 13, 1991 (State's Exhibit #1), the State Medical Board notified Eric Burstein, M.D., that it intended to determine whether to take disciplinary action against his certificate to practice medicine and surgery because of his long-term sexual relationship with Patient #1 while Dr. Burstein was her treating psychiatrist. The Board alleged that this sexual relationship constituted "a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established", as that clause is used in Section 4731.22(B)(6), Revised Code. The Board also alleged that Dr. Burstein's acts, conduct, and/or omissions constituted "the violation of any provision of a code of ethics of a national professional organization as specified in this division", as that clause is used in Section 4731.22(B)(18), Revised Code, to wit: Principles I, II and IV of the American Medical Association Code of Ethics.
- B. By letter received by the Board on December 12, 1991 (State's Exhibit #2), Dr. Burstein, through counsel, requested a hearing in this Matter.

II. Appearances

- A. On behalf of the State of Ohio: Lee I. Fisher, Attorney General, by Susan C. Walker, Assistant Attorney General
- B. On behalf of the Respondent: Bricker and Eckler, by Martha Post Baxter, Esq., and Catherine Ballard, Esq.

III. Testimony Heard

- A. Presented by the State
1. Eric Burstein, M.D., as on cross-examination

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2. Bahman Sharif, M.D.
 3. Patient #1
- B. Presented by the Respondent
1. Ronald Litvak, M.D.
 2. Caroline A. Gale, M.S.W.
 3. Eric Burstein, M.D.

IV. Exhibits Examined

In addition to those noted previously, the following exhibits were identified and admitted into evidence in this Matter:

- A. Presented by the State
1. State's Exhibit #3: December 13, 1991 letter to Attorney Baxter from the State Medical Board advising her that a hearing set for December 26, 1991 was postponed until further notice pursuant to Section 119.09, Revised Code.
 2. State's Exhibit #4: December 17, 1991 letter to Attorney Baxter from the State Medical Board scheduling Dr. Burstein's hearing for March 2, 1992.
 - * 3. State's Exhibit #5: Records of Patient #1.
 4. State's Exhibit #6: American Medical Association Principles of Medical Ethics.
 5. State's Exhibit #7: Three-page curriculum vitae of Bahman Y. Sharif, M.D.
 6. State's Exhibit #8: November 20, 1991 article from the Journal of The American Medical Association entitled "Sexual Misconduct in the Practice of Medicine".
 7. State's Exhibit #9: Three-page excerpt from the DSM III, Third Edition, relative to Borderline Personality Disorder, 301.83.
 - * 8. State's Exhibit #10: October 25, 1989 deposition of Patient #1 taken in a civil suit she filed against Dr. Burstein.

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- * 9. State's Exhibit #11: August 3, 1989 deposition of Dr. Burstein taken in connection with Patient #1's civil suit against him.
- B. Presented by the Respondent
 - 1. Respondent's Exhibit A: Five-page curriculum vitae of Ronald Litvak, M.D.
- * THE ABOVE EXHIBITS HAVE BEEN SEALED TO PROTECT PATIENT CONFIDENTIALITY

FINDINGS OF FACT

1. Eric Burstein, M.D, graduated from medical school in 1976. He completed a psychiatric residency at Ohio State University in 1979 and then completed a one-year psychiatric fellowship at Riverside Methodist Hospital. He is not board certified and presently practices psychiatry in New Mexico where he received a temporary certificate to practice medicine and surgery in November of 1989 and subsequently received an unrestricted medical license in June of 1990. At the time of his application for endorsement of his Ohio license, Dr. Burstein notified the New Mexico licensing authorities of the 1988 lawsuit filed against him by Patient #1 in Ohio.

These facts are established by the testimony of Dr. Burstein (Tr. Vol. I at 23, 24; Vol. II at 203, 204, 235, 236).

2. Dr. Burstein assumed treatment of Patient #1 in July of 1984. This physician-patient relationship continued until 1987. During the course of the psychiatric relationship with Patient #1, Dr. Burstein engaged in sexual intercourse with her on a number of occasions. During the time of the sexual relationship with Patient #1, she was being treated by Dr. Burstein variously for his diagnoses of borderline personality disorder, dysthymic disorder, and disassociative disorder. Also during the course of his psychiatric treatment of Patient #1, Dr. Burstein prescribed antibiotics, antidepressants, and birth control pills to Patient #1. As a result of the sexual relationship with Dr. Burstein, Patient #1 filed a civil lawsuit against him and his employer.

