IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 831646

ROBERT GREENSPAN, M.D., et al.,

Appellants,

v.

ROBERT J. OSHEROFF, M.D., et al.,

Appellees.

JOINT APPENDIX - VOLUME IV

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in respect to the Prince William application, would you tell the Court, to the best of your recollection, it was that you contacted Dr. Hampers?

A In July.

Q Where did you see Dr. Hampers in July?

A I flew to Boston, in his office.

MR. PLEDGER: I have nothing further, your Honor.

CROSS EXAMINATION

BY MR. HIRSCHKOP:

Q At the time you first started with Dr. Osheroff, you say that was the beginning of June, 1978, is that correct?

A That's when I started practicing with Dr. Osheroff.

Q Then you testified that Dr. Tolkan started several months later, what did you mean by several months?

A It might have been one or two, I'm not sure.

Q He started the month after you did, did he not?

A It might have been one or two, I'm not sure.

Q Do you recall sometime in July of 1978?

A It might have been, July or August.

Q At that time, Dr. Chan was there full time, was she not?

A She wasn't there full time.

Q How much was she there?

A She worked part of the day, I think four days a week.

Q And the fifth day Dr. Goldberger was there to help with rounds, was he not?

A He was there one shift.

Q On Monday.

A Yes.

Q And she was there Tuesday through Friday.

A As I recall.

Q So there was another doctor there, aside from you, Osheroff and Tolkan, each of the five days, was there not?

A Part of the day, yes.

Q Were there three full shifts each of those five days?

A No.

Q How many of those five days was there only one shift?

A There were three shifts three days and two

shifts three days.

Q During the days there were two shifts, Dr. Chan was there both days, was she not?

A She was not there Saturday; Tuesday and Thursday, she might have been there just in the morning, I don't remember.

Q You were the one making up the schedules, but you don't remember when she was in?

A I think she was there just in the morning on Tuesdays and Thursdays.

Q Prior to the time you showed up in June of '78, you had no experience working in a private unit, isn't that correct?

A That's wrong.

Q Where did you work previously?

A I worked for the Central Ohio Valley Center in Columbus.

Q Was that attached to the university at all?

A It was a private National Medical Care unit, unaffiliated with Ohio State.

Q That was part of your fellowship, wasn't it?

A No.

Q How long did you work there?

A I worked there for about six months.

Q I would like to go back over the dates you gave us originally. What were the dates you worked on your fellowship?

A This was during my fellowship, but it was a moonlighting opportunity.

Q How often did you work there on a moonlighting opportunity?

A I believe it was several times a week. I worked with one of the other fellows and we rotated. The chief of nephrology of Ohio State was medical director of the unit, and he paid us a salary to see some of the shifts.

Q It wasn't a full time job.

A No, it was after hours and odd hours.

Q So it was a fill in job, more or less?

A Yes.

Q You never had a full time job in a private dialysis center prior to coming to Osheroff's?

A No.

Q Did you make up the schedules at the dialysis facility in Ohio?

A I did with the other renal fellow, we made up

our own schedule. The doctor told us when he was not going to be there, and we made up the schedule among ourselves to cover the shifts.

Q You just worked it out with him who would cover the shift.

A Yes.

Q The doctor left that up to you?

A Yes.

Q He hadn't posted a schedule as to who would show up when in that facility, had he; that was between you and this other guy?

A That's right.

Q When you first went to work for Dr. Osheroff, it was clear that was a practice that two people could run, isn't that correct?

A Yes.

Q And yet there were four doctors in it at that point, including Dr. Chan, isn't that right?

A Yes.

Q So there were more than ample doctors to run that practice, were there not?

A Yes.

Q At the time you joined his practice, Dr.

Osheroff had about the same number of patients as he had some months previous, isn't that correct?

A I think that is correct, that had not been changed.

Q So by bringing in two new people it was obvious that Dr. Osheroff wanted to cut back a little, isn't that correct?

A Are you asking for a conclusion?

Q Yes.

A It would appear to me he wanted some help.

Q But in a practice that two doctors could have run, having four doctors it was clear there wasn't enough to keep everyone busy full time, isn't that correct?

A I felt there were more than enough doctors to handle the practice.

Q And he was the boss, was he not?

A Yes.

Q If he wanted you to make rounds and not him, it's up to him to say that, wasn't it?

A Yes.

Q He had the authority, as far as you understood, if he said look, I don't want to go on hospital rounds,

you do it and you do it, to give that kind of instruction, did he not?

A I would have accepted his pronouncements as long as I thought it was in good patient care.

Q Was it bad patient care for you to make rounds?

A No.

Q Was it bad patient care for Dr. Tolkan to make rounds?

A No.

Q Was it bad patient care for Dr. Chan to make rounds in the unit?

A No.

Q Was it bad patient care for Dr. Goldberger to come and make rounds in the unit?

A No.

Q And you had found out, before you ever joined Dr. Osheroff, that National Medical Care had recently purchased the unit, had you not?

A Yes.

Q In fact, the unit was still in flux from the changes being brought about by having brought in a full time administrator from National Medical Care, isn't that correct?

A The administrator was there when I got there. I didn't notice a great deal of flux in an administrative way. I noticed confusion that was there, not flux because a new administrator had been put in.

Q You say you set up time schedules, in fact before you got there, there were a certain amount of time schedules, were there not?

A In the dialysis unit?

Q Yes.

A I have no way of knowing.

Q You know Dr. Goldberger was making rounds certain days, do you not?

A Yes.

Q You didn't set that up, Dr. Osheroff set that up, isn't that correct?

A Between Dr. Chan and Dr. Goldberger, they had set times to see those patients.

Q So there was a schedule before you got there, wasn't there?

A In that respect, yes.

Q You heard Dr. Tolkan testify, as far as you knew, the patients were getting adequate medical care before you guys there, do you disagree with that?

A It's a hard question to answer because I have some question whether they were in the dialysis unit. There were lots of basic problems with patient communication and dissatisfaction. When you say adequate, it wasn't satisfactory to me.

Q In fact, it was satisfactory enough for you to say I will keep your practice and I will wait for you to come back, wasn't it?

A Those are two separate things.

Q But you said those things when he went to the hospital, didn't you?

A I said I would maintain his practice until he would be able to participate fully in the practice.

Q So from your observation of the man during the six months of practicing with him, he was a competent doctor or you wouldn't have agreed to stay with him, isn't that correct?

A I had questions, but I was assuming that the problems he demonstrated were related to his depression. What I saw as a physician in Dr. Osheroff, I was not ready to accept as a physician after he came back.

Q Now you say you were given a contract to sign, do you recall that?

A Yes.

Q That contract had a non-compete clause, did it not?

A Yes.

Q So it was perfectly plain to you that he and his lawyer were interested in a non-competitive situation when they hired you?

A Yes.

Q Did you feel by not signing that contract you were not bound by the non-competitive situation, that you could, as an employee, set up competition from within?

A I felt if I had signed the contract, I would have agreed to it. I didn't sign it. I didn't make any statement either way by not signing it.

Q You never went to Mr. Westerman and said I do not agree with the non-compete clause, did you?

A That was one of the clauses I had a question with but that was not the main reason I didn't sign it.

Q You didn't mention that in your direct examination, did you?

A Why I didn't sign the contract?

Q Yes, that wasn't the reason you gave at all.

A No, it was because of the partnership stipulation, that was not in there, but there were other reasons I didn't sign it.

Q And it was clear with regard to the partnership you wouldn't get that for at least four years, was it not?

A I think that's correct.

Q You say that you and Ray Osheroff made rounds together originally, is that correct?

A Yes.

Q There is nothing wrong with that, is there?

A No.

Q You were just out of fellowship, were you not?

A Yes.

Q Perfectly valid for a senior doctor to make rounds with a person just out of fellowship and just starting in the business, isn't it?

A I had no objection to that. I thought that was good.

Q Did he ever make rounds without you?

A Yes.

Q This would be in June, right?

A Yes.

Q What about July when Dr. Tolkan came?

A I think he made a few rounds by himself.

Q A few rounds in July?

A Yes.

Q By August and September, according to you, he had stopped making rounds, is that correct?

A I believe that is correct.

Q You heard Sue Smith testify that he made rounds regularly for a matter of months, apparently she is wrong, is she not?

A What time period?

Q In August and September.

A If he did, it was very infrequent.

Q Were you at her deposition?

A Yes.

Q Did you hear her state that through the end of October he made rounds regularly?

A I also heard --

Q Did you hear that, sir?

A Yes.

Q You knew it was wrong at the time, did you not?

A What do you mean wrong?

Q That he hadn't been making rounds regularly

through the end of October.

A It was my understanding that he made very infrequent rounds, if any.

Q In addition to very infrequent rounds, you testified that when he is supposed to be on call was not available sometimes, do you recall that?

A That was a problem that I was facing frequently.

Q He was only on call every third weekend, isn't that correct?

A That's the brief period of time when we tried to get a schedule going, most of the time it didn't work that way.

Q During that brief period of time, how many times would you expect him to be called to Alexandria intensive care unit, that would be very infrequent, would it not?

A It would be fairly infrequent.

Q So Sue Smith couldn't have seen him regularly in the intensive care unit taking into account he wasn't making rounds regularly and infrequently got called to the ICU.

A I don't know what you mean regularly.

Q More than three or four times.

A In a month?

Q In a period of three or four months when he was going through this depression.

A During the fall of the year, I would not suspect that he was there more than once or twice a month.

Q You say the scheduling wasn't working; as a doctor you have testified that you recognized he was depressed, is that correct?

A Yes.

Q You recognize, as a doctor, that a person in the throes of a severe depression would have a difficult time keeping any schedule, do you not?

A Yes.

Q Regimentation would be almost impossible for a man in the throes of a deep depression, isn't that correct?

A Yes.

Q His pacing was consistent with a man in deep depression, isn't that correct?

A That is the first time I have ever heard of it or seen it. I have never seen it.

Q You said during this period in the autumn of '78 he continually voiced his concern about whether

he got a good deal from NMC, concerns about the dollar value of the business, number of patients, and things along that line, isn't that right?

A That's right.

Q He was telling you, was he not, that he was very concerned about his business, about his practice, isn't that correct?

A Yes.

Q Didn't you testify that in phone calls and visits this was an absolute pattern with this man?

A That's right.

Q And yet in March you started setting in gear the mechanism to take part of his practice away from him, why is that?

A You are talking about the dialysis unit?

Q Yes.

A The dialysis unit was not competing with Dr. Osheroff, it was competing with National Medical Care. Dr. Osheroff does not own the unit.

Q Dr. Osheroff got extra money according to the number of patients who were going through the unit, did he not?

A Extra money?

Q He got paid as the doctor seeing the patients in the unit, did he not?

A He got the professional fees, that's right.

Q And if a patient left that unit and went to another unit, he stopped getting the professional fees, didn't he?

A Unless he followed the patient to the other unit, then he would get the full professional fee.

Q All these conversations with you about his psychiatric treatment, about his going to see Dr. Wellhouse, about his business, they were of a personal nature, were they not?

A I felt they were, apparently he didn't.

Q The man took you deep into his confidence, didn't he?

A Me along with others.

Q Did he go to anyone else's house every night in the week?

A He couldn't have, he was at our house.

Q So you are the only one he went to that frequently, isn't that correct?

A That's correct.

Q Did he go make rounds with other people and

sit and talk with them on rounds?

A He did talk to other physicians frequently about his personal problems.

Q Who did he make rounds with?

A He made rounds with me.

Q Do you know if he asked another physician to go see Dr. Wellhouse with him at any time?

A No, he didn't.

Q And you were the physician that helped transport him to Chestnut Lodge, were you not?

A That's right.

Q So as far as you versus anyone else, you were the major confidant he had during the autumn and early winter of 1978, isn't that true?

A I would say I was the major one, but not the only one.

Q In fact, when his calls were restricted, you were the only one they would let him call, aside from his mother, isn't that correct?

A I don't know.

Q Do you know of anyone else he was calling?

A I don't know whether he was calling Mr. Notaris or Mr. Westerman.

Q Let's include those two, do you know anyone else he called beside the four of you, his mother, Notaris, Westerman, and yourself?

A I don't know of anyone else.

Q Aside from you four, he was isolated from the world, was he not?

A That was the impression I got from talking with people at Chestnut Lodge.

Q As far as the day to day workings of that unit, he was solely dependent on you to give him information of what was happening at the Northern Virginia Dialysis Center, was he not?

A He could get the financial information from Mr. Notaris. I did not know that Dottie Smith was not allowed to see him. Most of the information did come from me, yes.

Q You gave him very little information, didn't you?

A No, I answered his questions.

Q Aside from answering his questions, did you volunteer a lot of information?

A ABout the dialysis unit?

Q Yes.

A I told him about the -- I tried to, I tried to

talk about patients, but he was not interested.

Q In the eight months he was in Chestnut Lodge, you only went to see him three times, isn't that correct?

A Three that I can remember.

Q And the last two or three months he was at Chestnut Lodge, you didn't see him once, did you?

A That's right.

Q During the whole summer of 1979, you didn't see him once.

A It was two months or so.

Q In fact, once you got yourself your raise to a hundred thousand dollars and got him to sign the slip that you were now acting medical director, you didn't go see him again after that, did you?

MR. PLEDGER: I have to object to the form of the question. Again, we take and telescope everything as though there was no time interval between those things happening, and it is an impossible type of question to answer, unless you go into a very long answer to put things in the timeframe. I think we should ask questions and ask them properly.

MR. HIRSCHKOP: On cross examination, I think

it is a perfectly valid question, your Honor.

THE COURT: Rephrase the question.

Q While he was in the mental hospital, you got a raise to $100,000, isn't that correct?

A Yes.

Q How long after he went in the mental hospital did you get that raise?

A It might have been a month or two.

Q And you were the one who told Dottie Smith to make out those checks in a larger amount, isn't that correct?

A No. Any raise went through Mr. Notaris and Mr. Westerman, as per the agreement in Mr. Westerman's office.

Q Did you ever have any written request for that raise?

A No.

Q Do you have any written confirmation for that raise?

A No.

Q Do you have anything in writing to show that you consulted Westerman or Notaris at all about that raise?

A No.

Q Do you have anything in writing to show you consulted anybody about Tolkan's raise?

A No.

Q Other than the letter that Mable Lowrey had, do you have anything in writing to show that you consulted anybody about her four thousand dollar raise?

A Nothing in writing.

Q As the person who was acting as the guardian or taking care of the practice while he was in a mental insitution, did it not seem strange to you that this secretary, Mabel Lowrey, got a four thousand dollar raise?

A I think it was three thousand dollars.

Q How much was she earning, twelve, thirteen thousand?

A I think the final figure was seventeen, it was three or four thousand.

Q She went from thirteen to seventeen, did she not?

A I would have to see the letter.

Q As the person who was taking care of the practice, didn't it seem odd to you that she got a

substantial raise?

A It seemed odd, but there was a close relationship, and she was one of the confidants of Dr. Osheroff, and I referred that to Mr. Notaris and Mr. Westerman; any raises, any purchases went through those two fellows.

Q Can you show us anything in writing to substantiate your testimony that you referred it to Mr. Notaris and Mr. Westerman?

A I never did anything like that in writing. The only notes I have are medical.

Q Also within the first couple of months he was in the mental institution, you got a letter signed appointing you the acting medical director, isn't that correct?

A Yes.

Q Where was that letter typed?

A Probably it was typed in Dr. Osheroff's office.

Q Who dictated the letter?

A As I recall, I and Mr. Westerman had discussed the letter.

Q Who dictated the letter, who decided what language went on that piece of paper?

A I think I did.

Q And you wanted that letter, did you not?

A There was a reason I wanted it and a reason Mr. Westerman wanted it.

Q You, in fact, wanted the letter, did you not?

A There is a reason I wanted it and a reason Mr. Westerman wanted it.

Q You, in fact, requested the letter, did you not?

A I called Mr. Westerman and we discussed it, and he told me it was important from his point of view to have the letter.

Q At the time you called him, it was to request that letter, was it not?

A That's correct.

Q And you initiated the call, did you not?

A As I remember, I did.

Q Prior to going into the mental institution, Dr. Osheroff had several discussions with you about whether or not he should be institutionalized, did he not?

A Yes.

Q You demanded that he be institutionalized, did you not?

A No. I told him as it look from my perspective, the only way to save himself was to be institutionalized. My point of view was if he didn't, then I would have to leave, this was just before he went in. To me he was suicidal, and I thought he was going to commit suicide, and I couldn't continue doing what I was doing if he did not take that kind of therapy.

Q Did he ever try to commit suicide?

A In a way he did, he was a very heavy drinker, and took a lot of drugs.

Q Was he ever committed to a hospital for treatment for those drugs, overdose, or anything like that?

A No.

Q Did you ever treat him for overdosing on drugs?

A No.

Q With regard to going into the mental institution, you made it clear that you would no longer accept out patient therapy, he had to go into the mental institution, that was the price of your staying, wasn't it?

A I was not going to stay unless he took that form of therapy. He had tried everything else, out patient, he had tried drugs, hypnosis, and continually

worse and worse. I couldn't see any other alternative.

Q In fact, you and he went to Marty Gannon in early December of 1978?

A I don't know whether that was the date.

Q It was sometime in December of 1978, wasn't it?

A Yes.

Q And it was certainly at least two weeks before he went into the mental institution, was it not?

A I would think so.

Q At that meeting, Marty Gannon said to you why don't you try some more out patient therapy, and you said no, he absolutely must go into the mental institution or I am leaving.

A At that point, I don't know whether I used those words, I told him it was important to me to have in patient therapy.

Q REgardless of the words, did you not convey to Marty Gannon that unless he went into a mental institution, you were leaving?

A I don't remember specifically.

Q If Marty Gannon said that, you wouldn't dispute it, would you?

A I didn't force Dr. Osheroff to go into the

mental hospital. I, also, could not practice with him under those present circumstances. If Mr. Gannon had given me another rational alternative, I would have listened.

Q Marty Gannon suggested very strongly, did he not, that Dr. Osheroff should get further out patient therapy?

A He might have. This was after a year of out patient therapy, and years of drugs.

Q In your conversation with Gannon, you also told him that you would take care of the practice for the man while he was gone, did you not?

A I would take care of the patients and the practice, and as long as it took for him to get well, assuming he would come back and practice adequately.

Q There is no question that in December, 1978 it was his practice, is that correct?

A That's right.

Q There is no question in December '78 they were his patients, isn't that correct?

A I have trouble dealing with the phrase whose patients they are. To me a patient is whoever they want to be. I have trouble with the patients being

looked at as property, ownership of patients. A patient is affiliated with me today, he is my patient; if he changes tomorrow, he is somebody else's patient.

Q Until he changes he is your patient.

A If a patient wants a certain physician, he is a patient of that physician.

Q In May of 1978, you had never lived in Northern Virginia, had you?

A No.

Q Did you have a wide familiarity with doctors practicing in Northern Virginia?

A No.

Q Did you have any close personal contacts who you expected would give you a lot of referrals when you first came to Northern Virginia?

A No.

Q You were a total stranger to this area, were you not?

A No. I grew up in Montgomery County.

Q Your professional contacts in Northern Virginia, to say the least, were extremely limited.

A That's right.

Q And you came here to practice because it was th

only job you could get in your specialty in the metropolitan area, isn't that true?

A The jobs were limited. For the type of job I wanted, there was only one opening. I could have done other things and been in the area.

Q But not as a nephrologist?

A I might have gotten a faculty position at GW. I was offered a faculty position at Ohio State, going academic was one of the alternatives.

Q Were you offered a faculty position at GW?

A No, I didn't pursue it.

Q When you first moved to Northern Virginia and started making rounds for Dr. Osheroff, you started meeting doctors, did you not?

A Yes.

Q But still you were basically a stranger to the area?

A Yes.

Q He was getting most of the referrals in the Alexandria area, was he not?

A Absolutely.

Q Now with regard to drug therapy, you said that he had tried it and it hadn't worked, what drugs was

he given at Silver Hill?

A I believe he was given phenathiazines.

Q Was he given those prior to 1979?

A He had had phenathiazines in the past, but I am not sure whether there was a particular type of phenathiazine.

Q You mentioned that he had Sinequan, is that correct?

A Yes.

Q Do you consider Sinequan to be a phenathiazine?

A I think it is, I am not sure.

Q You don't know, do you?

A I think it is an antidepressant.

Q Are phenathiazines antidepressants?

A Sometimes.

Q They are not, are they?

A Sometimes.

Q What are they chiefly used for?

A They treat psychiatric disorders, agitation.

Q They are used for psychosis, not depression, isn't that correct?

A There are different forms of depression, there are agitated forms of depression as well that can be

treated with phenathiazines.

Q Prior to his getting drug therapy in 1978, you know he was not in psychotic depression, do you not?

A I don't know that.

Q Didn't you tell the judge this morning that he wasn't agitated, he was more passive aside from the pacing?

A At what time?

Q In 1978, it wasn't until he got these drugs that he became agitated.

A The point is you can be depressed and be agitated, you can be depressed and pacing, you can be depressed and not agitated, there is no relationship.

Q You wouldn't want to stake your professional reputation on whether phenathiazine is an antidepressant, would you?

A I would stake my reputation that it can be used in an agitated form of depression.

Q It would have to be extremely agitated, would it not?

A You wouldn't use it unless a patient was agitated, it's a circular argument.

Q Doctor, what specific drugs was he given at

A I don't know what he was given at Silver Hill.

Q In what dosage was he given Sinequan prior to going to Silver Hill?

A I don't know what the dosage was.

Q You don't know if he got adequate dosage, do you?

A No.

Q You don't know whether he had adequate drug therapy in 1978, do you?

A I am not a psychiatrist. I do know that he represented to me that he was going to an expert in depression, was going to several experts in depression around the country.

Q You know a lot of so-called experts don't turn out to be so, that's true, is it not?

A Whether they are board certified or not, that is true.

Q In fact, you don't know what that doctor prescribed in New York for him, isn't that correct?

A It is my understand it was Sinequan.

Q How did you find out, did you talk to the doctor?

A No. I saw a bottle when he came back.

Q ANd the only knowledge you had of what drugs he got in '78 was seeing some bottles laying around,

isn't that true?

A And what Dr. Osheroff told me.

Q Did he sit down and discuss with you the dosage he was getting of Sinequan?

A No.

Q Did he discuss with you the specific drug he was getting other than Sinequan?

A No.

Q Did he ever tell you exactly what drugs he got in Silver Hill?

A No.

Q You mentioned something about a biopsy in 1978, actually when that occurred there would have been a number of other people there, would there not?

A Yes.

Q Hospital personnel?

A Yes.

Q No hospital personnel ever complained about a man sticking needles in someone for thirty to forty-five minutes, did they?

A There was never a formal complaint.

Q We have only your word for the fact that that happened, isn't that correct?

A If you allow us to have another witness, I can give you another word.

Q Did you ever enter that in a record anywhere, in that patient's chart, for instance?

A It was really Dr. Osheroff's patient.

Q Doctors don't own patients, didn't you tell me that a few minutes ago?

A But the patient had a relationship with Dr. Osheroff, he was following the patient.

Q Who performed the procedure, you did, right?

A Both of us.

Q You were the one who ultimately performed the procedure, right?

A We both performed it, I was successful.

Q As the one who performed even a part of the procedure, you had an obligation to see the medical record was full and accurate, did you not?

A Yes.

Q You didn't do that, according to your testimony here. You never put a word in that medical record of this thirty to forty-five minutes of probing around with a pin.

A No, I didn't do that; why should I embarrass

Dr. Osheroff.

Q The first time you ever complained about it is when you had the fight over who had the patients in Prince William Dialysis Facility, isn't that correct?

A The first word about what?

Q About the biopsy procedure.

A It came up at the Executive Committee meeting.

Q It was after he fired you.

A That's right.

Q Well over a year after the supposed event?

A That's right.

Q You say that you never heard of Chestnut Lodge prior to Dr. Osheroff's commitment, is that correct?

A Yes.

Q You lived all your life in Montgomery County, is that correct?

A That's right.

Q You went to medical school in Baltimore, is that correct?

A That's correct.

Q You went through your residency in Baltimore?

A Yes.

Q Your internship in Baltimore?

A How many psychiatric facilities are there in the Maryland suburbs?

A The only other one in Baltimore is Enoch Grad, but I had no relationship. The only reason I can tell you that is because that is one of the psychiatric hospitals I heard named at the same time I heard Chestnut Lodge. I had no contact with any of those placed while I was in training.

We had a psych unit at the University of Maryland Hospital. I did psychiatry a couple of years in Baltimore but the patients were in patients at the hospital.

Q You say you did what in Baltimore for a couple of years?

A Two years of my training in medical school I took psychiatry rotation at the in patient facility at the University of Maryland.

Q And still you assert that you never heard of Chestnut Lodge during that time?

A That's right.

Q You know Chestnut Lodge has been around for a long, long time, do you not?

A It has a good reputation, I understand.

Q Where do you understand that from?

A Dr. Osheroff told me.

Q Before he went in.

A Just after I heard it, he mentioned it's a good place to go, and I talked about it with his mother.

Q She's from New York, isn't she?

A Yes.

Q You testified that during the time he was there he got worse, did he not?

A In my mind, he showed some deterioration after he got there.

Q What treatment were they giving him at Chestnut Lodge?

A My understanding was daily visits with a psychiatrist, and I believe he had ward meetings, a group meeting once or twice a week with Dr. Dingman.

Q No medication whatsoever, isn't that correct?

A As far as I knew, he did not get medication.

Q As far as you know, Chestnut Lodge doesn't believe in medication for depressed people?

A That's what I came to find out.

Q And you consider that to be a good institution?

MR. PLEDGER: Your Honor, I am going to have to

object to this. I don't want to get involved in other litigation and I don't want any questioning here. It is my understanding that Dr. Osheroff is contemplating or has authorized his attorneys to file suit against Chestnut Lodge. I don't think we ought to take testimony here as to what this doctor's opinion of Chestnut Lodge is.

THE COURT: Only to the extent that it is relevant to the issues in this case.

MR. HIRSCHKOP: He's the one who said he heard it was a good institution unsolicited.

Q Is that a good institution that will not give medication to a depressed person?

THE COURT: Objection sustained.

Q Do you have any specific knowledge of depression?

A Me, I've been depressed.

Q I assume you are trying to be cute. You have never been depressed as this man was back in 1978, have you?

A No, I have been depressed, but I have never been that depressed.

Q You have never been depressed enough to go into an institution, have you?

A No.

Q You have never been depressed enough to get medical treatment for depression, have you?

A When I was at the University of Maryland Hospital and took my rotation, part of it was discussions with a psychiatrist there. I did have some depression when I was in medical school, but not to the degree that Dr. Osheroff had.

Q Do you claim to have a specialized knowledge of depression more than the average doctor?

A No.

Q You heard Dottie Smith testify about how Mabel Lowrey got her raise, did you not, that you came in and ordered it and she had a disagreement with you about it, do you remember that?

A I remember she was concerned that I called her Mrs. Osheroff and flipped it on her desk.

Q You completely deny that happen, right?

A I don't remember calling her Mrs. Osheroff and whether or not I flipped something on her desk, but I showed her the letter. I think I also made Mr. Notaris or Mr. Westerman aware of it.

Q You think you did, is there anything in writing

to show that at all?

A No.

Q Not only were three raises given during the first two months Dr. Osheroff was gone, but you got the new van, is that correct?

A That's right.

Q Anything in writing to show you were authorized to get a new van?

A No.

Q And you bought new rugs for the office, isn't that correct?

A They were ordered but the order was cancelled.

Q And then someone finally put them in, didn't they?

A The rugs were not there when I left.

Q Dr. Greenspan, Dr. Osheroff was depressed, he wasn't completely crazy, was he?

A I thought --

THE COURT: What does completely crazy mean?

Q Totally unable to function, put it that way.

A He had problems with certain activities of daily living.

Q For instance, when you went to see him with Mr.

Westerman, Mr. Westerman offered to sell the practice to you, do you think he was able to comprehend what Westerman was saying on that day?

A I had questions.

Q Did you have an opinion whether he was or was not able to comprehend? When you took this offer seriously that Westerman made in the man's presence, did you have an opinion whether he was able to comprehend what Westerman was saying?

A I had questions; that's why we thought a guardian would be important.

Q Did you have such an opinion, yes or no?

A I have questions as to whether he understood what was going on.

MR. HIRSCHKOP: Your Honor, can we have an answer to that question; it is a very simple question whether or not he had such an opinion?

THE COURT: Can you answer that?

A Repeat the question once more.

Q Do you have any opinion whether or not Dr. Osheroff was able to comprehend what Westerman was saying in the meeting when you say Westerman offered to sell you the practice?

A Yes, I have an opinion.

Q What is your opinion?

A I don't think he was able to comprehend it fully.

Q He just didn't understand, is that correct?

A He wasn't paying attention; in other words, at the time I was there, his mind was elsewhere.

Q When he would call you when in these conversations when he first went in and he would ask you about the practice in terms of number of patients, and the reasonableness of selling to NMC, these were thoughts that he had before, were they not?

A Yes.

Q And they showed you that he at least understood or recalled what he had done with NMC, did they not?

A Yes, he seemed to be consistent in the same questions and the same answers. The problem was that they were the same, thousands of times over.

Q Thousands of times, that's a little exaggerated, isn't it?

A I hardly think so.

Q After he was in the hospital two weeks they limited his phone privileges, isn't that correct?

A It was a short period after he went in, it

might have been two weeks.

Q It might have been days?

A It might have been.

Q But you know it wasn't two months.

A I would say I knew it wasn't two months; it might have been a month, up to a month.

Q After that, he called you how frequently?

A We had contact once a week.

Q In fact, when you got to July and AUgust, you didn't have contact once a week, isn't that correct?

A That's right.

Q It got to be more like once for the whole summer?

A The last two months, we didn't have any contact.

Q You didn't talk to him on the phone or see him in person during July and August, isn't that correct?

A That's right.

Q And that's when you were sending out all these letters to get support for the Prince William Dialysis Facility, isn't that correct?

A I believe that is what I was doing.

Q You never sent him a copy of one of those letters, did you?

A I was not sure, at that time, he would understand what was going on.

Q You never sent him a copy of the application, did you?

A No.

MR. HIRSCHKOP: Could you put Exhibits 12, 18, 19, 22 through 24, 26, 27, 28 and 29 before the Court? The Court has not yet admitted these specific exhibits.

Q I would like to put some exhibits before you, sir. You have Exhibit No. 12, a letter of July 17, 1979, do you see that, sir?

A Yes.

Q You received that letter in the course of your preparations for the Prince William Dialysis Facility, did you not?

A Yes.

Q And see Exhibit 18, a letter of August 4, 1979?

A Yes.

Q Those were also part of the same preparations, weren't they?

A Yes.

Q Exhibit No. 19, a motion of August 7, 1979?

A Yes.

Q From the Prince William County Board of Supervisors

that was also part of the same preparation, was it not?

A This was in the certificate of need application.

Q Exhibit 22, a letter from George Brown to Greenspan of August 10th, also part of that preparation?

A I don't recall 22 specifically.

Q It starts off "Thank you for your letter of August 1 giving me additional information about your intention of opening a new dialysis center in Prince William County. You did write the Chamber of Commerce about such intention, did you not?

A Yes.

Q You don't question this is the letter you got back that you supplied us?

A I don't remember seeing it, but I can't argue with it being authentic.

Q And the letter from Ann Thompson of August 10, 1979, part of the same preparation, Exhibit 23?

A Yes.

Q And the resolution of the dialysis center of Prince William County signed by Harry Parrish of the City of Manassas of August 13, 1979, part of the same preparation, was it not?

A Yes.

Q Let's look at Exhibit 24. Did you appear before that body?

A I believe I did.

Q I ask you to read in the record the fifth paragraph.

THE COURT: It's not in evidence yet.

Q This was secured as part of your preparation to open the Prince William facility, is that correct?

A Yes.

MR. HIRSCHKOP: I would move Exhibit 24 in evidence, your Honor.

MR. PLEDGER: No objection.

THE COURT: Exhibit 24 is admitted.

Q Now, would you read into the record the next to the last paragraph?

A Now, therefore, be it resolved by the council of the City of Manassas meeting in regular session the 13th day of August, 1979 that the efforts of the Northern Virginia Dialysis Center, Inc. to establish a dialysis center in Prince William County be endorsed.

Q You took that document, with that paragraph in it, and made it part of the application, did you not?

A Yes.

Q You read it, did you not?

A Yes.

Q Did you make any attempt in writing to correct the statement in that paragraph that it was the efforts of the Northern Virginia Dialysis Center to establish a dialysis center in Prince William County?

A Yes, but later.

Q What did you do in writing?

A I wrote a letter later on to clarify it.

Q That was February or March of 1980, was it not?

A That's right.

Q In fact, your application was pending for some months by that time, was it not?

A That's right.

Q Why did you wait several months to file that correction?

A I would like to give a bit of a lenghy answer to that, if I may.

Q Certainly, I want a full answer.

A I think the point about all the letters and the Prince William Dialysis Facility is the following --

Q Pardon me. Would you just answer me with regard to this one document?

MR. PLEDGER: That wasn't the question.

THE COURT: The question was why did you wait until February or March to clarify this.

MR. HIRSCHKOP: I am referring to the paragraph in that document, your Honor.

A Because it didn't make any difference. I can explain why it didn't make a difference in my mind.

Q In fact, the application was approved before you ever wrote the letter?

A You mean the letter of February?

Q Let me be clear. YOu filed this resolution as part of your application, you said that.

A Yes.

Q And that application was approved in January '80, wasn't it?

A When you say approved, do you mean for a provider number or for a certificate of need?

Q What did you get in January of '80?

A I think we got the state approval, but we had not gotten the federal approval yet.

Q And you had never notified the state prior to that time that this document was inaccurate, had you?

A I notified the authorities at the board meeting

the HSA that it was inaccurate, not the statement but the fact of the statement was inaccurate.

Q Did you ever in writing seek to have the city council change this particular resolution which you have alleged to be inaccurate?

A As far as I recall, I wrote Mr. Parrish in February that it was in error.

Q At that point, you had this thing for some six months, had you not?

A That's right.

Q Why did it take you six months to seek a correction?

A In my mind, it didn't make a difference, and the reason it didn't make a difference was the background being that Dr. Osheroff could not have a unit in Prince William County; therefore, and this had been told to me by Dr. Hampers, someone was going to have a unit in Prince William County, there was need. If Dr. Osheroff came back into the practice and was able to practice medicine, then this would be my contribution to the practice, as that's the only way he could get in is through me.

If he didn't come back, he had told me multiple

times about my having the first right of refusal to buy his practice, so to me it didn't make any difference.

Q Didn't Dr. Hampers tell you it did matter to him and he didn't think a unit was necessary in Prince William County?

A He told me Dr. Strauch had told him that he felt there was no need.

Q Isn't it a fact Dr. Hampers told you that if you were to take the right of first refusal you would be bound by Ray's contract, and you couldn't open a center there, either?

A He told me there was a problem with me having an independent unit at the same time I was medical director of a National Medical Care unit.

Q Isn't it a fact that you didn't write that letter of clarification until you had been before Judge Lewis and lost, and been told by the federal judge that what you were doing was unethical?

A In my mind, the situation had been clarified when I went before the board of the HSA and specifically told them that this unit does not relate to National Medical Care, or the Northern Virginia Dialysis Center, or Dr. Osheroff. That had clarified it, as far as I

was concerned, and when the testimony came up in the federal case that there was still concern and discussions about it, that's when I wrote the letter.

Q Look at Exhibit 26, Greater Manassas Chamber of Commerce, August 14, 1979. You received this as part of your effort at that time to get support for the Prince William Dialysis Facility, did you not?

A I don't remember submitting this particular piece of paper in the application.

Q You received it as part of your efforts to get the Prince William Dialysis Facility, did you not?

A I don't remember getting the minutes of the meeting.

Q You know this was supplied to us by your counsel in discovery, do you not?

A I don't know for certain, I can't argue.

Q Are you saying you have never seen this before, you are totally unfamiliar with it?

A I don't remember seeing it. I can't argue its authenticity.

Q Look at Exhibit 27, Minutes of meeting of August 22, 1979.

A Yes.

Q You secured that, also, as part of the continuing effort to get the Prince William Dialysis Center, did you not?

A I don't remember seeing these minutes.

Q Go back to 26 for a moment. Look at paragraph number five, Mrs. Jett presented a letter from Dr. Greenspan requesting an endorsement from the Chamber of a kidney dialysis facility to be built on Davis Ford Road. You, in fact, did make such a request as set for therein, did you not?

A Yes.

Q Mr. Aholt recommended the Chamber support the project and all agreed; in fact, they did so agree, did they not?

A Yes.

Q That would appear to be an accurate reflection of the actions taken by you and the Chamber, would it not?

A Yes.

Q And the minutes of the meeting, Exhibit No. 27, you see the bottom paragraph in the first page, do you not, sir?

A Yes.

Q President Brown called upon the Executive Director to make a report on the proposed dialysis center in Prince William County.

That is consistent with your understanding of what was happening at the time?

A Yes.

Q The Executive reports that the Chamber of Commerce has been contacted by six patients or family members.

To your knowledge, some patients or family members were contacting the Chamber during that time, were they not?

A Yes.

Q And that each indicated the hardship now involved in seeking dialysis treatment in Alexandria.

You, in fact, had sent a letter around to the patients of Northern Virginia Dialysis Center who were residents of Prince William County for them to contact people, had you not?

A Yes.

Q And that statement in these minutes is consistent with that memo, is it not?

A Yes.

Q Do you want to see the memo, or are you clear in your mind what I am talking about?

A You can ask me questions about it, but if you are going to ask me questions, I would like to see it.

Q I will show you our copy. This is the memo you sent around to the patients, is it not?

A Yes.

Q And at the time, they were patients who were being dialyzed at Northern Virginia Dialysis Center, were they not?

A That's right.

Q Turn to the next page, the minutes of the meeting, 27; The Executive then introduced Dr. Robert Greenspan of Alexandria, Virginia.

You went to that meeting, did you not?

A Yes.

Q So you know these minutes are accurate as far as they reflect on the dialysis facility?

A Yes.

(Brief recess)

Q I ask you to look at Exhibit 28, a letter from George Brown, August 23, 1979; do you see that, sir?

A Yes.

Q You received that as part of your efforts to establish Prince William Facility, is that correct?

A I assume I did.

Q In fact, that refers back to the minutes of the meeting you were at, in the first paragraph, it ties right into the meeting you went to?

A Which exhibit again?

Q Number 27.

A Yes.

MR. HIRSCHKOP: Your Honor, at this time, I would submit into evidence Exhibits 12, 18, 19, 22, 23, 26, 27 and 28.

THE COURT: Any objection?

MR. PLEDGER: Your Honor, as to two of those I do question their admission at this time. Your Honor, Exhibit 26 is apparently the Minutes of the Executive Committee of August 14 of the Chamber of Commerce, and it has been the testimony of this witness that he does not recall seeing this.

I recognize Mr. Hirschkop apparently feels as though I gave them to him. I don't think that is accurate, this is something they got from the Chamber.

Exhibit 27 is the minutes of the general membership and the Board of Directors of the Chamber of August 22, 1979, and again, the issue, is not, I guess, whether Dr. Greenspan appeared there, but whether these are documents that he generated, and they are certainly not.

I would object to those.

MR. FUDELLA: Your Honor, may I respond to that because I handled this. Both of these documents were attached to a request for admissions during the course of discovery, and they were admitted to be authentic and also admitted to be public records by the defendant.

MR. PLEDGER: The question that was asked by Mr. Hirschkop of the witness was didn't you get these, or weren't these generated by you in the course of your application, which is not exactly accurate. I object to them on that basis.

As to whether they are published records, I believe they probably are. If they are introducing them, at this time, as part of the public record that Dr. Greenspan has testified that he appeared there, so at least they are accurate in that they show he

appeared there on one date, and he wrote a request on another date, I have no objection for that purpose.

THE COURT: Plaintiff's exhibits 12, 18, 19, 22, 23, 26, 27, and 28 are admitted. I have already admitted 24.

MR. HIRSCHKOP: Thank you. We are withdrawing 29, your Honor, in case there is any question about it. It seems to correspond exactly with 28.

Q Dr. Greenspan, you said that when you would talk with Dr. Osheroff on the phone, you would hear screaming in the background, is that correct?

A I assume the timeperiod is just after he went in.

Q Did it change at all later during the time he was in Chestnut Lodge?

A No.

Q So during the eight months he was in Chestnut Lodge whenever you talked to him on the phone, you would hear screaming and loud noises in the background, is that correct?

A There were loud noises, and one particular screaming woman that I could hear.

Q Did you consider that a good environment for treatment of this man's disorder, from what you could hear?

A As I said, I was concerned that he was not getting better, that is why I called Mrs. Palacious to relay my concerns.

Q You were concerned that he went to Silver Hill, were you not?

A I was concerned about the transfer, that's right.

Q You objected to the fact that he went to Silver Hill, did you not?

A I objected to the fact that I didn't know anything about it. I wasn't told anything about the transfer, and I didn't know anything about Silver Hill. I was also told by Mrs. Palacious that he had to get worse before he got better, this was their program.

Q She was a social worker, wasn't she?

A Yes, she was my line of communication.

Q Nothing stopped you from tying to contact the psychiatrist, did it?

A I was told definitely not to talk to the psychiatrist.

Q Who told you that?

A Mrs. Palacious.

Q You were so upset about his leaving that you called up Dr. Dingman a week after he was gone, did you not?

A I called to verify that he was transferred, because this was something I had heard, and I first wanted to find out had he been transferred, and why and where.

Q What do you mean to verify, he called you from Connecticut and said I'm at Silver Hill, didn't he?

A This is before he called me.

Q Didn't you say on direct that's how you found out he went to Silver Hill, he called you?

A No, somebody told me.

Q Who told you?

A I can't remember specifically, but it might have been Dottie or Kay.

Q You hadn't talked to the man for two months, and out of the clear blue sky you come up with the knowledge he's gone to Silver Hill?

A That's one of the things that concerned me.

Q Now you knew at Chestnut Lodge he had not been getting better, did you not?

A From my viewpoint, he was not getting better. I can't tell you psychiatrically whether he was getting better.

Q And you knew there were people screaming in

the background, isn't that correct?

A There was one woman screaming in the background, and there were sounds of voices. I didn't know where he was calling from, whether it was an auditorium, his room, or what.

Q And you knew he wasn't getting medication in Chestnut Lodge, isn't that correct?

A That's what I was told.

Q And you knew nothing about Silver Hill, isn't that correct?

A That's right.

Q Then how could you, as a responsible medical person, object to Silver Hill without finding out something about it?

A I objected after Dr. Dingman told me that he had reservations about Dr. Osheroff being transferred. He didn't feel it was appropriate.