These facts are established by the testimony of Dr. Burstein (Tr. Vol. I at 25-30, and Vol. II at 207-258), the testimony of Patient #1 (Tr. at 102-135) and State's Exhibits #10 and #11.

3. Dr. Burstein admitted to engaging in a social and sexual relationship with Patient #1 while she was a patient, although he disclaims her recollection of the frequency of sexual intercourse and admits to only three separate occasions. Dr. Burstein

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expresses a number of reasons as to why he became sexually involved with Patient #1 and explains that it started as a friendship based upon the intellectually stimulating nature of his office interactions with Patient #1. Dr. Burstein's sworn recollection of the frequency and initiating party in their sexual encounters is markedly divergent from the sworn testimony of Patient #1. However, his testimony at hearing was consistent with his deposition testimony given on August 3, 1989.

Dr. Burstein testified that psychiatrists are frequently reluctant to treat borderline personality disorder patients because they are so difficult and threatening. Dr. Burstein acknowledges that one of the biggest fears of a typical borderline personality disorder patient is abandonment. He readily acknowledges that his sexual relationship with Patient #1 was unethical and violative of the standards of the American Medical Association. Dr. Burstein testified that he was diligently working to obtain outside treatment for Patient #1 toward the end of their sexual relationship because he felt that the restrictions imposed by the HMO covering her medical costs were unrealistic in view of the pervasive nature of her mental disorder. He testified that he also felt that "because our relationship was no longer therapeutic" that she needed another caregiver to treat her borderline personality disorder. Dr. Burstein never prescribed sex with himself as a treatment modality for Patient #1. It is his opinion that there was fluctuation in the symptomology of her mental disorder which had no perceptible correlation to the ongoing sexual relationship.

These facts are established by the testimony of Dr. Burstein (Tr. Vol. II at 204-215).

4. Dr. Burstein characterized his treatment of Patient #1 from 1984 through 1987 as mere medication management and opines that any therapy which took place was merely on a superficial level as true therapeutic duties were referred to social workers under the HMO where he practiced and treated Patient #1. He also disavowed any trauma inflicted upon Patient #1 by the sexual relationship with him and testified that it was his medical opinion that there was no worsening of her borderline personality disorder due to this sexual relationship. He did acknowledge that the sexual contact between them "affected treatment" but also observed that it was his belief that Patient #1 could separate the treatment aspects of their relationship from the sexual aspects. Dr. Burstein agreed with Drs. Sharif and Litvak that borderline personality disorder patients have an overwhelming fear of abandonment. Ultimately, Dr. Burstein admitted that he had made a "terrible mistake" by becoming sexually involved with his patient and that it was his professional and ethical obligation to prevent or halt the sexual relationship with Patient #1. However, Dr. Burstein also

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emphasized the fact that Patient #1 voluntarily entered into a sexual relationship with him, notwithstanding his diagnosis of her as suffering borderline personality disorder--common traits of such disorder being unstable interpersonal relationships and overwhelming fear of abandonment. Dr. Burstein testified that his sexual relationship with Patient #1 "had nothing to do with any influence I had over her."

These facts are established by the testimony of Dr. Burstein (Tr. Vol. II at 210, 220, 224-225, 234, 237, and 255-256).

5. Dr. Burstein candidly acknowledged consuming some of a prescription antibiotic issued to Patient #1 by her HMO gynecologist due to a gynecological infection. He claims that Patient #1 pressured him into consuming some of the medication since it was her belief that she was being reinfected during sexual intercourse with Dr. Burstein. Dr. Burstein testified that he did not consume any of the antibiotic which he personally prescribed for Patient #1, but did consume part of the gynecologist's prescription which was intended for Patient #1. He also admitted that Patient #1 is the only borderline personality disorder patient for whom he prescribed birth control pills.

These facts are established by the testimony of Dr. Burstein (Tr. Vol. II at 240-243).

6. Dr. Burstein testified that in his New Mexico practice of psychiatry, he has enacted measures to prevent another ethical violation such as he committed with Patient #1. Presently, he brings in a fellow therapist who is female when he realizes that a patient may be feeling sexual attraction toward himself. Dr. Burstein also immediately consults with a psychologist in the same building if he perceives that a patient may be implicating some type of personal sexual desire during the course of therapy. Dr. Burstein also participates in weekly meetings with his HMO colleagues in his practice in New Mexico wherein group discussion of particularly difficult or troubling cases is available and essentially serves as a peer review session. Such weekly meetings were also a part of Dr. Burstein's practice in 1984 through 1987 when he was treating Patient #1 in Ohio.