Q When you objected, did you happen to have in mind that if the man got better and came back that one year period might not have run, and you might not be able to get his medical practice?

A I was looking forward to him coming back from the beginning.

Q You had made up your mind by the time he went to Silver Hill that you would not practice medicine with him.

A No.

Q You say the nurses all knew, they were getting calls, is that correct?

A Early on after he was admitted to Chesnut Lodge, nurses came to me and said they were getting calls, and was he hospitalized.

Q Tell me which nurses on the unit he was calling, at that time.

A I can't give you names, I believe it was the shift leader.

Q Doctor, you have heard these nurses repeatedly testify they didn't know where he was during that period of time. They heard he was on vacation, that he was abroad, you have heard that repeatedly, haven't you?

A That's what I kept telling them, that's probably why they said it.

Q You heard them say that repeatedly, have you not?

A Yes.

Q Not one of them, in all this discovery, suggested that he ever called them from a mental institution,

isn't that correct?

A I don't remember her saying that.

Q In light of that, do you want to reconsider your prior answer, or can you give me the name of one nurse he called from the mental institution?

A I do not want to reconsider my testimony.

Q Then give the name of a nurse he called.

A I can't.

Q Now you say the first visit to Chestnut Lodge, you just had small talk, is that correct?

A That's right.

Q Isn't that the visit you said here, sign this document making me the medical director?

A No.

Q When did you say that to him?

A It was a later visit, and I didn't say that.

Q You did bring that document for him to sign, did you not?

A Yes.

Q And he signed it in your presence at your request, is that correct?

A Yes.

Q Well, if his mental state was so questionable

in your mind that you couldn't send him a copy of all these letters, you couldn't send him a copy of the application, how could he reasonably sign that letter?

A That's a question that we had, I had mentioned to Mr. Westerman. Mr. Westerman wanted him to sign the document, also.

Q But guardians weren't appointed for him for some months after that, isn't that correct?

A As far as I know.

Q You never had the guardians ratify that action, did you?

A No, but it was imperative, at that time, to have a medical director at the unit. There was no official director, and it was my understanding from Mr. Westerman that National Medical Care was concerned that there was no one there, no official medical director and they wanted one. Whether it was me or someone else, they had to have someone at the helm.

Q Aside from National Medical Care, you were content to have him sign the letter and you made no other effort to get official radification, isn't that true?

A That's right. At that point, Mr. Westerman

was his representative to me and that was Mr. Westerman's wishes.

Q Now, the second visit, you went with Mr. Westerman, isn't that correct?

A I believe that is correct.

Q Did you drive out together?

A I don't think so.

Q You said on direct examination that you didn't know the purpose of that visit, do you remember that?

A As I recall, I didn't know a specific reason at that point.

Q Is it your testimony that you and Mr. Westerman happened to show up coincidentally at the same time?

A No, there was a visit organized, but sitting here I can't remember the purpose of the visit.

Q Who organized the visit?

A I don't remember.

Q You said on direct examination that a week after you got to Alexandria, this would be early June of '78, Ray offered to sell you the practice, did you mean to say that?

A I don't believe that is what I said. What I said was about a week after I got there, he was talking

about selling, not in a very specific or official way, but he did offer in an official way just prior to going into Chestnut Lodge, but throughout that time-period he was making statements like he didn't want to practice medicine any more.

He wanted to make sure I had the first right of refusal, he's covered by National Medical Care, he didn't want the Georgetown group in should he not come back, those kinds of statements. I never really took them seriously.

Q Now the second time you went to Chestnut Lodge when Westerman was also there, you know that's not the time he signed the letter making you medical director, do you not?

A I don't know that for sure.

Q You know that was not done in Westerman's presence, do you not?

A I don't think it was.

Q So it must have been the third time you went there that he signed the letter.

A Again, if it wasn't the second, it was the third.

Q The second and third visits were fairly close in time, were they not?

A Certainly within a month.

Q Now the letter to Dr. Hampers that you dictated, do you remember about when he signed it?

A I would say within a few months after he got in Chestnut Lodge.

Q That was the second or third time you saw him?

A That sounds right.

Q So you didn't see him again after April of 1978.

A There might have been another visit after that, but I don't remember.

Q You can't point to such a visit, can you?

A No, I don't specifically remember.

Q You can't remember seeing this man any time April '78 or later until he finally shows up back in October '78.

A I can't specifically remember a visit. The reason for the visit, the fact of the visits were slowed down was the fact that he continued to look worse to me, and his behavior deteriorated. I wasn't doing him any good. I couldn't communicate with him, it was a waste of my time and his time.

Q According to Mrs. Palacious, as you say, she told you that he would get worse.

A He would get worse and that was part of the therapy, that his personality had to be restructured. In order to be restructured, there had to be some tearing down and rebuilding.

Q During the six month period '78, you made no effort to keep him apprised of what was happening to his medical practice, did you?

A There was no point to it. From my point of view, he didn't understand, and that's why he needed a guardian.

Q During this six months, you made no effort to keep him apprised of what you were doing with the Prince William Facility, isn't that correct?

A That's right.

Q You mentioned two conversations with Dr. Dingman. You heard Dr. Dingman's testimony there was a third conversation, did you not?

A Yes.

Q You have denied that conversation previously, haven't you?

A What I was denying was the first conversation. The two conversations I have always had in mind was the conversation after he was transferred to Silver

Hill, and the second conversation was after he was discharged and came back from Silver Hill.

Q You previously denied every talking to Dr. Dingman after Ray got out of Silver Hill, have you not?

A Again, I talked to Dr. Dingman at the time he was coming back on visits; whether he had been actually discharged from Silver Hill or not, but I had the conversation when it looked like he was coming back from Silver Hill.

Q After Dr. Osheroff got out of Silver Hill, you called Dr. Dingman to question why the man was getting released, did you not?

A I had questions based on what Dr. Dingman had told me on the previous conversation.

Q Why did you call Dr. Dinghamn, who hadn't seen him in three months, and was administrator of another place?

A Because, in my mind, he knew the most. He had been with him for many months and had intimate daily contact with him. At Silver Hill, he had a group session once a week, and I didn't know of any psychiatrist who had anything -- I was told there was no psychiatrist who had any contact with him.

Q If you were concerned, as you say, why didn't you call Silver Hill?

A For what purpose?

Q To find out if it was reasonable to discharge him at this time, what his mental state was.

A I assume they felt it was reasonable because they did discharge him.

Q Did you make any effort then to find out what kind of institution Silver Hill was?

A My understanding was primarily from Dr. Dingman, who told me they believed almost solely on medication. I had serious questions about Silver Hill after that conversation with Dr. Osheroff in which he was reciting poetry, and just sounded to me the same way he did on drugs before, it sounded like the same type of thing.

Q Yet you told the Executive Committee on December 27th that Dr. Osheroff was much improved, his symptoms were much better, did you not?

A He felt better and he sounded, from a lay perspective, he sounded happier.

Q Other than talking to Dr. Dingman, after you found out Ray was getting out of Silver Hill, did you make any effort to otherwise check out Silver Hill?

A No.

Q Did you make any effort to secure from Silver Haill any kind of report or evaluation of this man's condition?

A No.

Q Now, you say you called Dr. Dingman because he had seen him daily; Dingman didn't see him daily, Dingman never had anything to do with his treatment, isn't that correct?

A If that's the case -- he was the ward administrator, and it was my understanding he was there every day.

Q Was he the ward administrator or the hospital administrator?

A He was on the particular ward that Dr. Osheroff was on.

Q Who was the treating psychiatrist?

A Dr. Ross.

Q You never made any effort to find out from Dr. Ross about Silver Hill, did you?

A I was told never to call Dr. Ross.

Q But there is no question now that you, in fact, called Dr. Dingman when you heard this man was getting

released from Silver Hill, no question about that, is there?

A That's right, I called him.

Q You said when Ray got to Silver Hill he called you after he had been there a week or two, do you recall that?

A Yes.

Q He told you he was getting better?

A He was feeling better.

Q His appetite was returning?

A Yes.

Q Isn't it a fact that a classic symptom of this type of disorder is loss of appetite?

A Again, I am not an expert in depression.

Q Isn't it a fact that when you saw him at Chestnut Lodge, he already had a severe weight loss?

A He had lost weight, yes.

Q His hair had grown down to his shoulders?

A Yes.

Q He had black marks on his feet from pacing?

A I didn't see his feet.

Q He was emaciated and clearly physically ill in addition to being mentally depressed, at that time,

isn't that correct?

A I didn't think he was seriously physically ill as you describe, when I saw him, that came out later.

Q When he called you he said I am eating lobster, I've got an appetite and eating, that was a positive sign, was it not?

A Well, he was overweight when I knew him. I thought it was a positive sign that he was feeling better. I was glad to hear he was feeling better.

AGain, my particular concern was to his medical ability. As I said before, I wanted him to feel better, but I was thinking of him coming back as a practicing physician.

Q You told the Executive Committe, did you not, that you had no question of his medical knowledge?

A At what time?

Q On December 27th.

A His medical knowledge at what period.

Q At that time, they asked you if you questioned his medical knowledge, and you said no, isn't that correct?

A I believe I was referring to the time before he went in.

Q Did you feel when he came back he had forgotten all his medical knowledge?

A I had questions. It is very difficult to be away from medicine for that long a period of time without losing something.

Q You had a meeting in August of 1979, do you recall that, with Westerman and your lawyer?

A Yes.

Q Do you recall a prior meeting you spoke about Westerman offered to sell you the practice, as you put it, the second meeting at Chestnut Lodge?

A I believe it was the second meeting.

Q As a result of that meeting, you asked Mr. Rubin to ask Notaris to get figures together for you?

A I told Mr. Rubin what had taken place, and he said in order for us to consider this we needed figures, so the impetus to get figures came from Mr. Rubin as my attorney.

Q And Mr. Rubin had been representing you in your affairs with regard to this practice for almost a year, had he not?

A That's true.

Q He reviewed the contract sent to you in June

or July of '78, did he not?

A Yes.

Q In fact, Mr. Rubin is a life long friend of yours, is he not?

A Yes.

Q And someone in whom you had great confidence?

A Utmost confidence.

Q In fact, his father is one of the major backers of the Prince William Dialysis Center?

A Yes.

Q Now at the conclusion of the August meeting, you are saying that you were to await figures from Notaris, is that correct?

A Yes.

Q Isn't it a fact that at that meeting Westerman suggested that you have a probationary period for Ray to come back?

A We talked about this in general terms, and I agreed with that, in general terms.

Q Let me be more specific then. Not only did they propose it, but you and your lawyer specifically rejected any probationary period for him to come back.

A There was difficulty defining probationary

period, and one of the problems we had was we had no objection to him coming back and getting back into the practice, but if you are talking about whose to judge whether he is ready or not, it is kind of ridiculous for a person to come back to a practice and then ask that person is he ready to practice.

Q At that time, you rejected it, didn't you, sir?

A We rejected the possibility of me making a judgment on Osheroff when he came back, of me saying you are going to be in the practice or you are not going to be in the practice.

If Dr. Osheroff were to come back as a functioning nephrologist, he would have been welcomed back into the practice. For there to be a period where a judgment was to be made by me or Dr. Tolkan, it just didn't make sense for us to say no, you are not ready and you can't practice any more. What he was saying didn't make any sense.

Q Dr. Greenspan, while all of this was going on, this talk about buying the practice in August, you had long been negotiating with United Health Care and Dr. Kim about setting up a facility in Prince William County, had you not?

A Mr. May called me during the summer --

Q May I interrupt you?

A I had been negotiating.

Q You had been negotiating since March or April, hadn't you, long before this summer?

A I had listened to their request, they had approached me.

Q The first contact was in March or April, wasn't it?

A Yes, by Mr. May.

Q And you weren't negotiating with them in good faith because you never intended to open a facility with them, isn't that correct?

A It depended on what they had to offer. What they initially offered to me, the type of set up they offered to me was not acceptable. If they had offered me something different, I would have listened. What they had to offer, I didn't feel was worthwhile.

Q Dr. Greenspan, see if you can answer this yes or no, sir. Isn't it true that you were concerned they would beat you to the punch and get an application in before you did?

A Yes, they would beat me to the punch, and that

National Medical Care would beat me to the punch in Manassas, either way, that would be it. I had two concerns about opening a dialysis unit quickly in Prince William County; one was the fact there was a very severe medical need for patients, and two is the fact that Dr. Osheroff couldn't do it by contract.

Q Pardon me, I asked you if you could answer it yes or no, obviously I was wrong.

Can you answer this yes or no: Isn't it a fact that part of your reason for negotiating with them was to stall so they wouldn't file an application, can you answer that yes or no?

THE COURT: Do you want a yes or no answer as to whether he can answer yes or no, or do you want an answer to the question?

MR. HIRSCHKOP: I want the first, your Honor.

A No, I can't answer yes or no.

Q Did you, in fact, try and stall them?

A Part of what I was doing was stalling, part of it was anticipating a better figure.

Q You said Jay Long started to help you about that time, is that correct?

A Yes, I called Jay Long for some help.

Q When you called Jay Long, didn't he advise you of a corporate opportunity problem?

A He advised me of the problem, however, I didn't feel there was a corporate opportunity problem since, again, we are talking about a National Medical Care unit which I had or was going to tell the parent corporation about it. I didn't see any problem if you notify the people who have the interest.

Q You hired him because he was supposedly an expert in preparing these applications, did you not?

A Yes.

Q Your own expert advised you that you might have a corporate opportunity problem, did he not?

A I believe that was before I explained to him what the situation was.

Q And despite that advice, you never in writing tried to apprise National Medical Care, Dr. Osheroff, or Dr. Osheroff's representatives of the application, of all the letters you were sending out, or any of those activities, did you?

A That's incorrect. I notified -- in writing, that's correct. I didn't notify anybody in writing. I did it orally.

Q You have heard Dr. Hampers' testimony that when you saw him in November you asked him don't rehire this man, force him to sell to me, you remember that, don't you?

A I remember his testimony, I disagree with it.

Q Now --

A (Interposing) Dr. Hampers had a conflict of interest himself in that I was becoming a fairly formidable competitor to his outfit.

Q How could you be a competitor to Dr. Hampers and not be a competitor to Dr. Osheroff?

A Very simple.

Q How simple?

A Because the dialysis unit in Northern Virginia was owned by National Medical Care. We are talking about the sources of income and the patients, Prince William was an open unit, therefore professional fees could have been attained by Dr. Osheroff if he had applied. The profits were to go to National Medical Care, the sixty percent of the profits, the forty percent of the profits that Dr. Osheroff had obtained, as far as I could see, that was about to go because another corporation was going to get the provider

number in Prince William County.

Q With regard to Dr. Osheroff, that's what happened anyhow, someone else got the provider number, isn't that true?

A That's what happened, but National Medical Care, his own corporation was trying to get the provider number to do the same thing I am alleged to have done.

Q But he wasn't paying any of them a salary, was he?

A Who, National Medical Care?

Q This corporation.

A No, he wasn't.

Q The only income you were deriving is what that man was paying you in 1978, isn't that correct?

A That's right.

Q And you were setting up this facility on time for which he was paying you, isn't that correct?

A That's incorrect, I can't say that I worked for him 24 hours a day.

Q You used a list of his patients with your application, did you not?

A AGain, you are dealing with his and whose patients. I used a list of patients who currently were

being dialyzed at the Northern Virginia Dialysis Center.

Q You made application on Northern Virginia Dialysis stationery, did you not?

A Yes, I did, which was not his.

Q You referred to we all the time in that stationery, isn't that true?

A Yes, I did, and the reason for doing that was the fact, as I said before, ultimately from either of two ways, it really didn't matter, if Dr. Osheroff came back as a functioning nephrologist, he would be welcome and the unit would be from me into the practice; if he didn't come back, I was to purchase the practice anyway, so to me it did not matter.

Q And the majority of the staff you listed in the application were under the employ of National Medical Care in the center in which he had been medical director, isn't that correct?

A That's right.

Q What about the social worker, the social worker is someone who worked for Ray for years, isn't that correct?

A That's right.

Q You didn't meet her until you came to work in

his practice, isn't that correct?

A Yes.

Q The dietician, same thing, right?

A Yes.

Q The nurses, same thing, right?

A That's right.

Q You listed all those people to go to work for you, didn't you?

A I didn't list the nurses specifically by name. The dietician and social worker was part time, and the job they have now is part time, so there is no inconsistency about working part time in both places.

Q Now you suggested in an answer a minute ago that while it would have been an open facility, he could have come down there, do you recall saying that?

A I said that at the Executive Committee meeting in December, by the way.

Q Haven' you, in fact, testified under oath that at the time you filed that application you had not made up your mind whether it would be an open or closed facility?

A That's correct, at the time I filed it. The decision was crystalized at the full board meeting of the HSA.

Q At the time you filed the application, while you were in his employ, it was not clear that he could have come down there and followed his patients.

A AGain, the unit would either have been in our practice if he had come back, or he would have sold, so it was a moot point.

Q You said there were two reasons in your meeting with Hampers that you had for getting a separate facility in your own name; one, you couldn't have followed your patients if someone else had opened up that facility, do you recall that?

A If someone opened a closed unit I couldn't follow the patients.

Q And you were prodded by your lawyer because you couldn't remember the second reason, and you finally remembered you were negotiating the purchase of Ray's practice, and you wanted to protect the practice against someone else opening a unit down there.

A Yes.

Q How would it hurt the practice if someone opened a unit down there?

A It depends, in one respect, whether it was an open or closed unit. If it was a closed unit, those

patients would have been lost; if it was an open unit, it wouldn't have hurt a bit. It would help the patients since they wouldn't have to travel and we would do the travelling, which didn't bother me.

Q If it was a closed unit, would he be any more hurt in owning the practice than you would have been hurt in owning the practice?

A I don't understand.

Q You said you wanted to protect the practice because you thought you might own it.

A Yes.

Q And you said if someone were to open a unit in Prince William County it would hurt that practice.

A Yes.

Q It would equally hurt the practice whether he owned it or you owned it, if it was a closed unit down there, wouldn't it?

A If we are both in the same practice or different practices?

Q Regardless of who owned the practice, Osheroff's practice would have been hurt if someone opened a closed unit down in Prince William County.

A If he were not admitted to the unit, that's ric

Q Even opening an open unit, it probably would have hurt the practice, would it not?

A Well, you would have to define how it would hurt the practice.

Q People like to be treated by the physician at the unit they are going to.

A Not necessarily, they like to be treated by the physician -- that's really not the case, it is more personal than that, people have a very close relationship to the doctor who treats them, it is not just whoever is the medical director.

Q Mr. Talbot, the gentleman you put on the stand the other day, you heard him say Dr. Kim was his doctor, didn't you?

A Yes.

Q In fact, while Dr. Kim was his doctor, you gave him one of those forms to sign, didn't you?

A I gave him a form because I was responsible for him, at that time.

Q And you gave Dr. Goldberger's patients forms to sign to choose you, didn't you?

A No.

Q Goldberger had patients in that unit on

dialysis, didn't he?

A There were patients in the unit who preferred to be followed by Dr. Goldberger.

Q They were patients that Dr. Goldberger had brought into that unit for dialysis.

A That's right.

Q And you gave those patients your form to sign, didn't you?

A No. I was responsible, at that point to all those patients, I felt, and if I was not responsible, I wanted the patients to tell me. I had an obligation to each of those patients to be there if they wanted me. There were patients who had preferences, I knew, to Dr. Osheroff, DR. Goldberger and other doctors, but I didn't know which was which at that point. I explained to them if they signed it they would have a preference for me; if they didn't, they wouldn't. I was not ready to abandon the whole flock or any new patient.

Q Have you a patient Eva Allen?

A I believe so.

Q Eva Allen was Goldber's patient, was she not?

Q I was responsible for Eva Allen in the dialysis

unit, and had been seeing her many times for many weeks, and was responsible until Eva Allen said I prefer another doctor.

Q You were responsible because you had been medical director?

A No, because I had been seeing the patient, and there was an on-going relationship with those patients.

MR. PLEDGER: Your Honor, I have to enter an objection to asking about patients like Eva Allen now. If counsel wants to pursue that, then I will produce these patients so they can testify as to why they made a certain choice.

You have to make some kind of selection, and we have tried to present a cross section. As a matter of fact, last Wednesday, I take that back, last Monday when counsel wanted to know which patients we were going to call, so he could be prepared, and he wanted to know by Wednesday evening, I told the Court, at that time, what my problem was, it was difficult to work out schedules and know who could appear and when. Because we did not know by Wednesday evening Miss Imhoff could be present to testify today, she was barred from testifying because we didn't tell

him about her.

I did not list all these other patients, and I have not sought to bring them. If we are going to talk about individual patients, and let's talk about this Eva Allen and wasn't she somebody else's patient, I will be happy to bring Eva Allen and any other patient that he wants so that can come before the court.

THE COURT: I don't believe Eva Allen was mentioned on direct examination.

MR. HIRSCHKOP: He went into how careful he was in checking, and I just wish to show -- I haven't heard a valid objection, I have heard a speech.

THE COURT: Let me decide whether it's valid.

MR. HIRSCHKOP: WEll, I don't know what his objection is.

MR. PLEDGER: Beyond the scope of direct examination.

THE COURT: Your objection is sustained.

Q You did say on direct examination you were very careful about giving these forms out so you would know whose patients they are, did you not?

A I wanted to know if the patients had preferences and what the preferences were.

Q You heard Mr. Talbot testify Dr. Kim was his doctor, did you not?

A Yes.

Q In fact, you knew Goldberger and Kim had patients there in the facility, did you not?

A I knew there were patients in the facility who preferred to have Dr. Goldberger and Dr. Kim as their physician, and I certainly respected that. I didn't know specifically what was what and until I was told, I continued to feel responsible for them. That is what I wanted to find out on December 12th.

Q You gave the form out to everybody, did you not?

A I gave it out to every patient who was there.

Q YOu had it attached to some of the charts when they weren't there, isn't that correct?

A No. I didn't want that to be given to the patients unless I gave it to them in as benign a way as possible, although I would have chosen other circumstances if I had an opportunity to.

Q You say sometime in October Ray started coming back, is that correct?

A That's correct.

Q You didn't see him more than a couple of times

or a couple of weekends in October, isn't that correct?

A That is probably correct.

Q At no time in the autumn of '79 was he ever in your home again, isn't that correct?

A That's right.

Q In fact, you only sat down and ate with him once, isn't that correct?

A That is my recollection.

Q In fact, you never ate with him that time, isn't that correct?

A No, I finished my lobster, it was very good.

Q Didn't you get a buzzer on your little beeper and before you ate you ran out?

A No, I ate the lobster, I like lobster, but I had to see a patient.

Q Do you remember being asked about that in your deposition?

A About the meeting?

Q Do you remember being deposed?

A Yes.

Q A year ago?

A I think it was about a year ago.

Q Would your memory be better a year ago than

it is today if you think about events occurring in the autumn of '79?

A It probably would.

Q Let me go back to United Health Care. You negotiated with them over a period of several months, did you not?

A I don't know it was that long.

Q You, in fact, didn't give them a formal rejection until you had your application all prepared and ready to file, isn't that true?

A That's true.

Q Now, you testified about a meeting with Dr. Hampers at the airport, do you remember that?

A Yes.

Q When was that meeting?

A I would guess November.

Q November 1979?

A Yes.

Q That's the meeting which Hampers said you told him not to reappoint the man, and you deny that occurred.

A That's right.

Q At that meeting, you say Hampers told you not

to let Ray see patients, do you recall that?

A I don't recall at that meeting. My recollection it was one of several telephone calls we had.

Q When did that happen?

A This was around the same period. We had conversations October, November from here to Boston, and that was one of his instructions.

Q Do you recall on or about October 29th some letters were written to Hampers by some nurses in the unit?

A Yes.

Q Do you recall the Tolkan incident when Ray said I want to make rounds?

A I wouldn't classify it as the Tolkan incident. I thought it was a serious incident.

Q Do you recall that happened before the November 29 letters went to Hampers?

A The nurses letters you are referring to?

Q Yes.

A I never knew the nurses -- when the nurses' letters went to Dr. Hampers.

Q Didn't you say on direct examination you found out about the letters right after they were written?

A Yes, but I didn't know whether they were sent.

Q You know you had already told Ray he couldn't see patients on the unit at that time, isn't that correct?

A That, I can't remember.

Q It was December 12th you were fired.

A That, I can remember.

Q The refusal to let Ray see patients happened at least two weeks before that, didn't it?

A It was about two weeks.

Q It would have preceded Hampers receiving any letters from these nurses about Ray.

A I don't know when the letters were sent.

Q Let's assume they were written on the 29th of November, which is the date they say. It would have been before Hampers received those letters, wouldn't it?

A If they were sent on November 29th, would that be before Dr. Osheroff was restricted from the unit?

Q It would have been after the time that Osheroff was restricted from the unit.

A If that's the case, I suppose it would be.

Q I am asking you what Hampers would know about Ray's medical condition, other than what you told him?

A From what Pat Shine told Mr. Shalaba and other people at National Medical Care.

Q Pat Shine only knew what you told her, isn't that correct?

A Obviously from a medical standpoint, she did, but he also had observations.

Q During the ten months that Ray was away, she didn't have any observations, did she?

A I am talking about after he came back.

Q What about the ten months he was gone?

A No, she had no observations.

Q The only one at that unit who knew anything about that man's mental condition was you.

A That's correct.

Q And the only one who Dr. Hampers could get any information about his medical treatment or his medical condition while he was gone was you, isn't that correct?

A Unless he inquired directly to Chestnut Lodge and the doctors there. I assume they would give that information.

Q And if Dr. Hampers said he did not, and he relied on you to tell him --

MR. PLEDGER: I have to object to that. That

is not Dr. Hampers' testimony.

THE COURT: Even if it is, the form of the question is improper.

The question is withdrawn.

MR. PLEDGER: I understand that. I object to our trying to characterize what is in a deposition that has been offered into evidence. If counsel wants to pose a question based on that, let's pose it based on that. We have had several questions that are supposedly based on something in the deposition, we never get a page or statement. I think if we are going to use questions in that fashion --

MR. HIRSCHKOP: I have been very specific as to page and statements.

Q If I may, in October,you saw Osheroff on one or two weekends, is that correct?

A Yes.

Q When was the conversation at the Lobster Shed?

A Probably it was in November sometime.

Q Was that on a weekend?

A I don't remember.

Q Ray was discharged from Silver Hill November 1st, does that meet with your recollection?

A He never told me that he was discharged. I heard that. I don't know how I heard that.

Q Prior to November, you had only seen him on one or two weekends.

A That's right.

Q And nothing specific happened on those weekends, did it?

A Not that I can recall.

Q In November he came back and you only saw him a day or two at a time during the first week in November, is that correct?

A As I recall, during the month of November, I can't really break down the month specifically. I saw him on the two occasions I mentioned, and I also saw him in the unit.

Q You didn't see him every day in the unit, did you?

A No.

Q In fact, after you barred him from the unit, he didn't come on the unit again until the day he fired you, isn't that correct?

A As far as I recall, after the time he was told that he should not be seeing patients until December 1, a,

I can't remember seeing him on the unit.

Q Your total observation of him was during this three or little bit more week period in November, isn't that correct?

A The timeperiod up until I was fired, I didn't see him on the unit, I might have seen him around in the office, or here and there. I can't make the statement I did not see him for that long.

Q You can't tell us that you did in fact see him between the time you told him he couldn't make rounds, sometime the end of November, and the time you were fired?

A I can't say definitely I saw him; I can't say definitely I didn't.

Q You know you didn't have any conversations of substance with him during that period, isn't that correct?

A I didn't have any conversations of substance before.

Q The day you told him you cannot see patients, that was a conversation of substance, was it not?

A I didn't tell him that.

Q What did you tell him?

A The background of the incident was the fact that I did not think he would be attempting to see patients without some kind of a medical recall.

Q Dr. Greenspan, I thought I said what did you tell him.

A I didn't tell him anything.

Q Well, there came a time when he tried making rounds.

A Yes.

Q And you came on the unit and you didn't tell him anything when he said he wanted to make rounds?

A No.

Q How come he didn't make rounds?

A Dr. Tolkan called me and told me that Dr. Osheroff was going to make rounds. As the acting medical director, what should I do, and I had told Dr. Tolkan previously that it was my instructions from Dr. Hampers that he should not be making rounds on patients. This was between me and Dr. Tolkan, and I believe it might have been Pat Shine.

Q Is this a party phone call you had?

A I am talking about the people who knew of this situation and the conversation between me and Dr.

Tolkan, it was our instruction he should not be making rounds, and he shouldn't be making rounds. Then I called Dr. Hampers after that to say, to tell him Dr. Osheroff was making rounds, does he still concur with his previous statement that Dr. Osheroff should not make rounds. Dr. Hampers told me yes, the instruction was the same, he should still not be making rounds.

Q You were supposed to be out of town that day, were you not?

A I was hoping to go to a meeting on diabetes and eye disease in New York.

Q When you got the call from Dr. Tolkan, you then went to the unit, did you not?

A I don't remember.

Q You don't remember going to the unit that day and telling him that he could not make rounds, that Dr. Hampers did not want him to make rounds?

A I don't remember that. My recollection is that I told Dr. Tolkan that that was the case.

Q Dr. Tolkan was at the hospital.

A I think he was at the hospital, he might have been home.

Q Dr. Osheroff was at the unit, as far as you know?

A As far as I knew, yes.

Q And you were the acting medical director, now how was he supposed to find out that Dr. Hampers didn't want him making rounds?

A That was the problem. I made a mistake and I really should not have let Dr. Hampers put me in the middle. I should have told Dr. Hampers if you don't think he should be making rounds, you tell him, don't put me in the middle.

I didn't think the situation would become a reality, because I didn't think he would want to make rounds until he had talked about the patients with us.

Q I am just trying to find out very simply, if you were home and Tolkan was at the hospital, and Osheroff was at the unit, and you were the medical director, how was he supposed to find out that day he was not supposed to make rounds unless you told him?

A It was my understanding Dr. Tolkan was going to tell him, since he had called Dr. Tolkan and Dr. Tolkan asked me what should be done.

Q Do you deny that you told some of the nurses, at that time, that they were not to take orders from

Dr. Osheroff?

A I believe I did tell some of the supervising nurses that at this point those are the instructions.

Q At that point, you were his employee and fully salaried by him, were you not?

A Yes.

Q At that time, you already had a good indication he wasn't going to get his privileges at Alexandria Hospital, or his privileges would be suspended, did you not?

A It depended on whether he started seeing patients. It was something that Dr. Haut nor I wanted to get into. We hoped he wouldn't see patients until there would be some kind of adaptation period.

Q By the end of November, you had it pretty clear in your mind that if he tried seeing patients at Alexandria Hospital, his privileges would be suspended?

A Yes, I knew that.

Q Why didn't you sit down with this man, who was your employer, who paid your salary, and who was back a month at that point, and say if you try to see patients they are going to suspend your privileges, why didn't you give him some warning?

A Because I didn't think he would try to see patients, you don't just walk into a hospital and start seeing patients without talking to us. If he had come to us and said let's review the patients, let's talk about the history of these people, then it wouldn't have been a problem for me. I didn't expect him to waltz in the hospital without any review whatsoever. I didn't think it was necessary to worry about it.

Q When he called Dr. Tolkan, you had a pretty good indication he wanted to see patients.

A That's why I got very concerned at that point.

Q If you were so concerned, why didn't you tell the man, look, if you go to the hospital and see patients, they are going to suspend your privileges?

MR. PLEDGER: I realize this is cross examination, and you can jump from one subject to another, but he is asking first about privileges and the hospital, then we go back to the dialysis facility, and now we are back to privileges at the hospital. This question has been asked and answered.

MR. HIRSCHKOP: Your Honor, all I need the hospital for is the privileges, the dialysis facility is the point in time. Once Dr. Osheroff tried seeing

patients at the dialysis facility, it is perfectly obvious he might try to see them at the hospital. Why didn't this employee in the man's pay ever warn the man if he tried seeing patients, they would suspend his privileges. He can answer that question.

THE COURT: Objection is overruled.

A After that incident that you just pointed out, I didn't see him any more.

Q Doctor, he was a phone call away, wasn't he?

A He was coming and going, and that timeperiod, he was really not -- I am not sure I even knew where he lived. HIs house was being refurbished and he lived in temporary quarters and was spending a lot of time elsewhere out of town.

Q Couldn't you have said to Dottie, I would like to talk to Dr. Osheroff, or Kay, you could have done that, couldn't you?

A It's something I could have done, I don't deny that. It was a difficult situation for me to be in.

Q You made no effort to let him know the knowledge that you had gotten from Dr. Haut, isn't that true?

A That's right.

Q Didn't you say a few minutes ago you think you

saw him around the office from the time of that incident with Tolkan until December 12th?

A I might have seen him in or out.

Q Well, if you saw him, you could have said, Dr. Osheroff, I would like to talk to you for a minute, couldn't you?

A I could have.

Q But you chose not to, didn't you?

A It's not that I chose not to. The conversations between me and Dr. Osheroff during that timeperiod was just as strange as it had been before, and I am not sure the meaning of those conversations would have been received.

Q Did you have any arguments with him during that period?

A Which period?

Q During the period November, 1979.

A I didn't have arguments.

Q He sought you out to go to the Lobster Shed to have lunch or dinner, did he not?

A Yes.

Q That was his idea, wasn't it?

A Yes.

Q And he said to you, Dr. Greenspan, I want to come and practice, did he not?

A Yes.

Q You could have told him then Hampers doesn't want you back, and Haut may lift your privileges, you could have told him any of these things, and chose not to tell him, didn't you?

A Dr. Osheroff was carrying the conversation, he was talking about personal problems. I could have done it then, that's right.

Q He did say to you, according to your own direct examination, I want to come back into practice.

A Yes.

Q Now, you were here when Dr. Tolkan testified that Ray tried talking to Tolkan, I want to come back to practice, and Tolkan sat there quietly and didn't answer, you heard that, didn't you?

A Yes.

Q Is that what you did when he said I want to come back into thepractice?

A I made an effort to talk about the things I thought were important.

Q Wasn't it important to you to sit him down and

with you and say Ray, I would like to know what your medical condition is; you didn't do that, did you?

A I didnt ask him about his medical condition, at that time.

Q Wasn't it important to you, when he said I want to come back to practice, to say, Doctor, we ought to sit down and go over the patients first, you didn't do that, did you?

A I was going over patient information, medical type information that was just not responded to. I would talk about a patient in the unit, and medical problems, and the response would be I've got to set up my house; which were reasonable responses, but it just told me it was going to be a long time before he was coming back.

Q You saw him on the unit at various times in the middle weeks of November going over patient charts, talking to patients, reading a manual, did you not?

A Yes.

Q You could have gone up to him then and talked to him, could you not?

A I said hello.

Q That's not talking about patient information, is it?

A He was reading what I felt, were in some respects, appropriate types of things. He was reading the Washington Manual, which is really a medical student review, and I felt that was appropriate.

Q It is more than a medical student review, it has all the current drugs in it, doesn't it?

A I can't say all the current drugs.

Q It is published every year or twice a year so it can stay current, is it not?

A That's true.

Q If you have been out of the practice for a year, it is one of the places you should go to see what new drugs there are in your specialty?

A As an internist, not as a sub-specialist. It is a general medical review for internists and residents.

Q It has a section on nephrology, does it not?

A It has a section on nephrology that interns should know, not that a nephrologist should know.

Q The section on nephrology includes new drugs, does it not?

A I would assume it does. I thought that was appropriate at that stage. I had no problem with that.

Q Now you testified on direct examination about

these bylaws; you drafted the bylaws from another center, did you not?

A I would like you to define the term drafted.

Q The final set of bylaws was typed up in the unit, who typed it?

A The final set, I believe, Mabel Lowrey typed, she was a secretary at Northern Virginia.

Q And she typed it from something you gave her, isn't that correct?

A I don't recall whether I gave it or Pat Shine gave it. In fact, now, I remember, Pat gave me the DuPont bylaws. I crossed out DuPont Circle, put in Northern Virginia; crossed out the particular names that I mentioned, and gave it back to Pat, and that was it. Then she gave it to me to sign.

Q You were the one who chose to leave in there the section that closed the staff to everyone but George Washington, isn't that correct?

A When I read it, I thought it was a pretty good idea. I didn't think to myself, at that point, I am going to change Dr. Osheroff's contract or anything like that. I just thought this is what Georgetown was going to do, and they have been successful, so thi:

is what we should do.

Q Would you answer my question?

A I did.

Q It was your choice, wasn't it?

A To leave it in?

Q Yes.

A It was my choice because I signed it, and Pat Shine's choice because she signed it.

Q With regard to the medical staff bylaws, the medical director is the one who was basically in charge of that, isn't that correct?

A I don't understand what you mean in charge of the bylaws. You promulgate bylaws.

Q The medical director is the one who promulgated those bylaws, isn't he?

A I was responsible for the bylaws since I was the acting medical director.

Q And you wanted that in to keep the Georgetown people out, didn't you?

A That is what I was thinking as I was reading it.

Q To that extent, it was a closed facility, was it not?

A That's right. Well, unless those people from

Georgetown could get privileges at GW. There was one particular person I know who did have privileges at both hospitals, who would have fallen into that category.

Q They had to be on the staff of George Washington.

A Yes.

Q Now, you say after the bylaws were drawn, you stuck them in the drawer, did you not?

A No, I didn't stick them in my drawer.

Q You stuck one set in your drawer.

A I might have. I gave them back to Pat Shine, I don't know whether I got a copy then or several months later.

Q And you included the head nurse in the governing body, did you not?

A Yes.

Q Who was the head nurse?

A Peggy Hess.

Q At the time you drafted the bylaws?

A I believe so, I don't really remember.

Q Did you give her a copy of the bylaws?

A No.

Q Did you give Dr. Tolkan a copy of the bylaws?

A No.

Q Did you give Dr. Goldberger a copy of the bylaws?

A No.

Q In fact, other than Pat Shine, you didn't give anybody a copy of the bylaws?

A No.

Q You made no effort to have them known to anybody, isn't that true?

A There was no reason.

Q Of course, it was some seven or eight months later that you started writing dozens and dozens of letters to United States Senators and State Senators, and making phone calls and going to see legislators demanding that facilities should be open facilities.

MR. PLEDGER: Your Honor, I think that is well beyond the scope of direct examination. I know we would like to get this through this evening.

MR. HIRSCHKOP: Your Honor, I am not going to finish this evening. I haven't gotten into his deposition yet, I am just going through his direct examination.

This goes to the bylaws that they raised, and they consistently raised throughout this litigation

the fact that he was so insistent it had to be an open facility, when he, himself, drafted a closed set of bylaws, didn't tell anybody about it, and later on went to everybody making complaints about Ray having a closed facility, when he, himself, had drafted the closed facility bylaws.

MR. PLEDGER: I don't think the defendant is the one who raised the bylaws. The plaintiffs in this action have raised the bylaws and we simply have said what the facts are.

THE COURT: You alluded to the bylaws on direct examination.

MR. PLEDGER: That is one of the allegations in this case. Whether he wrote the senators or somebody else after this case was filed is not something that was part of the direct examination.

THE COURT: If it has to do with the bylaws, he may inquire into that.

MR. PLEDGER: The letters to senators, I understand did not have anything to do with the bylaws.

THE COURT: To the extent that the bylaws may have been part of a closed unit.

MR. PLEDGER: It seems to me that's been asked

and answered. He's already elicited it was made clear to the governing authorities in the State in October, 1979 that it was an open unit, the Woodbridge unit. If we are confusing that with the issue of Northern Virginia Dialysis Center, I will stipulate to the fact that Northern Virginia Dialysis Center was not open as a unit for other people, other than those permitted by Dr. Osheroff until 1981.

MR. HIRSCHKOP: Your Honor, the exhibits on this are already in evidence, there is no question of materiality.

On direct examination, he not only asked him about the bylaws, but he asked him also did he ever do anything to hurt Dr. Osheroff. When they filed the federal suit, they raised the bylaws, and not only he, himself, but he had his lawyers go and make complaints about Dr. Osheroff. I am going to get to that. He was asked about all this in terms of general questioning.

THE COURT: Objection overruled.

Q You wrote dozens and dozens of letters, did you not, to lots of legislators, state and federal, complaining about closed facilities?

A Yes.

Q And at that time, you didn't tell any of them that you had proposed a closed set of bylaws yourself, did you?

A There was no comment in the Prince William application of either open or closed. When they asked about it, I stated it was open.

Q In fact, the final series of questions on your direct examination was about the inspection, and you said you had nothing to do with the inspection, is that correct?

A I, personally, had nothing to do with the inspection.

Q Who is David Tatel?

A He is one of the lawyers of Hogan and Hartson, who did send a copy of the federal lawsuit to some federal authorities.

Q He was your lawyer, was he not, in the federal lawsuit?

A He was one of the lawyers representing me, yes.

Q On December 19, seven days after you are fired, he sent a copy of the complaint you filed in federal court to the Deputy Administrator of the Health Care

Financing Administration.

A I found out about it after he had done it.

Q Well, did you find out that prior to your hiring him to represent you, he had a dispute with Dr. Osheroff?

A Repeat that, please.

Q Did you find out that prior to the time you hired him he had a private dispute with Dr. Osheroff?

A I had no knowledge of that. Mr. Tatel has a dispute with Dr. Osheroff?

Q Yes, that Mr. Tatel had a private dispute.

A No, this is news to me.

Q You filed your lawsuit against Dr. Osheroff on the 15th day of December, 1979.

A That sounds correct.

Q Is there any question in your mind that that letter to HCVA was related to the filing of that suit?

A It was related to the filing of the suit, it's named in the letter.

Q And there is no question in your mind that man was your agent, and you were paying him a fee to represent you in a federal lawsuit, is there?

A That's right.

Q In fact, that man told you that he was personally friendly with someone at HCFA, did he not?

A He told me that he had a relationship with the Health Care Financing Administration.

Q And this was in relation to contacting him about this lawsuit, wasn't it?

A Again, this was after that. I don't know whether it was in relationship to that letter or not. In fact, I know it wasn't since I found out the letter had been sent after it was sent. I don't know when he told me that he knew somebody in HCFA.

Q When he told you that, it was during the same period of time that you were sending all these letters out, and contacting legislators about open facilities, was it not?

A I don't know whether it was or wasn't.

Q Now let's go to December 12.

THE COURT: Let's do that tomorrow.

MR. HIRSCHKOP: I will be very candid, the way I have been proceeding is to go through my notes on direct examination, and then go back to the notes of the deposition. Having the evening will allow me to incorporate the two, and it will be more efficient.

IG

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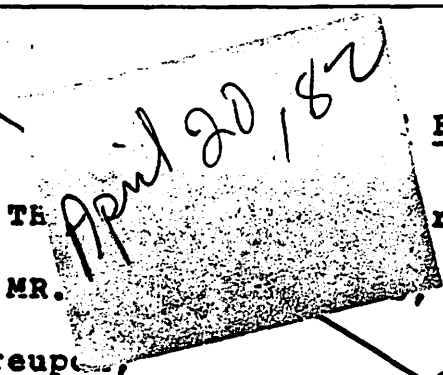

E D I N G S

Th ready to proceed?

MR. , your Honor.

Whereup

ROBERT GREENSPAN,

resumed the stand, was questioned and testified as follows:

CROSS EXAMINATION

BY MR. HIRSCHKOP:

Q Dr. Greenspan, you said yesterday the first mention you made of the Prince William Dialysis Facility was in July of 1979, do you recall that?

A Yes.

Q You actually started negotiating with United Health Care and Dr. Kim at least three months before that, did you not?

A I believe I was contacted before I contacted Dr. Hampers.

Q You say you contacted Dr. Hampers before you talked to Dr. Kim?

A I was contacted by Mr. May before I contacted Dr. Hampers.

Q And you, in fact, entered negotiations with

Dr. May and negotiated with him for at least two or three months before you ever contacted Dr. Hampers.

A I had this discussion with Mr. May before I discussed anything with Dr. Hampers.

Q As the acting medical director, why did you wait for a period of months before notifying Dr. Hampers?

A In my mind, those were just preliminary discussions. I had nothing specific, and when Mr. May contacted me, it solidified the idea that something had to be done. Before he contacted me, we were still in a fairly preliminary stage, that was one of the impetus that got me going.

Q With regard to when you were notified not to come in the unit, you were notified on December 12th you were not to go into the unit and you would be arrested if you did, right?

A Yes.

Q Did you tell Dr. Tolkan that?

A I probably did.

Q So if Dr. Tolkan testified that he didn't find out until a week later that he wasn't to go in the unit, that would be incorrect, wouldn't it?

A I don't know that would be incorrect. I don't remember whether I told him that day or not.

Q With regard to that day, you were very busy, were you not?

A That's an understatement.

Q Let's see if we can review some of the things you did that day. You had to clean out your office with necessitated making several trips to your car, is that correct?

A Yes.

Q You went and talked to as many patients as you could, did you not?

A I made rounds on the afternoon shift.

Q In addition to making rounds, you had this form that you were handing out?

A That was on rounds.

Q You had to draft the form, did you not?

A Yes.

Q And Mabel Lowrey had to type the form for you, did she not?

A Yes.

Q And that form was typed on stationery from an organization you no longer had authority to use their

stationery, isn't that correct?

A That was a little vague at that point.

Q You had been told that you were no longer medical director?

A Yes.

Q And Mabel Lowrey was not your employee, was she?

A No.

Q But that day she became your employee?

A She continued with National Medical Care for several weeks part time, she worked for both of us for awhile.

Q So one of the things you did in that busy day was reach some kind of understanding with Mabel Lowrey about working for you?

A We didn't make a specific agreement.

Q She didn't force her way into your office, did she?

A No. I asked her to type the statement, and she typed it up. I didn't offer her a job, and she didn't ask for a job. There was kind of a limbo period where she actually did work for us and National Medical Care, and then resigned from National Medical Care several weeks later.

Q What about Hall, she also went to work for you that day?

A Yes.

Q You had some discussion with her that day about working for you.

A Yes.

Q In addition, you had discussions with your wife, isn't that correct?

A Yes.

Q In addition, there were arrangements about renting an office that day, isn't that correct?

A Yes.

Q Then when you made your regular medical rounds you stopped and talked to each patient about this form?

A I made that particular statement to each patient that I outlined, yes.

Q And some of them must have had some questions?

A Yes.

Q Normally, it takes forty-five minutes to an hour just to make medical rounds, isn't that correct?

A Anywhere from ten minutes to an hour.

Q How many patients would be on those machines in a shift?

A Usually fifteen.

Q Sometimes twenty?

A I think we had nineteen stations at that time.

Q To make rounds of fifteen patients in ten minutes, you really had to rush, didn't you?

A I didn't feel rushed. If a patient had no complaint and was very stable, I went to the next patient. I didn't chitchat.

Q You are saying you can spend less than a minute with the patient and do an adequate job if they had no complaints.

A You can.

Q You, also, had negotiations that day?

A In what form?

Q With regard to your continuing to see patients there..

A Yes.

Q And you also had conversations with Mr. Rubin that day?

A Yes.

Q With regard to that day, you also hired the three technicians, did you not, the hospital techs?

A I wasn't there when that took place. I just

know what I heard.

Q With regard to that day, you also had conversations with Tolkan, did you not, about his going with you?

A Yes, Dr. Tolkan did not really know what was going on on the twelfth. I told him I had been fired and it was up to him to decide what he wanted to do. It was not until later that evening that he actually decided to come with me. That's the reason his name wasn't on the petition, I didn't know whether he was coming or not.

Q You also called Dr. Haut that day?

A Either that day or around that time, as I remember.

Q On that day, you said on direct examination you had a great deal of concern regarding the patients, that you were not willing to abandon them, those were your exact words, do you recall that?

A Yes.

Q If you weren't willing to abandon them, sir, why didn't you stay when Ray Osheroff offered you the chance, let's just stay and see patients, and we'll try and work things out. Why say no, if you see a

patient, I am walking out of here; why did you take that posture?

A You are misquoting; I didn't say if you see a patient I am walking out of here. My concern was the fact that he would be seeing patients over that time-period, and I again, had a lot of doubts about his ability to see those patients safely.

Q He did offer you the ability to stay and see patients while you were trying to work things out, did he not?

A That's right. Our suggestion was over a two week period, we stay, see the patients, and negotiate and try to work something out as long as he did not see the patients. That's the way the agreement, in our minds stood, and the next morning, he was making rounds.

Q Dr. Greenspan, try and answer my questions and maybe we can finish today. My question was he offered you, not what you offered him.

A I don't remember him offering us that.

Q Are you denying the fact that he offered you guys that you could stay there and see patients, and have a cooling off period and try to work things out?

A When you say you all see patients --

Q He would see patients, too.

A Yes, and we weren't agreeable to that.

Q But he did offer that, didn't he?

A Yes.

Q And by your refusing that and walking out, in essence he was the only one who could see the patients.

A We didn't walk out, we went into the unit to see the patients.

Q He told you you couldn't go into the unit to see patients.

A That's right.

Q The net effect was that all the patients were left alone for him to see.

A We saw the patients, we made rounds for several days.

Q After several days, you couldn't make any more rounds.

A We could not make rounds from a jail cell.

Q But he told you on the 12th you would be locked up for trespass if you tried to go into the unit.

A Mr. Westerman told us that, but again, there was a bit of inconsistency and confusion in our minds

in that Pat Shine did not know anything that day, and Dr. Hampers was totally silent that day, so the people who were the administrators of the unit had not told us anything.

Q When you had questions before, you managed to reach Hampers with a phone call, did you not?

A That's right, and one of the things I could have done was to call Dr. Hampers and verify what was going on. The point being, in my mind, there still was a persistent danger in the unit and things might have been different if a physician, who I felt was qualified, was going to see those patients -- then I am not sure I would have gone in the unit that afternoon.

Q When you were told by Ray Osheroff that he had been appointed by Hampers as acting medical director, that they had decided to fire you, why didn't you call Hampers then?

A My immediate concern was for the patients. I might have called him, but if he had said, if he had verified the story, I still would have gone into the unit. The only way I would not have gone into that unit is if Dr. Hampers had sent down a nephrologist

who I was comfortable with, then I probably would not have gone in that afternoon.

Q It's clear you knew at the time you could have called Hampers?

A That's right.

Q Now, you, just two weeks before had relayed orders to the nurses that Ray couldn't see patients, and they weren't to take orders from him, had you not?

A After instructions from Dr. Hampers, that's right.

Q If you, as acting medical director, had the authority to bar him, why didn't he, as the medical director, have the authority to bar you from seeing patients?

A He didn't have any authority to make me place those patients in what I thought was a medical danger.

Q After a week you took his admonition seriously and you stopped seeing the patients in the unit, did you not?

A Yes.

Q Did you, at that time, say to him look, I am so concerned about these patients, what about your prior offer, we will see patients together and maybe

we will try and work something out, did you do that?

A I had no more evidence, at that time, that -- let me -- I was getting information throughout that period from nurses that he was seeing patients in a very inconsistent way, that he was writing questionable orders and questionable procedures --

Q Dr. Greenspan, please answer my question. Did you do it, yes or no?

MR. PLEDGER: I have to object. I believe the doctor was trying to answer the question. Sometimes the answer is not always what we want. I think the witness ought to be permitted to finish the answer, then if it is not answered, he can re -ask the question.

A I did not do that because of the growing concern I had with the way Dr. Osheroff was running the unit.

Q You gave some testimony in your direct examination about drugs prescribed by Dr. Osheroff, and that he went to the Executive Committee and you brought them some evidence that he had given a wrong prescription, do you remember that testimony?

A Yes.

Q Doctors, from time to time, make mistakes on prescriptions, do they not?

A Yes.

Q Some of the differences of opinion that doctors have on prescriptions depends on physical viewing of the patient at the time, isn't that correct?

A Yes. You have to remember that I was talking to doctors at the meeting, so they understood the same thing.

Q You, yourself, have made mistakes on prescriptions, have you not?

A Yes.

Q You, in fact, administered Tolwin to one patient when the records of the patient said the patient was allergic to Tolwin.

MR. PLEDGER: Your Honor, again, we are going into side issues.

THE COURT: Your objection is sustained.

MR. HIRSCHKOP: Your Honor, we would like to make a proffer that he administered Tolwin to a patient named Jackson who died as the result of the administration of the wrong drug when the patient's records said that he was allergic to that drug.

That he further administered Norpace to another patient, who subsequently died from overdosing on

Norpace in four times the quantity the Physician's Desk Reference says you can give to a patient.

THE COURT: You may ask whether or not he made a mistake, but we are not going to go off and try side issues.

Q With regard to Jackman, you did administer Tolwin when it said clearly in his records that he was allergic to the drug.

A No.

Q Did you order the drug to be given?

A When it was clearly written that he was allergic, no. I can give you the background on the story, if you like.

Q Did the records reflect the man was allergic to Tolwin?

A After it was given, not before.

Q How did it get in there afterwards?

A It was written after he got it. I will be glad to go over it.

Q Charles Lee, do you remember that patient?

A Yes.

Q Did you administer Norpace to that patient?

A I don't remember.

Q I show you physician's order for Lee, Charles H., does that refresh your recollection that you ordered Norpace 150 miligrams every six hours?

A No.

MR. PLEDGER: Your Honor, I would, at this time, like to inquire as to whether the plaintiffs have received from these patients, whose records they apparently gone through and obtained copies of, as to whether there is any authorization for them to do so?

THE COURT: Do you represent the patients?

MR. PLEDGER: I represent Dr. Greenspan. This is a patient that is Dr. Greenspan's, and as far as I know that patient has never authorized the breach of the confidentiality of his physician-patient relationship. It would appear to me that unless they have something from this patient, there should not be anything in this record with respect to this patient.

Perhaps if they have done that, I would assume that Dr. Osheroff has had him under his care for a period of time, he's gotten a written authorization from him saying that he can release this information to the public.

I am sure his counsel has cautioned him about

that, but I think that ought to go into evidence before we start talking about these things, if there is a release from this patient.

MR. HIRSCHKOP: Your Honor, they have used patients' names freely and so have we in this litigation. We will agree to seal the names of the patients. These are two deceased patients we are talking about. Jackman came up in discovery.

THE COURT: All right, you may proceed.

A Could I see that again, please?

Q Still doesn't refresh your recollection?

A There are a couple of comments I could make about this.

Q Does it refresh your recollection?

A Yes.

Q Did you, in fact, give that order to give that dosage?

A Yes.

Q With a patient under hemodialysis, that would not be a reasonable dosage, would it?

A I disagree with that. You have to reduce the dose in hemodialysis. As you know from the order, the patient was in the intensive care unit, at that time, ar

transferred to the coronary care unit, and you can use higher doses of drugs early on, including Digitalis, that you wouldn't use on a regular chronic basis. This was a very unstable patient when that drug was used, and I had just stopped Quinaden because that was ineffective, and changed over to another drug. Sometimes you use a higher dose early on, and then taper down.

Q You were giving that patient 600 miligrams a day, were you not?

A That one day.

Q For patients with severe renal insufficiency -- I am reading from the Physicians Desk Reference -- the recommended dosage regimen is 100 mg at intervals shown in the table below, with or without an initial loading dose of 150 miligrams.

Do you agree with that statement so far?

A Yes.

Q The table shows below that when you have less than a creatinine clearance of 15, you can only give it every 24 hours, that is 100 mg every 24 hours.

A Could I see that, please?

Q Sure. This patient by definition had a

creatinine level of less than fifteen, didn't he?

A Yes. Down further it says: A limited number of patients with severe refractory ventricular tachycardia have tolerated daily doses of Norpace up to 1600 mg per day (400 mg every six hours) resulting in disopyramide plasma levels up to nine micrograms per milileter."

Q That doesn't supply to the severe, does it -- it was a separate paragraph.

A He was in intensive care, and I considered him a severe arrythmia patient.

Q What does it say right there, Doctor, for 8/12/79, just read what that one line says.

A Widening QRS complexes.

Q Because you gave him the drug for five successive days at that level, and that is what killed that man, isn't it?

A No. The man had severe heart disease and had cardiac surgery.

Q You gave him 600 mg for five successive days, didn't you?

A I don't know, I would have to sit down and review this. You are talking about the person who

wrote that was the cardiac surgeon.

Q He wasn't your patient, you were called in on a consult, isn't that correct?

A By Mr. Lee?

Q He had a cardiac problem, he had severe arrythymia and he was put in the hospital for that, isn't that correct?

A That's right.

Q You were called in because he was a prior hemodialysis patient as a consult, at that time, were you not? You were not the admitting physician in the hospital at that time.

A The patient also had a cardiologist, Dr. Schwartz.

Q And it was Schwartz who called you in, wasn't it?

A That's right.

Q And you were the one who gave him 600 mg a day for five successive days of that drug?

A With the knowledge of the cardiologist. The cardiologist's consult is right on there.

Q With regard to Jackman, page 584 of the medical record, what is the date of that record?

A 8-11-77.

Q It does indicate allergies Tolwin, does it not?

A Yes, it does. If I may explain?

Q Please.

Q Number one, the writing is different, and the problem was the patient had sycle cell disease and was in severe pain. We usually got Demerol. We were out of Demerol in the unit, and I asked about analgesics and there were none written on the chart. We gave him Tolwin, and the patient had a seizure about a half hour later and was admitted to the hospital. I called up his wife and asked her for some more history, and was there any problem with Tolwin. She told me that he was allergic to Tolwin and had a problem in the hospital before and was very embarrassed that she hadn't told us, and then we went back to the chart and wrote in Tolwin.

Q The handwriting on the Tolwin is apparently the same as the fill in please handwriting, and the ID policy number handwriting, is it not?

A It looks like it's the same, but you would have to talk to the wife to verify what I just said.

MR. HIRSCHKOP: I would submit this chart as our next exhibit.

THE COURT: Any objection, other than what you

have already stated?

MR. PLEDGER: No, your Honor.

THE COURT: It will be admitted as Plaintiff's Exhibit 190.

Q Just so it is clear, your administration of Tolwin was in 1979, was it not?

A As I recall, it was.

Q You said that Sue Smith showed you the petition that she drafted, is that correct?

A Yes.

Q Do you know why she would deny showing you the petition?

A She might not have remembered it.

Q You said that you received a copy of the petition, but you failed to say from whom you received it; from whom did you receive it?

A As I recall, I made a copy when Sue Smith showed it to me.

Q So when she testified that she didn't supply you with a copy, that was not true?

MR. PLEDGER: Your Honor --

THE COURT: Objection sustained. The form of the question is improper.

Q You say you never told patients that Dr. Osheroff was incompetent, is that correct?

A That's right.

Q But you heard Mr. Sparrow's testimony that he says you told him that.

A Yes.

Q Do you have any explanation for the difference in your testimony?

A Yes.

Q What is that?

A Mr. Sparrow is one of the patients I mentioned who was fairly aggressive in asking me what was going on, and what the mental health of Dr. Osheroff was. Again, my response was that I couldn't work with him, and I couldn't see how he could misinterpret that.

Q Let me read you specifically what Mr. Sparrow said.

"Do you recall specifically what was said?

"Yes, something to the effect that they thought he was incompetent and should no longer continue in the role that he was in, and they wanted to get him out of the unit."

Mr. Sparrow testified to that under oath, and

you say that is not correct?

A When he says something to the effect of, in my mind, that is his interpretation of what we were saying. We did not say we wanted him out of the unit, and we didn't say he was incompetent; at least, I didn't.

Q You say you had conversations with your wife regarding Ray's competence.

A Yes.

Q You heard her testify that she never spoke to you about that?

A I don't remember her saying that.

Q You say you brought suit in federal court to protect patients, but you sued for $600,000.

A I didn't know anything about triple damages.

Q You have read the complaint?

A I read the complaint, and I was told by the lawyers that is what you usually do.

Q And you hadn't set up any patient's fund to give them any benefits from the damages you sought in that suit, is that correct?

A No.

Q Of course, if you saw patients in the unit, you could get that $260 a month, couldn't you?

A That's correct. The money that we hoped to be able to get from the $260 was money we would hope to support the antitrust litigation which hopefully would open units around the country. We weren't able to afford that, and that's one of the reasons we dropped the antitrust suit.

Q You dismissed that case, didn't you?

A That's right, we couldn't afford it.

Q You said in the Aminophyllin incident you got a call from somebody, who called you?

A I don't remember whether it was Sue or Peggy, Sue Smith or Peggy Hess.

Q Sue Smith denied called you, you know that, don't you?

A I said I don't remember.

Q Peggy Hess denied talking to you about it.

A My recollection sitting here is that one of the two called. I don't remember which or either, I don't know.

Q You know in your deposition you denied having the third conversation with Dingman, you remember that?

A You have to define which conversation we're talking about.

THE COURT: Didn't you go through that yesterday?

MR. HIRSCHKOP: I will give him the specific deposition number later on.

Q With regard to the Aminophyllin incident, that occurred in late December when you had been gone from the unit at least two weeks.

A Yes.

Q You said that Ray was very perfunctory in his rounds.

A That's not the word I used, that is Dr. Tolkan's word.

Q You testified that he was very brief in his rounds and he treated them in a perfunctory manner, didn't you?

A That is correct.

Q YOu know Dr. Tolkan, himself, didn't show up for rounds until two hours after the person was put on the machine, he's testified to that under oath.

A That is not uncommon for everyone to do.

Q Very often people are on the machine only three hours.

A That's right.

Q And showing up at that point, you can only spend two or three minutes with the patient?

A Well, you can spend an hour with the patient or longer.

Q And not leave any time for the other fourteen patients that are on the machines, right?

A That would be correct.

Q And of course, a ten minute round that you made sometimes, it would be almost impossible to go any faster than that unless you didn't say anything to any patients?

A No. I say something to every patient, but you can do it depending on how many patients there are.

Q You have testified several times about the burden on you and Dr. Tolkan, but Dr. Chan was there a substantial amount of time at the unit, and she was a good and competent doctor, was she not?

A That's two questions. When you say substantial amount of time?

Q Let me withdraw that question. She was a very helpful and good doctor, was she not?

A Yes.

Q And you testified that people left the unit

when you got there, there was a lot of dissatisfaction, but, in fact, during all that period of several months only one or two people left the unit, isn't that correct?

A The period after I came?

Q Yes.

A I said they were leaving, they did not leave after I came.

Q In fact, one may have transferred into another unit during that same period of time?

A That might have happened after I came.

Q Now, you had testified that you made an agreement with Ray you would keep his practice until he got back. You believed that he would be gone from six to twelve months at the time you made that agreement, didn't you?

MR. PLEDGER: Your Honor, I am going to object to the question. It wasn't an agreement, apparently there was a statement made, as Mr. Bader characterized it, the type that you would give to reassure a friend so he would get the medical care he needed, but a statement made that I will watch this.

MR. HIRSCHKOP: Your Honor, they have answered

in the complaint they agreed to maintain his practice.

THE COURT: Let's not quibble over whether it was an agreement or statement, at this juncture.

Q You told numerous people, Marty Gannon, Mr. Westerman, Mr. Notaris, Ray Osheroff, and others, including Dr. Tolkan that you would maintain and keep that practice for Dr. Osheroff until he got back, did you not?

A That's correct, at which time he would come back as a functioning nephrologist. I don't understand why you always present half the statement because I always presented that picture to everybody.

Q You, in fact, told Dr. Osheroff that same thing that you just said, did you not?

A The same thing I just said which is what I told everybody.

Q At the time you gave these assurances, or agreements, or whatever they were, you had a firm belief it might take six to twelve months for him to get back from a mental hospital?

A Initially, I thought it would be shorter. I was given the time six to twelve months at Chestnut Lodge. I didn't know whether it was going to be two

months, three months or longer. In fact, later on, I was given the impression it would be longer than a year.

Q But at Chestnut Lodge, that was the very first day, and that is the same day you gave those assurances to Ray.

A At Chestnut Lodge, my impression was six to twelve months.

Q So when you gave the assurances at some period, you knew it might be six to twelve months?

A Yes.

Q There came a time however, long before he got out of the hospital, you made up your mind you wouldn't practice medicine with him regardless of those assurances, isn't that correct?

A I wouldn't practice medicine with him unless he came back as a functioning nephrologist. I would not go back to the same type of relationship that I had before where my social life and private life were totally being abused. I wanted a partner, not somebody I had to care for.

Q In the hearing before Judge Lewis, Page 286, do you recall this question and answer:

"MR. CLEMENTS: Had you made that decision?

"Answer: Yes, over the several months prior to his returning I had made the decision that most likely I would not be able to work with him on his return."

Did you make that answer?

A Yes, that's right.

Q So you had made the decision prior to his return, prior to the time you saw him or knew if he was cured, you most likely wouldn't work with him.

A That's correct, I was continuing to get information by way of telephone conversations with him at Silver Hill, seeing him when he came back, there was really no change in his expectations of me being much, much more than a partner. I wanted a partner.

Q You, also, had negotiated with United Health Care, that's true, also, isn't it? You can answer that yes or no.

A Yes.

Q And you had also filed an application for Prince William Dialysis Facility?

A At what time?

Q Prior to his coming back.

A I believe that is correct.

Q You had also gotten a raise to a hundred thousand dollars prior to his coming back, that's true, also?

A Yes.

Q So there were a lot of changes after you made the assurances to him and prior to changing your mind, a lot of changes, weren't there?

A There were changes. I don't believe the changes have anything to do with what you are trying to implicate, they are separate things.

The unit increased. The number of patients and his practice increased which was a change. His practice was much better throughout that summer, which was a change.

Q You were trying to get his business, weren't you, in the summer of 1979?

A No.

Q Let me ask you a question, page 308 of the trial transcript:

"Question: You tried to give them a choice at that time to become your patients?

"Answer: That is right, after I was terminated.

"But the termination was at that time --

A (Interposing) Who is questioning, Mr. Clements or Judge Lewis?

Q Does it matter?

A It matters to me.

Q I think it was Mr. Troy who was asking the question.

"But the termination was at that time that you did not want to be an employee of Osheroff or his partner, correct?

"Answer: Please repeat that.

"Question: You would have taken the business, correct, you would have gotten the business from Osheroff completely?

"Answer: I would have either got it or compromised one or the other, we were hoping to compromise."

So if you didn't compromise, you were going to get his business, that was your intention, isn't that correct?

A How you get someone's business in a medical situation is unclear to me. We were hoping to compromise. If there was no compromise, we were going to practice and compete.

Q Isn't it a fact you stated to another doctor, prior to his coming back, that there won't be anything to buy when Ray gets back?

A That was with respect to the Georgetown group.

Q Who did you say that to?

A Where are you reading that from?

Q Who did you say that to?

A I don't remember saying that.

Q Do you recall a conversation with a Dr. Ocuin?

A Yes.

Q When did that conversation occur?

A This was during that summer period at the DuPont Circle unit; he was one of the doctors over there. He called me up and invited me over.

Q And you talked to him about setting up a unit, did you not?

A He had heard that I was interested in a unit, and they wanted to help finance it, and they wanted to invest in it.

Q Was he anywhere around in any of your conversations with Dr. Hampers?

A He had a conversation with Dr. Hampers after my conversation at the airport.

Q In November, 1979.

A If that is when it was.

Q And you were talking to Dr. Hampers then about what?

A Dr. Hampers had called me up and wanted to discuss the northeast application.

Q Let me read your testimony from your deposition in the other lawsuit, page 153:

"Did you tell him by the time Dr. Osheroff --

A (Interposing) Did I tell who, Dr. Hampers?

Q I was talking about Dr. Ocuin, do you remember?

"Did you tell him by the time Dr. Osheroff got out of the hospital there wouldn't be much practice left to purchase?

"Answer: I don't recall makign that statement to him.

"Do you recall saying something like that?

"Answer: I might have because that is the way I felt. I did feel by the time he got out there wasn't much to sell of the private practice, although again, for the numbers I mentioned, I was willing to offer a very fair price."

A That's correct; if I can explain.

Q Try, please.

A I don't have to try, it's very easy.

If Dr. Osheroff were going to sell -- you have to remember that the Georgetown group was a competitor to me in the sale, any sale that Dr. Osheroff made would have been, in my mind, either to them or to me. And me being in the practice and knowing the patients gave me an advantage over the Georgetown group, and that's what I was talking about. I had that advantage of being more worth to me than to them.

Q Being on the inside did give you an advantage, didn't it?

A I don't deny that.

Q Being on the inside gave you some special obligations, did it not?

A To the patients. I did have an obligation to Dr. Osheroff that I met.

Q When you made these assurances to Osheroff, and Westerman, and others that you would maintain the practice for six to twelve months, you discussed that with Dr. Tolkan, at that time, did you not?

A Yes.

Q And he agreed with you, and said he would

maintain the practice, did he not?

A Yes.

Q And you relayed that to Mr. Westerman, did you not?

A I probably did.

Q Now at the time you gave these assurances that you would maintain the practice, you had sought Mr. Rubin's advice with regard to that subject, didn't you?

A I probably did, he was very close.

Q You say you probably did; you know for a fact you did, don't you?

A I probably did, I talked to him just about everything.

Q Let me refresh your recollection, page 94, in your deposition of the 7th.

"What I want to know at the time you were entering discussions with Dr. Osheroff and Mr. Westerman, I believe you said with regard to maintaining Ray's practice until he got better, did you seek advice of counsel as to the ramifications of your agreement to doing that?

"MR. PLEDGER: Is your question whether he sought advice of counsel at the time he undertook this?

"MR. FUDELLA: Right, fine.

"Question: Did you?

"Answer: Yes.

"Question: Was that Mr. Rubin?

"ANswer: Yes."

Does that refresh your recollection?

A My memory was better during the deposition than it is now.

Q So you will agree now that you did seek such advice?

A I am sure I did.

Q With regard to your salary increase once you were in, you only assumed Osheroff granted that increase, did you not?

A Yes.

Q Yet you saw him three times, why didn't you discuss it with him directly?

A I didn't think it would be helpful to him, and number two, he was in no condition to consider that kind of information. He was totally in his own thoughts at that point. Most of the business matters went through Mr. Notaris and Mr. Westerman, and they, I assume, relayed to Dr. Osheroff, but I am sure that

would have been a difficult situation for them. In my mind, was one of the reasons a guardian was appointed.

Q A guardian wasn't appointed until the summer, isn't that correct?

A There were two guardians.

Q But they weren't appointed until the summer.

A That is probably correct, I don't know exactly.

Q By the time a guardian was appointed, you had not seen Ray any more.

A I don't know exactly when a guardian was appointed.

Q Doctor, I would like to show you Exhibit No. 8. This is the letter to Constantin Hampers granting you medical director. You said yesterday you dictated and had that letter typed, is that correct?

A Yes.

Q You hand carried that letter to Dr. Osheroff in the hospital and he signed that letter, at that time.

A That is my recollection.

Q And this was late March, he had already been in the hospital almost three months.

A That's right.

Q If he could sign this letter competently granting you the medical directorship and agreeing that you were an associate, which would have the ramifications of giving you the right of first refusal under the contract, if he could deal with those fine legal issues, why couldn't you ask the man about a raise of forty thousand dollars?

A There was a serious question in my mind and Mr. Rubin's mind whether that letter was valid, since we were concerned about the competence prior to that letter, and one of the reasons for the guardian was because of our concerns that any contract signed would not be valid.

But again, that letter in substance, as far as the medical directorship, was just a form, and was requested, as I mentioned, by Dr. Hampers.

Q Your getting a hundred thousand dollars wasn't a matter of form, that was a lot of money, wasn't it?

A A lot of money for a lot of work, twelve to fifteen hours a day.

Q You went from forty-five thousand dollars to a hundred thousand dollars within a period of seven months.

A That's correct, and I went from twelve to fifteen hours a day to twelve to fifteen hours a day.

Q You testified yesterday that two doctors could run the practice; there was you, Dr. Tolkan, Dr. Chan and Dr. Goldberger, wasn't there?

A That's right.

Q Now with regard to the appointment of guardian, I would like to show you what has been marked as Exhibit 83 that a guardian wasn't appointed until August 8, 1979, almost five months after you put that under his nose to sign, the right of first refusal letter. Does that refresh your recollection when a guardian was appointed?

A Yes.

Q And dealing with these fine legal issues of right of first refusal, and whether you were associated in practice, you cannot produce one thing in writing to show that you went to Westerman and requested I need a guardian because we are dealing with legal issues and I had him sign this letter.

MR. PLEDGER: Your Honor, counsel, I realize, wasn't here when that testimony came out, but it is clear from Mr. Westerman that the guardian was his ide

if you recall his testimony, and he is the one that thought there was a question and a look of impropriety if somebody is in a mental institution, and he wanted to do that for himself.

There was never any testimony that Dr. Greenspan had a guardian appointed, and the form of his question to which I object assumes that to be the fact. I can excuse counsel because there is a lot of testimony here that he is unfamiliar with. I think first you have to lay the foundation, did he, in fact, request the guardian, and if so, why. But the facts are that he didn't, and there is yet another guardian that was requested by Mr. Gannon, and who actually, as I understand it, has not been discharged, so Dr. Osheroff, at the present time, has a guardian.

THE COURT: Does he now have a guardian?

MR. HIRSCHKOP: No, the guardian has been dismissed. Your Honor, he's been insisting that he had questions in his mind about the man being able to understand.

THE COURT: You may ask him if he requested or suggested that a guardian be appointed.

Q Did you request of Mr. Westerman in March, when

these letters were being signed by Dr. Osheroff that a guardian be appointed?

A No.

Q But you did discuss with Mr. Rubin the right of first refusal issue, did you not?

A Yes, I discussed it with Mr. Rubin.

Q And at that time, you had Dr. Osheroff's contract, did you not?

A Yes. But again, if it was an illegal letter because he is incompetent, what difference does it make?

Q Were you practicing a fraud on the man when you got him to sign an illegal letter?

A That didn't enter my mind, because I was doing that pursuant to a request from Dr. Hampers, trying to protect the unit.

Q The right of first refusal wasn't protecting Dr. Hampers, that was protecting you, was it not?

A That's right, it was to protect both of us.

Q The only reason to have in there associated in practice was to give you that right of first refusal, wasn't it?

A That was one of the dual purposes of the letter. The other reason was to give the dialysis unit a

medical director.

Q Now, you said yesterday you couldn't recall when Ray's telephone calls got limited. I would like to read you from your deposition of the 8th.

A When I say I didn't recall, I gave you the timeperiod.

Q Do you recall today that it was, in fact, within the first few weeks of his being at Chestnut Lodge?

A That's what I said yesterday, I believe.

Q With regard to that letter, you were the one who requested the letter, were you not?

A Which letter.

Q The one I have been asking you about, the right of first refusal letter.

A I called Mr. Westerman because of my concern. He, also, had concern because he wanted the letter to say, also, information about the medical director.

Q But you initiated that letter, did you not?

A As I remember, I called him because I had a concern.

Q With regard to Peggy Hess, you recommended to Pat Shine that Peggy Hess be hired, did you not?

A Yes, I discussed it with Dr. Osheroff, too.

Q Peggy Hess was referred to you by your wife, isn't that correct?

A Yes.

Q And pursuant to that, you recommended to Pat Shine that Hess be hired, did you not?

A I suggested that Pat Shine interview Miss Hess, and Pat Shine interviewed Miss Hess, and Pat Shine hired Miss Hess, with my recommendation, by the way.

Q You said under oath that you recommended she be hired.

A That's right.

Q Yesterday there was some question about who wrote the bylaws. There is no question in your mind you wrote both sets of bylaws, isn't that correct?

A I did exactly what I told you I did.

Q On both sets of bylaws?

A Yes.

Q You were asked in March in your deposition, Page 151, the first trial:

"Did you write the bylaws?

"Yes.

"Did you write the governing body bylaws as

well as the medical staff bylaws?

"That's correct."

THE COURT: I think you have sufficiently covered that subject.

THE WITNESS: If you continue reading, I explain the same way.

Q Now, you have mentioned the Georgetown group wanted to buy the practice and asked you about something being left -- they had offered one million dollars for that practice.

A That is what I understand from Dr. Osheroff.

Q And Osheroff had rejected that offer as being insufficient, isn't that correct?

A That was my understanding from Dr. Osheroff.

Q In August, when there was discussion of buying the practice, you offered a million dollars for the practice, did you not?

A I think I said that we would match the Georgetown offer, but we wouldn't be able to pay in a lump sum.

Q But the aggregate sum was a million dollars, wasn't it?

A That's right, but I think you would have to

verify that is what Georgetown had offered, because I have no evidence that's what they really offered.

Q And Osheroff had demanded three million dollars, isn't that correct?

A This is in August?

Q Yes.

A I don't remember. He was in the hospital in August, I don't remember a discussion with Dr. Osheroff.

Q What about on December 12th, a demand of three million dollars for the practice then?

A That's right.

Q And you made a counter off of one million dollars to purchase the practice.

A No. What we offered was an amount of money over the years just to have privileges in the unit, and to allow patients to choose whoever they wanted. We didn't offer to buy the practice then.

Q Let me read you from your deposition of January 8, 1981, page 330:

"There were negotiations on December 12th as to whether you would actually buy the practice on that day?

"Yes.

"Who was present for those negotiations?

"Westerman, Osheroff, Rubin, Tolkan and myself.

"Mr. Evans and Mr. Bader weren't involved at that point?

"No."

Mr. Bader and Mr. Evans had been the guardians, had they not?

A Yes.

Q Going back to the transcript:

"Was there a figure mentioned as to what the value would be?

"The value as represented to me was a total of three million dollars."

Now, up to that point, is that all correct?

A If you are reading it, I assume it's correct.

Q Well, you were there on the 12th, I wasn't. Do you agree those things happened on the 12th?

A Yes.

Q Continuing with the transcript:

"Did you make an offer to purchase the practice then?

"Yes. We offered to purchase the practice initially; that figure came up following our negotiations.

"You made an offer on December 12th, is that right?

"Yes.

"How much was that offer for?

"That was for one million dollars.

"And they came back and said no, the thing is worth three million?

"We initially offered a hundred thousand dollars a year for ten years."

You admit all that occurred on December 12th?

A Yes. Keep reading.

Q That's where my question ends, your counsel can ask you.

MR. HIRSCHKOP: Your Honor, I can read the whole transcript.

MR. PLEDGER: He should read the next question and answer.

Q "Question: We are talking about two different things, aren't we?

"Answer: Yes, that is what I am about to say, it is not to buy his practice.

Is that what you are referring to?

A Yes, I had made a mistake and corrected that in

the next sentence or two.

Q You have apparently reviewed these transcripts, you know them pretty well, don't you?

A I know I made a mistake in that transcript at that point, and I corrected it.

Q And you also know in these transcripts you absolutely denied a third conversation with Dr. Dingman after he got out of Silver Hill, isn't that true?

A I don't remember one way or the other.

Q Is it your position that there were no more negotiations to actually purchase the practice after August of '79?

A That's right.

Q Now, you heard Mr. Westerman testify about your July 26, 1979 conversation with him, is that correct?

A That's the telephone conversation?

Q Yes, sir.

A Yes.

Q At that time, he made a memo to the file of exactly what was said between you, did you hear him say that?

A Yes.

Q Have you reviewed that memo?

A Yes.

Q Is it your contention that memo is incorrect?

A Absolutely.

Q You have testified, have you not, that there in fact was such a telephone call from Mr. Westerman?

A Yes, there was.

Q And you indicated in that phone call that the Prince William center would be for yourself, is that correct?

A Yes.

Q Did you tell him, at that time, that you never told Osheroff because Osheroff didn't ask that this thing would be for yourself?

A I don't remember that. I don't remember saying that I told Dr. Osheroff when he was at Chestnut Lodge.

Q We agree you didn't tell Dr. Osheroff.

It's clear that you did not tell Osheroff about it at Chestnut Lodge.

A I don't believe I did. Most of the things I was saying were not heard anyway.

Q Of course, in March of 1980 you testified in your deposition "I, in fact, told both Dr. Osheroff and Mr. Westerman about the unit while Osheroff was in

Chestnut Lodge." That wasn't true when you said that under oath, was it?

A I can't remember. My main concern that summer was with Mr. Notaris, Mr. Westerman and the guardians; Dr. Osheroff, as far as I was concerned, was not hearing what I was saying.

Q At Page 65 in that deposition, you were asked:

"Do you recall whether they asked you whether it was for Dr. Osheroff or for yourself?

"Answer: Dr. Osheroff never asked."

Does that refresh your recollection on that?

A I would have to see that, but again, I don't recall any specific conversation at Chestnut Lodge with Dr. Osheroff about the dialysis unit.

Q At the time you told Westerman that this unit was only for you, did you tell him that was because Osheroff couldn't go into Prince William County under his contract?

A That was one of the reasons.

Q Did you tell that to Westerman?

A I told that to him along with other things.

Q That is fairly consistent with his memo where he says you didn't put his name on it because he

couldn't go into Prince William County but it was for him?

A No, that's not the way I said it.

Q You not only applied for Prince William while you were employed with Osheroff, but you also filed for two other facilities, is that correct?

A That's right.

Q And you didn't tell Osheroff about either of those two other facilities, did you?

A No.

Q In the application for the two other facilities, you listed a number of personnel who were employed by Osheroff, did you not?

A Not by Dr. Osheroff; as I recall it, I might have listed people employed by National Medical Care, other than my wife.

Q Your wife was employed by Dr. Osheroff?

A On a part time basis.

Q And Dr. Tolkan was employed by Dr. Osheroff, was he not?

A Yes.

Q You listed Dr. Tolkan as a co-director on one of those applications, did you not?

A Please show me. I might have.

Q Is this the application for the mid-Montgomery dialysis facility?

A Yes.

Q That is a true copy of it?

A As far as I can tell.

Q Is this a copy of the Northeast Washington dialysis facility that you filed?

A It appears to be.

Q Look at the Northeast application, Page 1051; what is that, sir?

A That is a CV of Dr. Tolkan.

Q You included his resume in your application?

A Yes.

Q At the time he was a full time employee of Dr. Osheroff, is that correct?

A Yes.

MR. HIRSCHKOP: Your Honor, I would like to admit these two into evidence.

MR. PLEDGER: No objection, your Honor.

MR. HIRSCHKOP: The mid-Montgomery application will be the first one.

THE COURT: Will be admitted as Exhibit 191.

MR. HIRSCHKOP: The Northeast dialysis application will be the second one.

THE COURT: Will be admitted as 192.

Q At the time you filed both of these applications, Ray Osheroff was already back at the center?

A He probably was on leave, back and forth at that time.

Q Doctor, you filed one on November 19th, that was the mid-Montgomery one.

Q Yes.

Q You filed the Northeast one on December 3rd.

A Yes.

Q I know yesterday you testified you didn't know where he lived during that period, but you know without any question you could have contacted him, that you were seeing him periodically during that period.

A I think if I had made an effort to reach him, I could have.

Q Didn't you, in fact, in the meeting at National Airport with Dr. Hampers have an argument about these applications?

A There was a discussion about the Northeast application.

Q He voiced his objection to it, did he not?

A When you say objection, he voiced his concern and was trying to make a compromise.

Q Despite that conversation, you still did not go to Dr. Osheroff and tell him about it, isn't that correct?

A I just didn't see any relevance of Dr. Osheroff with these applications.

Q With regard to either of these applications, did you request his assistance from Miss Thompson at George Washington Hospital?

A She wrote a letter for the application, in support of the application.

Q And you specifically requested that she mail you the letter at your home rather than at Northern Virginia Dialysis Center, isn't that correct?

A I believe that is correct.

Q What was the reason for that?

A That was Mr. Rubin's advice.

Q What was the reason for it, sir?

A He wanted to create a clear separation.

Q You wanted to be clear that the centers were to be separate from any affiliation with Dr. Osheroff,

isn't that correct?

A That's what I just said.

MR. HIRSCHKOP: May I have Exhibit 34, please?

Q Do you recognize that as the application for Prince William Dialysis Facility?

A Yes.

Q You made no effort, at that time, to have anything mailed to your home to keep the address separate, did you?

A No. Mr. Rubin had a sharper legal mind than I did. My feeling throughout the whole application was that it didn't matter, because if Dr. Osheroff came back into practicing, this unit would have been part of his practice. We would have joined it, gotten together on it. If he didn't come back and sold, then it wouldn't matter anyway, so I never gave any second thought to the letterhead or to the other differentiation with Mr. Rubin, as a lawyer, who had second thoughts.

Q You say your lawyer's legal judgment was better, but you were consulting your lawyer during this period of time about the Prince William Dialysis application, were you not?

A The application was almost complete by the time I contacted him.

Q By this time, you had been regularly contacted about your business in the Northern Virginia Dialysis Center, had you not?

A Yes, but Mr. Long wrote the application.

Q And Long advised you, at the time, that you had to keep it separate from NVDC, didn't he?

A He didn't make that statement. He said that there may be problems with National Medical Care. But from my perspective, that is one of the reasons I went to National Medical Care, to get their input.

Q Long told you specifically that you could not use the facility at Northern Virginia Dialysis Center to promote the Prince William application, didn't he?

A I don't remember him making that statement.

Q I will see if I can refresh your recollection from his deposition, page 34:

"Answer: I told him I didn't have any problem with it being a separate application, that I had seen this often in the review process where new facilities were involved, someone had to file for them, and that is why I agreed to help him with a

narrative because I felt it was a separate application as long as he understood that he could not use the facilities of Northern Virginia to promote the application."

Does that refresh your recollection?