These facts are established by the testimony of Dr. Burstein (Tr. Vol. II at 202, 216-217, 229, and 244-247).

7. Patient #1 testified that while she was a patient of Dr. Burstein in the Spring of 1986 through March 10, 1987 she had sexual intercourse with him on approximately 30 occasions. She also testified about a social relationship with Dr. Burstein where they dated, went to movies, dined out, and essentially engaged in activities which a romantic couple often share. Throughout the course of this social and sexual relationship with Dr. Burstein,

she was also seeing him as a psychotherapy patient. Prior to sexual intercourse with Dr. Burstein, Patient #1 told him of the rape she suffered in 1978 and other emotionally traumatic historical events. She testified that as a result of the relationship with Dr. Burstein, she has suffered emotional trauma and psychic upheaval. Presently, she has extreme difficulty in trusting physicians and will not knowingly enter a room with a male psychiatrist or psychologist. She also testified about the disbelief she now feels if anyone attempts to get emotionally close to her. She doesn't believe that anyone can love her or feel affection for her because of the way she was emotionally abused by Dr. Burstein. She testified that she felt directionless and very ill during the therapy with Dr. Burstein because her frames of reference had been destroyed by the intimate relationship with her treating psychiatrist.

These facts are established by the testimony of Patient #1 (Tr. Vol. I at 102-135).

8. Bahman Sharif, M.D., graduated from medical school in Iran in 1975. He then completed a three-year residency at Case Western Reserve Medical School in Cleveland, Ohio. He followed that up with a one-year fellowship in psychobiology through Case Western Reserve. He has been board certified since 1985 and is currently the medical director of the Cuyahoga Community Mental Health Board, acts as a consultant for various healthcare systems, and conducts a private practice of psychiatry. Dr. Sharif reviewed the medical records of Patient #1, State's Exhibit #5, and the deposition of Dr. Burstein, State's Exhibit #11, prior to testifying in this Matter.

These facts are established by the testimony of Dr. Sharif (Tr. at Vol. I at 35-38).

9. Dr. Sharif was able to glean from his review of Patient #1's records that she had been in a therapeutic, psychiatric relationship with Dr. Burstein from 1984 through 1987. Dr. Burstein primarily diagnosed her as suffering from borderline personality disorder. Dr. Sharif testified that individuals suffering borderline personality disorder are extremely unstable, impulsive, and may show signs of depression, suicidal ideation or other indicia of malfunctioning personality. Dr. Sharif characterized borderline personality disorder as one of the most severe personality disorders that psychiatrists treat. He testified that the hallmark of a personality disorder patient is the inability to establish stable interpersonal relationships. He also testified that such individuals frequently have a history of victimization which may contribute to a confused sexual identity.

These facts are established by the testimony of Dr. Sharif (Tr. Vol. I at 40-44).

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10. Dr. Sharif testified about the nature of the psychotherapeutic relationship between a physician and his patient. He opined that the natural process of a therapeutic relationship involves the patient revealing their innermost secrets, fears, and anxieties to the psychiatrist and thereby becoming very vulnerable and emotionally exposed to the therapist. Patients thereby often feel that a close intimate relationship has been established with their therapist. Such a relationship may lead to the psychiatric phenomena of transference. Transference occurs when a patient reacts to the therapist as if the therapist were someone from the patient's past. Often the therapist is seen by the patient as an adult figure--one possessing authority and control over the patient's life. Transference is not necessarily a positive or a negative reaction to the therapeutic relationship and can actually be used a therapeutic tool if the psychiatrist manages patient care appropriately.

These facts are established by the testimony of Dr. Sharif (Tr. Vol. I. at 45-50).

11. Dr. Sharif also testified that it is imperative that the psychiatrist remain objective and non-biased in order to provide a well balanced, competent medical service to the patient. A component of the necessary objectivity is the psychiatrist's recognition that patients with certain mental disorders will be more inclined to experience intense transference reactions than would other patients. Dr. Sharif testified that an individual suffering from borderline personality disorder would likely exhibit a proclivity for strong transference reactions to a therapist. Included in such transference reaction could be a sexual or erotic aspect. Especially when such transference is evident to the psychiatrist, there is a professional and ethical duty upon the psychiatrist to completely avoid sexual intimacies with a patient. Dr. Sharif testified that it was his opinion that a patient suffering from borderline personality disorder would be incapable of giving meaningful consent to sexual relations with a treating psychiatrist. Dr. Sharif based this opinion upon the coercion inherent in the psychotherapeutic relationship and the lack of parity between the patient and the psychotherapist.

These facts are established by the testimony of Dr. Sharif (Tr. Vol. I at 50-53).

12. Although Dr. Sharif did not examine Patient #1, he testified that it was his belief that a borderline personality disorder patient who engaged in a sexual relationship with a treating psychiatrist would likely suffer traumatization. Dr. Sharif felt this was especially true if the patient entered psychotherapy having previously been sexually abused, as was Patient #1 who had a history of rape and adolescent sexual abuse. Dr. Sharif's review of the records led him to the opinion that Dr. Burstein's

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prescribing of birth control pills to Patient #1 while Dr. Burstein was engaged in a sexual relationship with her constituted inappropriate care. Dr. Sharif opined that by prescribing birth control pills for Patient #1, Dr. Burstein was opening the door for her to act out any sexual fantasies she may have had which involved Dr. Burstein. Dr. Sharif believes that Dr. Burstein should have recognized the high potential for transference reaction by Patient #1 and that by offering birth control pills he was merely making himself available to Patient #1. Overall, Dr. Sharif found the care rendered by Dr. Burstein to be below minimal standards of similar practitioners under the same or similar circumstances due to the sexual relationship which Dr. Burstein and Patient #1 both acknowledge. Dr. Sharif found that this relationship between the therapist and patient would impair the efficacy of psychotherapy by infringing upon the therapist's neutrality and objectivity.

Dr. Sharif also testified that the AMA Principles of Medical Ethics were violated by Dr. Burstein's sexual relationship with his patient. Specifically, Dr. Sharif found that Principle #1, which mandates that a physician shall be dedicated to providing competent medical services with compassion and respect for human dignity, was violated because of the fashion in which Patient #1 was treated by Dr. Burstein when he voluntarily entered into a sexual relationship with her, fully aware of her mental disorders and of the resultant potential for emotional trauma. Principle #2 mandates that a physician shall deal honestly with their patients, a provision which Dr. Sharif opined was markedly absent from the psychiatric relationship between Dr. Burstein and Patient #1. Dr. Sharif opined that Dr. Burstein was making his own needs paramount to his concern for the patient and thereby was dealing with her in a dishonest fashion within the professional relationship. Principle #4 mandates that a physician shall respect the rights of a patient, another ethical provision that Dr. Sharif found violated by Dr. Burstein's conduct with Patient #1. Dr. Sharif testified that Patient #1 was very clearly traumatized because of this sexual relationship with her psychiatrist.

These facts are established by the testimony of Dr. Sharif (Tr. Vol. I at 55-72).

13. Ronald Litvak, M.D., graduated from Ohio State University College of Medicine and did a one-year internship at University Hospitals in Columbus, Ohio. He then completed a three-year psychiatric residency at University Hospitals in Columbus. While in his residency, he obtained an M.S. degree in Psychiatry. He is board certified by both the American Board of Psychiatry and Neurology and the American Board of Forensic Psychiatry and is a member of the American Academy of Psychiatry and Law. He presently practices psychiatry, of which about 75% of the practice is

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clinical, with the remainder of his practice spent consulting for attorneys, courts, and governmental bodies. He also holds the position of clinical associate professor of psychiatry in the medical school at Ohio State University in the Department of Psychiatry. Dr. Litvak characterized borderline personality disorder as those traits which often date back to adolescence and cause subjective distress to the patient or may interfere with social or occupational functioning. Dr. Litvak agreed with Dr. Sharif that treating borderline personality disorder is one of the more difficult therapeutic tasks facing psychiatrists. Dr. Litvak explained that a hallmark of the borderline personality disorder patient is severe difficulty in maintaining interpersonal relationships. He explained that the psychiatric term of "splitting" is often used when dealing with borderline personality disorder. This simply means that it is not unusual to have a borderline personality disorder patient fluctuate between expressing extreme hate or dislike for someone, including the therapist, and then shortly thereafter expressing love or fond emotional attachment for that same person. Dr. Litvak chronicled the arduous nature of treatment of the disease and the severe emotional strain it places upon the therapist due to the demanding and unpredictable nature of borderline personality disorder patients.