A The first part does, but I don't remember him saying not to use those facilities.

Q In fact, you used the facilities to promote the application, didn't you?

A In what specific way; Jay Long typed it, Jay Long wrote it.

Q You used Northern Virginia Dialysis Center stationery to send out most of your letters, didn't you?

A That's right.

Q Dottie Smith got you various names of people that you could write to, did she not?

A That, I don't remember.

Q Mabel Lowrey typed your letters, did she not?

A She typed the letters requesting responses.

Q Mr. Notaris prepared the financial statement, did he not?

A No. He prepared my financial statement.

Q That you used in this application?

A Yes.

Q And that's the reason for which you requested him to prepare it, for this application?

A Yes, and that's exactly -- what happened at that time, I told him it was separate from the unit, and during that conversation he offered to supply Dr. Osheroff's money to support the application. I told him I couldn't use Dr. Osheroff's money because it was separate, and then I got a call from Mr. Westerman after that.

Q And without belaboring it, we have been through a number of resumes that you included; these were a number of people employed by NVDC or Dr. Osheroff, do you recall that?

A You have to be more specific about who you mean.

Q We have been over that.

Now, in the application, Page 1845, you say in the second paragraph at the top, the second sentence: "There are currently seventeen Medicare patients travelling from this area to the Northern Virginia Dialysis Center alone."

You knew how many patients were going to NVDC because you were at NVDC, isn't that correct?

A Yes, and because it was public information.

Q You didn't have to go to public information, you used the information you had.

A That's because it was easier to get.

Q You were the attending physician for those patients, were you not?

A Yes. I am glad you admitted I was the attending physician.

Q I'll admit you stole the patients, if that helps you.

When you went to public hearings on this application, who was representing the Northern Virginia Dialysis Center at those hearings?

A I believe there were administrators or physicians who were related to National Medical Care who were at the meetings.

Q Who represented Northern Virginia Dialysis Center at any of those meetings.

A There was no direct representative.

Q In fact, there was one meeting that Dr. Osheroff asked you about going to, and you told him not to go to, isn't that correct?

A I didn't tell him not to go, I said it wouldn't

be a good idea.

Q When you went to these meetings, you were there as the applicant, were you not?

A Yes.

Q You weren't there as the medical director of NVDC?

A That's right.

Q You never said I am not here as the medical director of NVDC, did you?

A I said there was no affiliation between myself and the unit in NVDC and Prince William. I did not make a statement I am not here as medical director of NVDC.

Q You signed numerous letters seeking support of that application as acting medical director, didn't you?

A That's the way I signed the letters for support.

Q And in those letters, you refer to we are opening a center, do you not?

A Yes.

Q Who is the we?

A That was Dr. Osheroff's practice.

Q Well, how could you say Dr. Osheroff's practice

was opening a center, when you hadn't consulted him, and you hadn't informed him, and you didn't have his permission to do it, how could you say that?

A Well, a little bit of lack of clear thinking at that point, and a lot of understanding the practice was going to be sold, and things would have hopefully worked out anyway, as far as this unit if he were going to be coming back.

Again, going back to the fact that it was clear in my understanding that Dr. Osheroff could not have a unit in Prince William County as verified by Dr. Hampers and Mr. McNeeley.

Q He could with National Medical Care.

A They did not give permission, and that is one of the reasons I went up to Boston.

Q They never refused permission, because he never got to ask, isn't that true?

A That's one of the things I did in Boston, was to ask.

Q You didn't ask him if you could ask, did you?

A No.

Q In the application, page 1849, you make the following statement under paragraph number five:

"The Northern Virginia Dialysis Facility has reached a capacity of 2.5 shifts per day, and an additional facility in Prince William County would allow for them to take new patients without going to a sixth shift." Do you see that?

A Yes.

Q That was your language, was it not?

A That was the language of Mr. Long, but I certainly signed the application.

Q And you certainly read it and approved it before you filed it, did you not?

A Yes.

Q The them you are referring to there is the Northern Virginia Dialysis Center, is it not?

A It's unclear to me; it might refer to the additional facility in Prince William County, and it might refer to NVDC, it's unclear.

Q Prince William couldn't go to a sixth shift because they didn't have any shifts, did they?

A More likely than not, it represents the Northern Virginia Dialysis Facility.

Q Dr. Greenspan, I asked you yesterday about the resolution of Manassas Council. You never told the

mayor of Manassas Park, I am sorry of Manassas, that the Prince William Facility would not be part of the Northern Virginia Dialysis Center, isn't that true?

A Not early on.

Q You never told him, isn't that true?

A I assume that he was on the list of individuals we wrote in February.

Q Let's see if we can refresh your recollection regarding that; page 102 of your March deposition in the other case:

"Question: Are you aware of how it was the resolution came of the view that it was Northern Virginia Dialysis Center seeking to open a Prince William County center?

"Answer: The mayor was never told that would be part of their unit. He might have gotten it from the mailing address.

"He might have gotten it from the mailing address?

"He might have, but again, he was never told specifically it would be affiliated at all with the dialysis center in Virginia.

"Was he ever told to the contrary?

"Answer: No."

That is your recollection, is it not?

A Yes, unless he was on the list in February of the people we sent out.

Q Of course, when you got that resolution in mid-1979, you didn't have to wait six months, you could have called him up and said mayor, you made a mistake, could you not?

A Again, it didn't make a difference. I didn't recognize there was a problem because if Dr. Osheroff came back, then the unit would have been in his practice. That's the only way I saw Dr. Osheroff having a unit in Prince William County was through me.

Q You said before when you said we in these letters seeking support, you meant Osheroff's practice, is that correct?

A That's right.

Q In your deposition, the same one in March, at Page 111:

"Question: And the we therefore, I assume you mean particularly since it is on Northern Virginia Dialysis Center and Dr. Osheroff's stationery, that's what you mean by we?

"Answer: That's right."

Did you also mean the Northern Virginia Dialysis Center as part of that we?

A No, that wasn't the way I was writing it.

Q After July 10th or 11th, whenever it was when you had the discussion with Hampers in Boston about the dialysis facility, you never talked to him again about the Prince William facility, isn't that correct?

A No. He called a couple of days later. He told me he was going to check with other physicians who he had contracts with and let me know.

He called back and told me that he had talked to Dr. Strauch and Strauch said there was no need, and therefore, since Dr. Strauch had contracts with Prince William County, National Medical Care could not go into that county.

Q Your deposition, page 159 and 160:

"Did you discuss the Woodbridge facility with Dr. Hampers again in November and December?

"I don't recall ever discussing it again after July 10 with Dr. Hampers."

Was that just a mistake you made in that deposition?

A No. November and December, we never discussed

it. I mentioned in the deposition before, whenever the meeting was in Boston, I got a call a couple of days later relaying the information I just mentioned. I told about that several times before.

Q Your answer: "I don't recall ever discussing it again after July 10 with Dr. Hampers", that would be in error, would it not?

A Not if I was under the impression that July 10 was the second telephone call.

Q I had asked you before about not informing Osheroff about the United Health Care Association contact you had under discussion. You didn't inform either Westerman or Notaris of that, did you?

A About what again?

Q The negotiations with United Health Care.

A I don't remember discussing it with them.

Q In fact, in your July meeting with Dr. Hampers, you didn't tell him about that either, did you?

A I don't remember telling him, no.

Q With regard to the meeting with Hampers in July, you didn't tell Osheroff, Westerman or Notaris about that meeting, did you?

A I don't remember telling them, no.

Q Yet Osheroff was your employer, not Hampers, wasn't he?

A That's right.

Q Didn't you have some duty to keep Osheroff or his guardians informed of your actions regarding his practice?

A Yes, I had an obligation. The point was that I just didn't feel that Dr. Osheroff had any direct or indirect relationship at that point, since he was restricted.

Q I had asked you about your conversation with Westerman. I want to read from your deposition, page 169, July 7 -- it's January 7th, this is you talking:

"Implicit in my statement, and I may have said other things, but I specifically remember telling him that Dr. Osheroff could not have an interest in Prince William County. To me it would be awkward then to file in Dr. Osheroff's name. I told him that would be in violation of his contract."

Does that refresh your recollection about the conversation with Westerman?

A Yes.

Q You told Westerman those things, did you not,

not only that Osheroff hadn't bothered asking you so you didn't tell him about the Prince William facility, but that it would be awkward to file in his name.

A Illegal and awkward, as far as I was concerned.

Q How could Dr. Osheroff ask you about the Prince William facility if he didn't know about it?

MR. PLEDGER: Your Honor, this cross examination has ranged far and wide, and I think it is delaying this case unduly, and the questions are beyond any realm of reason in this.

Again, counsel has omitted, when he comes back and reframes his questions, and my objection is specifically to the form of the question. The response was to me it would be awkward then to file in Dr. Osheroff's name. I told him that would be in violation of his contract. So we have awkward to file in his name, and violation of his contract. If you take that and take two words out of the center of it, then it appears to be a different statement than what is in the original transcript.

MR. HIRSCHKOP: I haven't changed the man's testimony.

Your Honor, we have one rebuttal witness I would

like to take at this time unless he will stipulate. We have these records that I have put before witnesses of people's attendance during the period that is in question.

She is the bookkeeper who keeps the records during the ordinary course of business and they say whether someone was present or not. That's all. It is just to get them in evidence. They are having a state inspection soon, so she needs to get back to work. May I just put her on for that, unless he is going to stipulate?

MR. PLEDGER: A) I am not going to stipulate to it, and B) I am not going to permit this witness to be interrupted at this time for that, and C) that witness is going to take a little bit more time than a minute or two. I think rebuttal witnesses can come at the end of the case.

MR. HIRSCHKOP: Your Honor, we have taken patients out of turn. She had a particular need, and we do have an inspection to worry about.

MR. PLEDGER: I have a lawyer sitting here, who has been here, because counsel represented that his cross examination would take no longer than the

direct, and it is double that now.

I am not going to interrupt at this point. If he wants to finish with this witness, and in the meantime I can see the records, maybe we can work out some kind of stipulation.

THE COURT: We will take that up after you complete your cross examination of Dr. Greenspan. We will take a recess and maybe you can stiulate it. Will you permit Mr. Pledger to talk to the witness so he can satisfy himself as to the authenticity of the records?

MR. HIRSCHKOP: Yes, sir.

(Brief recess)

BY MR. HIRSCHKOP:

Q At the time you talked to Mr. Long, before you filed the application, he warned you there would be problems with patients choosing doctors, did he not?

A Yes, he said that was a concern.

Q You knew that he had been involved in a lawsuit over that very problem, did you not?

A Something related to that, I didn't know the specifics.

Q You had all that knowledge when you drew up

that form on December 12th, did you not?

A I had that knowledge, I didn't think of it.

Q At the time Mr. Long advised you, he advised you that you might end up in a lawsuit with National Medical Care over setting up the Prince William facility, did he not?

A Yes, he said that was a possibility.

Q Yet despite all those warnings, and the warnings about corporate problems, you never chose to put anything in writing to Ray or his representatives concerning the establishment of the Prince William facility, did you?

A That's correct. In my mind, he had nothing to do with it; that's why I went to Boston.

Q With regard to the Prince William facility, you testified about how patients had difficulty getting up here in a snow storm, they had just as much difficulty down there in a snowstorm, didn't they?

A Yes.

Q In fact, you have patients at the Prince William facility that travel more than an hour to get there, do you not?

A I can't say that they travel more than an hour.

They do travel from Fairfax County down, some of them do, by their choosing. Patients are given the choice of dialyzing at any unit in Fairfax County or dialyzing at the Prince William unit.

Q Page 225 of your deposition of the 8th:

"Question: Were some of the patients who are now dialyzing in Prince William, who formally dialyzed at Northern Virginia Dialysis Center, travelling more than an hour to get there?

"Answer: Yes."

Do you recall that?

A I don't recall it, but as I said, close to an hour.

Q At the time you were deposed on January 8, 1979, of the roughly 26 or 27 patients at Prince William facility, approximately 20 had previously been at the Northern Virginia Dialysis Center, is that correct?

A I can't argue with that.

Q You appeared before the Executive Committee, and at that time they asked you about Ray Osheroff's mental state upon his return, did they not; do you recall that, sir?

A Not specifically, in general, I do.

Q Did you tell them at that time that symptomatically he was better?

A I believe I did, yes.

Q Did you tell them, at that time, that his mood was elevated, he was no longer depressed?

A Yes.

Q Did you tell them his mood was not unreasonably elevated?

A I don't know whether I told them, but in my own mind it was not unreasonably elevated.

Q Did you tell them at that time you thought he had adequate knowledge of nephrology?

A I believe I was referring to the time before he went to Chestnut Lodge that he had adequate knowledge.

Q Your exact statement "As far back as then, I did not think Ray's knowledge of nephrology was poor, I thought it was adequate.

MR. PLEDGER: Your Honor, I am going to object. We have taken it out of context because the statement is -

MR. HIRSCHKOP: Your Honor, I was going to read the whole statement. I was trying to read it and he

interrupted me in the middle of a question.

MR. PLEDGER: I am objecting because the portion he chose to read gives a different light than it does if you read the next five words.

MR. HIRSCHKOP: That's what I was doing when he stood up. May I finish the question?

THE COURT: The objection is well taken. You read it first in part, read the whole thing. Why don't you read all of it before you give him a chance to answer.

MR. HIRSCHKOP: In fairness, your Honor, he said, and I read the language as far back as then. I didn't have to refer to that at all.

Q Continuing from where we were: I can't say that now. It was not the knowledge of medicine, it was the practice of medicine. It was the application of that knowledge and the consistency of that knowledge that was lacking then. You recall that, do you not?

A Yes.

Q I couldn't go away for weekends because I knew I would get calls. I knew they couldn't find him. He ordered this, this and this, what do you think. This was on my weekends off. Not only was I doing my

practice, I was backing up his practice. That's why I told him to make a decision. If you can't make a decision, go some place and get the ability to make a decision.

THE COURT: Before he answers; are you satisfied that is the entire statement?

MR. PLEDGER: Yes, sir.

A Yes.

Q There was more to the answer, I picked up in the middle, now let me read you the first part.

"How do you compare your impression of Ray's capacity to treat patients now as compared with the time when you first joined him in patient care?

"Dr. Greenspan: I would say it's about the same. Let me, also, add that as soon as I came here in June, I was doing the practice. I was it. We go to see a consult, let's say at Circle Terrace, he would be on the telephone talking to his accountant, and I would go back and see the patient. There never really was that much concurrent medicine. As far back as then, I did not think Ray -- et cetera. Now, that is the whole answer. Do you recall that?

A Yes.

Q When you say I would say it's about the same in response to the question, is that what you meant to say at that time?

A In the question it says his fund of knowledge?

Q The question was how would you compare your impression of Ray's capacity to treat patients now as compared with the time when you first joined him in patient care.

A I have a disagreement with that statement it was about the same.

Q So you didn't tell the truth to the medical committee?

A The rest of the answer told the truth. I am not sure I interpreted the question correctly, but the explanation was correct.

Q You told them you were perfectly content to have him come down and admit patients to the Prince William Dialysis Facility at that time; it was an open unit and he could come and admit patients.

A I said it was an open unit, and he was free to apply.

Q So you might not have accepted him?

A That's a possibility. We have never turned down

a physician. If you look at the Executive Committee minutes, you will see the explanation I gave.

Q You never circulated any notice to anyone that it was an open facility, did you?

A It was in the newspaper, it was everywhere, and if Dr. Osheroff could not have practiced for some reason, his representative could have practiced. We have no rule limiting an employer; employee of a physician from practicing in Woodbridge.

Q He wasn't stopping you from having a representative practice in Northern Virginia.

A Yes, he is.

Q YOu referred that patient on the stand yesterday to a doctor up in Northern Virginia, didn't you?

A The doctor I referred to is a referall, he is not a physician I work with. He does not allow any physician who works with me, the chief of nephrology at GW couldn't go in his unit if that physician worked with me. That's one of the bylaws.

Q There is no question that in the first two weeks in December, you instructed the nurses not to take orders from Osheroff, is there?

A Yes.

Q And you did not allow Osheroff to treat patients, that's true, also?

A As I recall, he wasn't there.

Q In fact, you knew his hospital privileges were actually suspended before he did?

A I am not sure I knew they were suspended. I knew they would be suspended if he started seeing patients, and I knew he hadn't started seeing patients. The actual suspension was up to Dr. Haut. All he wanted to know from me is when Dr. Osheroff was coming back, and that's all I told him. I didn't suspend Dr. Osheroff.

Q Page 82 of your January 3rd deposition in the other case:

"Question: When did you become aware Dr. Osheroff's privileges at Alexandria Hospital had been suspended?

"Answer: Dr. Haut informed me either the same day or within the same timeframe that he was suspended. I wasn't told Dr. Osheroff was suspended prior to him being notified.

No, let me take that statement back. Dr. Osheroff was in a suspended status. It was not told for

a while. He would have been told if he entered into the hospital to see patients. That is what I was told from Dr. Haut, that he would not invoke the suspension unless Dr. Osheroff saw patients in the hospital. Dr. Osheroff didn't see patients in the hospital for a long time period while he was back.

"Question: Were you informed of the suspension? Obviously, you were informed of it before Dr. Osheroff was.

"Answer: That's right."

Does that refresh your recollection?

A At this point, I don't remember Dr. Haut telling me that he had suspended Dr. Osheroff. I just remember making the telephone call to tell him what happened. That, I don't remember.

I can't disagree with what I said then, I can just tell you what I remember now.

Q Did you inform Osheroff of the full HSA meeting with regard to Prince William Dialysis Facility?

A That's the one that he asked me to go to.

Q You advised him not to go.

A I said it wouldn't be a good idea.

Q After that, did you advise him of the Network meeting?

A No.

Q And he was not aware of the Northeast Washington facility application, was he, as far as you know?

A Not from me, but Pat Shine was aware of all these applications, all these meetings, everyone at National Medical Care was aware. National Medical Care had representatives at the full board meeting and at the local meetings, so National Medical Care was totally aware, and he had free access through National Medical Care to all meetings and all discussions.

Q You said yesterday the only time you ever talked to him about coming back was at the Lobster Shed, do you recall that?

A No. There was another meeting in my office, as I remember there were two times.

Q At the meeting in your office, he told you that he wanted to come back, did he not?

A Yes.

Q When was that?

A I would say sometime in November.

Q Remember when I asked you before about the

application you were preparing for Northeast and Montgomery, you said you weren't sure you could get hold of him. He came into your own office and sat down with you saying I want to go back into practice, you could have told him then. I am setting up a Prince William facility, I am applying for a Northeast facility, and I am applying for a Montgomery facility; you didn't tell him any of those things.

A I could have told him that, and he could have told me he wants to talk about patients, about medical care, talk about a lot of things. He could have done a lot of things, and he never did.

Q You weren't in a mental institution.

A He was supposed to be rehabilitated.

Q You knew his wife had separated from him?

A Yes.

Q This was a man under great stress still, wasn't he?

A That's why I didn't want to press things.

Q As a doctor, you are supposed to be understanding of people's conditions, are you not?

A Yes.

Q Wasn't it incumbent upon you to take this man

who was under stress and tell him that you were doing these things?

A No. In my mind, I wasn't hiding it from him. I didn't think that was an appropriate thing to be talking about.

Q Regardless of your statement you weren't sure how to get hold of him, you didn't know where he lived, he came into your office and you could have told him anything you wanted.

A I could have reached him before, but those were not appropriate discussions at that time, in my mind.

Q Then why did you say you didn't know where he lived, that was an out and out lie, wasn't it?

A I didn't know where he lived.

Q You went to his house when he was so-called committing suicide, you knew where he lived then, didn't you?

A His house on Prince Street was being refurbished and he didn't live there.

Q Where did he live?

A I don't know. You tell me.

Q When he came into your office, you were the acting medical director, were you not?

A Yes.

Q When he came to you and said I want to come back into medical practice, you, as acting medical director, had some responsibility for that facility, did you not?

A I had a responsibility to the patients.

Q You had a responsibility as to who came in there and practiced medicine at that facility, did you not?

A Yes, that's what I was trying to maintain.

Q At that time, you didn't try to discuss with him any schedule of when he was coming back, did you?

A I thought he had already begun scheduling by reading the Washington Manual, by going into things. I had no idea what was going to happen December 12th. I didn't know whether we were talking about a couple of weeks or a couple of months. But at that point, he was doing the appropriate thing by starting to review. I didn't feel like I wanted to pressure him and put him on a schedule.

Q I would like to read you the following question and answer of January 8 on page 309 from your deposition to see if it will refresh your recollection on another matter.

"Question: When Dr. Osheroff was discharged from Silver Hill, did you make any contact with any of his psychiatrists or staff people to inquire about the discharge?

"Answer: No.

"Did you inquire of anyone at Chestnut Lodge with regard to that discharge?

"Answer: No.

"Did you call Dr. Dingman?

"Answer: No."

That answer was untrue, was it not?

A I called Dr. Dingman after he had left Silver Hill.

Q So your answer given in this deposition was untrue, was it not?

A That's right.

Q And it wasn't until you heard Dr. Dingman testify under oath that he in fact got such a call from you, that you changed your testimony, isn't that true?

A That's not ture. That may have slipped my mind during the deposition. I do remember at least two telephone calls.

Q You went to Dr. Dingman's deposition at Chestnut

Lodge and sat there and heard him testify?

A Yes, I did.

Q And prior to that time, you never sought to correct this incorrect testimony that you hadn't called Dr. Dingman, had you?

A I am not sure I read it at that point.

Q You didn't waive signature in your deposition, and you read that deposition, didn't you?

A Which deposition.

Q Your deposition of January 8th that I just read to you, you refused to waived your signature.

MR. PLEDGER: Your Honor, rather than let the mischaracterization go, he didn't refuse, I told him not to waive his signature, so it is not a question of his refusing. It is a question of my advice to my client.

Q And you thereafter read your deposition, didn't you?

A I glanced it over.

Q And Dr. Dingman's deposition was after you had received and read your deposition?

A Probably true.

Q You said on direct examination you did not

express to anyone your reservations about Ray's competence. You did, in fact, tell Pat Shine you had reservations about Ray's competence, did you not?

A Yes, I did, and she told me the same thing.

Q When you said on direct that you hadn't discussed it with anybody, that also was untrue, wasn't it?

THE COURT: He included several people, and I think she was one of the ones he included.

Q You expressed reservations about his medical competence to Hampers, also, did you not?

A Yes.

Q With regard to the letters from Eileen Collins and Pat Shine to Hampers, you may have seen them before they were sent, isn't that correct?

A I might have, I didn't know when they were sent.

Q You discussed Osheroff's competence with the medical community, did you not?

A The executive committee.

Q Is that what you mean by medical community?

A That's the only time I discussed his competence was at the executive committee.

Q You were asked at your deposition, page 369:

"Do you today have problems with Ray's medical competence?

"Answer: Yes.

"Question: Have you discussed that with members of the medical community?

"Answer: Yes."

Are you saying you meant by that answer it was just the members of the executive committee?

A Yes.

Q Was Dr. Goldberger on the executive committee?

A No.

Q Let me read you further without skipping:

"You don't discuss it with just anyone, do you?

"Answer: A select few.

"Any of them doctors?

"Dr. Tolkan.

"Anyone other than that?

"Dr. Goldberger."

So you discussed his medical competence with Dr. Goldberger.

A Yes, we discussed it together. He was coming to me, and I couldn't deny what was going on to him.

Q And you told Haut specific concerns you had about Dr. Osheroff, didn't you?

A Yes, he asked what was going on, and what

concerns I had, and I told him.

Q I had asked you before about a suspension, I will read you further testimony, page 382.

"But you did know before you were fired that he was suspended?

"That's my recollection.

"And you didn't tell him that he was suspended?

"No."

Does that further refresh your recollection that you knew he was suspended before you were fired?

A Again, I can't remember now if you had one and one is two. Dr. Haut told me he was going to be suspended if he was going to practice medicine, and I told him he was going to be practicing medicine.

Q Now, you said all you said to the patients was that they should make a choice between doctors, is that correct?

A Yes.

Q When you gave this form to the patients, you did it at that time because you were upset, isn't that correct?

A I can't say I wasn't upset.

Q Isn't that the reason you were doing it at that time?

A No. There is no relationship.

Q During the time you handed out these forms, you told the patients you were uncomfortable with Dr. Osheroff, didn't you?

A No. Only the patients who asked me why I had been fired and what was going on and questioned me, that's the response I gave. I was uncomfortable and I couldn't work with him.

But that was not a statement I made on rounds. I made no statement on rounds, except the statement I described, and the patients questioned me later that day or later the next day, and those were the comments I was making.

Q In the hearing before Judge Lewis, you recall testifying, do you not?

A Yes.

Q The Judge asked you this question, page 305:

"Why didn't you wait then and talk to them when they were in a normal condition?

"I was very upset."

Do you remember saying that?

A I was upset at Judge Lewis, not the patients. Let me explain why I chose that particular time if

that is what you are getting at.

Q The Court, page 304:

"Were they all on the machine?

"Most were on the machine. There were very few patients who came down and took the paper --

"The Court (Interposing) Did you not consider that to be highly unethical for a doctor to go around soliciting patients when they're under a machine, or in pain, watching their own blood go up and down, is that proper?

"The Witness: I think the patients should have a choice.

"The court: Is there anything in there, you gave them a choice while they were going through with this, is that right?

"The witness: They were aware of what they did and the nurses --

"The court: My, my, my, you did it while they were going? Why weren't you manly enough to wait until they had come off and walk around, and come talk to you, because they didn't, didn't they?

"The witness: That is right.

"Why didn't you wait and talk to them when

they were in a normal condition?

The witness: I was very upset."

That was your reply to Judge Lewis' questions.

A That's what I replied. However, the patients were not in a normal condition either before or after dialysis. There was no other time except on rounds which I believed to be the most consistent time to talk to patients.

I have had occasions in the past when I had talked to a patient before dialysis, who had been fluid overloaded, and they do not feel like talking before dialysis. They have a schedule to get on dialysis. After dialysis, they often feel terrible.

Q You had them coming down to your office after dialysis for prescriptions, didn't you?

A I didn't have them come down, they came down.

Q You could have done it then, couldn't you?

A I don't know how I could have reached all the patients that way.

Q Not only were you upset, but at the time you were giving this form to patients on the machine, they were upset, weren't they?

A That's right, and that was the tragedy of the

day. I had no other way of notifying those patients what happened, and that situation, to me, was created by your client.

Q You, in fact, informed some of these patients when you gave them the form to sign that Osheroff's privileges had been suspended, didn't you?

A No.

Q Pages 83 and 84 of your deposition in the other case.

"Have you talked to any of the patients at the Northern Virginia Dialysis Center about Dr. Osheroff's suspension of privileges at Alexandria Hospital?

"There might have been one or two patients who asked me specifically what happened if I get hospitalized, where do I go. A lot of patients asked me and continued to ask me what will I do if I need to go in the hospital. There might have been one or two patients that I made aware of the suspension, I can't remember specifically. Under no circumstances did I tell everyone. In fact, I could not say more than one or two people were aware of that from me."

Does that refresh your recollection?

A Yes, I can't ascribe to any more knowledge now than I had then.

Q At that point, it was common knowledge in the unit, the staff knew all about it, didn't they?

A I don't know.

Q You told technicians, also, who quit Osheroff that day that he was suspended from the hospital.

A I don't remember seeing the technicians that day when they came to the office.

Q Let me continue where I just left off:

"Answer: I might have told one or two patients, again, I can't give you names because I can't remember specifics, but if I told anyone, it was no more than one or two patients, but again, I can't remember telling anyone.

"Question: You now say you didn't tell anyone.

"I can't remember telling anyone specifically Dr. Osheroff was on suspension and you can't see him in the hospital.

"We are talking about patients now -- did you tell the staff of Northern Virginia Dialysis Center?

"I think I told a couple of staff members."

You said that under oath, didn't you?

A Yes.

Q Was it true?

A I can't remember.

Q Now.

A What's wrong with telling the truth?

Q Was it true when you said it then?

A I am talking about the suspension; again, I don't remember any more now than I did then.

Q You said unequivocally on direct examination you didn't tell anyone.

A I can't remember now I told them.

Q But you said then, in a deposition just a month after the event, I think I told a couple of staff members; so the likelihood is that you told a couple of staff members, isn't that correct?

A My recollection certainly would be better then than it is now.

Q And you thought then I probably told a couple of nurses, line 8.

"Question: Did you tell the technicians who worked at Alexandria Hospital that he had been suspended?

"Answer: I don't recall telling any technicians.

"You don't?

"Answer: No, I probably told a couple of nurses.

"You don't recall discussing it with Claudia Brown or John Doyle?

"I might have discussed it with them. When you say technicians, the reason I think of them is because they are not in the chronic unit, they were acute technicians."

So according to this, you might have discussed it with them, is that correct?

A That's right.

Q In fact, those are two of the three technicians who worked in the hospital for Dr. Osheroff and who quit immediately upon the firing.

A That's right. Again, let me explain a couple of points. This was just talking about Alexandria Hospital. He still had privileges at eight other hospitals.

Q Those technicians worked at Alexandria Hospital.

A They worked everywhere.

Q But they worked at Alexandria primarily, did they not?

A Yes, and Dr. Osheroff had the opportunity of hiring someone or asking someone to see patients for him at Alexandria Hospital, or to see his patients at Alexandria Hospital.

Q You told the patients you were uncomfortable with Dr. Osheroff, did you not, when you passed out this form?

A No, I did not. If they asked why have you been fired, what was the reason, I told them the reason was that I was uncomfortable and I couldn't work with him, that was it. If they didn't ask, and most didn't, I didn't say anything.

Q Now you have said you don't recall at this time telling staff people about him losing his privileges at the hospital, although you said it a month after.

I would like to refer you to your deposition of January 8, 1981, a year after the event. Do you recall discussing with staff members as to whether or not he had privileges?

A At what time, after December 12th?

Q Yes, on or after December 12th.

A At this point, I don't remember that.

Q Did staff members and patients come to you

with a multitude of rumors regarding his privileges?

A Yes, they did.

Q At that time, didn't you tell some of the staff members that he had lost his privileges?

A Again, I can't remember. I found it very difficult to lie to people. If a staff member had said has he lost privileges, I would have said yes.

Q Who is Jeanne Rawles?

A One of the technicians.

Q Did you ever instruct her not to do dialysis for Dr. Osheroff?

A Yes, she was working for us, and did a treatment for Dr. Osheroff when she was in our employ.

Q You knew Martha Hall was contacting patients, did you not?

A After she was contacting them, yes.

Q Did you give her any instructions with regard to that?

A When I found out she was contacting the patients, I told her to make sure she was careful in telling the patients they had a choice of either way to go.

Q You didn't try to stop her in any way from contacting patients, did you?

A I believe she had made most of the calls, but I didn't tell her not to make calls.

MR. HIRSCHKOP: No further questions.

REDIRECT EXAMINATION

BY MR. PLEDGER:

Q You began having thoughts about a facility in Woodbridge, Virginia, was it your intent at that time to set up some type of competing facility?

A No.

Q You have been asked at great length about why you did not tell Dr. Osheroff about Prince William, why you did not tell him about the various meetings on the application, would you explain to the Court what you were thinking at that period of time with respect to the Prince William application, and how Dr. Osheroff fit into it, if he did?

A In my view, he did not fit into it at all, because of his contract with National Medical Care which precluded him from going into that area. The people I thought had direct involvement were the owners of his unit, National Medical Care, and those are the people that I made aware of everything that was going on. Every meeting Pate Shine was aware of, and

facility in Manassas. Actually, it was Dr. Hampers who had signed the application, so it was a National Medical Care application.

Q Would you explain to the Court what you saw as Dr. Osheroff's potential role in the Prince William facility, if and when he came back from psychiatric care?

A If and when he came back from psychiatric care, I was assuming that he would come back as a practicing nephrologist and be in the practice, and we would be able somehow to work the Prince William County unit into our practice; in other words, that would be my contribution to the practice.

One of the things that had to be worked out was a waiver for the Georgetown group to waive their rights to Prince William County in order to bring the Prince William Dialysis unit into the practice. I felt if I had the provider number, they would be willing to do that, in just the same way they had given Dr. Osheroff a waiver to have his unit in Alexandria.

The whole Northern Virginia area was promised to this Georgetown group by National Medical Care, and Dr. Osheroff was given a waiver by the Georgetown

group to have his Northern Virginia Dialysis Center. I felt the same mechanism could come into effect, but I couldn't wait because other people were already preparing applications. I had no choice.

Q As to the last conversation you had with Dr. Hampers with respect to this Prince William application, did you understand that he was still considering whether that was a possibility of adding that to the National Medical Care group?

A As far as I know that remained a possibility throughout. That is one of the reaons I was a little unclear initially about the status of open or closed, because if it were going to be somehow related to National Medical Care that was an area I was unclear about, however, I did specifically open the unit at the board meeting in Manassas.

Q When Dr. Osheroff returned from Silver Hill in the fall of 1979, did you consider him to be ready to return to the active practice of nephrology?

A Not at all.

Q Would you explain to the Court why you didn't consider him to be ready to return?

A Many of the same characteristics that I had

* * *

Loudon County where there was need for a dialysis unit.

Q On cross examination, you also stated that the names of people who came from certain areas were part of the public knowledge. Would you explain to the Court what you mean by that?

A Required by regulation is the fact that every dialysis unit has to supply the Renal Network with information of patients' names and localities from which they derive their statistics regarding need and service areas.

So that all one needs to do is call up the renal network to find out how many patients on dialysis live in a specific area, and they will give you the addresses and zip codes. I don't know whether they give names or initials, but they have the addresses and zip codes.

Q Were you aware of that fact at the time your application was being prepared by Mr. Long?

A Yes.

Q Did there come a time when you were requested by one of the government agencies that was reviewing your application to supply the names and addresses

* * *

Q Do you recall your conversation with Mr. Westerman as to what input he put into the preparation of that document?

A Just in general that he was concerned there was no acting medical director in an official way, and he wanted a document to verify it.

Q Did Mr. Westerman tell you as to what might occur if there were no medical director appointed in the absence of Dr. Osheroff?

A I can't remember him telling me. I do know that there was a concern that the --

MR. HIRSCHKOP: Objection. The question was only what he told him.

Q Do you recall Mr. Westerman's testimony before this Court that he was concerned that National Medical Care would appoint a director?

A Yes.

Q Do you remember that as a part of your conversation with him?

A I don't remember him saying that to me. I do know that he was extremely concerned about having a director. Again, that feeling I had was that he wanted a medical director, but I don't remember him

telling me specifically that statement.

Q Do you remember him telling you, as he testified in this Court, that he felt it was a necessary thing to protect Dr. Osheroff?

A Yes, I do remember concern about Dr. Osheroff and wanting to protect his interests.

Q When you went out to see Dr. Osheroff in Chestnut Lodge with this letter that would appoint you as the acting medical director, did Mr. Westerman know that is what you were going to do?

A Oh, yes.

Q Did he feel that was an appropriate thing for -- Did he ask you not to go out there and have him sign it?

A No, he was aware of me doing it, that's how it had to be signed.

Q There came a time when there was a second letter dealing with this subject or a letter from National Medical Care asking for clarification of your relationship with Dr. Osheroff, did there not?

A I am a little confused. The letter that I am talking about is the one in which I state I am associated in practice, pursuant to your request letter.

Q I show you what has been admitted as Plaintiff's

number five, were you aware of that letter prior to the time you were fired?

A I believe I was.

Q Was this letter brought up in your conversation with Mr. Westerman with respect to your being appointed as the acting medical director?

A Yes.

Q Did he tell you that he had a telephone conversation with National Medical Care in which he had requested your appointment?

A I believe he did.

Q You have read Dr. Hampers' deposition, have you not, which has been offered into evidence in this case?

A Yes.

Q Do you recall Dr. Hampers testifying that he wanted the letter, which is Exhibit No. 8, signed in order to officialy appoint you as the acting medical director?

A Yes, that is correct.

Q Did Dr. Hampers tell you that it was necessary for you to get this letter in order to carry out Mr. Westerman's request that you be appointed?

* * *

particular shift that he was doing. However, there were occasions when some of his patients were on other shifts because of transportation limitations, and there were times when he couldn't see his patients.

Q I show you what has been marked as Plaintiff's Exhibit No. 13, a memorandum to the file that Mr. Westerman has testified to. You were asked whether you told him, at that time, your reasons for putting the application in your name, and as to whether Mr. Westerman's memo to that effect was correct, and you said it was not.

Would you tell the Court what your recollection of that telephone conversation, on or about July 26, 1979, with Mr. Westerman was?

A He called me to verify that I was putting in an application for a Prince William County unit, and I told him that I was. He told me that it should be for Dr. Osheroff. I told him that under Dr. Osheroff's contract with National Medical Care, Dr. Osheroff could not have a unit in Prince William County, nor t he profits from Prince William County.

Q Did he respond to that, when you said that?

A His response was he wanted to send me a letter

for me to say it was somehow related to Dr. Osheroff and wanted me to sign it.

Q Did he tell you that you were misinterpreting the contract between Dr. Osheroff and National Medical Care when you said he could not go into that area?

MR. HIRSCHKOP: Objection. He's still his witness, he cannot put words in his mouth. All he can ask is what he said in the conversation.

Q What did he say in that conversation with respect to the statement you made that Dr. Osheroff could not go into Prince William County?

A He didn't deny that that was a fact. He wanted me still to sign a statement that it was related to Dr. Osheroff, and I told him that I couldn't because it wasn't.

Q Did you tell him that you had discussed it as of that time with Dr. Hampers?

A No, I didn't tell him that.

Q Did he ask you to put in writing that you had obtained a waiver from National Medical Care?

Q He never mentioned anything about a waiver, that I recall.

Q Did you tell him, as he has incorporated in

this memorandum --

MR. HIRSCHKOP: Your Honor, did you tell him is really leading, this is his own witness.

MR. PLEDGER: I wanted to ask him this statement that is contained in the memorandum.

THE COURT: You may ask him whether or not he made the statement contained in the memorandum.

Q At the end of the second paragraph of Exhibit 13: "I asked Bob whether he considered the filing to be on behalf of Ray, and he responded immediately that the filing would belong to Ray." Did you tell him this filing would belong to Ray?

A Absolutely not.

Q The next sentence states: "Since he (Bob) was an employee of Ray's, I asked Bob to confirm in writing the substance of his conversation with Gus Hampers so as to establish NMC's waiver with respect to the Woodbridge area, and to confirm in writing that the application would belong to Ray." Did he ask you to do that?

A No. The first time I heard the word waiver was during Mr. Westerman's deposition.

Q He concludes by stating : "Bob agreed to do thi

indicating that copies of letters would be prepared and mailed within the next several days." Did you ever prepare a letter stating that National Medical Care had waived, and that the application would belong to Ray?

A I never prepared a letter and I never agreed to prepare a letter.

Q Did Mr. Westerman ever contact you again, following up what he has said you were going to do in this memorandum that he put in his file?

A No.

Q At the meeting on August 21st, when Mr. Bader was present, Mr. Evans was present, you, Mr. Rubin and Mr. Westerman, did Mr. Westerman ever tell you that what he was proposing to sell to you on behalf of Dr. Osheroff would include the Prince William application?

A The Prince William application never came up.

MR. PLEDGER: I have nothing further.

RECROSS EXAMINATION

BY MR. HIRSCHKOP:

Q Dr. Strauch, when he went to these meetings, he was a competitor of Ray Osheroff, was he not?

A In one sense, yes; in one sense, no.

Q You have previously testified that he came to you in early '79 and talked to you about leaving Ray, haven't you?

A He came to me shortly after I came to Virginia in 1978.

Q Do you deny that he came and talked to you after Ray went in the hospital?

A I can't remember a second time; I remember a first time.

Q Do you recall Dr. Tolkan testifying that Dr. Strauch talked to him shortly after Ray went to the hospital about joining them, and he said well, I am working out a contract so Strauch wouldn't bother him anymore; do you recall that?

A Yes.

Q Then he came to you right after that, does that refresh your recollection?

A I really don't remember him coming to me after that. I remember the dinner they invited me to.

Q You testified, did you not, sir, that the reason you had to move on Prince William back in early '79 was that the Bethesda group were going to move

down to Manassas and take the territory if you didn't get it; do you remember that?

A Yes, I was concerned about another facility.

Q As competitors?

A That's right.

Q So when he appeared at these meetings, how could he represent the interests of Northern Virginia Dialysis Center since he was there as a competitor?

A He represented the interests of National Medical Care that owned the Northern Virginia Dialysis Center.

Q You said that you were requested to supply names to the federal government in March of 1980, but you heard Martha Hall testify that she called these patients based on knowledge that she had gotten of these patients in the three and a half years she had worked for Dr. Osheroff, didn't you?

A I heard that, yes.

Q When she called those patients, she was your agent, was she not?

A Yes.

Q You said you didn't use anything but public record information in the application , but the

curriculum vitae of these people who worked for NVDC and worked for Ray, they were not public records, were they?

A No.

Q And the knowledge of whether the unit would expand or not expand, and the effect on the unit, that was not public record, was it?

A It was not public record, though that information was requested by planning agencies.

Q Ray Osheroff's contract wasn't public record either, was it?

A I don't think so. When you say public record, I would guess it's not.

Q When you got his contract from Ray, you got it in light of your private employment relationship with him, isn't that correct?

A That's right, he gave it to me.

Q Now, you say you never told Pat Shine that Ray couldn't make rounds or wasn't allowed in the unit, you told her, when he had asked Tolkan to make rounds, you told her and the nurses, and you stated this in your sworn deposition, he is not allowed to make rounds, Dr. Hampers said so, didn't you?

A That's what I said, I just said ten minutes ago that Pat Shine was aware of that fact, of the instructions that Dr. Hampers had given me.

Q When you say you didn't need all these letters of support, they really weren't necessary, you wrote the patients on August 7, 1979, over your own signature, calling yourself acting medical director, and saying in order to be approved for this unit, we need community support, didn't you?

MR.PLEDG ER: I would suggest that is objectionable as being beyond the extent of redirect.

MR. HIRSCHKOP: He said he didn't need the letters.

MR. PLEDGER: The question now is whether he wrote the patients.

THE COURT: If he didn't think he needed the letters, why did he write the patients.

MR. PLEDGER: I am not sure there are any patient letters in there.

MR. HIRSCHKOP: Let me read the exact line to clear up the objection, your Honor.

Q In order to be approved for this unit, we need community support. He didn't limit it to patients.

You wrote that to your patients, did you not?

A That we needed community support?

Q Yes.

A Yes.

Q Was that a lie?

A Again, I was a novice at the whole situation, and my feeling then was we needed as much support as we could get. After looking at the situation later on and in conversations with people who knew more of what they were doing, as it turned out, we probably didn't.