Dr. Litvak testified that, based upon his review of Patient #1's records, her deposition testimony, and the deposition testimony of Dr. Burstein, he was unable to form an opinion as to whether her psychiatric condition had worsened due to the sexual relationship with Dr. Burstein while she was a patient. He also testified that knowledge that Dr. Burstein and Patient #1 had engaged in sexual intercourse during the time of the physician-patient relationship did not, standing alone, indicate that such conduct necessarily worsened any psychiatric condition which Patient #1 was then suffering. He acknowledged that the fear of abandonment is a prevailing concern in borderline personality disorder patients and there is a "very likely possibility" that a borderline patient who engaged in a sexual relationship with the treating psychiatrist will be harmed as a result. Dr. Litvak also testified that it is clearly unethical for a psychiatrist to engage in sex with a patient and that the psychiatrist bears the responsibility of preventing such unethical conduct. He also acknowledged that continuing the therapeutic relationship while concomitantly having sex with a patient was a violation of the patient's trust and was probably impinging upon the therapist's objectivity.

These facts are established by the testimony of Dr. Litvak (Tr. Vol. I at 136-177).

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14. Caroline Ann Gale, M.S.W., testified that she is a psychiatric social worker and she directly supervised Dr. Burstein's clinical and administrative practice during the time that they were both affiliated with Riverside Hospital. She testified that for Dr. Burstein's first two years at Riverside, he reported clinically to a physician who was the medical director and administratively to her. She further testified that from 1980 through 1987, Dr. Burstein reported both administratively and clinically to her. Ms. Gale was responsible for assigning cases to the psychiatrists on staff at Riverside and also reviewed the patient charts on a daily basis and countersigned them. She testified that Dr. Burstein accepted the patients who suffered difficult psychiatric disorders and had usually been through a number of other therapies and therapists. She testified that such patients were usually most responsive to chemotherapy and that Dr. Burstein was proficient in this modality. Dr. Burstein was respected by the staff at Riverside and Ms. Gale felt that his professional demeanor and services were exemplary. She testified that her opinion of Dr. Burstein's medical care and competence is not affected by knowledge that he engaged in a sexual relationship with a patient during the course of therapy.

These facts are established by the testimony of Ms. Gale (Tr. Vol. I at 178-194).

CONCLUSIONS

1. Dr. Burstein's acts, conduct, and/or omissions as set forth in Findings of Fact Nos. 2-5, 7, and 9-13 constitute "a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established," as that clause is used in Section 4731.22(B)(6), Revised Code.
2. Dr. Burstein's sexual relationship with Patient #1 while he was her treating psychiatrist constitutes "the violation of any provision of a code of ethics of a national professional organization as specified in this division," as that clause is used in Section 4731.22(B)(18), Revised Code, to wit: Principles I, II, and IV of the American Medical Association Principles of Medical Ethics.

* * * * *

Dr. Burstein readily acknowledged ethical violations by his sexual conduct with Patient #1 although he attempted to show that she had suffered no harm. Dr. Burstein's assertions that Patient #1 voluntarily and willingly entered into a sexual relationship with him while he was her treating psychiatrist ignores the fact that he was in

a position of power and control and was ethically-bound to refrain from sexual relations with his patient. The poignant testimony of Patient #1 indicates that she suffered harm due to this sexual relationship. No minimization of the therapeutic relationship can eradicate the deleterious impact of Dr. Burstein's behavior. Dr. Burstein's motives in prescribing birth control pills for Patient #1 are suspect, and his ingestion of medication prescribed for her highlights the inappropriate emotional and sexual influences which invaded the sanctity of the physician-patient relationship. Ethical violations of this degree are indicative of unsound medical judgment and questionable character. Persuasive mitigating factors are absent and the compromise of patient care as evidenced in this Matter demands an uncompromising sanction.

PROPOSED ORDER

It is hereby ORDERED that the certificate of Eric Burstein, M.D., to practice medicine and surgery in Ohio is permanently REVOKED.

This Order shall become effective immediately upon the mailing of notification of approval by the State Medical Board of Ohio.

KEVIN P. BYERS
Kevin P. Byers
Attorney Hearing Examiner



STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

EXCERPT FROM THE MINUTES OF MAY 13, 1992

REPORTS AND RECOMMENDATIONS

.....