Q In the same memo, you told the patients "This unit would be staffed by some of the same nurses and technicians now at NVDC as well as by the same physicians." That is what you told the patients back in August of 1979.

A Yes, I was under the impression that it would be worked out. I was represented that by the defendant.

Q One further thing with regard to Mr. Westerman's memo. Are you saying that this partner in a major law firm fabricated a memo of a conversation with you?

A Absolutely.

Q He has no financial stake in the outcome of thi

litigation, does he?

A He has a close relationship with Dr. Osheroff as an employee.

Q You say he is an employee of Dr. Osheroff?

A Yes.

Q But you didn't make a memo of any of these so-called conversations that you had, did you?

A I don't believe I have ever made a memo of any conversation.

Q You didn't bother writing letters to Osheroff, to Westerman, or to Hampers to confirm or set straight any of these things, did you?

A No, I still don't do that now.

MR. HIRSCHKOP: No further questions.

THE COURT: Any re-redirect?

MR. PLEDGER: No, your Honor.

THE COURT: Thank you, Doctor, you may step down.

MR. HIRSCHKOP: We would like to put on the records clerk to authenticate some records.

MR. PLEDGER: Your Honor, I am willing to, based on my conversations, to stipulate the young lady will say that she received those forms, that she made

* * *

A No, he didn't.

Q When you left the building on the evening of December 12, 1979, what did you understand to be the next step that would be taken?

A Well, the way it was left on the evening of the 12th was that Dr. Greenspan and Dr. Tolkan were barred from the unit.

Q Did you become aware of the fact that Dr. Greenspan and Dr. Tolkan had continued to go onto the dialysis unit?

A Yes.

Q Would you tell the Court how you became aware of that?

A I had spoken with Dr. Greenspan about it.

Q Did there come a time when you advised them with respect to that?

A Yes.

Q When did that happen?

A Two or three days later, two or three days after December 12th, to the best of my recollection. It depends on what day of the week December 12th was, but certainly two or three working days beyond that.

Q What did you advise them at that time?

A I only spoke with Dr. Greenspan, and I advised him not to go back in the unit.

Q Why did you tell him that?

A I had been told that if he went back in the unit again, he would be arrested.

Q Who told you that?

A Mr. McFeeley, general counsel of BMA.

Q With respect to the Prince William Facility, did you ever hear any statements made publicly with respect to the ownership of that facility?

A Yes.

MR. FUDELLA: Objection, that is hearsay. He is going to testify now to what he heard at a meeting.

THE COURT: If it were being offered to prove the true ownership of it, I would agree, but you have offered evidence as to what representations were made by Dr. Greenspan to the agencies and to the various governing bodies from whom he sought support. It seems to me if other representations were made, they are entitled to show that.

MR. FUDELLA: Your Honor, I believe we have gone about it in the proper way, eliciting it from the witness who made the statements and by showing the public

* * *

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

RAPHAEL J. OSHEROFF, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	IN CHANCERY NO. 11345
ROBERT GREENSPAN, M.D., et al.,	)	
Defendants.	)	

PLAINTIFFS' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

I. Findings

1. Dr. Raphael Osheroff, a board certified nephrologist, opened a nephrology practice in Northern Virginia in March of 1972, consisting of an office practice and a dialysis center in Alexandria which Dr. Osheroff had originally begun by supplying in-hospital dialysis to patients in the Northern Virginia area. The process of dialysis is necessary to sustain the lives of persons with end stage renal disease, and is an integral part of a nephrology practice. The process involves the filtering of the blood through an artificial kidney to remove toxins from the blood and to remove excess fluids from the blood and from body tissues. (Maitland test., tr. pp. 802-803). In 1977, Dr. Osheroff's dialysis center had approximately 85 patients and was very successful. (Osheroff test., tr. pp. 215-16, 217-25).

2. By 1977 Doctor Osheroff was operating the Northern Virginia Dialysis Center in Alexandria and a second dialysis

facility in Fredericksburg, Virginia. He also owned at that time, a license or Certificate of Need to open a third facility in Warrenton, Virginia. (Osheroff test., tr. pp. 227-231; Pl. Ex. 1).

3. On October 1, 1977, Raphael J. Osheroff, M.D. entered into a Consulting and Profit-Sharing Agreement with National Medical Care, Inc. (Pl. Ex. 1, p. 793). The terms of this agreement were effective until September 30, 1987, and subject to renewal at that time (Pl. Ex. 1, p. 795). National Medical Care is a private corporation and the largest provider of out-of-hospital dialysis services in the country (Hampers depo., p. 7).

4. Pursuant to this agreement, National Medical Care purchased Dr. Osheroff's dialysis center in Alexandria, Virginia, his center in Fredericksburg, Virginia and his Certificate of Need for a facility in Warrenton, Virginia. National Medical Care retained Dr. Osheroff as Medical Director of these facilities. (Pl. Ex. 1, p. 795).

5. As compensation for the medical directorship, Dr. Osheroff received 40% of the net income after taxes of the income generated by these centers. (Pl. Ex. 1, p. 796).

6. Further, pursuant to the Consulting and Profit Sharing Agreement, Dr. Osheroff retained the exclusive right to payment of physicians' services rendered to patients in the dialysis center and the exclusive right to choose the physicians who practiced in the centers. (Pl. Ex. 1, p. 795)

7. After the sale of the dialysis centers to National Medical Care, Inc., Dr. Osheroff incorporated his practice as

Raphael J. Osheroff, M.D., Inc. He continued his office nephrology practice, ran the Northern Virginia Dialysis Center, and did renal consults in Northern Virginia hospitals. (Smith test., tr. pp. 866-67).

Greenspan and Tolkan

8. In June of 1978, Dr. Osheroff hired Dr. Robert Greenspan as an employee of Osheroff, Inc. to assist Dr. Osheroff in his medical practice. Dr. Greenspan was hired at a salary of $50,000 with an understanding that he would become a partner in two years. (Osheroff test., tr. pp. 232-235; Westerman test., tr. p. 654).

9. At the time Dr. Greenspan joined the practice in 1978, he had had no prior experience in the private practice of nephrology and had just finished his residency (Tolkan test., tr. p. 1905).

10. Shortly after Dr. Greenspan was hired, Dr. Steven Tolkan, a board-certified nephrologist, joined the practice in mid-1978 with the understanding that he would be a salaried employee of Osheroff, Inc. with no promise of a partnership. His salary was $45,000. (Tolkan test., tr. pp. 1748-1749, 1823). Dr. Tolkan, at that time, had also just finished his residency. (Tolkan test., tr. p. 1905).

11. Prior to accepting employment with Dr. Osheroff, Dr. Tolkan spoke with Dr. Greenspan who told Tolkan that Osheroff had a good reputation. (Tolkan test., tr. p. 1833). At the time Greenspan and Tolkan joined the practice in mid-1978, Dr.

Osheroff was getting most of the nephrology referrals in the Alexandria area. (Greenspan test., tr. p. 2479).

12. At the time Dr. Greenspan was hired, his wife, Bonnie Greenspan, R.N., was employed by Osheroff, Inc. as the in-hospital coordinator for dialysis services. (B. Greenspan test., tr. p. 2253).

13. Dr. Chanthawanich and Dr. Goldberger were also nephrologists working for the practice in 1978, doing rounds in the dialysis center on a limited basis. (Osheroff test., tr. pp. 240-251; Greenspan test., tr. pp. 2456-57). At that time, there were more than enough doctors to handle the practice. (Greenspan test., tr. pp. 2456-57).

14. From mid-1978 through December 1978, the practice was divided among Drs. Tolkan, Greenspan and Osheroff as follows: Dr. Tolkan covered the outlying hospitals such as Prince William and Potomac, and Dr. Osheroff and Dr. Greenspan covered Alexandria Hospital and the office patients. (Smith test., tr. p.4; Osheroff test., tr. pp. 469-70).

15. At the time Dr. Greenspan joined the practice, he was offered a written contract of employment which contained, among other provisions, a covenant not to compete and a covenant not to use confidential information, such as patient lists, for his own benefit. (Pl. Ex. 3, pp. 244, 246). Although Dr. Greenspan never signed this contract, it was clear to Dr. Greenspan that Osheroff and his attorney, Arnold Westerman, were interested in a non-competitive arrangement with Dr. Greenspan. (Greenspan test., tr. p. 2461; Westerman test., tr. pp. 654-55).

16. During employment negotiations, Arnold Westerman, Osheroff's attorney, provided information to Dr. Greenspan and his attorney, Larry Rubin, concerning Dr. Osheroff's contractual arrangment with NMC. Mr. Westerman sent to Mr. Rubin the confidential contract between Osheroff and NMC, the Consulting and Profit-Sharing Agreement, as well as a financial statement prepared by Frank Notaris for Osheroff's professional corporation. (Westerman test., tr. pp. 656-57; Pl. Ex. 4; Greenspan test., tr. p. 2345).

Osheroff's Depression

17. During the summer and fall of 1978, Dr. Osheroff became severely depressed. The depression was precipitated by the departure to Europe of his two young children from a former marriage and the sale of his dialysis centers to NMC. (Dot Smith test., tr. p. 865; Osheroff test., tr. pp. 246-48).

18. As his depression deepened, Dr. Osheroff gradually withdrew from the practice of medicine. During the fall of 1978 he did continue to see patients in the hospitals, in the dialysis center, and in his office, but he increasingly did less and less work in the practice. (Osheroff test., tr. pp. 246-49; Dot Smith test., tr. p. 867).

19. During the fall of 1978, Dr. Osheroff saw several psychiatrists in an effort to end his depression. He consulted with Dr. Wellhouse, a psychiatrist, Dr. Nathan Kline, Dr. Ralph Moore, and Dr. Frank Board. (Osheroff test., tr. pp. 588-92). Dr. Greenspan knew that Dr. Osheroff was seeking this treatment, and in fact, accompanied Dr. Osheroff on several occasions in his

sessions with Dr. Wellhouse. (Osheroff test., tr. pp. 254-255). Both Dr. Greenspan and Dr. Tolkan knew at that time that Dr. Osheroff was suffering from a serious depression. (Greenspan test., tr. p. 2465; Tolkan test., tr. pp. 1762, 1835-37)

20. During the fall of 1978 Dr. Greenspan encouraged Dr. Osheroff on numerous occasions to hospitalize himself. (Osheroff test., tr. p. 258). Even after Dr. Osheroff had consulted with Dr. Moore and informed Dr. Greenspan of Dr. Moore's proposed out-patient treatment with anti-depressant medication, Dr. Greenspan still insisted that Osheroff enter a hospital. Greenspan stated that he would take care of the practice in Osheroff's absence and that if Osheroff did not go to the hospital he would leave. (Osheroff test., tr. pp. 260-62; Westerman test., tr. p. 658; Greenspan test., tr. pp. 2474-75).

21. Dr. Greenspan was Dr. Osheroff's major confidant during the fall and early winter of 1978. (Greenspan test., tr. pp. 2467-68). Dr. Osheroff was a constant visitor in the Greenspan home during that period of time, and he discussed with Dr. Greenspan and his wife Bonnie Greenspan the intimate details of his personal problems and his depression. Dr. Osheroff trusted and relied on Dr. Greenspan's support at that time. (B. Greenspan test., tr. p. 2254; Osheroff test., tr. pp. 261-62).

22. During this period Dr. Greenspan continually as-
ed Dr. Osheroff and his representatives that he could maintain
edical practice until Dr. Osheroff recovered from his depres-
Dr. Greenspan made this representation to Dr. Osheroff,
rneys Arnold Westerman and Martin Gannon, to his account-

ant Frank Notaris and to Dr. Tolkan. (Greenspan test., tr. pp. 2599, 2476-77, 2460; Answer to Complaint).

23. Dr. Greenspan discussed this commitment with Dr. Tolkan, who also agreed to maintain the practice until Osheroff's return from hospitalization. (Greenspan test., tr. pp. 2606-07; Answer to Bill of Complaint).

24. At the time Dr. Greenspan made this commitment to maintain Dr. Osheroff's practice, he sought the advice of his attorney, Lawrence Rubin, regarding the duties and obligations demanded by this commitment. (Greenspan test., tr. pp. 2607-08).

Chestnut Lodge

25. On January 2, 1979, Dr. Osheroff voluntarily committed himself to Chestnut Lodge, a private psychiatric facility in Rockville, Maryland, for treatment of his depression. Dr. Greenspan, along with Dr. Osheroff's step father, Louis Bader, drove Dr. Osheroff to the hospital, and during the drive, Dr. Greenspan assured Dr. Osheroff several times that he would take care of the medical practice while Osheroff was away. (Bader test., tr. pp. 168-69).

26. Chestnut Lodge is a private psychiatric facility specializing in the use of psychoanalysis for the long-term treatment of schizophrenia and other psychotic conditions. Chestnut Lodge does not treat depression with medication. (Osheroff test., tr. pp. 311-13).

27. Dr. Osheroff was admitted to Chestnut Lodge with a diagnosis of a severe depression of nonpsychotic proportions. (Dingman depo., p. 25).

28. On the day of Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan discussed with the hospital personnel the course and proposed length of treatment for Dr. Osheroff, which he initially understood to be approximately six to twelve months. Later, Dr. Greenspan concluded that the treatment would be more than a year. (Greenspan test., tr. pp. 2599-2600).

29. An informal understanding was reached between Dr. Greenspan and the Chestnut Lodge personnel that Dr. Greenspan would be kept informed of Dr. Osheroff's progress as if Dr. Greenspan were a member of Dr. Osheroff's family. (Dingman depo. pp.14-15).

30. Within a day or two of Dr. Osheroff's entrance into Chestnut Lodge, Mr. Westerman arranged a meeting with Dr. Greenspan, Frank Notaris, and Dr. Joy Osheroff to discuss the operation of Dr. Osheroff's business in his absence. At that meeting, Drs. Greenspan and Joy Osheroff informed Westerman that they had made a study of the hospitals and found Chestnut Lodge to be a good facility for Dr. Osheroff because it would enable him to maintain contact with his business and friends in the Washington area. (Westerman test., tr. p. 660).

31. Following the meeting among Mr. Westerman, Mr. Notaris, Joy Osheroff, and Dr. Greenspan, it was agreed that all medical decisions would be handled by Dr. Greenspan. Dr. Greenspan agreed to assume the medical aspects of the business and told Mr. Westerman that he intended to act as a trustee and fiduciary for Dr. Osheroff in Osheroff's absence. (Westerman test., tr. pp. 661-62; Greenspan test., tr. pp. 2371-72, 2376).

It was also agreed at this meeting that Dr. Osheroff's financial affairs would be handled by Frank Notaris and several trusted employees of Dr. Osheroff's, including Dottie Smith and Kay Mills. (Westerman test., tr. p. 664).

32. While at Chestnut Lodge, Dr. Osheroff's phone calls were unlimited for a period of six weeks. Following that period, he was only allowed one call a week from Dr. Greenspan and one call from his parents. Greenspan's calls were for the purpose of informing Dr. Osheroff on the status of the practice. (Osheroff test., tr. pp. 276-78).

33. At some point during the first half of 1979, Dr. Greenspan was responsible for the curtailment of Dr. Osheroff's phone privileges at Chestnut Lodge. Mr. Westerman had difficulty communicating with Dr. Osheroff because his phone privileges had been removed. (Westerman test., tr. pp. 666-667).

34. On two occasions, Dottie Smith attempted to visit Dr. Osheroff at Chestnut Lodge to bring him clothes and visit him on his birthday, but she was not permitted to see him. (Dot Smith test., tr. p. 9).

35. In the ten month period that Osheroff was hospitalized, the only person in the dialysis unit and medical practice who knew anything about Osheroff's mental condition was Dr. Greenspan. (Greenspan test., tr. p. 2544; Smith test. tr. p. 11).

36. During Dr. Osheroff's stay at Chestnut Lodge, Dottie Smith tried to call him several times but was not permitted to speak to him. Dottie Smith did speak to Dr. Osheroff

on those occasions when Dr. Osheroff called the office, but she was never able to place a call to Dr. Osheroff at Chestnut Lodge during his confinement in that institution. (Smith test., tr. pp. 8-9).

37. Dr. Greenspan contacted Dr. Osheroff once a week on Sunday. Sometimes Dr. Greenspan would discuss with Dottie Smith the conversations he had with Dr. Osheroff, at which time Dr. Greenspan told her that Dr. Osheroff was progressing well. (Smith test., tr. pp. 10-11).

38. During the meeting among Westerman, Notaris, Greenspan and Joy Osheroff held shortly after Dr. Osheroff entered Chestnut Lodge, it was indicated to Dr. Greenspan that if any sale of the practice were to take place, Greenspan would receive first opportunity to buy it; however both Westerman and Notaris felt at that time that the proper thing to do would be to wait and see whether Osheroff would improve. (Notaris test., tr. p. 11). During Dr. Osheroff's absence, Frank Notaris made constant and frequent visits to Dr. Osheroff's office in order to ascertain how the practice was doing. During these visits, Notaris spoke frequently with Dr. Greenspan. (Notaris test., tr. pp. 8-10).

39. During the first two to three months of 1979, Dr. Greenspan was pressing Notaris for numbers concerning the sale of the practice. The impression that Notaris got from Greenspan at that time was that Greenspan had concluded that Dr. Osheroff was not going to get well. Greenspan led Notaris to believe that Osheroff was not going to be able to return to the Center a well

man and therefore a sale should be discussed and that they should start talking about numbers in terms of an agreement. (Notaris test., tr. pp. 1282-83).

40. During Dr. Osheroff's confinement at Chestnut Lodge, he received no medication for his depression and his physical and mental state deteriorated. (Osheroff test., tr. pp. 278-96).

41. During Dr. Osheroff's confinement at Chestnut Lodge, he spoke to Dr. Greenspan on the phone and asked him to help him get out. (Osheroff test., tr. p. 294). Greenspan was Osheroff's only link to the outside world during Osheroff's confinement at Chestnut Lodge, especially after his phone calls were limited. (Osheroff test., tr. p. 296).

42. Although Osheroff told Greenspan about the conditions at Chestnut Lodge, Greenspan told Dr. Osheroff that Chestnut Lodge would make him happy, promised to continue to take care of Osheroff's interests and to keep him abreast of the practice through the Sunday evening phone calls. (Osheroff test., tr. pp. 297-99).

43. After Dr. Osheroff left the practice for Chestnut Lodge, Dr. Greenspan instructed Dottie Smith to designate for his care all the referrals and all the new patients in the Alexandria area. (Dot Smith test., tr. pp. 1000, 11-12).

44. After Dr. Osheroff entered Chestnut Lodge, Dr. Greenspan told Dottie Smith that he would see all new patients and renal consults that came into the office, and that Dr. Tolkan would continue to see all the new patients in the outbound hospitals. (Dot Smith test., tr. pp. 1004-06).

45. Following Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan authorized a raise of $20,000 for Dr. Tolkan. (Tolkan test., tr. p. 1823).

46. Shortly after Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan's salary was raised from $50,000 to $100,000 Greenspan never discussed this raise with Dr. Osheroff. (Osheroff test., tr. pp. 273-74, 300; Greenspan test., tr. p. 2608).

47. After Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan arranged a $4,000 raise for Mabel Lowrey, a secretary in Dr. Osheroff's office. (Dot Smith test., tr. p. 14).

48. After Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan hired Peggy Hess as head nurse of NVDC. Ms. Hess was a friend of Bonnie Greenspan's and in February of 1979, Dr. Greenspan called Ms. Hess to invite her to interview for the position of head nurse. Ms. Hess accepted the position in March, 1979 and began work at NVDC on April 10, 1979. (Hess test., tr. pp. 1651-1655).

Greenspan - Acting Medical Director

49. In March of 1979, Dr. Greenspan contacted Dr. Osheroff's attorney, Mr. Westerman, seeking to have himself officially associated in the practice of medicine with Dr. Osheroff. (Westerman test., tr. pp . 650-51).

50. As a result of his conversation with Mr. Westerman, Dr. Greenspan dictated a letter indicating that he was formally "associated" in the practice of medicine with Dr. Osheroff. (Pl. Ex. 8). Greenspan personally carried the letter to Dr. Osheroff

in Chestnut Lodge on March 23, 1979, and obtained Dr. Osheroff's signature. (Greenspan test., tr. pp. 2609-10).

51. Pursuant to the March 23, 1979 letter to Dr. Hampers (Pl. Ex. 8), Dr. Greenspan was given the rights provided in Section 14 of Dr. Osheroff's contract with NMC, (Pl. Ex. 1); i.e.; that in the event of Dr. Osheroff's disability, Dr. Greenspan would have the right to obtain the practice and renegotiate with NMC to provide exclusive medical services at the dialysis unit. (Westerman test., tr. p. 652; Greenspan test., tr. pp. 2613-14).

52. "Disability" under Dr. Osheroff's contract with NMC was defined as the continuing inability for a period of twelve months of Dr. Osheroff to perform his duties under the contract by reason of physical or mental impairment. (Pl. Ex. 1, p. 796).

53. On or about March 9, 1979, Dr. Robert Greenspan was formally appointed Acting Medical Director of the Northern Virginia Dialysis Center and the Fredericksburg Dialysis Center. This appointment was formally acknowledged by Constantine L. Hampers, M.D., Chairman of the Board of NMC on March 29, 1979. (Pl. Ex. 5).

54. During Osheroff's hospitalization at Chestnut Lodge, Dr. Greenspan visited three times, the last time to enable Osheroff to sign Pl. Ex. 8, associating Greenspan with the practice. (Osheroff test., tr. pp. 262-63).

55. After Greenspan met with Osheroff at Chestnut Lodge to obtain Dr. Osheroff's signature on Pl. Ex. 8, and after he had received a $50,000 raise, Greenspan's visits to Chestnut Lodge stopped. (Osheroff test., tr. p. 299-300).

NVDC Bylaws

56. On March 19, 1979, Dr. Robert Greenspan promulgated bylaws for the medical staff of the NVDC. (Pl. Ex. 6). These bylaws specifically provided that "membership in the medical staff shall usually be granted to a physician who offers evidence that he or she is a member of the staff of the George Washington University Medical Center." (Pl. Ex. 6, p. 1602). This provision was directly contrary to Dr. Osheroff's contract with NMC, as, under that contract, Dr. Osheroff retained the exclusive right to admit physicians of his choice. (Westerman test., tr. pp. 669-70).

57. On or about March 22, 1979, Robert E. Greenspan, M.D., as Chairman of the governing body, promulgated bylaws for the Governing Body of the NVDC, Inc. (Pl. Ex. 7). These bylaws provided for various due process procedures including an opportunity for a hearing before the Executive Committee of the medical staff to any physician whose privileges were suspended or terminated. (pp. 1599-1600).

58. Dr. Greenspan never discussed the medical staff bylaws of the NVDC with Mr. Westerman. (Westerman test., tr. p. 668).

59. Greenspan never discussed the bylaws with Tolkan. (Tolkan test., tr. p 1916).

60. It was Dr. Greenspan's choice to retain in the bylaws the section that closed the staff to everyone but George Washington University associates. (Greenspan test., tr. pp. 2558-59).

61. At the time that Greenspan drafted the bylaws, he included Peggy Hess as head nurse in the Governing Body. Greenspan did not give Hess a copy of the bylaws nor did he give Tolkan or Goldberger a copy of the bylaws. (Greenspan test., tr. pp. 2560-61; Hess test., tr. pp. 1723-25).

62. Greenspan made no effort to have the bylaws known to anybody other than Pat Shine. (Greenspan test., tr. p. 2561).

Prince William Dialysis Facility

63. Within two months of Dr. Osheroff's admission to Chestnut Lodge, Greenspan began efforts to open a competing dialysis facility in Woodbridge, Virginia. (Greenspan test., tr. p. 2391).

64. The need for a dialysis unit in Woodbridge became clear to Greenspan in February of 1979 during a blizzard when a number of NVDC patients missed treatment. (Greenspan test., tr. p. 2391).

65. In March or April of 1979, Greenspan first began to look seriously into obtaining a certificate of need for Woodbridge facility. At that time, Greenspan had become aware of interest in a unit by the Bethesda (or "Georgetown") group who had been looking in the Manassas area, as well as Dr. Kim who was interested in setting up a dialysis facility in Woodbridge. (Greenspan test., tr. p. 2392).

66. Greenspan felt that he needed to act to set up a unit in the Woodbridge area for two reasons, one being that he had a relationship with the patients and feared that if another unit would be set up, it would be a closed unit and he would lose

contact with the patients. Greenspan also felt that he was protecting Dr. Osheroff's practice. (Greenspan test., tr. pp. 2393-94).

67. Dr. Greenspan told Dr. Tolkan in February or March of 1979 that he had been approached by the Georgetown group with an offer to join their practice and that if he did not join them, the Georgetown group would set up a competing practice in Alexandria. (Tolkan test., tr. p. 1909).

68. In early 1979, Dr. Tolkan was approached by the Georgetown group who tried to get him to join them and Dr. Tolkan informed them he thought he would soon have a written contract with Dr. Osheroff. (Tolkan test., tr. p. 1908).

69. At the same time, Dr. Tolkan learned that Dr. Kim was considering opening a unit in Prince William County, which posed a threat of competition. (Tolkan test., tr. p. 1910).

70. During Greenspan's visits to Osheroff in Chestnut Lodge during the first 3 months of 1979, he did not tell Dr. Osheroff about the proposed competing dialysis facility. (Osheroff test., tr. p. 302).

71. In July of 1979, Dr. Greenspan contacted Dr. Hampers, Chairman of the Board of NMC, to inquire about NMC's posture in establishing a facility in Woodbridge. Hampers initially told Greenspan that he was helpless to do anything about it, but on reflection, decided that Greenspan should be bound by the non-compete clause in Dr. Osheroff's contract with NMC. (Hampers depo. pp. 25-26).

72. Greenspan discussed with Tolkan, his meeting with Hampers. (Tolkan test., tr. p. 1931).

73. At the time of the meeting with Hampers, Greenspan and Tolkan assumed that Osheroff could not go to Prince William County because of contractual restrictions. (Pl. Ex. 1, pp. 797-98). Greenspan was concerned that another unit would be set up in that area and patients would be lost to that practice. (Greenspan test., tr. p. 2393; Tolkan test., tr. pp. 1929-30).

74. Tolkan also recognized that a competing unit in Prince William would do great harm to Dr. Osheroff's practice, and he intended to be involved in the Prince William unit, either as part of Dr. Osheroff's practice, or as a competitor. (Tolkan test., tr. pp. 1932-34).

75. Tolkan expected from the beginning that he might have a financial interest in the Prince William Facility. (Tolkan test., tr. p. 1935).

76. Tolkan knew in February and March 1979, that Greenspan intended to file an application for a competing dialysis facility. (Tolkan test., tr. pp. 1931-1935).

77. In July of 1979, Dr. Greenspan called Mr. Westerman and discussed the application for the Prince William facility. At that time, Mr. Westerman asked Dr. Greenspan why the application was to be filed in Greenspan's name rather than Dr. Osheroff's, and Greenspan explained that it was because Osheroff was not around to take care of the details and he felt it best to have it put in his name for that reason. However, Dr. Greenspan assured Mr. Westerman that it was Dr. Osheroff's application, that he was his employee and it was held for Dr. Osheroff. (Westerman test., tr. p. 676).

78. During the discussion between Mr. Westerman and Dr. Greenspan concerning Greenspan's application for the Prince William facility, Dr. Greenspan told Mr. Westerman that he had asked for a NMC agreement to join in the unit and that NMC had waived and agreed that he could go ahead and open it. (Westerman test., tr. p. 677).

79. On July 26, 1979, the date of the phone conversation between Westerman and Dr. Greenspan concerning the Prince William application, Mr. Westerman made a contemporaneous memo of the conversation. (Westerman test., tr. pp. 677-78; Pl. Ex. 13).

80. During a telephone conversation with Dr. Greenspan in early summer of 1979, Frank Notaris first heard that Dr. Greenspan intended to file an application for a dialysis facility in Woodbridge. When Notaris inquired of Greenspan whether he was going to file it under the name of the corporation, Greenspan replied that he could not do that but was going to file it under his own name because he was prevented from doing so by Dr. Osheroff's contract with NMC. Dr. Greenspan indicated to Notaris that the reason he was filing the application for the Woodbridge facility was because the Bethesda group had filed an application for Manassas and he felt that a Woodbridge facility would protect the Alexandria unit from losing patients that were presently coming from the Woodbridge area and might transfer to the Manassas facility proposed by the Bethesda group. (Notaris test., tr. pp. 16-17).

81. During his telephone conversation with Dr. Greenspan, Frank Notaris gained the clear impression that, although Greenspan was filing the Woodbridge application under his own

name, the facility was an operation to be managed by both Osheroff and Greenspan. (Notaris test., tr. p. 17).

82. Dottie Smith first heard about the proposed Prince William facility when Dr. Greenspan requested that she compile some data for him including the names, addresses, titles and phone numbers of civic leaders in the Prince William County area. Dr. Greenspan told her he was preparing an application for a Prince William Dialysis facility and also asked her to gather names and locations of patients who lived in that area. Dr. Greenspan told Dottie Smith that the proposed Prince William Center would be open for his and Dr. Osheroff's partnership. (Smith test., tr. p. 15; Smith test., tr. p. 1014).

83. In the summer of 1979, Kay Mills first became aware that Dr. Greenspan was filing an application for a dialysis facility in Prince William. (Mills test., tr. p. 917). She, too, was led to believe by Dr. Greenspan that the facility would belong to Osheroff. (Mills test., tr. p. 920).

Joseph Long and Peggy Hess

84. Joseph C. Long, Jr. is the Regional Administrator for Medical Administrative Services in Silver Hill, Maryland (Long depo., p. 4). Prior to that time, he was administrator for the Mid Atlantic Nephrology Center in Camp Springs, Maryland for four years. (Long depo., pp. 4-5). During that time, he worked with Peggy Hess at the Mid Atlantic Center. (Long depo., p. 6).

85. Joseph Long's company provided consulting services for the Prince William Dialysis facility with regard to the state of Virginia Certificate of Need application. Mr. Long first became involved with that application sometime in June or July of 1979. (Long depo., pp. 10-12).

86. Dr. Greenspan was referred to Joseph Long by Peggy Hess. Hess had previously been involved in a suit between Long and Dr. Solano when Long tried to set up a competing dialysis facility in Laurel Springs, Maryland. (Hess test., tr. pp. 1637-39; Long depo, pp. 46-47).

87. When Hess referred Greenspan to Long, she knew Greenspan was seeking help in setting up another dialysis facility. (Hess test., tr. pp. 1684-86).

88. Long told Greenspan that he should keep the Prince William Dialysis facility separate in funds and employees used. Long told Greenspan that he could not use the facilities of the Northern Virginia Dialysis Center to promote the application. (Long depo., p. 4).

89. Long advised Greenspan, because of Long's experience with regard to the lawsuit with Solano, that he would have a problem in the nature of a "corporate opportunity" if he did not keep the facilities separate. Long discussed with Greenspan that while he was working for Osheroff he should not provide for himself at the same time. (Long depo., p. 42; Greenspan test., tr. pp. 2527-28).

90. At the time Greenspan talked with Jay Long before the Prince William application was filed, Long warned Greenspan that there would be problems with patients choosing doctors. Greenspan knew that Long had been involved in a lawsuit over the same problem. (Greenspan test., tr. p. 2641).

91. Despite Long's warnings about corporate opportunity problems, Greenspan never chose to put in writing to Dr. Osheroff

or his representatives any information concerning the establishment of the Prince William facility. (Greenspan test., p. 2642).

United Health Care

92. During 1979, there were two other inquiries regarding potential filing of application for a dialysis facility in the Prince William County area. One was from a physician practicing in eastern Prince William County [Dr. Kim] and the other from a California corporation, United Health Care. (Montgomery test., tr. p. 1402).

93. Prior to Osheroff's return from his hospitalization, Greenspan had negotiated with United Health Care. (Greenspan test., tr. pp. 2601-02).

94. Greenspan had never informed Notaris or Westerman of his negotiations with United Health Care Association, nor did Greenspan inform Dr. Hampers of his discussions with United Health Care during his July meeting in Boston. (Greenspan test., tr. p. 2637).

Prince William Dialysis Facility

95. On July 17, 1979, Greenspan received the application for a Certificate of Need for a dialysis facility in Woodbridge, Virginia. (Pl. Ex. 12). This letter was addressed to Greenspan at the Northern Virginia Dialysis Center and set forth the time schedule for state review: application completed September 10, HSA review completed November 9, State Health Coordinating Committee review November 29, Commissioner's decision December 9.

96. The Health Systems Agency (HSA) is a regional planning agency that functions under federal and Virginia law to plan for the development including facilities such as hospitals, nursing homes, and renal dialysis facilities. In order to open a renal dialysis facility in Virginia, one of the procedures an applicant must follow is the certificate of need review which is overseen by the HSA. Under Virginia law, a proposed dialysis facility must be certified by the state and approved by the state health commissioner. In order to obtain that certification, an application must be filed in a form prescribed by the state health commissioner which provides all information requested. A public hearing is scheduled within the time constraints prescribed by the law and that public hearing is conducted by the local HSA. After the public hearing, the board of directors of the HSA makes a formal recommendation based on the results of the public hearing and its analysis of the application. That recommendation is transmitted to the state health commissioner. At the state level, there is another review body which makes a recommendation on the application as well. These two recommendations go to the state health commissioner who within a prescribed period of time must make a decision on the application either approving it or disapproving it. In addition to state requirements, the federal government must certify such a facility. (Montgomery test., tr. pp. 1358-60).

"Sale" of Practice

97. In late spring, early summer of 1979, Notaris and Westerman met with Dr. Osheroff to discuss whether Osheroff would

approve or indeed wanted them to seriously consider the idea of a sale of his practice. (Notaris test., tr. p. 13).

98. In the summer of 1979, when Frank Notaris observed Dr. Osheroff in Chestnut Lodge, Osheroff appeared to be in a worse state then when he first entered and he did not seem to be interested at all in the discussion regarding potential sale of his practice. Instead, his interest was on his family. (Notaris test., tr. p. 14).

99. In June of 1979, Mr. Westerman became concerned with the prospect of negotiating a sale or partnership agreement in Dr. Osheroff's absence and instituted a proceeding for the appointment of Mr. Evans and Mr. Bader as guardians for Dr. Osheroff. Mr. Westerman never thought that Dr. Osheroff was incompetent in any mental capacity. (Westerman test., tr. pp. 672-73).

100. In July of 1979, Frank Notaris was instructed to put together figures with regard to the value of Dr. Osheroff's practice for potential sale to Dr. Greenspan. Those figures were prepared and in late September 1979, the financial statement for the previous two years and 11 months were sent to Mr. Westerman and Mr. Evans. (Notaris test., tr. p. 15).

Transfer From Chestnut Lodge

101. By the summer of 1979, Dr. Osheroff's condition had deteriorated drastically. (Osheroff test., tr. pp. 310-17; Bader test., tr. pp. 169-71). Upon the recommendation of Dr. Sigmund Lebensohn, Dr. Osheroff was transferred on July 31, 1979 from

Chestnut Lodge to the Silver Hill facility in New Canaan, Connecticut where his depression was treated with medication. (Bader test., tr. pp. 172-74).

102. Dr. Greenspan knew that while he was at Chestnut Lodge Osheroff had not been getting better, and that Osheroff was not getting medication at that facility. (Greenspan test., tr. pp. 2509-10).

103. When Dr. Osheroff transferred from Chestnut Lodge on August 1, 1979, Dr. Greenspan called Dr. Dingman and expressed his concern over whether Dr. Osheroff's transfer was proper. (Dingman depo. p. 17; Greenspan test., tr. pp. 2518-19).

104. Greenspan and Tolkan both objected to Dr. Osheroff's transfer from Chestnut Lodge. (Greenspan test., tr. p. 2510; Tolkan test., tr. pp. 1968-70).

105. Greenspan told Dottie Smith that he objected to Osheroff's transfer because Osheroff had been doing "so well" at Chestnut Lodge. (Smith test., tr. p. 21).

106. Pat Shine, Administrator of NVDC, discussed with Dr. Greenspan his visits to Dr. Osheroff at Chestnut Lodge during the spring and early summer of 1979. Greenspan expressed the concern that Dr. Osheroff stay in therapy at Chestnut Lodge. He also discussed with Pat Shine whether or not Osheroff would be able to come back at the end of the year. Greenspan indicated to Pat Shine that Osheroff's condition was probably more serious than was initially known and that Osheroff probably would not be able to come back within a year. (Shine depo. pp. 38-40).

107. During Osheroff's hospitalization at Chestnut Lodge, Greenspan visited him only three times. During the last two or three months that Osheroff was in Chestnut Lodge, when he

was applying for the Woodbridge facility, Greenspan did not visit Dr. Osheroff at all. Further, during this same period, he had absolutely no phone contact with Dr. Osheroff. (Greenspan test., tr. pp. 2470, 2493).

108. Dr. Tolkan never visited, called or wrote Dr. Osheroff while he was at Chestnut Lodge or Silver Hill. (Osheroff test., tr. p. 469; Tolkan test., tr. pp. 1773-74).

109. Mr. Westerman's twice-weekly telephone conversations with Dr. Greenspan decreased beginning in late May or early June of 1979 to less than once or twice a month. (Westerman test., tr. pp. 665-666).

110. During the period when Greenspan was applying for the Woodbridge facility, Dr. Greenspan's contact with Mr. Notaris also decreased significantly. (Notaris test., tr. pp. 20-21).

111. During the six month period of 1979 following Greenspan's last visit to Osheroff at Chestnut Lodge in April, Greenspan made no effort to keep Osheroff apprised of his activities with regard to the Prince William facility. Nor did Greenspan keep Osheroff apprised of what was happening to his medical practice during his absence. (Greenspan test., tr., p. 2517).

112. During the summer of 1979 Greenspan told Dr. Haut, Chief of Medicine at Alexandria Hospital, that Dr. Osheroff was in a psychiatric facility. (Greenspan test., tr. pp. 2422-23). Tolkan also discussed Dr. Osheroff's hospitalization with Dr. Haut during this same period of time. (Tolkan depo., pp. 111, 115).

113. During the summer of 1979, while Dr. Osheroff was still in Chestnut Lodge, Dr. Greenspan directed Dot Smith not to

renew Dr. Osheroff's license to practice medicine. Dr. Greenspan said that he could see no reason for the renewal since it was more than likely that Dr. Osheroff would not be coming back any time soon. Dottie Smith renewed the license anyway because she did not want to let the license lapse in light of the possibility that Dr. Osheroff might return. (Smith test., tr. pp. 38-39).

Solicitation Re: PWDF

114. Beginning in August, 1979, immediately after Dr. Osheroff's transfer to Silver Hill and continuing into September and October, 1979, Dr. Robert Greenspan wrote numerous letters to public officials and other groups in Prince William County soliciting their support for a dialysis facility in Prince William County. These letters all indicated that the new facility would be part of NVDC. These letters were all written on NVDC stationery and signed by Robert E. Greenspan as Acting Medical Director. In these letters, Dr. Greenspan referred to "we" having provided acute dialysis in Prince William County for the "last several years." Greenspan also made constant reference to "our chronic dialysis program in Alexandria." (Pl. Exs. 14, 15, 16, 17, 20, 21, 25, 35, 36, 42). In these letters, Greenspan intended "we" to mean Osheroff's practice. (Greenspan test., tr. p. 2635-2636).

115. Also, beginning in August 1979, Dr. Greenspan received letters in return to his letters of solicitation for support directed to him at the NVDC and indicating that he was "planning an additional unit in the Woodbridge-Manassas area of Northern Virginia." (Pl. Ex. 8).

116. During August of 1979, Dr. Greenspan met with various public bodies to solicit support for the Prince William

Dialysis facility. (Pl. Exs. 22-29; Greenspan test., tr. pp. 2502-03).

117. Dr. Tolkan was aware of all these activities by Greenspan. (Tolkan test., tr. pp. 1918-19).

118. On August 13, 1979, the council for the City of Manassas issued a resolution indicating that "whereas NVDC, Inc. proposes to establish a dialysis center in Prince William County on Davis Ford Road near Hoadley." (Pl. Ex. 24). Dr. Greenspan thus led the council for the City of Manassas to believe that the NVDC was establishing the dialysis center in Woodbridge, Virginia.

119. Greenspan wrote NVDC patients on August 7, 1979 as the Acting Medical Director telling them that in order to have the Prince William facility approved, they needed community support. (Greenspan test., tr. pp. 2697-98; Pl. Ex. 100).

120. At the same time Greenspan told the patients in the memo that "this unit will be staffed by some of the same nurses and technicians now at NVDC as well as by the same physicians." (Greenspan test., tr. p. 2698; Pl. Ex. 100).

121. Dr. Greenspan never showed Dr. Osheroff any of the letters he wrote to these patients and various public bodies. Also, Dr. Osheroff never authorized Greenspan to make application for any other dialysis facility in the name of the NVDC. (Osheroff test., tr. p. 302).

122. On August 8, 1979, Brad Evans and Louis Bader were appointed as Dr. Osheroff's guardians. (Pl. Ex. 83).

August Meeting Re: Sale Or Partnership

123. On August 21, 1979, a meeting was held among Mr. Westerman, Dr. Greenspan and his lawyer, Larry Rubin, Mr. Evans and Mr. Lou Bader to discuss the possibility of a partnership or sale of Dr. Osheroff's practice. The guardians did not wish to see the practice sold but wanted a partnership which would enable Dr. Osheroff to return to practice, as he had been progressing well at Silver Hill. Dr. Greenspan rejected any partnership or probationary period which would enable Dr. Osheroff to return to the practice. At that time, Dr. Greenspan stated that it had been his efforts and his acitivities that held the practice together and increased the number of patients and that he thought those considerations should be recognized when arriving at a price. (Westerman test., tr. pp. 671-74; Bader test., tr. pp. 178-83; Greenspan test., tr. pp. 2524-25).

124. At the August 21 meeting, there was never a firm proposal for a sale communicated to Dr. Greenspan or his attorney. (Westerman test., tr. p. 675). Greenspan did, however, offer a million dollars for the practice at that meeting. (Greenspan test., tr. p. 2616).

125. The result of the August meeting was that Greenspan and his attorney were to receive more financial information concerning Dr. Osheroff's practice. (Greenspan test., tr. pp. 2390-91).

126. Following the August 21 meeting, on August 23, 1979, Brad Evans forwarded to Larry Rubin, Greenspan's attorney, a copy of the Consulting and Profit Sharing Agreement (Pl. Ex. 1) and other confidential information concerning Dr. Osheroff's business. (Pl. Ex. 79).

PWDF Application

127. On September 7, 1979, Greenspan filed the application for a Certificate of Need for the Prince William Dialysis Facility. (Montgomery test., tr. p. 1373; Pl. Ex. 34).

128. In the application, Greenspan and Tolkan were listed as co-medical directors. (Pl. Ex. 34; Tolkan test., tr. p. 1855).

129. Both Greenspan and Tolkan signed letters of intent to be physicians in the new facility and included these letters with their resumes in the application. (Pl. Ex. 34, pp. 1834-1837).

130. The application for the Prince William facility specifically referred to the 17 Medicare patients currently "travelling from this area to the NVDC," Greenspan knew how many patients were travelling to NVDC because he was there and he was the attending physician for those patients. (Greenspan test., tr. pp. 2629-30; Pl. Ex. 34, p. 1845).

131. The curricula vitae of those people who worked for NVDC and for Dr. Osheroff were not public records and were used in the dialysis applications Greenspan filed. (Greenspan test., tr. pp. 2695-96).

132. Greenspan used NVDC stationery to send out most of the letters regarding the Prince William Dialysis facility. (Greenspan test., tr. p. 2628).

133. Greenspan read and approved the language in the Prince William application, which states "the NVDC has reached a capacity of 2.5 shifts per day, and an additional facility in

Prince William County would allow for them to take new patients without going to a sixth shift." (Greenspan test., tr. pp. 2632-33; Pl. Ex. 34, p. 1849).

134. The knowledge of whether the NVDC expand or not expand with the number of patients was not public record. (Greenspan test., tr. p. 2696).

135. When Greenspan put in the application in September 1979, Dr. Hampers called Greenspan to tell him that he was going to be in violation of his non-compete clause and that Hampers would not continue Greenspan as Acting Medical Director of the NVDC as long as he had a competitive unit. (Hampers depo., p. 26).

136. The majority of the staff listed by Greenspan in the application for the Prince William facility were under the employ of NMC. The social worker who was listed in the application was someone who had worked for Ray for years and whom Greenspan had not met until he came to work in Osheroff's practice. The dietician and the nurses who were listed in the application also had worked for Osheroff and had not previously known Greenspan until he came to work in Osheroff's practice. (Greenspan test., tr. pp. 2531-32).

137. Pl. Ex. 24 was secured as part of Greenspan's preparation to open the Prince William facility. The fifth paragraph of Pl. Ex. 24 which reads "now, therefore, be it resolved by the council of the city of Manassas meeting in regular session the 13th day of August, 1979, that the efforts of the NVDC, Inc. to establish a dialysis center in Prince William County be endorsed." That document, containing that paragraph,

was part of the application prepared by Dr. Greenspan for the Prince William facility. (Greenspan test., tr. p. 2496).

138. Greenspan never sent Osheroff a copy of any of the letters soliciting support for the proposed Prince William facility nor did he send Osheroff a copy of the application for certificate of need. (Greenspan test., t. pp. 2493-94).

139. The application contains a financial statement prepared by Frank Notaris at the request of Dr. Greenspan in August of 1979. The financial statement was prepared on or about August 24, 1979, sometime after Notaris' conversation with Greenspan concerning the facility. Dr. Greenspan did not hire Notaris apart from his duties as an accountant for Osheroff's corporation, rather Notaris felt at the time he was performing a service basically for Osheroff, Inc. inasmuch as the provider number Greenspan sought was to be filed and eventually used by Osheroff, Inc. Mr. Notaris' fees were paid by the corporation. (Notaris test., tr. pp. 19-20; Pl. Ex. 34, pp. 1870-71).

140. In September of 1979, Kay Mills inquired of Dr. Greenspan if he wanted anything done about provider numbers from the insurance company for billing purposes for the Prince William facility. Greenspan told her he wanted her to file with the insurance companies for provider numbers. (Mills test., tr. p. 918).

141. Kay Mills sent out a form letter to all insurance companies for coverage for the Prince William facility. That letter was written on stationery bearing the address of Dr. Osheroff, (see Pl. Ex. 75) in which she requested a provider

number for Dr. Osheroff and also requested applications for the proposed Prince William facility. (Mills test., tr. p. 920).

142. At the time Kay Mills sent the letter, Pl. Ex. 75, requesting provider numbers for insurance coverage for the Prince William Dialysis facility, she thought it was going to be operated by Drs. Osheroff, Greenspan and Tolkan. That letter was sent out by Mills when she was working for Dr. Osheroff. Mills would not have sent the letter had she known the facility was going to be Dr. Greenspan's and not Dr. Osheroff's. (Mills test., tr. pp. 919-20).

143. When Dr. Tolkan signed a letter in support of the application for the Prince William facility on August 30, 1979, he did not make any effort to inform Dr. Osheroff, Mr. Westerman or Mr. Notaris of his support of an application for another facility. (Tolkan test., tr. pp. 1919-21).

144. Dr. Tolkan spoke with Dean Montgomery of the HSA about the application's approval, and he wrote letters to the HSA in favor of the application. (Montgomery test., tr. p. 1423).

145. Dr. Tolkan felt that it was essential to Osheroff's practice and the NVDC that they have a unit in Prince William County, as otherwise, a competing unit would take the patients. (Tolkan test., tr. p. 1934).

146. Dr. Osheroff did not authorize or have any indication that other employees would be leaving his employment to work for the Prince William facility as indicated by the inclusion of their curricula vitae in the Prince William application. (Osheroff test., tr. p. 636; Pl. Ex. 34, pp. 1826, 1828).

147. Dr. Osheroff did not authorize either Dr. Greenspan or Dr. Tolkan to use the NVDC stationery bearing Dr. Osheroff's name on the letterhead as part of the application for the Prince William facility. (Osheroff test., tr. p. 637).

148. On the evening that Federal Express was supposed to come to the office and pick up the application for certificate of need for the Prince William facility to take it to Richmond, Dr. Greenspan was in his office with the application in his hand and commented on how well it had been written, stating that BMA would not be able to do an application in two weeks which would block his application for the Prince William Dialysis Center. At that time, Dr. Greenspan stated that it would be a facility that he and Dr. Osheroff would share. Greenspan also noted that Ray would be pleased with the application. (Smith test., tr. pp. 18-19).

149. On page 1849 of Pl. Ex. 34, the application for certificate of need for the Prince William Dialysis facility, Dr. Greenspan stated that he would be providing better access to patients already under his care. Those patients under Dr. Greenspan's care were those at the NVDC. (Osheroff test., tr. p. 631).

150. It was common knowledge in the dialysis facility in the fall of 1979 that Dr. Greenspan was setting up a facility in Woodbridge. The NVDC staff assumed that the Prince William facility would be part of the NVDC. (Collins test., tr. pp. 2040, 2043; see Smith test., tr. p. 2187).

151. The opening of the Prince William Dialysis facility was discussed at a staff meeting, the minutes of which are con-

tained in Pl. Ex. 94. The opening of the new facility was discussed in relation to staffing problems at the NVDC and one consideration was that an additional evening shift at NVDC would be avoided since some patients would be leaving to go to the Woodbridge unit. (Collings test., tr. p. 2041).

152. Peggy Hess was present at that meeting. (Collings test., tr. p. 2042).

153. Mr. McFeeley contacted Arnold Westerman in the fall of 1979 to inform him that he felt Dr. Greenspan was, by setting up a competing dialysis facility, violating the consulting agreement between NMC and Dr. Osheroff. (McFeeley depo., p. 22).

United Health Care

154. While discussions about buying the practice from Dr. Osheroff were ongoing in August, Greenspan had been negotiating with United Health Care and Dr. Kim about setting up a facility in Prince William County. (Greenspan test., tr. pp. 2525-26).

155. Greenspan had been negotiating with Mr. May of United Health Care since March or April of 1979. (Greenspan test., tr. p. 2526).

156. Greenspan was trying to stall United Health Care from setting up a dialysis unit in Prince William County. (Greenspan test., tr. p. 2527).

157. Greenspan did not give United Health Care formal rejection until he had his application for the Prince William facility all prepared and ready to file. (Greenspan test., tr. p. 2541; Pl. Exs. 76, 77, 78).

Silver Hill

158. During Dr. Osheroff's hospitalization at Silver Hill, his psychological and physical condition improved radically. (Bader test., tr. pp. 177-78).

159. At the time of his discharge from Chestnut Lodge, Dr. Osheroff's mental and physical condition had seriously deteriorated from the time he had entered the hospital. Dot Smith visited him at Silver Hill during the first two weeks of August, and observed that his appearance had drastically changed since the day he had left from Chestnut Lodge in January 1979. Dr. Osheroff had lost 55 pounds, his hair was long, and he had no motor ability in his hands, which was obvious from his inability to use a knife and fork at dinner. (Smith test., tr. p. 22). She did notice, however, that his depression had lifted somewhat, and he was willing to talk about normal, everyday things. (Smith test., tr. p. 23).

160. At Silver Hill, Dr. Osheroff was treated for his depression with medication, and after three weeks he began to respond to this treatment and his depression stopped. (Osheroff test., tr. pp. 314-15).

161. On the first occasion that Dot Smith visited Dr. Osheroff in Silver Hill, she told him that Dr. Greenspan had applied for the Prince William facility and that the facility would be part of Dr. Osheroff's practice. (Smith test., tr. p. 20)

162. Two weeks after Dottie Smith first visited Dr. Osheroff at Silver Hill, she made a second visit during which

time she observed that Dr. Osheroff's appearance had improved and his motor ability in his hands had also improved. She learned that he received therapy and was on medication for his depression. Dr. Osheroff told her he was anxious to come back to the center to practice and become a doctor again. (Smith test., tr. pp. 23-24).

163. Approximately 4 weeks prior to Dr. Osheroff's discharge from Silver Hill, Dottie Smith met him for an outing in New York City. Dottie Smith noticed an overall improvement in his condition. (Smith test., tr. p. 25).

164. After her visits to Dr. Osheroff at Silver Hill, Dot Smith told Greenspan about her visits and that Osheroff was improved and ready to come back to practice medicine. (Smith test., tr. p. 1025).

165. After seven weeks at Silver Hill, Dr. Osheroff made a weekend visit to Washington during which he consulted with a psychoanalyst, Dr. Frank Board, who would see Dr. Osheroff upon his release. He also met with his attorney Mr. Westerman to discuss lifting the guardianship. (Osheroff test., tr. p. 322). The guardianship was lifted on November 1, 1979. (Pl. Ex. 85).

166. During a furlough from Silver Hill, Dr. Osheroff had lunch with Dr. Greenspan at Clyde's Restaurant, where they discussed Dr. Osheroff's hospitalization and his desire to return to practice. At the same time, Dr. Osheroff sensed a growing negativism from Dr. Greenspan regarding Dr. Osheroff's return to the practice and Dr. Greenspan told Osheroff that Dr. Hampers did not want Dr. Osheroff to return to the practice. (Osheroff test., tr. p. 324).

167. During Dr. Osheroff's stay at Silver Hill, Dr. Greenspan did not visit or call him. (Osheroff test., tr. p. 318).

168. When Dr. Osheroff was discharged from Silver Hill on November 1, 1979, Dr. Greenspan called Dr. Dingman at Chestnut Lodge and Dr. Dingman had had no correspondence or contact with Dr. Osheroff at all while he was at Silver Hill. (Dingman depo., p. 19).

169. Greenspan expressed to Dr. Dingman his concern over whether Osheroff's discharge was premature or advisable and he asked Dingman's opinion whether Osheroff should be discharged at that time. Dingman informed Greenspan that he was not Osheroff's doctor any longer and was not there to evaluate his clinical state so he could express no opinion concerning the advisability of his discharge. (Dingman depo., p. 19).

170. Greenspan further asked Dr. Dingman whether there was any input that he, Dr. Dingman, could have into what was going on with Dr. Osheroff's discharge, and Dingman told him there was nothing he could do about it. (Dingman depo., p. 20).

171. The statement made by Greenspan on page 309 of his January 8 deposition that he did not call Dr. Dingman when Dr. Osheroff was discharged from Silver Hill was an untrue answer. (Greenspan test., tr. p. 2655).

Staff Meetings

172. In the latter part of August, 1979, admid rumors in the unit that Dr. Osheroff was possibly coming back, there was a staff meeting at which Dr. Osheroff's return was discussed. At

that staff meeting, Peggy Hess, the head nurse, commented that they didn't feel Dr. Osheroff was coming back and that Dr. Greenspan was going to continue to provide continuity of care. She stated that if Osheroff did come back, she would understand if anyone had qualms about working for him, and that she didn't want him to come back. (Young test., tr pp. 776-77).

173. As of August 1979, Peggy Hess had never seen Dr. Osheroff, had never talked to him, or practiced medicine with him. (Hess test., tr. p. 1660).

174. At the August staff meeting where Dr. Osheroff's return was discussed, most of the people who made comments expressing concern about Osheroff's return had not worked for Dr. Osheroff prior to his absence. (Young test., tr. p. 778).

175. On or about October 17, 1979, when Dr. Osheroff was preparing to return to the Washington area, both Greenspan and Tolkan refused to sign assignment of Medicare benefits forms which would assign their fees to the corporation, from which their salaries would be paid. This was a routine procedure which had been done regularly during their employment with Dr. Osheroff. Tolkan initially signed the form, but apparently after consulting with Greenspan, scratched his signature from the form. (Miller test., tr. pp. 922-24; Pl. Exs. 101, 102, 103).

176. Around this same period of time Dr. Greenspan stated to Dr. Ocuin, an area nephrologist that "by the time Dr. Osheroff got out of the hospital, there wouldn't be much of a practice left for him to sell." (Greenspan test., tr. pp. 2605-06).

November 1 - December 12
"Osheroff's Return"

177. Dr. Osheroff was discharged from Silver Hill on November 1, 1979, and he returned to the Washington area at that time. (Osheroff test., tr. p. 447).

178. Following his return to the practice on November 1, 1979 and up until November 20, Dr. Osheroff prepared himself to re-enter the practice by reviewing patient charts and by referring to new drug lists and medical tests to update his medical knowledge. Prior to December 12, 1979, Dr. Osheroff made no rounds or gave any orders for medication. (Osheroff test., tr. pp. 326-28; Tolkan test., tr. p. 1939).

179. During this period of time, neither Greenspan, Tolkan nor Hess made any effort to discuss patient care with Osheroff, nor did they discuss with him at all his return to the practice. None of these individuals made rounds or even offered to make rounds with Dr. Osheroff. (Osheroff test., tr. pp. 459, 469; Tolkan test., tr. p. 1774; Hess test., tr. pp. 1596, 1658; Greenspan test., tr. pp. 2556-57, 2403-04).

180. Peggy Hess, on numerous occasions, including informal meetings of the NVDC staff, called Dr. Osheroff "a lunatic," "incompetent," and instructed the staff not to take orders from him. (Rowe test., tr. pp. 46-49).

181. In November 1979, Dr. Osheroff met Greenspan for lunch at the Lobster Shed in Alexandria to discuss Osheroff's return to the practice. When Osheroff made it clear that he did not wish to sell his practice, but wanted to practice medicine,

Greenspan told Osheroff that Dr. Hampers wanted Osheroff to sell. Greenspan terminated the meeting. (Osheroff test., tr. p. 325; Greenspan test., tr. p. 2545).

182. Following Dr. Osheroff's return to the area, Greenspan called Kay Mills into his office and asked her whether Osheroff intended to return to practice. He stated to her that he was concerned about Osheroff's ability to practice, although he had had no opportunity to observe Osheroff practice medicine since his discharge from Silver Hill. (Mills test., tr. pp. 914-15).

183. Prior to Dr. Osheroff's release from Silver Hill, Greenspan had already made up his mind that he would not continue to work with Osheroff. (Greenspan test., tr. p. 2601).

184. The day after Mills' discussion with Greenspan, Bonnie Greenspan asked her the same question. Bonnie Greenspan was Osheroff's employee at that time, in charge of the acute dialysis technicians. (Mills test., tr. p. 916).

Staff Meetings

185. Following a visit to the center by Dr. Osheroff in November, 1979, a meeting of the NVDC staff was held at which Dr. Osheroff's return was discussed. Peggy Hess stated at that meeting that she would not work for Osheroff and if he did come back, she would stay long enough to see that all the nurses were transfered out, and then she would leave. Hess also indicated that she did not want Osheroff to return and would do what she could to prevent it. (Young test., tr. pp. 793, 779).

186. Dr. Greenspan, Eileen Collins, Diane Synan, and Sue Smith were all present at this meeting. (Young test., tr. pp. 779-80).

187. At this November meeting, Sue Smith asked if the staff could do anything to prevent Osheroff's return. Hess stated that they could write a petition refusing to work for Osheroff, but that she could not initiate it because she was head nurse. This resulted in the petition alleging Osheroff's incompetence (Pl. Ex. 96) being circulated among the staff on December 12, 1979. (Young test., tr. pp. 780-81).

PWDF - HSA Meeting

188. On November 12, 1979, the full board of the HSA approved the Prince William Dialysis Facility application. Dr. Greenspan, Dr. Tolkan, Bonnie Greenspan, and Mr. Rubin all attended this meeting. (Pl. Ex. 58, B. Greenspan test., tr. pp. 2296-97; Tolkan test., tr. pp. 1854-55).

189. Dr. Osheroff asked Greenspan if he could go to this November 12 meeting, and Greenspan told Osheroff it would not be a good idea for him to go. Osheroff, nor any of his representatives attended this meeting. (Greenspan test., tr. pp. 2630-31).

190. At the November 12, 1979 meeting, the question of the ownership of the Prince William Facility was raised by one of the board members, who questioned whether the new facility would be part of NVDC. (Pl. Ex. 58, p. 3016).

191. The day after this meeting, on November 13, 1979, Greenspan's attorney, Larry Rubin, wrote Westerman concerning

Osheroff's intention to sell the practice. (Pl. Ex. 80). This letter was the first mention of sale since August, 1979. Greenspan and Rubin clearly were concerned about the PWDF ownership question which had been raised just the night before.

Meeting With Dr. Hampers

192. On November 15, 1979, Greenspan met with Dr. Hampers at National Airport. Hampers discussed his concerns that Greenspan was filing another application for a facility in Northeast Washington, and he told Greenspan that he wanted him to turn the Prince William application over to NMC. (Hampers depo., p. 27). Greenspan told Hampers that he would consider turning both the Prince William and Woodbridge applications over to NMC if he were made permanent Medical Director of NMC. (Hampers depo., pp. 28-29).

193. Greenspan then asked Hampers to use what influence he could to convince Osheroff to sell the practice to Greenspan. Greenspan stated that Hamper's decision not to re-appoint Osheroff as Medical Director would weigh heavily on Osheroff's decison to sell. (Hampers depo. pp. 26-28).

194. Hampers responded that he would not enter into collusion to force Osheroff to sell. Greenspan then told Hampers that if Osheroff didn't sell, he would take the patients from Osheroff anyway. (Hampers depo., pp. 28-29).

Patient List

195. On or about November 19, 1979 Greenspan instructed Martha Hall to make a list of patient names, addresses, and phone

numbers of all patients who had come to the practice since the beginning of his employment in June, 1978. (Pl. Exs. 104, 105; Mills test., tr. pp. 925-926; Hall test., tr. pp. 896-99).

Mid-Montgomery Application

196. On November 19, 1979 Greenspan filed the application for the Mid-Montgomery dialysis facility. (Pl. Ex. 191). Greenspan did not tell Osheroff about this application, nor did he or Tolkan tell Osheroff that Tolkan was listed as part of the medical staff in the application. (Greenspan test., tr. p. 2624).

Osheroff Barred From Unit

197. On or about November 20, 1979, Dr. Osheroff offered to make rounds at NVDC as Greenspan was due to be out of town, and Tolkan was occupied at the hospital. Osheroff called Tolkan at the hospital to tell him he would make the rounds. Tolkan did not offer to do the rounds with Osheroff, but rather told Osheroff that he could not make rounds, then immediately called Greenspan. Greenspan then appeared at the Center and told Osheroff he could not see patients or give orders, and that the nurses would not take his orders. Osheroff then left the Center without making rounds. (Tolkan test., tr. pp. 1945-46; Osheroff test., tr. pp. 327-29, 462-63).

198. Hess also ordered staff not to take orders from Osheroff. (Hess test., tr. p. 1595).

199. After Drs. Greenspan and Tolkan told Osheroff on November 20 that he could not see patients, Osheroff called Dr.

Hampers in Boston. On November 30, Dr. Osheroff met with Dr. Hampers in Boston to discuss his reinstatement as Medical Director. (Osheroff test., tr. pp. 332-34; Pl. Ex. 9).

200. Dr. Hampers met with Dr. Osheroff on November 30, 1979 and requested letters from two psychiatrists, Dr. Board and Dr. Frank, concerning Osheroff's competence to return as Medical Director. (Hampers depo. pp. 13-14). Hampers also solicited the opinion of the NVDC staff, including that of Dr. Greenspan. Greenspan told Hampers that Osheroff was not competent, but could give Hampers no sound basis for his opinion. (Hampers depo., pp. 15-16, 19). By letter of December 6, 1979, Hampers formally reinstated Osheroff as Medical Director of NVDC. (Pl. Ex. 10).

201. At the November 30 meeting with Dr. Hampers, Osheroff learned about Greenspan's activities in setting up competing dialysis facilities and of Greenspan's request that Osheroff not be re-appointed as Medical Director. (Osheroff test., tr. pp. 335-37).

202. Following the November 20 conversation between Tolkan and Osheroff regarding Osheroff's making rounds, Osheroff and Tolkan had a conversation initiated by Osheroff to discuss Osheroff's return to practice. At this meeting Osheroff expressed concern that Tolkan had been doing insurance physicals on the side, and he offered Tolkan a $10,000 raise. Tolkan did not discuss with Osheroff whether or not he would continue to practice with Osheroff, or whether Osheroff could return. Also, he did not express any doubts about Osheroff's ability to practice. (Tolkan test., tr. pp. 1776, 1944).

Osheroff's Privileges

203. At the end of November, 1979, both Tolkan and Greenspan knew that Dr. Osheroff's privileges would be suspended at Alexandria Hospital should he seek to admit patients there, based on their previous discussions with Dr. Haut, Chief of Medicine. Neither of these doctors discussed this fact with Dr. Osheroff. (Greenspan test., tr. pp. 2551-52; Pl. Ex. 115, Alexandria Hospital Transcript [Tolkan test.] pp. 73-74).

Northeast Application

204. On December 3, 1979, Greenspan filed the application for the Northeast Washington dialysis facility (Pl. Ex. 192), listing himself and Tolkan as the doctors for that facility. Greenspan and Tolkan did not inform Osheroff of the application. (Greenspan test., tr. p. 2624).

205. The Northeast (Pl. Ex. 192) and Mid-Montgomery (Pl. Ex. 191) applications were markedly different from the Prince William application (Pl. Ex. 34) in that Greenspan did not list himself as Acting Medical Director of NVDC, and they did not contain the numerous support letters on NVDC stationery. This was done on Rubin's advice to make it clear that the two new applications were not affiliated with Dr. Osheroff. (Greenspan test., tr. pp. 2625-26; Rubin test., tr. pp. 2743-45).

206. At the time the Northeast application was filed on December 3, 1979, there were seven or eight NVDC patients on dialysis who would be likely to go to a new facility in Northeast D.C. (Greenspan test. tr. p. 2677).

207. After Osheroff was told on November 20, 1979 that he could not make rounds in the Center, Greenspan did not see him in the center again until December 12, 1979.

December 12, 1979

208. On the morning of December 12, 1979, Arnold Westerman and Dr. Osheroff met with Greenspan to discuss the terms of his continued tenure with the practice. Greenspan refused to enter into a parntership agreement with Osheroff, and he was then terminated. (Westerman test., tr. p. 681).

209. Following his termination Greenspan vehemently stated to Westerman and Osheroff numerous times: "This is my unit, I built it up. You are not going to have a thing, Ray. I am going to take it all from you. I have already made a call to make sure you are not going to be able to practice medicine in this area again. You are going to lose everything you have unless you sell to me." (Westerman test, tr. p. 682; Osheroff test., tr. pp. 338-40).

Dr. Haut

210. The phone call referred to by Greenspan was a call he had made that same day to Dr. Haut, Chief of Medicine at Alexandria Hospital, concerning Osheroff's privileges. In response to Dr. Greenspan's call on December 12, 1979, Dr. Haut called Dr. Osheroff and summarily suspended his privileges. (Greenspan test., tr. p. 2578; Haut test., tr. pp. 365-66). The only knowledge Haut had about Dr. Osheroff was from Greenspan and Tolkan. (Haut test., tr. p. 379; Tolkan test., tr. p. 1869;

Tolkan depo., pp. 111, 115). Dr. Haut confirmed this suspension by letter of December 13, 1974. (Pl. Ex. 113).

211. Haut called Osheroff on the afternoon of December 12 and informed him he was suspending his privileges because Greenspan and Tolkan felt he was not ready to come back to practice. (Osheroff test., tr. p. 343; Westerman test., tr. pp. 684-85).

212. Prior to December 12, 1979, Dr. Osheroff had had no contact with Dr. Haut, but he had made an appointment with David Peters, Administrator of Professional Affairs to discuss his resumption of medical practice. (Osheroff test., tr. pp. 339-40).

213. According to Dr. Sanford Warshauer, President of the Alexandria Hospital Medical Staff in December 1979, such a summary suspension was extraordinary. Ordinarily, a physician would simply present his credentials to the hospital, as Osheroff had arranged to do, then resume his practice. (Warshauer depo. pp. 3-5, 12).

214. On the morning of December 12, 1979 Greenspan called Tolkan at the hospital and told him he had been fired. Tolkan immediately met with Greenspan in the office Greenspan had already rented on the first floor of the NVDC building. Even though Osheroff asked Tolkan to stay on and offered him a raise, Tolkan chose to resign and go with Greenspan. (Tolkan test., tr. pp. 1936-37, 1949-50, 1784; Westerman test., tr. p. 683; Greenspan test., tr. p. 2578).

215. Westerman informed both Greenspan and Tolkan that they were not to use Osheroff's facilities, nor were they to enter the dialysis unit. (Westerman test., tr. p. 686).

216. Despite Mr. Westerman's directive, Greenspan and Tolkan continued to make rounds in the unit for approximately two weeks after December 12, 1979. (Osheroff test., tr. pp. 344-45).

217. On the same day they left Osheroff, Greenspan and Tolkan set up a practice on the first floor of the same building that NVDC was located in. (Osheroff test., tr. pp. 440-41).

218. Throughout the day and into the night on December 12, 1979, Osheroff, Westerman, Rubin, Tolkan, and Greenspan conducted extensive negotiations on how to resolve the situation. At various points, Greenspan and Tolkan offered one million dollars for the practice, and Osheroff demanded three million dollars. (Osheroff test., tr. p. 342; Greenspan test., tr. p. 2617; Rubin test., tr p. 2727).

219. Osheroff offered to allow Greenspan and Tolkan to remain in the practice for a "cooling off period," during which all three doctors would see the patients. Greenspan and Tolkan rejected this compromise. (Greenspan test., tr. pp. 2579-80, 2583).

Patient Solicitation

220. On December 12, 1979, Martha Hall, a long-time employee of Dr. Osheroff's, went to work for Greenspan and Tolkan. She immediately began to call all the patients who had been part of Osheroff's practice and solicited them to see Greenspan and Tolkan. Both Greenspan and Tolkan knew she was calling these patients, but did nothing to stop her. (Hall test., tr. pp. 890-91; Greenspan test., tr. pp. 2668-69, 2695; Tolkan test., tr. p. 1799).

221. For a period of a few days immediately after December 12, 1979, Greenspan and Tolkan continued to use Dr. Osheroff's acute dialysis machines without his permission. (Tolkan test., tr. p. 1962).

Staff "Petition"

222. On the evening of December 12, 1979, a petition was circulated among the NVDC staff, stating that Osheroff was "professionally incompetent." (Pl. Ex. 96). Peggy Hess urged the staff to sign the petition in the "best interest" of the unit because Dr. Osheroff had made errors in taking care of patients. (Froelich test., tr. pp. 436-37). Osheroff, by that time had not rendered medical care to patients since before his hospitalization in January 1979.

223. Sue Smith wrote the petition, directed to Dr. Hampers (Pl. Ex. 96) on December 12, 1979 (Smith test., tr. pp. 2083-84). This was the petition which Hess had suggested in the November meeting concerning Osheroff's return to practice. (Young test., tr. pp. 780-81).

224. Drs. Tolkan and Greenspan decided to file suit against Dr. Osheroff the day after they left his employment. (Tolkan test., tr., p. 1871).

Staff Resigns

225. Within a day or two of December 12, 1979, all of Dr. Osheroff's acute techinicians, Jean Rowell, Claudia Brown,

and John Doyle, went to work for Greenspan and Tolkan. At the time they were all under the supervision of Bonnie Greenspan, who discussed their leaving Osheroff with them. (Rowell test., tr. pp. 845-846; B. Greenspan test., tr. p. 2298).

226. Jean Rowell, one of the acute technicians, was called into Greenspan's and Tolkan's office to sign a pre-typed letter of resignation, identical to resignation letters signed by Brown and Doyle, stating that she was resigning "in the best interests of the patients" (Pl. Exs. 98, 99). Dr. Greenspan, Bonnie Greenspan, and Tolkan were present in the office at the time. (Rowell test., tr. pp. 841-45).

227. Rowell refused to sign the letter because she objected to its language. (Pl. Ex. 97; Rowell test., tr. pp. 842-45). Rowell resigned because she had heard that Osheroff had no hospital privileges and thus no acute practice, and because she had heard Osheroff was released from Silver Hill against medical advice. (Rowell test., tr. pp. 846-47).

228. Mabel Lowrey, who had worked for Dr. Osheroff, went to work for Greenspan and Tolkan. Lowrey typed Jean Rowell's letter of resignation. (Rowell test., tr. p. 842).

229. Rowell, Doyle, and Brown continued to see the same patients they had seen when they had worked for Osheroff. (Rowell test., tr. pp. 848-49).

230. A number of Dr. Osheroff's and NVDC employees went to work for Greenspan and Tolkan (see Pl. Ex. 110): Martha Hall, Mabel Lowrey, Diane Synan, John Doyle, Jean Rowell, Claudia

Brown, Peggy Hess, Eileen Collins, Amy Chapman, Jesse Foster, and Anne Pierce. (Smith test., tr. pp. 27-31).

December 12th
Patient Solicitation

231. On December 12, 1979, and for one or two days thereafter, Greenspan and Tolkan circulated the following form, on NVDC stationery, among all the NVDC patients while they were hooked up to dialysis machines:

To Whom It May Concern:

I (patient name), currently a patient undergoing chronic hemodialysis at the Northern Virginia Dialysis Center, do hereby declare that I will not accept any medical services from Raphael J. Osheroff, M.D. and am under the care of Robert E. Greenspan, M.D. for any and all medical services associated with my therapy at the Northern Virginia Dialysis Center in Alexandria, Virginia, (Pl. Ex. 107, 108; Greenspan test., tr. pp. 2414-15).

232. Although Tolkan's name was not on the form, he helped draft it and discussed the form with numerous patients. (Tolkan test., tr. pp. 1791-92, 1959, 1951).

233. Tolkan and Greenspan did not have authority from anyone to use NVDC stationery for the solicitation form. (Tolkan test., tr. p. 1951).

234. The form was given to many patients who had been in Dr. Osheroff's practice from 5 to 10 years. (Tolkan test., tr. p. 1872).

235. Tolkan told many patients on or about December 12, 1979, that he and Greenspan were going to sue Osheroff to get

privileges in the center. (Tolkan test., tr. p. 1960).

236. The form was given to patients to sign who were under Dr. Kim's and Dr. Goldberger's care. (Greenspan test., tr. p. 2539).

237. Greenspan told patients that Osheroff's privileges had been suspended at Alexandria hospital and that Osheroff was incompetent. (Greenspan test., tr. pp. 2664, 2422, 2660).

238. The patients were very upset when this form was passed out to them. (Greenspan test., tr. p. 2662; Froelich test., tr. pp. 438-39).

240. Many of the patients were fragile, had poor eyesight, and couldn't read. (Sue Smith test., tr. p. 2090; Quesada depo.; Tolkan test., tr. p. 1953).

241. Peggy Hess acted as a witness on several of the patient solicitation forms while the patients were undergoing dialysis. (Hess test., tr. pp. 1665-67, 1673-74). (Hess even provided the form to one patient who didn't have one, and witnessed that patient's signature. Hess test., tr. pp. 1674-78). Hess never discussed the patient forms with Dr. Osheroff, even though he was the Medical Director. (Hess test., tr. p. 1680).

242. A list of patients was made up from these solicitation forms to determine which patients were "Greenspan's and Tolkan's. (Hess test., tr. p. 1671). Hess never discussed the list with Dr. Osheroff (Hess test., tr. p. 1697).

Breach Of Medical Ethics

243. Section 5 of the Code of Ethics of the American

Medical Association and the corresponding section of the Principles of Medical Ethics prohibit the solicitation of patients by physicians, solicitation being defined as the use of "undue influence or pressure to obtain patients." (Fletcher test., tr. pp. 384-86; Pl. Ex. 134).

244. Submission to a patient of a form such as Pl. Ex. 108 violates the central canon of medical ethics in protecting a patient's freedom of choice in the selection of his or her physician inasmuch as it exerts undue pressure and influence on that choice by a physician. (Fletcher test., tr. pp. 403-4).

245. The language in Pl. Ex. 108 which states that "I declare that I will not accept any medical treatment from Dr. Osheroff and am under the care of Dr. Robert E. Greenspan" is improper because it requests the patient to change physicians and is an example of one physician soliciting a change of a physician/patient relationship from another physician. (Fletcher test., tr. pp. 404-5).

250. A form such as Pl. Ex. 108 which is printed on the letterhead of the employer physician offends ethical principles because it might mislead a patient into believing that the employer physician approved of the form and because it violates the specific ethical principle that a physician should be honest to the patient in all things. (Fletcher test., tr. pp. 405-6).

251. It is unethical to ask a patient to sign a form when they are undergoing treatment since they are most likely to be vulnerable at that time. (Fletcher test., tr. pp. 406-7).

252. Even if a dialysis patient had been referred directly to Dr. Greenspan, if Dr. Greenspan had taken the form in Pl. Ex. 108 printed on Dr. Osheroff's stationery and presented it to that patient when he was hooked up on a dialysis machine, that conduct would be unethical. (Fletcher test., tr. p. 434).

253. Susan Young recalls a specific incident where the solicitation form (Pl. Ex. 108) was attached to the patient's chart and she gave it to the patient who said he needed to think about it before he signed it and was going to take it home. (Young test., tr. pp. 782-83).

254. The next time the patient came in for dialysis, Dr. Greenspan asked the patient if he had signed the form and the patient responded that no, he did not sign the form because he had had a nervous breakdown himself and he could not sign the paper in good faith. Dr. Greenspan responded that that was fine, that he didn't need his signature anyway. (Young test., tr. pp. 783-84).

Thomas Maitland

255. Thomas Maitland was a dialysis patient under the care of Dr. Osheroff since September of 1974 and recieved his dialysis treatments at the NVDC during that time. (Maitland test., tr. p. 801).

256. Thomas Maitland first saw the form, Pl. Ex. 108, when it was given to him by a nurse or technician while he was on the dialysis machine in the center. The form was also given to

other patients at the same time. (Maitland test., tr. p. 806).

257. After reading the form that Dr. Greenspan had sent around, Thomas Maitland became angry as did some of the other patients and wrote a letter, (Pl. Ex. 112) which was signed by other patients including Patricia Wool who had been a patient of Dr. Osheroff and asked to sign it. Matiland hung a copy of the letter in the waiting room for everyone to read. (Maitland test., tr. pp. 809-11).

258. Maitland did not feel that he was being given a straight story of what was occurring with regard to Dr. Osheroff but felt that he was being dragged into something that he didn't know anything about and about which he could not make an intelligent decision. Maitland also felt that it was unprofessional and cruel of Greenspan to drag patients into the dispute. (Maitland test., tr. p. 810).

Nestor Dialozo

259. Nestor Dialozo is a forty-three year old resident of Alexandria, Virginia, who became a patient at the Northern Virginia Dialysis Center as a dialysis patient in August of 1977. (Dialozo depo., p. 5). During the time that Dr. Osheroff was hospitalized, Mr. Dialozo was under the medical care of Drs. Greenspan and Tolkan. (Dialozo depo., p. 6). On December 12, 1979, while Mr. Dialozo was undergoing dialysis on the dialysis machine, Dr. Greenspan approached him with the form letter (Pl. Ex. 107). Dr. Greenspan told Dr. Dialozo at this time that he,

Dr. Tolkan and Dr. Osheroff were splitting and that Mr. Dialozo would have to choose the doctor that he wanted so that if he was hospitalized he would know who would be handling him in the hospital. Greenspan said also "that they were splitting because Dr. Osheroff is not competent enough or not yet fit to practice his profession." (Dialozo depo., p. 10).

260. At the time Dr. Greenspan handed out this form, Mr. Dialozo did not know that Dr. Osheroff had returned to his medical practice and had been reinstated as Medical Director of the Center. (Dialozo depo., p. 10).

261. Mr. Dialozo asked Peggy Hess why Dr. Osheroff was not fit to practice his profession if he had been hospitalized and had then been discharged from the hospital. Ms. Hess responded to Mr. Dialozo that Osheroff was not fit to practice his profession. (Dialozo depo., pp. 11-12).

262. Greenspan also told Mr. Dialozo that Osheroff had lost his privileges at Alexandria Hospital. (Dialozo depo., pp. 12-13).

Charles Sparrow

263. Charles R. Sparrow, a thirty-eight year old resident of the District of Columbia, was a chronic dialysis patient at the Northern Virginia Dialysis Center on December 12, 1979.

264. Prior to being asked to sign the form, (Pl. Ex. 108), Dr. Greenspan discussed with Mr. Sparrow Dr. Osheroff's incompetence to practice medicine. Dr. Greenspan stated that he

and Tolkan thought Dr. Osheroff was incompetent and that they wanted to get him out of the unit. (Sparrow depo., pp. 16-17, 36).

265. Mr. Sparrow was originally referred to Dr. Osheroff by Dr. Abramson, an Alexandria physician. Dr. Osheroff first diagnosed Mr. Sparrow's kidney problem and put him on chronic hemodialysis. (Sparrow depo., p. 39).

Albert Lazzaro

266. Albert Lazzaro was a 75 year old resident of Alexandria, Virginia who had been a chronic dialysis patient at the NVDC approximately 2½ years in December 1979. (Lazzaro depo., pp. 4-5)

267. Mr. Lazzaro was shown the form which was passed around to all the patients in the dialysis center. (Lazzaro depo. pp. 12-13).

268. Mr. Lazzaro refused to sign this form, because he felt it was an outrage and that it implied that Dr. Osheroff was not capable of treating patients. He also felt that for Dr. Greenspan to ask him to sign a paper which would give him total access to his medical treatment was unfair. (Lazzaro depo. p. 22).

269. Mr. Lazzaro was told on December 12, 1979 that Dr. Osheroff had been restored as medical director and that Dr. Tolkan and Dr. Greenspan had resigned because Dr. Osheroff had been restored to the directorship of the clinic. He was told this by Carol Mirc. Carol Mirc also told him that Dr. Osheroff

was not authorized or acceptable in the hospital to treat patients. She passed this information all around the clinic, and Mr. Lazzaro heard it from several sources in the clinic. (Lazzaro depo. p. 26-27).

Donald Quesada

270. Donald Quesada, at the time of his deposition in November 1980, was a 51 year old chronic hemodialysis patient at the NVDC. Mr. Quesada was blind and had been blind for several years prior to December 1979. (Quesada depo., pp. 4-6).

271. Mr. Quesada was an office patient of Dr. Osheroff's prior to Dr. Osheroff's leaving for the hospital, and Greenspan took over his medical care in 1979. (Quesada depo., pp. 11-12).

272. In December, 1979, Mr. Quesada was approached by Greenspan while he was on the dialysis machine and was given the form, Pl. Ex. 108, to sign. Mr Quesada asked Dr. Greenspan what the piece of paper was, as he could not read it, and Greenspan said it was permission slip for Greenspan to give him treatment. Greenspan did not read the form to the patient. (Quesada depo., pp. 13-14).

273. Mr. Quesada asked Greenspan twice what the form was about and Greenspan gave him no response other than it was just a form for treatment. (Quesada depo., p. 15).

274. At the time Dr. Greenspan asked Mr. Quesada to sign this form, Mr, Quesada did not know that Dr. Osheroff had returned to the area and to his medical practice. Further, Dr. Greenspan did not tell Mr. Quesada that Dr. Osheroff had been reappointed to the Medical Directorship of the center. (Quesada

depo., p. 18).

275. Judge Lewis, in Greenspan v. NMC, considered Greenspan's passing the form (Pl. Ex. 108) around to the patients to be highly unethical solicitation of patients. (Pl. Ex. 168, p. 267).

276. Judge Lewis considered Greenspan's passing the form around to patients while they were on the dialysis machines to be highly unethical. (Pl. Ex. 168, pp. 303-05).

277. Shortly after Dr. Greenspan and Dr. Tolkan opened their practice on the first floor of the NVDC building, they placed a sign (Pl. Ex. 109) on the door of their office stating that there would be no charge and no appointment necessary." Patients were to contact Martha (Hall) or the nurses if they needed hospitalization.

278. After Greenspan and Tolkan set up their office, Peggy Hess sent patients to Dr. Greenspan and Tolkan and engaged in a constant telephone communication with these doctors concerning the patients. (Osheroff test., tr. pp. 460-61). Greenspan and Tolkan would call the nurses in the unit and ask them to send patients up to their office. The nurses included Peggy Hess, Diane Synan, Eileen Collins, and Sue Smith. (Tolkan test., tr. pp. 1892-93).

279. Hess, Synan, and Collins communicated on a daily basis with Greenspan and Tolkan concerning the NVDC patients. This continued until all three nurses left at the same time on March 5, 1980 and went to work for Greenspan and Tolkan. (Collins test., tr. pp. 2013-2015, 2009-10; Synan test., tr. pp. 1563-64).

280. A list was posted in the dialysis unit of those patients who had signed the patient solitication form (Pl. Exs. 107, 108). This list was used to determine which patients were "Greenspan's and Tolkan's." (Collins test., tr. p. 2015; B. Greenspan test., tr. pp. 2299-2301).

281. At least thirty of these chronic hemodialysis patients transferred to the Prince William Dialysis Facility when it opened in June, 1980. (Dot Smith test., tr. p. 1076).

Executive Committee
Alexandria Hospital

282. During Dr. Osheroff's hearing to reinstate his privileges before the Executive Committee of the Alexandria Hospital, on December 27, 1979 (Pl. Ex. 115) Dr. Stephen Tolkan and Dr. Greenspan testified against him. (Osheroff test., tr. p. 443).