Dr. Gretter asked whether each member of the Board had received, read, and considered the hearing record, the proposed findings, conclusions, and orders, and any objections filed in the matters of Alan J. Block, D.P.M.; Eric Burstein, M.D.; Shakir M. Fattah, M.D.; David E. Little, D.O.; Thomas W. Michaelis, M.D.; Seldon R. Nelson, D.O.; Ohio Permanente Medical Group, Inc., Roland S. Philip, M.D., Responsible Physician; Scott L. Shook, M.D.; and Avanced Heart & Lung Surgeons, Inc., Thomas Hillman, M.D., Responsible Physician. A roll call was taken:

ROLL CALL:	Dr. O'Day	- aye
	Mr. Albert	- aye
	Dr. Stienecker	- aye
	Mr. Jost	- abstain
	Dr. Garg	- aye
	Dr. Kaplansky	- aye
	Dr. Heidt	- aye
	Dr. Hom	- aye
	Dr. Agresta	- aye
	Dr. Gretter	- aye

Dr. Hom indicated that she did not read the materials in the Matter of Seldon R. Nelson, D.O., and would abstain in this case.

.....

REPORT AND RECOMMENDATION IN THE MATTER OF ERIC BURSTEIN, M.D.

.....

DR. O'DAY MOVED TO APPROVE AND CONFIRM MR. BYERS' PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF ERIC BURSTEIN, M.D. DR. HOM SECONDED THE MOTION.

.....

A roll call vote was taken on Dr. O'Day's motion:

ROLL CALL VOTE:	Dr. O'Day	- aye
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EXCERPT FROM THE MINUTES OF MAY 13, 1992
IN THE MATTER OF ERIC BURSTEIN, M.D.

Mr. Albert	- aye
Dr. Stienecker	- aye
Mr. Jost	- abstain
Dr. Garg	- aye
Dr. Kaplansky	- aye
Dr. Heidt	- nay
Dr. Hom	- aye
Dr. Agresta	- aye

The motion carried.



STATE MEDICAL BOARD OF OHIO

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November 13, 1991

Eric Burstein, M.D.
6409 Turnberry Lane, NE
Albuquerque, NM 87111

Dear Doctor Burstein:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio intends to determine whether or not to limit, revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery, or to reprimand or place you on probation for one or more of the following reasons:

- (1) During the course of your professional relationship with Patient 1, as identified in the attached Patient Key (Key to be withheld from public disclosure), you engaged in a long-term sexual relationship with Patient 1 while you were her treating psychiatrist.

Your acts, conduct, and/or omissions as alleged in paragraph (1) above, individually and/or collectively constitute "a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established," as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraph (1) above, individually and/or collectively, constitute "(t)he violation of any provision of a code of ethics of a national professional organization as specified in this division," as that clause is used in Section 4731.22(B)(18), Ohio Revised Code, to wit: Principals I, II, and IV of the American Medical Association Code of Ethics.

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty (30) days of the time of mailing of this notice.

Mailed 11/15/91

November 13, 1991

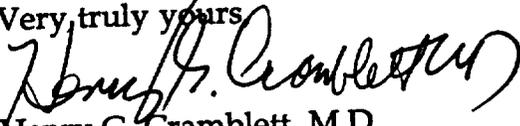
Eric Burstein, M.D.
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You are further advised that you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

In the event that there is no request for such hearing received within thirty (30) days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand or place you on probation.

Copies of the applicable sections are enclosed for your information.

Very truly yours



Henry G. Cramblett, M.D.
Secretary

HGC:jmb
Enclosures:

CERTIFIED MAIL #P 055 328 957
RETURN RECEIPT REQUESTED

AMERICAN MEDICAL ASSOCIATION
PRINCIPLES OF MEDICAL ETHICS

PREAMBLE:

The medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. As a member of this profession, a physician must recognize responsibility not only to patients, but also to society, to other health professionals, and to self. The following Principles adopted by the American Medical Association are not laws, but standards of conduct which define the essentials of honorable behavior for the physician.

- I. A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity.
- II. A physician shall deal honestly with patients and colleagues, and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception.
- III. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.
- IV. A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law.
- V. A physician shall continue to study, apply and advance scientific knowledge, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.
- VI. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical services.
- VII. A physician shall recognize a responsibility to participate in activities contributing to an improved community.