283. At the Alexandria Hospital Executive Committee meeting, Dr. Greenspan brought up a biopsy incident concerning Dr. Osheroff which he had never mentioned to Osheroff previously. (Osheroff test., tr. pp. 255-56).

284. When Greenspan and Tolkan testified at the hearing, their lawsuit against Osheroff was still pending. (Pl. Exs. 127, 168, 170).

285. Prior to the hearing at Alexandria Hospital, Dr. Osheroff had been given no statement of charges of mental incompetence nor did he have any knowledge that any witnesses intended to testify against him at that hearing. (Osheroff test., tr. pp.

443-4).

286. Dr. Osheroff had no intention of resuming his practice until December 14 when he intended to present his credentials to the Administrator of Professional Affairs at Alexandria Hospital. (Osheroff test., tr. p. 444).

287. Prior to Dr. Osheroff's entrance into Chestnut Lodge, neither Dr. Greenspan nor Dr. Tolkan complained to him of medical incompetence. (Osheroff test., tr. p. 444).

288. At the hearing of the Executive Committee of Alexandria Hospital, Dr. Greenspan submitted three letters from the dialysis center's shift supervisors and the administrator. One of these letters stated that the staff felt that its professional integrity would be damaged if it followed Dr. Osheroff's orders as they felt he was professionally incompetent (Pl. Ex. 96). At that time, Dr. Osheroff had not seen any of those letters nor had he given any of the people signing them orders prior to the time they were written. (Osheroff test., tr. pp. 449-50).

289. Dr. Greenspan brought to the attention of the Alexandria Executive Committee a matter concerning a typographical error in a pill prescription where the word microgram was confused for miligram and Dr. Greenspan interpreted that error as indicative of Dr. Osheroff's lack of knowledge on the newest drugs available and the appropriate dosages, implying the error was responsible for a lethal dosage. (Osheroff test., tr., pp. 451-52).

290. Dr. Greenspan also brought to the attention of the

Executive Committee of Alexandria Hospital an incident in which Dr. Osheroff had prescribed 250 milligrams of aminophylline for a patient who had previously received and responded to that dosage of medication. At the time Dr. Osheroff prescribed that medication, Peggy Hess, the head nurse for NMC, had refused to administer the drug despite the fact that the patient had previously received the same dosage, and that Dr. Greenspan had previously ordered the same medication on a PRN basis which gave the nurses authority to give that medication when needed without specific order from a physician. That same incident was the subject of a newspaper article. (Pl. Ex. 120; Osheroff test., tr. pp. 452-55).

291. At the Alexandria Medical Committee hearing, Dr. Greenspan also brought to the attention of the committee an incident which had occurred in late fall of 1978 where he alleged that Dr. Osheroff took 45 minutes and placed 25 needle holes in a child's back during a biopsy. During that incident in which Dr. Osheroff took two passes at the child's kidney, and the requested Dr. Greenspan to take a third pass, Dr. Greenspan never mentioned that he had done anything improper. (Osheroff test., tr. pp. 456-458).

292. Prior to his testimony at the Executive Committee of the Alexandria Hospital, Dr. Greenspan had never mentioned to Dr. Osheroff that he felt Dr. Osheroff was not fit to practice medicine. Further, Dr. Greenspan did not talk to Dr. Board or request information from Dr. Naarad of Silver Hill or any psychiatrist on Dr. Osheroff's case concerning Dr. Osheroff's mental medical competence. (Osheroff test., tr. pp. 466-67).

293. At the time Dr. Tolkan questioned Dr. Osheroff's medical competence at the Alexandria Committee hearing, he had two years of residency and two years of nephrology including a year and a half of private practice. Dr. Tolkan misinterpreted Dr. Osheroff's practice of looking drug doses up in a book as incompetent. (Osheroff test., tr. pp. 470-71).

294. Prior to his testimony before the Executive Committee of the Alexandria Hospital, Dr. Tolkan had never suggested to Dr. Osheroff that he thought he was incompetent in any way nor had Dr. Tolkan had much contact with Dr. Osheroff. (Osheroff test., tr. pp. 472-73; Tolkan test., tr. p. 1838).

295. Dr. Tolkan formed the impression that Dr. Osheroff was incompetent from information he obtained from Bob Greenspan while he was working in the hospital. (Osheroff test., tr. p. 474).

296. Dr. Tolkan testified before the Executive Committee of the Alexandria Hospital that his only link to Dr. Osheroff was through Dr. Greenspan and that he had no additional reason to question Dr. Osheroff's ability to make rounds. (Osheroff test., tr. p. 478).

297. Although Dr. Tolkan testified before the Executive Committee of the Alexandria Hospital that he was disturbed by Dr. Osheroff's psychiatric condition, Dr. Tolkan never made any effort to contact Dr. Osheroff, his doctors, his lawyer, his accountant or his family to determine his psychiatric status. (Osheroff test., tr. p. 480).

298. Dr. Osheroff came to the hearing of the Alexandria Hospital Executive Committee prepared to establish his ability to come back to the practice of medicine and towards that end, he carried two letters from physicians and had made arrangements with the director of the Silver Hill Foundation to speak to anyone over the telephone concerning his mental health and recovery from depression. (Osheroff test., tr. pp. 605-06).

299. Dr. Greenspan testified before the Alexandria Hospital Medical Committee hearing that when Dr. Osheroff returned from Silver Hill, he was not depressed. (Osheroff test., tr. p. 627).

300. In response to a question by Dr. Pepper at the Alexandria Hospital Committee hearing, Dr. Greenspan stated that he could not evaluate the elevation of Dr. Osheroff's mood upon his return from Silver Hill because he had not spent enough time with him as he did in the period previous to Osheroff's entry into Chestnut Lodge. (Osheroff test., tr. pp. 627-28).

301. During his testimony before the Alexandria Committee hearing, Dr. Greenspan stated that he thought Dr. Osheroff had gotten better, "there is no question about that, I think he got better because of the medication." (Osheroff test., tr. p. 629).

302. Dr. Tolkan testified before the Executive Committee of the Alexandria Hospital medical staff that he felt that Dr. Osheroff was incompetent. (Tolkan test., tr. p. 1796).

303. Tolkan told the Executive Committee of the Alexan-

dria Hosptial that he had been fired by Dr. Osheroff on the 12th of December, when he in fact had resigned. (Tolkan test., tr., p. 1964).

304. Dr. Tolkan testified before the Executive Committee of the Alexandria Hospital that he had been disturbed when he heard that Dr. Osheroff left (Chestnut Lodge) in dispute with the staff. Dr. Tolkan heard about the "dispute" with the staff from Dr. Greenspan. (Tolkan test., tr. pp. 1968-69).

305. Dr. Tolkan had no knowledge of whether Chestnut Lodge provided medication treatment to its patients. (Tolkan test., tr. pp. 1969-70).

306. In 1979, Dr. Tolkan had no idea what type of psychiatric treatment Dr. Osheroff had received. (Tolkan test., tr. p. 1974).

307. Eileen Collins had no idea how the letter she wrote to Dr. Hampers became an exhibit in Greenspan v. NMC or the petition she signed (Pl. Ex. 96) came to the attention of the Alexandria Hospital Executive Committee. Collins did not give the petition to Dr. Greenspan. (Collins test., tr. pp. 2033-34).

308. Collins never authorized the letter she wrote to Hampers or the petition she signed, (Pl. Ex. 96) to be given to Greenspan as exhibits. (Collins test., tr. p. 2035).

309. Diane Synan never gave Dr. Greenspan a copy of the letter she had written to Dr. Hampers which was subsequently presented by Dr. Greenspan to the Alexandria Executive Committee when they reviewed Dr. Osheroff's privileges. (Synan test., tr. p. 1561).

310. Greenspan took the documents with him to the Executive Committee meeting because he felt he needed evidence to support what he might have said. (Greenspan test., t.r pp. 2421-21A).

311. At the time Greenspan testified before the Executive Committee of Alexandria Hospital, he told the Committee that Osheroff was better symptomatically. Greenspan also told them that Osheroff's mood was elevated and he was no longer depressed. (Greenspan test., tr. p. 2644).

312. Dispite Tolkan's and Greenspan's efforts to have Osheroff's privileges removed after an evaluation by Dr. William Z. Potter of NIH was submitted to the Committee (Pl. Ex. 91), Osheroff's privileges were restored on January 16, 1980. (Pl. Ex. 116).

Greenspan v. NMC

313. On or about December 17, 1979 Greenspan and Tolkan, filed suit against Dr. Osheroff, his corporation, and National Medical Care for antitrust violations and to gain privileges in the center. (Pl. Ex. 127). Greenspan and Tolkan alleged that the patients had chosen them for their doctor, based on the patient solicitation form, and also that their due process rights under Greenspan's bylaws (Pl. Exs. 6, 7) had been violated.

314. Judge Lewis ruled against the two doctors, finding that they had improperly solicited Dr. Osheroff's patients, and that the bylaws they were suing under were fraudulently promulgated. (Pl. Ex. 168, pp. 267, 276-76, 303-05, 371-72, 368-69;

Pl. Ex. 170).

315. The antitrust claim was voluntarily dismissed by the plaintiffs. (Pl. Ex. 169).

Publicity And Complaints

316. After December 12, 1979, the situation at NVDC received a great deal of adverse publicity. Dr. Osheroff became aware of newspaper articles (Pl. Exs. 118, 119, 120A-O) which were published around the time of the lawsuit initiated by Greenspan in late December 1979. Those articles seriously disturbed Dr. Osheroff because of the professional and social ramifications and because of allegations about his professional competence and mental health. Dr. Osheroff was also concerned with the effect of this publicity on his three sons. (Osheroff test., tr. pp. 347-350).

317. The newspaper articles were derogatory in nature about the medical care at NVDC and upset and increased the anxiety levels of the patients. (Shine depo., p. 65).

318. Dr. Greenspan was interviewed on television on a number of occasions concerning his firing from NVDC, and on one occasion, the television crews came to the unit. This publicity greatly upset the dialysis patients. (Shine depo., p. 64).

319. On December 19, 1979, Greenspan and Tolkan's lawyers sent a copy of the complaint in their suit against Osheroff to the Health Care Financing Administrator. (Pl. Ex. 127). This complaint resulted in a surprise inspection of NVDC by HCFA on the second day of the Greenspan v. NMC hearing on January 10, 1980. (Pl. Ex. 121). Greenspan's and Tolkan's allegations

resulted in inspections by the Renal Network and the Virginia Board of Health as well. (Pl. Exs. 122-126).

320. Peggy Hess' contacts with Nancy Sharpe resulted in yet another inspection of NVDC. (Sharpe test., tr. pp. 1501-06; Pl. Exs. 124, 125).

321. On March 12, 1980, the Alexandria Journal published an article entitled "Half of Dialysis Center Nurses Quit." In that article, a nurse was quoted as stating that a patient "might well have died" had the nurse administered medication Dr. Osheroff had ordered. Peggy Hess was the nurse who made this false statement. (Pl. Ex. 120(j); Hess test., tr., p. 1627).

322. Hess knew that all she could accomplish by making such a statement to the press would be to injure the reputation of Dr. Osheroff and NVDC. (Hess test., tr. p. 1722).

Damages

323. The income accruing to Dr. Osheroff in his dialysis practice and his medical practice accrued from two different sources. A unit professional fee is derived from patients who are receiving chronic dialysis treatment within the center for which the corporation receives a fee every time a patient is dialyzed within the facility. The second source of income is derived from the medical practice for the treatment of patients in the office and in the hospital and some dialysis service that is provided on the hospital grounds. The unit professional fee is $260 a month per patient. In addition, Dr. Osheroff receives a participation fee as a result of his contract with National

Medical Care, that fee is equal of 40% of the new profits before taxes earned by the NVDC and is paid in July of the following year. (Notaris test., tr. pp. 22-23).

324. The Prince William Dialysis Facility opened in June, 1980. (Smith test., tr. pp. 41-43).

325. Since Dr. Greenspan opened his dialysis center in Prince William County, Dr. Osheroff has had no patients from the Manassas-Prince William area, although he used to average 16 to 20 chronic patients from that county. (Osheroff test., tr. p. 532).

326. During the period of time before Dr. Greenspan started working for Dr. Osheroff in May of 1978, there were approximately 79 chronic patients in the dialysis center. At the time Dr. Osheroff entered Chesnut Lodge in January of 1979, there were 86 chronic patients in the dialysis facility. In the fall of 1979, November 30, 1979, when Dr. Osheroff returned to his practice, there were 101 chronic patients in the dialysis facility. At the end of May 31, 1980, immediately prior to the opening of the Prince William facility by Dr. Greenspan, there were 82 chronic patients in the facility. In July 1980, one month after Dr. Greenspan opened the Prince William facility, there were 77 chronic patients in the NVDC. By December 31, 1980, there were 58 chronic patients in the NVDC facility. On September 30, 1981, the NVDC had 59 chronic patients. As of the present time, January 29, 1982, Dr. Osheroff has 60 patients in the dialysis facility. There are 12 patients that are seen by Dr.

Goldberger and 3 CAPD patients at present in the chronic dialysis facility at NVDC. (Smith test., tr. pp. 41-43).

327. Prior to Dr. Greenspan's joining Dr. Osheroff on May 31, 1978, there were 274 office patients in Dr. Osheroff's private practice. In January 1979 at the time Dr. Osheroff left for Chestnut Lodge, there were 157 office patients in his private practice. In November 1979 upon Dr. Osheroff's return to the practice, there were 195 office patients in his practice. As of May 1980, immediately prior to the opening of the Prince William facility, there were 47 office patients in Dr. Osheroff's private practice. On September 30, 1981, there were 91 office patients in Dr. Osheroff's private practice and on January 29, 1982, there are presently 115 patients in Dr. Osheroff's practice. (Smith test., tr., pp. 43-44).

328. Page 3000 of Pl. Ex. 147 contains the billing and unit professional fees of Osheroff, Inc. from October 1979 to September of 1980 as prepared by Frank Notaris. That statement covered a period time when Dr. Osheroff was in Silver Hill, recently out of Silver Hill, until Dr. Greenspan was fired. That document reflects the change in income in the practice, there was a dramatic change in June and July of 1980 and July to August 1980 when the Woodbridge unit opened up. During that period, the number of chronic patients in the unit dropped correspondingly. Prior to that time, the number of patients ranged from 74 to 101 and during the last two months of the year, the average was 57-58 patients a month. There was a dramatic drop in business in

August, 1979. (Notaris test., tr. pp. 35-36).

329. During the following 12 month period from October 1, 1980 to September 30, 1981, the number of the patient census decreased, the average number of patients per month in the unit was 51.2. (Notaris test., tr. p. 36).

330. A loss in the unit professional fee of $1 results in a $1 loss in actual net income. This is so because the overhead for dialysis is paid basically by NVDC and there is no additional overhead whether you have 80 patients or 45 patients. Most of the overhead is incurred by the doctors, basically for malpractice insurance which is required for both services, and will not increase with the number of patients. The heaviest overhead is accrued in the dialysis of acute patients outside the center. To the extent that a chronic patient leaves the unit, the business loses everything that patient contributed to whatever the professional income of the corporation is. (Notaris test., tr. p. 37).

331. Approximately 30 chronic patients actually left Dr. Osheroff's practice and went to Greenspan and Tolkan when the Prince William Dialysis Facility opened in June or July of 1980. (Smith test., tr. p. 1076; Montgomery test., tr. p. 1411; Greenspan test., tr. p. 2643).

332. Other patients left the medical practice and went to Dr. Greenspan and Dr. Tolkan at that time. (Smith test., tr. p. 1076). At least 77 former patients from Osheroff's practice have gone to Greenspan and Tolkan. (Pl. Ex. 176). Other

patients, chronic and office, have been lost because of lost referrals and loss of the Prince William referral area.

333. In 1977, Dr. Osheroff's medical practice generated gross fees of over one million dollars. (Notaris test., tr. pp. 1240, 1252-53; Pl. Ex. 147).

334. In 1978, the net income of Dr. Osheroff's practice was $301,755. (Notaris test. tr. pp. 26-28, 32-33, 1267-68, 1325).

335. In 1979, the net income of Dr. Osheroff's practice was $291,452. (Notaris test., tr. p. 1270).

336. In 1980, there was a net corporate loss for Osheroff, Inc., with no contribution made to the employee retirement plan. (Notaris test., tr. p. 1273). The net income of Dr. Osheroff's practice in 1980 was $150,000. (Notaris test., tr. pp. 1342, 1344, 1345).

337. In 1981, the net income for Dr. Osheroff's practice was approximately $50,000 to $60,000. (Notaris test., tr. pp. 32-33, 1329-31).

338. NVDC and Osheroff, Inc. operated at a significant profit in 1978 and 1979, but ran into a loss beginning in mid-1980.

339. Osheroff's medical practice has suffered significant losses, both during the years prior to trial and future lost profits. (Schramm test., tr. pp. 1122-1123; Pl. Ex. 175).

340. Using Dr. Schramm's assumption 1, the loss to Osheroff's practice would be $824,762 for the years 1980 through

1985. Using a 9% discount rate, the present value of this figure is $535,270 (Schramm test., tr. pp. 1122-23; see Pl. Ex. 177 as aid).

341. Using assumption 2, the loss to Osheroff's practice from 1980 through 1985 is $1,237,211 discounted to present value, the figure is $802,949. (Schramm test., tr. p. 1123).

342. Dr. Schramm's calculations were based only on the most conservative calculations. He used only the income stream that was projected forward as an aggregation of the medical practice fees and unit fees for chronic patients only. (Schramm test., tr. p. 1125).

343. Under Dr. Schramm's first assumption, he assumes that, absent the harm done by Greenspan and Tolkan, the NVDC would continue to have its historic share of the total Network 23 market of chronic patients, i.e. 10.53%. Using this growth factor, the NVDC should have had 96 patients in 1980 and approximately 129 patients by the year 1985. (Schramm test., tr. p. 1128).

344. Assumption 2 is based on the NVDC's historic growth rate which is greater than the surrounding dialysis facilities in the metropolitan area. Using this higher growth rate, the patient stream at the NVDC should grow to 105 patients in 1980 and should grow to 172 patients by the year 1985.

345. Assuming that the actual income for 1981 was not the projected $161,940 but somewhere closer to $65,000, (See Notaris test., tr. pp. 1329-31), the total loss to Osheroff and Osheroff, Inc. for the years 1980 and 1981, using these calculations, would be $334,733. (Schramm test., tr. pp. 1175-76).

II. Proposed Conclusions of Law

A. Counts I and II

1. Counts I and II allege that defendants Greenspan, Tolkan and Hess concerted together for the purpose of wilfully and maliciously injuring the reputation, trade, business, and profession of Raphael J. Osheroff, M.D. and Raphael J. Osheroff, M.D., Inc., in violation of Va. Code §§18.2-499 and 18.2-500. These statutes, in pertinent part, provide:

> §18.2-499 - (a) Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever ... shall be jointly and severally guilty of a Class 3 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under §18.2-500.
>
> (b) Any person who attempts to procure the participation, cooperation, agreement or other assistance of any one or more persons to enter into any combination, association, agreement, mutual understanding or concert prohibited in subsection (a) of this section shall be guilty of a violation of this section and subject to the same penalties set out in subsection (a) hereof.
>
> §18.2-500 - (a) Any person who shall be injured in his reputation, trade, business or profession by any reason of a violation of §18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel, and without limiting the generality of the term "damages" shall include loss of profits.

2. Subsection (a) of 18.2-499, together with 18.2-500(a) requires a finding that (1) the defendants acted

in concert (2) for the purpose of wilfully injuring plaintiffs and (3) that the reputation, trade, business and profession of plaintiffs were indeed injured. The conspiracy or agreement need not be shown expressly, however; indeed, the gist of a civil conspiracy is not the agreement itself, but the harm done. Gallop v. Sharpe, 179 Va. 335 (1942). The conspiracy may be shown by indirect or circumstantial evidence. Floyd v. Commonwealth, 219 Va. 575, 580 (1978). See Pl. Tr. Memo., at pp. 9-10.

Further, plaintiffs need not show that defendants acted with "actual malice," but rather that defendants "intentionally interfered with a right without lawful justification." 16 Am. Jur. 2d, Conspiracy, §50, p. 268. See Pl. Tr. Memo., at pp. 3, 11.

3. Defendants Greenspan, Tolkan and Hess clearly acted together with the common purpose in mind of preventing Dr. Osheroff from returning to his practice of medicine and to obtain that medical practice for themselves.

a. Within a few months of Dr. Osheroff's hospitalization, Greenspan and Tolkan began the process of setting up a competing dialysis facility, which, after it opened, took numerous patients from the NVDC and removed a large traditional patient referral area from Dr. Osheroff's practice. Both Greenspan and Tolkan testified that they knew that a competing facility in Prince William would gravely injure Dr. Osheroff's practice, yet they proceeded to set up the facility without even honestly revealing to Osheroff or his representatives

what they intended to do. That facility now provides a generous source of income for both Greenspan and Tolkan.

Greenspan was the author of the Prince William Dialysis Facility, and it was he who used Osheroff's staff, his accountant, the NVDC staff, his reputation and medical practice to set up a competing facility. Greenspan misrepresented his intentions to Westerman, Notaris, Osheroff's staff, the NVDC staff, the patients, and the public bodies whose support he solicited, by directly telling these people that his efforts were on behalf of Osheroff, and by the numerous letters he wrote indicating that the center would be part of NVDC. Indeed, both Eileen Collins and Sue Smith testified that it was common knowledge among the staff that the Prince William Dialysis Facility would be part of the NVDC. It was clearly Greenspan's intention to mislead and deceive everyone in order to obtain that part of the practice for himself.

Tolkan also directly participated in the setting up of the Prince William Dialysis Facility and now derives substantial income from that facility. Tolkan testified that he intended to be part of a facility in Prince William, and that he knew about Greenspan's plan in early 1979 to set up the Prince William Dialysis Facility. Tolkan was listed as co-medical director of the facility, he submitted a copy of his resumes with the application, he submitted a letter of intent to provide services at the competing facility, he wrote letters in support of the facility and spoke to Dean Montgomery of the

HSA in favor of the application, and he attended at least one HSA meeting with Greenspan where the application for the facility was considered. Tolkan, like Greenspan, never revealed these activities to his employer, Dr. Osheroff, or to any of his representatives.

Greenspan and Tolkan also attempted to set up two other dialysis facilities while employed with Osheroff, the Mid-Montgomery and Northeast D.C. facilities. Neither of these doctors told Osheroff about these centers.

Hess, who was hired by Greenspan in Osheroff's absence, was also directly involved in the setting up of the Prince William Dialysis Facility. Hess was well aware of the legal implications of setting up a competing facility, based on

offer to make rounds, Osheroff was barred from the unit, and the staff was instructed not to take orders from him.

In October 1979 both Greenspan and Tolkan refused to sign assignment of Medicare benefits forms which would entitle Osheroff, Inc. to payment for their physicians' services.

Both Greenspan and Tolkan had told Dr. Haut, Chief of Medicine, about Osheroff's hospitalization, and both knew that Osheroff's status at Alexandria Hospital would be questioned when he returned. Neither doctor told Osheroff about this. Greenspan called Dr. Haut on the day he was fired to have Osheroff's privileges suspended, and Tolkan spoke to Haut about Osheroff's privileges around that same time. The suspension was based solely on information Haut obtained from Greenspan

and Tolkan.

Greenspan and Tolkan both defamed Osheroff before the Alexandria Hospital Executive Committee, by testifying that Osheroff was incompetent. Neither doctor had had an opportunity to practice medicine with Osheroff since his hospitalization. Both doctors knew that they had a lawsuit pending against Osheroff and that the loss of privileges at Alexandria Hospital would destroy Osheroff's practice.

Greenspan raised an incident before the Executive Committee concerning the administration of the drug aminophylline to a patient. He had learned about this incident from Hess, who later reported the incident to the press which resulted in an article alleging that Osheroff was endangering the lives of the patients at the Center.

On December 12, 1979, Greenspan was fired and Tolkan resigned and joined him in practice. On that same day, Hess circulated the petition alleging Osheroff's "professional incompetence."

Both Greenspan and Tolkan openly and actively solicited Osheroff's patients by circulating forms among the dialysis patients and by having Martha Hall call all of the office patients at home. Hess witnessed some of the forms and helped circulate the forms among the patients. In circulating these forms, Greenspan told patients that Osheroff had no hospital privileges and was incompetent. Tolkan told patients that he and Greenspan were going to sue Osheroff to gain

access to the Center. This solicitation was a breach of medical ethics and thus, in and of itself, constitutes "wrongful interference" with Osheroff's practice. See Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175, 1184 (Pa. 1978); see also Pl. Tr. Memo., at pp. 3-5.

Greenspan and Tolkan joined in suing Dr. Osheroff, alleging that the patients in the Center were their patients, and claiming center privileges and due process rights under the NVDC bylaws fraudulently promulgated by Greenspan. Even after losing the suit and being admonished for their unethical conduct, they continued in their efforts to establish a competing facility.

Hess assisted Greenspan and Tolkan after they left Osheroff's practice by providing them with information on the patients at the center while she continued as head nurse until March 5, 1979. Greenspan and Tolkan were thus able to maintain contact with the patients until they were ready to open the competing facility.

4. There is no evidence that defendants acted with any "legal justification," (see Pl. Tr. Memo., at pp. 3, 11), but rather the evidence shows that the conduct was intentionally calculated to prevent Osheroff from practicing medicine and to obtain his practice. Indeed, many of the activities, including the setting up of the Prince William Dialysis Facility and Hess' meetings with the staff, occurred before Osheroff ever returned to the Washington area. Further, there is no evidence

that any of the defendants ever attempted to use legitimate channels to prevent Osheroff from practicing, if they had a valid concern about his competence. Accordingly, defendants can make no claim that their conduct was justified in the "interest of the patients."

5. Under §§18.2-499(b) and 18.2-500(a), Dr. Greenspan is liable to Osheroff for treble damages, costs, and attorneys fees for his conduct, as these sections proscribe the conduct of any person who attempts to procure the assistance of others to participate in a violation of 18.2-499(a). Greenspan clearly involved Tolkan and Hess in his activities, and, even if Hess and Tolkan were "innocent" in their participation, Greenspan violated this subsection by procuring their assistance. Further, on November 15, 1979, Greenspan asked Dr. Constantine Hampers not to reappoint Osheroff as Medical Director of NVDC, as this would force Osheroff to sell his practice to Greenspan. Hampers refused to participate in this scheme. Given the power and influence of Dr. Hampers' position, his decision not to re-appoint Osheroff would have virtually ended Osheroff's medical career. Greenspan's solicitation of Dr. Hampers, by itself, constitutes a violation of §18.2-499(b), entitling plaintiffs to relief.

6. The evidence shows overwhelmingly that the conduct of defendants has severely injured the reputation, trade, and profession of plaintiffs. The drastic drop in numbers of chronic patients, office patients, referrals, and net income can be traced directly to the conduct of defendants during 1979 and the opening of the Prince William Dialysis Facility in 1980.

Prior to that time, Osheroff had a thriving, highly profitable practice of nephrology. In cases such as this, involving lost profits, damages need not be shown with exact certainty. See Worrie v. Boze, 198 Va. 553 (1956); see also Pl. Tr. Memo., at pp. 7-8.

B. Count III

1. Count III alleges that Greenspan, Tolkan and Hess defamed Osheroff and injured his reputation.

2. Greenspan defamed Osheroff by telling patients, including Mr. Sparrow and Mr. Dialazo, that Osheroff was incompetent. Further, he introduced no evidence of the truth of these statements.

3. Greenspan and Tolkan defamed Osheroff before the Executive Committee of Alexandria Hospital by testifying that Osheroff was incompetent. Neither doctor had a sufficient basis to assess Osheroff's competence, and they had no basis on which to claim that Osheroff had not been cured of his depression. Greenspan raised incidents which had been conveyed to him by Peggy Hess, and he introduced NVDC staff letters to Hampers which were privileged communications between NVDC staff and Dr. Hampers. Both doctors were involved in litigation with Osheroff over the right to see patients in the unit, and both doctors knew that if Osheroff's privileges were not restored, Osheroff would not be able to practice medicine. The evidence shows that Greenspan and Tolkan both had an ulterior purpose

for testifying adversely against Osheroff and both testified before the Committee in bad faith. These doctors cannot claim any qualified privilege for their statements before the Committee under these circumstances. See Pl. Tr. Memo., at pp. 13-16.

4. Hess defamed Osheroff to the NVDC staff by calling him a "lunatic" and "incompetent." Further, she reported incidents to the press which resulted in a newspaper article (Pl. Ex. 120(j)), indicating that Osheroff was endangering the lives of patients. Ms. Hess admitted that, with regard to one incident, she told the newspaper reporter that the patient "might well have died." No competent evidence was introduced to prove the truth of that statement, or the truth of any of Ms. Hess' defamatory statements.

5. Ms. Hess can make no claim of common law qualified immunity for her statements, as no evidence was introduced to show either that she made these statements out of a duty to patients or that she pursued legitimate channels to protect patients from an "incompetent" doctor. Ms. Hess herself testified that she had no purpose in mind when she spoke to the press about Osheroff and that she knew her statements would injure his reputation. See Pl. Tr. Memo., at pp. 13-16.

6. The statements made by these defendants concerning Osheroff's competence are defamation per se. Rosenberg v. Mason, 157 Va. 215, 234 (1931); see Pl. Tr. Memo., at p. 14.

C. Count IV

1. Count IV alleges that Greenspan and Tolkan breached their fiduciary obligation to Osheroff and Osheroff, Inc. by setting up a competing facility, and thus holds the Prince William Dialysis Facility as constructive trustees for plaintiffs.

2. Greenspan and Tolkan, as plaintiffs' employees, and, by virtue of their agreement to maintain Dr. Osheroff's practice, stood in a fiduciary relationship with plaintiffs and were bound to exercise utmost faith and loyalty to their employer. Horne v. Holley, 167 Va. 234, 241 (1958); H-B Partnerships v. Wimmer, 220 Va. 176, 197 (1979); see also Pl. Tr. Memo., at pp. 17-20.

3. In setting up the Prince William Dialysis Facility, Greenspan and Tolkan acquired an interest adverse to that of their principal and severely injured Dr. Osheroff's practice. In addition, these doctors took advantage of confidential information which came to them by virtue of their position: a) the nature and terms of Dr. Osheroff's contract with NMC, b) confidential financial information, c) patient names and lists, and d) inside information about NVDC's ability to expand. More importantly, these doctors took advantage of the physician-patient relationship which they had developed only because they were Osheroff's employees and used these relationships in setting up a competing facility. This conduct was in breach

of their fiduciary obligations to their employer. See Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175, 1184 (Pa. 1978); see also Pl. Tr. Memo., at pp. 3-5; Community Counselling Service v. Reilly, 317 F.2d 239, 244 (4th Cir. 1963); Pl. Tr. Memo., at pp. 18-20.

4. The fiduciary duty owed by these two doctors is underscored by the fact that their employer was incapacitated during most of the time relevant to this case, and he entrusted his medical practice to his two employees. Greenspan and Tolkan were privy to medical information concerning Dr. Osheroff's progress, and they used that information to their advantage.

5. Under these circumstances, with such a wilfull breach of fiduciary trust, the appropriate remedy in equity is to impose a trust on behalf of plaintiffs on the profits of the Prince William Dialysis Facility. Pl. Tr. Memo., at pp. 17-22.

D. Count VI

1. Count VI alleges that defendant Greenspan, individually, deliberately interfered with the business reputation and profession of plaintiffs. This count is based on the common law tort of interference with business relationships, (see Picture Lake Campgrounds v. Holiday Inns, Inc., 497 F.Supp. 858, 863 (E.D. Va. 1980); also Pl. Tr. Memo., at pp. 5-7,) and differs from a claim under Va. Code §18.2-499(a) and §18.2-500 in that a conspiracy need not be proven.

2. As set forth in Counts I, II, III, and IV, Greenspan took many actions in concert with other defendants to prevent Osheroff from practicing medicine, but his conduct warrants a further finding that he personally undertook to interfere with Dr. Osheroff's practice.

3. Greenspan was appointed Acting Medical Director and "associated" with Osheroff in the practice of medicine, which gave him the right of first refusal to the NVDC Medical Directorship if Osheroff did not return within twelve months. Greenspan was kept abreast of Osheroff's progress at Chestnut Lodge, and he knew that Osheroff was not progressing well. He used this knowledge to his advantage in negotiating for sale of the practice, as he led Osheroff's representatives to believe that Osheroff would lose the directorship by virtue of the disability clause. When Osheroff transferred to Silver Hill and later, when he was discharged from Silver Hill, Greenspan called Dr. Dingman to discuss Osheroff's progress and to see if Dingman could do anything about Osheroff's discharge. Greenspan's intent is transparent: he wanted to keep Osheroff in Chestnut Lodge as long as possible to lower his purchase price or to gain the Medical Directorship by default.

4. Greenspan personally misrepresented to Westerman and Notaris that he was developing a dialysis facility in Prince William. Osheroff's representatives, trusting Dr. Greenspan in his position as employee and professional, were

thus misled and delayed taking steps to protect Osheroff's interests.

5. Greenspan personally undertook to have Dr. Osheroff's privileges removed at Alexandria Hospital. He threatened Osheroff on the day he was fired and called Dr. Haut the same day to carry out his threat. Further, his testimony before the Alexandria Hospital Executive Committee was an obvious malicious attempt to insure that Osheroff had no privileges at Alexandria Hospital, which would have given him a tremendous advantage in his then pending lawsuit against Osheroff.

6. Greenspan personally requested Dr. Hampers not to reinstate Osheroff as Medical Director so that Osheroff would be forced to sell his practice. When Hampers refused to assist Greenspan, Greenspan threatened to take the patients anyway. On December 12, 1979 he threatened again to steal Osheroff's practice.

7. Greenspan personally solicited each and every dialysis patient at NVDC, telling some of them that Osheroff was incompetent.

8. While he was Osheroff's employee, Greenspan filed applications for <u>three</u> dialysis facilities. He told Osheroff about none of them.

9. Greenspan's conduct was not inadvertent, but intentional and deliberate, calculated to prevent Dr. Osheroff from practicing medicine and to obtain the medical practice for himself.

10. As a result of Greenspan's conduct, plaintiffs have suffered severe financial losses, as reflected in the markedly decreased number of chronic and office patients in plaintiffs' practice and in the significant decreases in net income to the practice. Additionally, Dr. Osheroff has suffered grave personal humiliation and embarassment and irreparable damage to his professional reputation.

Collateral Estoppel

1. Defendants are collaterally estopped from asserting that the patients they solicited from Dr. Osheroff's practice were "their" patients or that their conduct in soliciting patients was not a breach of medical ethics. These issues were raised and litigated between the same parties in Greenspan v. NMC, et al., (Pl. Ex. 168) and were findings necessary to the decision in that action. The record in that case, and, indeed, the record in this case, fully support these findings. The doctrine of collateral estoppel thus precludes this court from making a contrary finding. Bates v. Devers, 214 Va. 667 (1974); see Pl. Tr. Memo., at pp. 22-26.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiffs' Proposed Findings of Fact and Conclusions of Law was hand delivered to R. Harrison Pledger, Jr., Esquire, 1489 Chain Bridge Road, Suite 204, McLean, Virginia, 22101, this 8th day of June, 1982.

David J. Fudala

DAVID J. FUDALA

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

RAPHAEL J. OSHEROFF, M.D.	)	
and	)	
RAPHAEL J. OSHEROFF, M.D., INC.,	)	
Plaintiffs,	)	
vs.	)	IN CHANCERY NO. 11345
ROBERT GREENSPAN, M.D.,	)	
STEVEN TOLKAN, M.D.,	)	
PRINCE WILLIAM DIALYSIS FACILITY, INC.,	)	
and	)	
MARGARET HESS,	)	
Defendants.	)	

MEMORANDUM OPINION

In this chancery cause the complainants seek damages, equitable relief, counsel fees and costs. The complainant, Raphael J. Osheroff, M.D., hereinafter referred to as Dr. Osheroff, is a physician who practices nephrology primarily in the City of Alexandria. The complainant, Raphael J. Osheroff, Inc., hereinafter referred to as Osheroff, Inc., is a professional corporation. The defendants, Robert Greenspan, M.D., hereinafter referred to as Dr. Greenspan, and Steven Tolkan, M.D., hereinafter referred to as Dr. Tolkan, are physicians who practice nephrology in Northern Virginia. The defendant, Prince William Dialysis Facility, Inc., is a Virginia corporation operating a dialysis facility in Woodbridge, Virginia, of which Dr. Greenspan is president and sole stockholder. The defendant, Margaret Hess, hereinafter referred to as Nurse Hess, is a registered nurse and a former staff member of the Northern Virginia Dialysis Center in Alexandria. The complainants contend that the defendants have interfered with and damaged their professional and business

interests and that Dr. Greenspan and Dr. Tolkan have attempted to take over the practice of Dr. Osheroff.

THE FACTS

Dr. Osheroff, a board-certified nephrologist, opened his practice in Northern Virginia in 1972. At the outset, the practice consisted of an office and the provision of dialysis services in local community hospitals. By 1977, Dr. Osheroff was operating the Northern Virginia Dialysis Center in Alexandria, which had approximately eighty-five patients, and another center in Fredericksburg. He also held a license to open a third facility in Warrenton.

On October 1, 1977, Dr. Osheroff entered into a consulting and profit sharing agreement with National Medical Care, Inc., a national corporation which specializes in the management of renal dialysis centers. Pursuant to this agreement, National Medical Care purchased Dr. Osheroff's dialysis center in Alexandria, the center in Fredericksburg and his certificate of need for a facility in Warrenton. National Medical Care retained Dr. Osheroff as Medical Director for these facilities and as compensation therefor he was to be paid forty percent of the net income of the centers. As part of the agreement, Dr. Osheroff retained the exclusive right to payment for physician's services rendered to patients in the dialysis centers and the right to choose the physicians who practiced in the centers. In order to open his own separate facility in Prince William County, Dr. Osheroff was required to obtain the consent of National Medical Care and a waiver from another National Medical Care affiliate which had the right of first refusal to establish a new unit in this area. But for intervening events, Dr. Osheroff probably could have obtained both the consent and the waiver.

After the sale of the dialysis centers to National Medical Care, Inc., Dr. Osheroff established a professional corporation and practiced as Raphael J. Osheroff, M.D., Inc. Thereafter, he maintained his office practice, operated the Northern Virginia Dialysis Center and made renal consults in Northern Virginia hospitals.

In June of 1978, Dr. Osheroff engaged Dr. Greenspan, a board-certified nephrologist, as an employee of Osheroff, Inc. to assist Dr. Osheroff in his medical practice. Dr. Greenspan's initial salary was $45,000.00 per annum, and it was agreed that he would become a partner in the practice in two years. Shortly thereafter, Dr. Tolkan, a board-certified nephrologist, was employed with the understanding that he would be a salaried employee of Osheroff, Inc. His beginning salary was $40,000.00; however, he was not offered the prospect of a partnership.

Although Dr. Greenspan and Dr. Tolkan did not sign written employment contracts with Osheroff, Inc., a written employment contract containing, among other things, a covenant not to compete was submitted to Dr. Greenspan for his consideration and he was made aware that Dr. Osheroff and his attorney desired a non-competitive arrangement. Dr. Greenspan was dissatisfied with the proffered contract and declined to sign it.

During the summer and fall of 1978, Dr. Osheroff became severely depressed and was seen by several psychiatrists as an outpatient. As his condition grew worse, Dr. Osheroff was unable to perform his share of the work and gradually withdrew from the practice. Both Dr. Greenspan and Dr. Tolkan were aware that Dr. Osheroff was suffering from a severe depression. Dr. Greenspan encouraged Dr. Osheroff to enter a hospital for treatment. Dr. Osheroff and Dr. Greenspan enjoyed a close personal relationship, and Dr. Greenspan assured Dr. Osheroff

that he would maintain the medical practice until Dr. Osheroff recovered from his depression and could resume his practice. This representation was also made to Dr. Osheroff's attorneys and accountant. Dr. Greenspan discussed his commitment to Dr. Osheroff with Dr. Tolkan and Dr. Tolkan also agreed to stay on and maintain the practice until the return of Dr. Osheroff. When Dr. Osheroff's condition continuted to deteriorate, Dr. Greenspan threatened to leave the practice unless Dr. Osheroff entered a hospital for treatment.

On January 2, 1979, Dr. Osheroff voluntarily admitted himself to Chestnut Lodge, a private psychiatric hospital in Rockville, Maryland, for treatment of his depression. Dr. Osheroff was accompanied on the drive to the hospital by his stepfather, Louis Bader, and Dr. Greenspan. During the trip, Dr. Greenspan assured Dr. Osheroff several times that he would maintain the practice while Dr. Osheroff was away.

At the time of Dr. Osheroff's admission to Chestnut Lodge, an informal understanding was reached between Dr. Osheroff and the Chestnut Lodge personnel that Dr. Greenspan would be kept informed of the progress being made in the treatment of Dr. Osheroff and that Dr. Greenspan was to be included in the treatment plan discussions just as if he were a member of Dr. Osheroff's family.

When Dr. Osheroff was admitted to Chestnut Lodge, Dr. Greenspan was under the impression that Dr. Osheroff would be hospitalized for a period of six to twelve months. As time passed, he concluded that the period of hospitalization probably would be for longer than a year.

Within a day or two of Dr. Osheroff's admission to Chestnut Lodge, his attorney, Arnold Westerman, arranged a meeting at his office with Dr. Osheroff's former wife, Dr. Joy Osheroff,

Dr. Greenspan and Frank Notaris, Dr. Osheroff's accountant, to discuss the continued operation and management of Dr. Osheroff's practice. During the course of the meeting, Dr. Joy Osheroff and Dr. Greenspan assured Mr. Westerman that Dr. Osheroff would receive good medical treatment at Chestnut Lodge and that its nearby location would enable Dr. Osheroff to maintain contact with his practice and friends. It was agreed that Dr. Greenspan would make all of the medical decisions regarding the practice. Dr. Greenspan also agreed to take over the medical aspects of the business and told Arnold Westerman that he would act as a trustee and fiduciary for Dr. Osheroff while he was away. It was also agreed at this meeting that Frank Notaris and several trusted employees would be responsible for Dr. Osheroff's financial matters, and that Arnold Westerman would be available for consultation, if needed.

During the aforesaid meeting, mention was made of a possible sale of Dr. Osheroff's practice and Arnold Westerman and Frank Notaris stated to Dr. Greenspan that if a sale of the practice took place, Dr. Greenspan would be given the first opportunity to purchase it; however, both Arnold Westerman and Frank Notaris felt they should wait and see whether Dr. Osheroff improved before considering a sale.

After Dr. Osheroff had been a patient at Chestnut Lodge for approximately two months, the staff and Dr. Greenspan became concerned about the frequent telephone calls that Dr. Osheroff was making to his family, Dr. Greenspan and others connected with his business. The consensus was that the calls were too numerous and counter-productive. As a result, a decision was made by the staff to limit Dr. Osheroff's telephone privileges to a weekly call from Dr. Greenspan to discuss the status of the practice and a weekly call from Dr. Osheroff's parents. Dr. Osheroff was also permitted to talk from time to

time with his attorney and accountant.

During Dr. Osheroff's hospitalization, Frank Notaris frequently visited Dr. Osheroff's office to check on the status of the practice. He often spoke to Dr. Greenspan while on these visits. In early 1979, Dr. Greenspan began pressing Frank Notaris to provide him the numbers involved in a sale of the practice. Dr. Greenspan gave Frank Notaris the impression that he had concluded that Dr. Osheroff was not going to return to the Northern Virginia Dialysis Center as a well man, and that, therfore, he should begin discussing the terms of a sale.

During Dr. Osheroff's confinement at Chestnut Lodge, his physical and mental condition deteriorated drastically. Dr. Osheroff spoke to Dr. Greenspan on the telephone and complained about the poor treatment he was receiving, and asked Dr. Greenspan to arrange his release from Chestnut Lodge. Dr. Greenspan reassured Dr. Osheroff by telling him that Chestnut Lodge would make him happy and that he would take care of everything for him.

After Dr. Osheroff entered Chestnut Lodge, Dr. Greenspan saw all of the new patients and any renal consults who came into the office. Dr. Tolkan continued his earlier practice of visiting all of the patients in the outlying hospitals. Dr. Tolkan was given an annual raise of $20,000.00 after his request therefor was forwarded by Dr. Greenspan to either Arnold Westerman or Frank Notaris. Dr. Greenspan's salary was increased from $45,000.00 to $100,000.00, although Dr. Greenspan never mentioned it to Dr. Osheroff.

After Dr. Osheroff was hospitalized, Dr. Greenspan and Pat Shine, Administrator of the Northern Virginia Dialysis Center, interviewed Peggy Hess for the position of Head Nurse at the Northern Virginia Dialysis Center. Nurse Hess accepted the position and began work on April 10, 1979.

In March 1979, Dr. Greenspan was appointed Acting Medical Director of the Northern Virginia Dialysis Center and the Fredericksburg Dialysis Center. This was accomplished as the result of a letter written to Constantine L. Hampers, M.D., President of National Medical Care, Inc., by Dr. Greenspan and signed by Dr. Osheroff at the request of Dr. Greenspan, which confirmed the fact that Dr. Greenspan was associated with Dr. Osheroff in the practice of medicine. The purpose of this arrangement was to protect Dr. Osheroff's rights under his contract with National Medical Care, Inc. and to give Dr. Greenspan the right of first refusal to negotiate with National Medical Care, Inc. in the event Dr. Osheroff was disabled and unable to return to his practice.

During the approximately seven months that Dr. Osheroff was a patient at Chestnut Lodge, Dr. Greenspan visited him on three occasions, the last of which was on or about March 23, 1979. Neither Dr. Tolkan nor any other member of the staff visited Dr. Osheroff.

On March 19, 1979, Dr. Greenspan, acting for the medical staff, promulgated bylaws for the medical staff of the Northern Virginia Dialysis Center. Unlike Dr. Osheroff's contract with National Medical Care, Inc., which gave Dr. Osheroff the right to admit physicians of his choice to practice in the Center, the bylaws restricted membership on the medical staff to staff members of the George Washington University Medical Center. Dr. Greenspan did not discuss these bylaws with anyone other than Pat Shine and their existence was unknown to Dr. Osheroff until the trial of the suit brought by Dr. Greenspan and Dr. Tolkan against Dr. Osheroff in the federal court

In early 1979, Dr. Greenspan began considering the possible need for a new dialysis center in the Woodbridge area of Prince William County. The severe winter weather made it

difficult for patients living in that area to obtain transportation to Alexandria, and Dr. Greenspan was aware of efforts by other doctors to establish a new unit in the Woodbridge area, which would have an adverse impact on the Alexandria practice. At the outset, Dr. Greenspan intended that the new center be a part of Dr. Osheroff's practice. Dr. Greenspan discussed the matter with Dr. Tolkan, who concurred in the desirability of a Prince William unit and decided to participate in its operation.

In July 1979, Dr. Greenspan inquired of Dr. Constantine L. Hampers to learn the reaction of National Medical Care, Inc. to Dr. Greenspan's proposal to open a new facility in Woodbridge. Initially, Dr. Hampers told him that National Medical Care, Inc. could interpose no objection; however, later in the summer Dr. Hampers changed his mind and decided that Dr. Greenspan should be bound by the non-competition clause in Dr. Osheroff's contract with National Medical Care, Inc. In September 1979, Dr. Hampers informed Dr. Greenspan that he thought Dr. Greenspan was in violation of Dr. Osheroff's contract with National Medical Care, Inc.

In July of 1979, Dr. Greenspan discussed the Prince William application with Dr. Osheroff's attorney, Arnold Westerman, and told him that the application was being made in Dr. Greenspan's name instead of Dr. Osheroff's because Dr. Osheroff was not available to handle the details. Dr. Greenspan assured Westerman that the application was Dr. Osheroff's and that it would be held for him. Dr. Greenspan also told Arnold Westerman that National Medical Care, Inc. had waived its right to object to the proposed unit under the non-competition clause of its contract with Dr. Osheroff, when in fact such was not the case.

Dr. Greenspan also discussed the application for a Prince William facility with Frank Notaris. Dr. Greenspan told Notaris that he was precluded from filing the application in the

name of Osheroff, Inc. by the terms of Dr. Osheroff's contract with National Medical Care, Inc. and that he was filing the application to forestall competition from another nephrology group. Dr. Greenspan gave Frank Notaris the impression, however, that the new unit would be jointly operated with Dr. Osheroff.

On September 7, 1979, Dr. Greenspan filed the application for a certificate of need for a dialysis center in Woodbridge, using information gleaned in large measure by virtue of his position as Acting Medical Director of the Northern Virginia Dialysis Center and as an employee of Dr. Osheroff. The letters written in connection with the application were all written on Northern Virginia Dialysis Center stationery and were signed by Dr. Greenspan in his capacity as Acting Medical Director. The course of action followed by Dr. Greenspan in pursuing the application led those acting on behalf of Dr. Osheroff to believe that the application was being made for the benefit of Dr. Osheroff.

On November 12, 1979, the Board of Directors of the Health Systems Agency, the regional planning agency responsible for reviewing applications for new health care facilities, met and approved the application. On January 8, 1980, the State Health Commissioner granted a certificate of need to Prince William Dialysis Facility, Inc., a Virginia proprietary corporation, the stock of which is wholly owned by Dr. Greenspan. Unlike the Northern Virginia Dialysis Center, the Prince William Dialysis Facility is an open unit which permits all physicians to treat their patients there.

During the time that Dr. Osheroff was a patient at Chestnut Lodge, negotiations were initiated for the sale of Dr. Osheroff's practice to Dr. Greenspan. Although his attorney did not believe him to be mentally incompetent, guardians were

appointed to protect Dr. Osheroff's interests. A meeting was held on August 21, 1979, between Dr. Osheroff's guardians, H. Bradley Evans and Louis Bader, Dr. Osheroff's attorney, Arnold Westerman, Dr. Osheroff's accountant, Frank Notaris, and Dr. Greenspan and his attorney, Lawrence Rubin, for the purpose of discussing a possible sale of the practice. The guardians favored a partnership arrangement that would permit Dr. Osheroff to return to the practice; however, Dr. Greenspan refused to enter into any partnership arrangement with Dr. Osheroff. A firm proposal for the sale of the practice was not made on behalf of Dr. Osheroff to Dr. Greenspan or his attorney and the meeting concluded with the understanding that Dr. Greenspan and his attorney would be provided additional financial information about the practice.

By the summer of 1979, Dr. Osheroff's physical and mental condition had deteriorated drastically. Concerned about the situation, Louis Bader conferred with a psychiatrist in Washington, D.C. and the decision was made to transfer Dr. Osheroff to Silver Hill, a psychiatric facility in New Canaan, Connecticut. Dr. Osheroff was admitted on August 1, 1979, and within a short time thereafter, he began to show marked signs of improvement. After several weeks at Silver Hill, Dr. Osheroff made a weekend visit to Washington, D.C. during which he consulted a psychoanalyst who agreed to see him upon his release from Silver Hill and met with his attorney to discuss termination of the guardianship. On November 1, 1979, the guardianship was terminated and Dr. Osheroff was discharged from Silver Hill.

Following his discharge from Silver Hill, Dr. Osheroff returned to the Washington area and prepared to resume the active practice of medicine by visiting the Northern Virginia Dialysis Center, reviewing patients' charts and reading current literature

on medications. He did not, however, actually make rounds or give orders for medication prior to December 12, 1979.

In November 1979, Dr. Osheroff met Dr. Greenspan for lunch to discuss Dr. Osheroff's return to practice. When Dr. Osheroff said he was feeling well and wished to come back to the practice, Dr. Greenspan responded by saying that Dr. Hampers wished for him to sell the practice to Dr. Greenspan. The conversation was then terminated by the departure of Dr. Greenspan, who had been paged to see a patient.

Following a visit to the Northern Virginia Dialysis Center by Dr. Osheroff in November 1979, a meeting of the staff was held at which Dr. Osheroff's return was discussed. During this meeting, Nurse Hess stated that Dr. Osheroff was incompetent. She further stated that she did not want to work for Dr. Osheroff and that if he did return, she would stay long enough to see all the nurses transferred and then she would leave. In response to a question about whether the staff could do anything to prevent Dr. Osheroff's return, Nurse Hess stated that they could write a petition refusing to work for Dr. Osheroff, but that she could not initiate it because she was the head nurse. This resulted in the petition alleging Dr. Osheroff's incompetence which was circulated on December 12, 1979.

On November 15, 1979, Dr. Greenspan met with Dr. Constantine L. Hampers at National Airport. Dr. Hampers told Dr. Greenspan that he wanted him to turn over the Woodbridge facility to National Medical Care and operate it as partners. Dr. Hampers also expressed his concern over the fact that Dr. Greenspan had made application for a new facility in northeast Washington, which would be a competing unit. Dr. Greenspan told Dr. Hampers that, if he were made the permanent medical director of the Virginia facilities, he would consider

turning over the northeast Washington and the Woodbridge facilities to National Medical Care, Inc. Dr. Hampers informed Dr. Greenspan that he would have to talk to Dr. Osheroff to determine how well he was before deciding whether to consider Dr. Greenspan for the permanent medical directorship. Dr. Greenspan then asked Dr. Hampers to use whatever influence he had to convince Dr. Osheroff to sell his practice to Dr. Greenspan. When Dr. Hampers responded that Dr. Osheroff would have to decide that for himself, Dr. Greenspan stated that Dr. Hampers' decision not to reappoint Dr. Osheroff as Medical Director would weigh heavily on Dr. Osheroff's decision to sell. Dr. Hampers then said he would not enter into collusion to force Dr. Osheroff to sell. Whereupon, Dr. Greenspan told Dr. Hampers that if Dr. Osheroff didn't sell, he would take the patients from Dr. Osheroff anyway.

On November 19, 1979, Dr. Greenspan filed an application for a new dialysis center in Montgomery County, Maryland, on which he listed himself as Co-Medical Director and Chief Executive and listed Dr. Tolkan as a staff member. Neither Dr. Greenspan nor Dr. Tolkan told Dr. Osheroff about this application.

On or about November 20, 1979, Dr. Osheroff offered to make rounds at the Northern Virginia Dialysis Center because Dr. Greenspan was scheduled to be away and Dr. Tolkan was occupied at the hospital. Dr. Osheroff called Dr. Tolkan at the hospital to tell him he would make rounds, and Dr. Tolkan responded that he was not to do so. Dr. Tolkan then called Dr. Greenspan who in turn called Dr. Hampers in Boston to apprise him of the situation. Dr. Greenspan then went to the Northen Virginia Dialysis Center and informed Dr. Osheroff that he could not make rounds, whereupon Dr. Osheroff left the Center.

After being told that he could not make rounds, Dr. Osheroff called Dr. Hampers and arranged a meeting. They met on November 30, 1979, and discussed Dr. Osheroff's reinstatement as Medical Director. During this meeting, Dr. Osheroff learned about Dr. Greenspan's activities in setting up competing facilities and of his request that Dr. Osheroff not be reappointed as Medical Director. It was decided during this meeting that Dr. Greenspan should be terminated as Acting Medical Director. After satisfying himself that Dr. Osheroff was competent to resume the practice of medicine, Dr. Hampers wrote to Dr. Osheroff on December 6, 1979, and formally reinstated him as Medical Director of the Northern Virginia Dialysis Center.

On December 3, 1979, Dr. Greenspan filed an application for the Northeast Washington Dialysis Facility on which he listed himself and Dr. Tolkan as doctors for the facility. Neither Dr. Greenspan nor Dr. Tolkan informed Dr. Osheroff of this application. Unlike the application for the Prince William facility, the northeast Washington and Montgomery County applications did not refer to Dr. Greenspan's position as Acting Medical Director of the Northern Virginia Dialysis Center and did not contain letters of support written on Northern Virginia Dialysis Center stationery. This procedure was followed at the suggestion of Dr. Greenspan's attorney to make it clear that these two facilities were not to be affiliated with Dr. Osheroff.

On December 12, 1979, Arnold Westerman and Dr. Osheroff met at length with Dr. Greenspan for the purpose of negotiating a mutually satisfactory arrangement. After protracted discussions, Dr. Greenspan refused to enter into a partnership agreement with Dr. Osheroff and he was then told that his services were being terminated. During the course of these conversations, Dr. Greenspan told Dr. Osheroff that he had already made a call

to make sure that Dr. Osheroff would not be able to practice medicine in the area again and that he was going to lose everything he had unless he sold his practice to Dr. Greenspan.

Prior to December 12, 1979, Dr. Donald D. Haut, Chief of the Department of Medicine at the Alexandria Hospital, inquired of Dr. Greenspan about Dr. Osheroff's status and requested that Dr. Greenspan notify him if Dr. Osheroff intended to resume his practice and admit patients to the Alexandria Hospital. On December 12, 1979, Dr. Greenspan telephoned Dr. Haut and informed him that Dr. Osheroff intended to resume his practice. Thereupon, Dr. Haut called Dr. Osheroff and summarily suspended his privileges at the Alexandria Hospital. Dr. Haut confirmed the telephonic suspension by letter on December 13, 1979.

On December 12, 1979, Dr. Greenspan called Dr. Tolkan at the hospital while he was making rounds and told him of his firing. Thereafter, Dr. Tolkan met with Dr. Osheroff and Arnold Westerman who asked him to continue working for Dr. Osheroff. Dr. Tolkan also met with Dr. Greenspan in an office Dr. Greenspan had rented on the first floor of the same building in which the Northern Virginia Dialysis Center was located. After expressing concern about Dr. Osheroff's medical competence, Dr. Tolkan declined the offer to remain with Dr. Osheroff and elected to join Dr. Greenspan.

After the negotiations of December 12 culminated in the firing of Dr. Greenspan and the resignation of Dr. Tolkan, they were both told by Arnold Westerman that they could no longer use the facilities or enter the dialysis unit. They then opened their own practice in the office Dr. Greenspan had rented. Martha Hall, a long-time employee of Dr. Osheroff, resigned and was employed by Dr. Greenspan. With the knowledge of Dr. Greenspan and Dr. Tolkan, she began telephoning patients to notify them

that Drs. Greenspan and Tolkan were in a new location and to inquire whether they wished to continue being treated by Drs. Greenspan and Tolkan. Several of Dr. Osheroff's other employees, including all of his acute technicians, resigned and were employed by Drs. Greenspan and Tolkan.

Notwithstanding the admonition of Arnold Westerman, Dr. Greenspan and Dr. Tolkan continued to see patients and make rounds in the unit for about two weeks after December 12, 1979. They ceased making rounds only after they were threatened with arrest.

After he was fired and opened his own office, Dr. Greenspan drafted the following form and had it typed by one of his employees on Northern Virginia Dialysis Center stationery:

> TO WHOM IT MAY CONCERN:
>
> I, _____, currently a patient
> Name of Patient
> undergoing chronic hemodialysis at the Northern Virginia Dialysis Center, do hereby declare that I will not accept any medical services from Raphael J. Osheroff, M.D. and am under the care of Robert E. Greenspan, M.D. for any and all medical services associated with my therapy at the Northern Virginia Dialysis Center in Alexandria, Virginia.
>
> _____
> Signature of Patient
>
> _____ _____
> Date Signed Signature of Witness

Dr. Greenspan distributed the form to patients in the dialysis center, discussed it with them and suggested they should sign it if they preferred to have Dr. Greenspan continue treating

them. This was done while many of the patients were undergoing dialysis and many of the patients became upset over the situation.

Although it is unclear whether Dr. Tolkan participated in the drafting or circulation of the form, he nevertheless discussed it with several of the patients and told some of them that he and Dr. Greenspan were going to bring suit in the federal court in order to obtain privileges in the unit.

Nurse Hess acted as a witness to the execution of the forms, and in one instance provided a form to a patient who didn't have one. Although she was still acting as Head Nurse, Nurse Hess did not discuss the patient forms with Dr. Osheroff.

Section V of the Principles of Medical Ethics of the American Medical Association, which was excerpted from the American Medical Association Code of Ethics, prohibits the solicitation of patients by physicians. Solicitation is defined elsewhere as the use of "undue influence or pressure to obtain patients." Dr. Greenspan violated this prohibition by drafting the form in the language he chose, having it printed on Northern Virginia Dialysis Center stationery and presenting it to patients for execution while they were undergoing treatment.

A hearing was held by the Executive Committee of the Alexandria Hospital on December 27, 1979, to determine if Dr. Osheroff's privileges should be restored. Dr. Greenspan testified and expressed the opinion that Dr. Osheroff was not competent to practice medicine, buttressing his opinion with references to incidents he considered to be irregular and letters from the staff of the Northern Virginia Dialysis Center which had been written in connection with Dr. Osheroff's return as Medical Director of the Northern Virginia Dialysis Center. Dr. Tolkan also testified and concurred in the opinion that Dr. Osheroff was not competent to practice. At the conclusion of the hearing,

the Executive Committee required that Dr. Osheroff be evaluated by an independent psychiatrist. After considering the evaluation on January 15, 1980, the Executive Committee terminated the suspension of Dr. Osheroff's clinical privileges.

On December 18, 1979, Dr. Greenspan and Dr. Tolkan filed suit against Dr. Osheroff and Osheroff, Inc. in the United States District Court for the Eastern District of Virginia seeking a temporary and permanent injunction to permit them staff privileges at Northern Virginia Dialysis Center, Incorporated, to treat patients on dialysis machines, injunctive relief against alleged antitrust violations and treble damages for violation of the antitrust laws. The Federal Court bifurcated the antitrust claims and held an expedited evidentiary hearing on the prayer for a permanent injunction, at the conclusion of which the prayer was denied. In the memorandum opinion and order that followed the hearing the Court concluded that there had been no deprivation of the plaintiffs' constitutional rights, that the patients being treated at the Northern Virginia Dialysis Center were Dr. Osheroff's and not Dr. Greenspan's or Dr. Tolkan's, and that Dr. Greenspan's reliance on the bylaws he had promulgated was misplaced. The Court also concluded that Dr. Osheroff had ample cause to summarily discharge Dr. Greenspan. The antitrust charges were voluntarily dismissed by the plaintiffs.

The controversy between Dr. Osheroff and Drs. Greenspan and Tolkan became the subject of extensive newspaper publicity at about the time of the trial of the lawsuit brought against Dr. Osheroff by Drs. Greenspan and Tolkan in the Federal Court. The newspaper articles were about the trial in the Federal Court and the situation at the Northern Virginia Dialysis Center. Some of these articles seriously disturbed Dr. Osheroff because they contained statements about his professional competence and mental health which he considered to be derogatory.

It should be noted that the article published in the Alexandria Journal on March 12, 1980, entitled "Half of Dialysis Center Nurses Quit" was admitted into evidence for the limited purpose of showing that publicity was generated by the controversy and was not re-offered during or following the testimony of Nurse Hess. Thus, the Court was not called upon to rule whether a sufficient showing had been made that Nurse Hess was the source of the comments in the article.

After Dr. Greenspan and Dr. Tolkan opened their own office, Nurse Hess and two other nurses in the Northern Virginia Dialysis Center communicated on a daily basis with Dr. Greenspan and Dr. Tolkan about the patients at the Center. This communication continued until all three nurses left employment at the Center on March 5, 1980, and went to work for Dr. Greenspan and Dr. Tolkan.

Approximately thirty of the chronic hemodialysis patients of the Northern Virginia Dialysis Center transferred to the Prince William Dialysis Facility when it opened in June 1980.

CONCLUSIONS OF LAW

COUNTS I AND II

In Counts I and II the complainants allege that the defendants concerted together for the purpose of willfully and maliciously injuring the complainants in their reputation, trade, business and profession in violation of Virginia Code Sections 18.2-499 and 18.2-500. These statutes provide in pertinent part as follows:

> § 18.2-499. - (a) any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever, . . . shall be jointly and severally guilty of a Class 3 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

(b) any person who attempts to procure the participation, cooperation, agreement or other assistance of any one or more persons to enter into any combination, association, agreement, mutual understanding or concert prohibited in subsection (a) of this section shall be guilty of a violation of this section and subject to the same penalties set out in subsection (a) hereof.

§ 18.2-500. - (a) any person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel; and without limiting the generality of the term "damages" shall include loss of profits.

There are no reported decisions of the Virginia Supreme Court construing Code Sections 18.2-499 and 18.2-500. The lack of State case law, coupled with the nonexistence of any recorded legislative history, poses a dilemma for the Court when trying to fathom the purpose and scope of this statute. There are, however, several federal decisions interpreting the statute. In Federated Graphics v. Napotnik, 424 F.Supp. 291 (E.D.Va. 1976) the Court stated that the statute provides a remedy for wrongful conduct directed at one's business, not one's person, and that the statute does not codify common law actions. See also Moore v. Allied Chemical Corp., 480 F.Supp. 364 (E.D.Va. 1979). In Falwell v. Penthouse International, Ltd., 521 F.Supp. 1204 (W.D.Va. 1981) the Court concluded that the allegations of the complaint did not state a viable claim under Code Sections 18.2-499 and 18.2-500 because there was no basis for the general allegation that any of the defendants conspired for the specific purpose of injuring the plaintiff. The Court noted that the plaintiff had alleged no facts or circumstances which even remotely suggested that the defendants acted for any more sinister purpose than to sell magazines.

In order to recover for a violation of Code Section 18.2-499(a) the complainants must prove that (1) two or more of the defendants acted in concert (2) for the purpose of willfully and maliciously damaging the complainants in their reputation, trade, business or profession and (3) that the reputation, trade, business or profession of the complainants was in fact injured.

In my view of this case, the liability of the defendants under Counts I and II depends on whether they acted with the specific intent to injure the complainants in their business or profession, and if so, whether they acted willfully and maliciously. Keeping in mind that the gist of Counts I and II is a violation of a criminal statute to which severe civil penalties are attached, I would construe the statute to require proof of actual malice or malice in fact as contrasted to legal malice. Actual malice, or malice in fact, may be established by showing that a person acted out of a sinister or corrupt motive such as hatred, personal spite, ill will, or a desire to injure the plaintiff. On the other hand, legal malice may be established by showing that the actor lacked legal excuse or justification for his actions. This construction of the statute equates the test for treble damages with the common law definition of actual malice.

My assessment of the evidence has led me to the conclusion that Nurse Hess did not act out of a malevolent desire to injure Dr. Osheroff or his professional corporation in their business or profession. Notwithstanding the fact that some of her actions demonstrated questionable judgment, I am persuaded that Nurse Hess was motivated by a desire to fulfill what she deemed to be her professional responsibilities as a nurse. Thus,

Nurse Hess was not party to a conspiracy proscribed by the statute.

Dr. Tolkan's motive or purpose is not as easily discernable as that of Nurse Hess. Not only did he have a substantial stake in the outcome of the maneuverings between Dr. Greenspan and Dr. Osheroff, but he also elected to join Dr. Greenspan when confronted with the choice of practicing with either Dr. Osheroff or Dr. Greenspan. Nevertheless, I have concluded that Dr. Tolkan acted not out of a malicious desire to damage Dr. Osheroff's practice, but rather for the purpose of fostering his own practice and rendering proper medical care to his patients. Inasmuch as these were legitimate ends, Dr. Tolkan was not party to an illegal conspiracy.

Although Dr. Tolkan and Nurse Hess may have been the unwitting accomplices of Dr. Greenspan and engaged in conduct which adversely affected the business or profession of Dr. Osheroff, the Court has found that neither of them maliciously conspired with another for the specific purpose made illegal by the statute. It follows, then, that since the complainants have failed to prove that two or more of the defendants engaged in an illegal conspiracy, there has been no violation of Code Section 18.2-499(a).

The complainants contend that, even if Dr. Tolkan and Nurse Hess are innocent of violating the statute, Dr. Greenspan still must respond in treble damages because he violated subparagraph (b) of Code Section 18.2-499, which penalizes anyone who attempts to procure any other person to participate in a conspiracy prohibited by subparagraph (a). My research has failed to disclose any cases, state or federal, concerning subparagraph (b), and its meaning is even more enigmatic than that of subparagraph (a).

I read the statute to mean that Dr. Greenspan must have been motivated by a malicious desire to harm Dr. Osheroff and his professional corporation in their business or profession in order

to have violated either subparagraph (a) or (b) of Code Section 18.2-499. As in the case of Dr. Tolkan, I am satisfied that Dr. Greenspan intended to foster his own practice and render proper medical care to his patients, both of which are legitimate purposes; however, his conduct was so unprincipled and over-reaching as to convince me that he did in fact act willfully and maliciously for the specific purpose of harming Dr. Osheroff and his professional corporation in their business or profession. Having considered Dr. Greenspan's entire course of conduct, including his involvement of Dr. Tolkan and Nurse Hess and his attempted involvement of Dr. Hampers in his scheme to take over Dr. Osheroff's practice, I have reached the conclusion that Dr. Greenspan violated Code Section 18.2-499 (b).

COUNT III

Count III alleges that the defendants defamed Dr. Osheroff and injured his reputation.

The common law action of defamation includes two classes of defamatory statements which encompass the allegations allegedly made by the defendants about Dr. Osheroff in this case. Under Virginia law, the following words are actionable per se: (1) Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment; and (2) defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. M. Rosenberg and Sons v. Kraft, 182 Va. 512, 518, 29 S.E.2d 375 (1944).

The defendants assert that any statements they may have made about Dr. Osheroff were qualifiedly privileged. Dr. Greenspan and Dr. Tolkan rely on Code Section 8.01-581.16 to shield them from liability for any statements they made before the Executive

Committee of the Alexandria Hospital, and the Court has heretofore ruled that the privilege afforded by this statute is a qualified privilege. The defendants rely on the common law privilege as to any other statements they may have made. In Taylor v. Grace, 166 Va. 138, 184 S.E. 211 (1936) the Supreme Court of Appeals stated:

> A communication, made in good faith, on a subject matter in which the person communicating has an interest, or owes a duty, legal, moral or social, is qualifiedly privileged if made to a person having a corresponding interest or duty. 166 Va. at 144.

In order to successfully invoke the defense of privilege when the occasion on which the communications were made was qualifiedly privileged, three elements must concur: (1) The occasion on which the words were used must be privileged; (2) the words used must not transcend the scope of the privilege of the occasion; and (3) the words must be used in good faith, without actual malice. Rosenberg v. Mason, 157 Va. 215, 234, 160 S.E. 190 (1931). If a communication is one of qualified privilege, the person claiming to have been defamed bears the burden of proving the existence of actual malice. Story v. Newspapers, Inc., 202 Va. 588, 590, 118 S.E.2d 668 (1961).

In Preston v. Land, 220 Va. 118, 255 S.E.2d, 509 (1979) the Supreme Court stated the burden of the plaintiff to be as follows:

> Where defamatory words are uttered under a qualified privilege, they are actionable only when the plaintiff proves they were spoken with actual malice.
>
> "[I]n order to avoid the privilege it is necessary for the plaintiff to show that the words were spoken with malice in fact, actual malice, existing at the time the words were spoken; that is, that the communication was actuated by some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff; or what, as a matter of law, is equivalent to

> malice, that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff."

(Citations omitted) 220 Va. at 120, 121.

As previously noted in the Findings of Fact, the newspaper article attributed to Nurse Hess was never admitted into evidence for the purpose of proving that she made the allegedly libelous statement contained therein. Thus, Nurse Hess may not be found to have libeled Dr. Osheroff as a result of the publication of this article. This leaves for consideration the oral statements made by the defendants on other occasions.

Applying the foregoing principles to the facts and circumstances of this case, I have concluded that any statements made by Dr. Tolkan and Nurse Hess meet the criteria for qualified privilege and that Dr. Osheroff has failed to prove that either Dr. Tolkan or Nurse Hess was actuated by actual malice or the legal equivalent thereof.

I have reached a contrary conclusion in the case of Dr. Greenspan. I am satisfied from the evidence that he uttered false and defamatory statements about Dr. Osheroff which were actuated by sinister and corrupt motives and that, as a result thereof, he may not avail himself of the defense of privilege.

COUNT IV

Count IV alleges that the defendants intentionally, maliciously and wantonly sought to interfere with the contractual relationship between the complainants and National Medical Care attempting to cause a breach or disruption thereof. At the conclusion of the complainants' evidence, the Court granted a motion to strike the evidence as to this Count. Accordingly, the defendants will be granted summary judgment as to Count IV.

COUNT V

Count V alleges that Dr. Greenspan and Dr. Tolkan breached a fiduciary obligation owed to the complainants, and that as a result thereof, Dr. Greenspan, Dr. Tolkan and the Prince William Dialysis Facility, Inc. stand to profit at the expense of the complainants. The complainants ask that a constructive trust be imposed in their favor on the profits of the Prince William Dialysis Facility, Inc.

A constructive trust is one which the law creates, independently of the intention of the parties, to prevent fraud or injustice. A constructive trust may arise from actual fraud, violation of a fiduciary duty or unconscionable conduct amounting to constructive fraud. Leonard v. Counts, 221 Va. 582, 272 S.E.2d 190 (1980); Porter v. Shaffer, 147 Va. 921, 133 S.E. 614 (1926).

In Horne v. Holley, 167 Va. 234, 188 S.E. 169 (1936) the Virginia Supreme Court stated:

> It is well settled that where one person sustains a fiduciary relation to another he can not acquire an interest in the subject matter of the relationship adverse to such other party. If he does so equity will regard him as a constructive trustee and compel him to convey to his associate a proper interest in the property or to account to him for the profits derived therefrom. (Citations omitted) 167 Va. at 240.

A mere preponderance of the evidence will not suffice to prove the basis of a constructive trust. The complainants must establish their entitlement to this equitable remedy by evidence which is clear, definite and convincing. Sutton v. Sutton, 194 Va. 179, 185, 72 S.E.2d 275 (1952).

Having considered the nature of the relationship between Dr. Osheroff and Drs. Greenspan and Tolkan, I have no hesitation in concluding that Dr. Greenspan and Dr. Tolkan owed Dr. Osheroff and his professional corporation the high degree of

fidelity required of a fiduciary. Consequently, they were bound to exercise the utmost faith and loyalty to their principal or employer. I am equally satisfied that their conduct under the circumstances of this case was such as to amply justify the imposition of a constructive trust on the profits of the Prince William Dialysis Facility. I find no merit in the contention of Dr. Greenspan and Dr. Tolkan that Dr. Osheroff is barred from this relief because of latches or his failure to mitigate his damages.

COUNT VI

Count VI alleges that Dr. Greenspan, individually, deliberately and intentionally interfered with the business, reputation and profession of the complainants. This Count is predicated on the common law tort of interference with contractual relationships.

The common law has recognized an action in tort for the intentional interference by a third party with the contractual relations of another at least since the early English case of Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Reprint 749 (1853). The essential elements of this tort are: (1) existence of a contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom. 45 Am.Jur.2d, Interference, § 39.

Although I am unaware of any Virginia cases which explicitly recognize the tort of interference with contractual relations, the case of Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1956) strongly suggests that the tort is cognizable in Virginia. In Worrie, supra, the Supreme Court of Appeals declared that the right to performance of a contract and to reap the profits therefrom are property rights which are entitled to protection

in the courts, and recognized the rule that an action in tort will lie against those who conspire to induce the breach of a contract. Consequently, I have no hesitation in concluding that Virginia recognizes the common law tort of interference with contractual relations.

The case of Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175 (Pa. 1978) is similar in many respects to the case at bar and the legal principles explicated therein are applicable to the issues posed by Count VI in this case. In Adler, Barish, supra, a Philadelphia law firm sought to enjoin former associates of the firm from interfering with existing contractual relationships between the firm and its clients. Reversing the Superior Court, the Pennsylvania Supreme Court directed the Court of Common Pleas to reinstate its final decree granting an injunction. Noting that the defendants had clearly violated the proscription against self-recommendation (solicitation) contained in the Code of Professional Responsibility, the Pennsylvania Supreme Court concluded that the defendants were guilty of "improper" conduct justifying injunctive relief.

If the "improper" conduct found to exist in Adler, Barish, supra, was sufficient to justify injunctive relief, then the facts of this case are far more compelling. Not only did Dr. Greenspan solicit Dr. Osheroff's patients, but he also engaged in a whole series of improper acts calculated to deprive Dr. Osheroff of his practice. His conduct was particularly reprehensible when considered in light of the fact that Dr. Osheroff was either suffering or recovering from a severe mental depression during much of the time that Dr. Greenspan was trying to take unfair advantage of him.

Dr. Greenspan attempts to justify his actions by arguing that he was merely fulfilling a duty to provide continuing treatment for his patients; and that, inasmuch as his

employment contract did not contain a covenant not to compete, he was free to engage in unrestricted competition with Dr. Osheroff after leaving his employment. When analyzed in light of the facts, neither of these arguments is persuasive.

DAMAGES

Dr. Osheroff receives income related to the practice of medicine from three separate sources. Unit professional fees of $260.00 per month are paid for each patient receiving chronic dialysis treatment within a dialysis facility. Medical practice fees are paid for the treatment of patients in the office and in the hospital. Lastly, Dr. Osheroff receives a participation fee as a result of his contract with National Medical Care, Inc. which is equal to 40% of the net income of the dialysis centers.

The complainants rely in large measure on the testimony of Dr. Carl Schramm, an expert economist, to prove their claim for damages. Using data provided to him, Dr. Schramm calculated the income loss sustained by Dr. Osheroff and his professional corporation as a result of the departure of Drs. Greenspan and Tolkan and the opening of the Prince William Dialysis Center. In doing so, he eliminated the participation fees from his projections because they are too speculative and based his calculations solely on an aggregation of the medical practice fees and the unit professional fees for the chronic patients. Using the assumption that the practice would continue to grow at the same rate as the rest of the greater Washington area, Dr. Schramm concluded that the loss to Dr. Osheroff's practice would be $824,662.00 for the years 1980 through 1985, which he discounted to a present value of $535,270.00. Using the assumption that the practice would continue to grow at the faster rate previously experienced by the Northern Virginia Dialysis

Center, Dr. Schramm calculated the loss to be $1,237,211.00 for the years 1980 through 1985, which he discounted to a present value of $802,948.00.

I recognize that it is not required that the complainants prove their damages with absolute certainty in a cause of this nature; nevertheless, I perceive several flaws in the complainants' assessment of their damages. First, Dr. Schramm calculated the loss sustained over a period of six years. The determination that six years should be used as the basis seems arbitrary to me, and I think it more reasonable to conclude that Dr. Osheroff could be expected to rebuild his practice to its former state within three years after the departure of Drs. Greenspan and Tolkan. Furthermore, the longer the period for which lost income is projected, the more speculative the loss becomes. Second, Dr. Schramm's calculations fail to take note of other factors revealed by the evidence which could have an adverse impact on Dr. Osheroff's practice for which Drs. Greenspan and Tolkan are not answerable. Last, Dr. Schramm's projections do not take into account the obvious fact that Dr. Osheroff would not have received all of the projected increase in income if Dr. Greenspan and Dr. Tolkan had remained in practice with him.

After carefully reviewing the evidence, I have concluded that the damages sustained should be limited to the years 1980, 1981 and 1982, and that the projected loss calculated by Dr. Schramm should be reduced by 50% in order to more accurately reflect the actual out-of-pocket loss sustained by Dr. Osheroff and his professional corporation. Accordingly, the compensatory damages awarded against Dr. Greenspan for Counts I, II and VI will be in the amount of $184,804.00. To approach the question from a slightly different angle, this amount is roughly equivalent to the loss of unit professional

fees for thirty patients during the first of the three years for which damages will be allowed, twenty such patients during the second year and ten such patients during the third year.

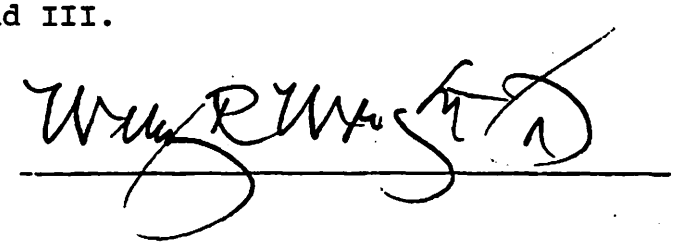
As to Counts I and II, the complainants will be awarded treble damages against Dr. Greenspan in the total amount of $554,412.00, plus a reasonable attorney's fee and costs. If counsel are unable to agree on the amount of the attorney's fee, the Court will hold a further hearing for the limited purpose of determining the amount of the fee.

As to Count III, Dr. Osheroff will be awarded compensatory damages in the amount of $10,000.00 plus punitive damages in the amount of $20,000.00 against Dr. Greenspan; however, these damages will not be in addition to the damages awarded as to Counts I, II and VI.

As to Count V, the Court will impose a constructive trust upon one-half of the profits of the Prince William Dialysis Facility, Inc. in favor of the complainants. Relief is being limited to one-half of the profits because Dr. Greenspan's employment agreement with Dr. Osheroff contemplated that Dr. Greenspan would be made a partner in two years, and it will more nearly put the parties in their original position if the trust is so limited.

As to Count VI, the complainants will be awarded compensatory damages in the amount of $184,804.00 and punitive damages in the amount of $369,608.00 against Dr. Greenspan; however, these damages will not be in addition to the damages awarded as to Counts I, II and III.

February 8, 1983



Def ex 11 to Supp. Mot

CURRENT OPINIONS OF THE JUDICIAL COUNCIL OF THE AMERICAN MEDICAL ASSOCIATION — 1982

Including the PRINCIPLES OF MEDICAL ETHICS
and RULES of the JUDICIAL COUNCIL

Prepared by the JUDICIAL COUNCIL

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PREFACE

This edition of *Current Opinions of the Judicial Council* replaces all previous editions of *Current Opinions* and supersedes *Opinions and Reports of the Judicial Council* that was originally compiled in 1958 and last revised in 1979. It is intended as an adjunct to the revised Principles of Medical Ethics that were adopted at the Annual Convention in 1980.

Medical ethics involves the professional responsibilities and obligations of physicians. Behavior relating to medical etiquette, custom or usage will not be dealt with in *Current Opinions of the Judicial Council.*

The opinions which follow are intended as guides to responsible professional behavior, but they are not presented as the sole or only route to medical morality. For the sake of brevity, pronouns of the masculine gender apply to both male and female physicians.

The Judicial Council encourages comments and suggestions for future editions of this publication.

JUDICIAL COUNCIL

June 1982

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HISTORY

The earliest written code of ethical principles for medical practice was conceived by the Babylonians around 2500 B.C. That document, the Code of Hammurabi, was indeed a *code* of conduct, setting forth in considerable detail for that era the nature of conduct demanded of the physician. Today that code would be subject to criticism because it went into too much detail. It is doubtful that it could have continued as a practical document through the centuries because, as medical science and cultural patterns became more complex, it would have required one skilled in jurisprudence to codify and interpret the myriad situations covered by it.

The Oath of Hippocrates, a brief statement of principles, has come down through history as a living statement of ideals to be cherished by the physician. This Oath was conceived some time during the period of Grecian greatness, probably in the fifth century B.C.. It protected rights of the patient and appealed to the inner and finer instincts of the physician without imposing sanctions or penalties on him. Other civilizations subsequently developed written principles, but the Oath of Hippocrates (Christianized in the tenth or eleventh century A.D. to eliminate reference to pagan gods) has remained in Western Civilization as an expression of ideal conduct for the physician.

The most significant contribution to ethical history subsequent to Hippocrates was made by Thomas Percival, an English physician, philosopher, and writer. In 1803, he published his *Code of Medical Ethics*. His personality, his interest in sociological matters, and his close association with the Manchester Infirmary led to the preparation of a "scheme of professional conduct relative to hospitals and other charities" from which he drafted the code which bears his name.

At the first official meeting of the American Medical Association in Philadelphia in 1847, the two principal items of business were the establishment of a code of ethics and the creation of minimum requirements for medical education and training. Although the Medical Society of the State of New York and the Medico-Chirurgical Society of Baltimore had formal written codes of medical ethics prior to this time, it is clear that AMA's first adopted Code of Ethics was based on Percival's Code.

In general, the language and concepts of the original Code adopted by the Association in 1847 remained the same throughout the years. There were revisions, of course, which reflected the temper of the times and the eternal quest to express basic concepts with clarity. Major revisions did occur in 1903, 1912, and 1947.

In December, 1955, an attempt was made to distinguish medical ethics from matters of etiquette. A draft of a two-part code seeking to accomplish this was

submitted to the House of Delegates at that time but was not accepted. This proposal was, in effect, a separation of then existing statements, found in the *Principles*, into two categories. Little or no change was made in the language of the forty-eight sections of the *Principles*.

Subsequently, in June, 1956, a seemingly radical proposal was submitted to the House of Delegates for consideration. This proposal, a short version of the *Principles*, was discussed at the December, 1956 session of the House after wide publication and broad consideration among members of the medical profession. It was postponed for final consideration until the June, 1957 meeting of the House of Delegates, when the short version was adopted.

The format of the *Principles* adopted in June, 1957 is a change from the format of the *Principles* promulgated by Percival in 1803 and accepted by the Association in 1847. Ten short sections, preceded by a preamble, "succinctly express the fundamental concepts embodied in the present [1955] Principles," according to the report of the Council on Constitution and Bylaws. That Council assured the House of Delegates in its June, 1957 report that "every basic principle has been preserved; on the other hand, as much as possible of the prolixity and ambiguity which in the past obstructed ready explanation, practical codification and particular selection of basic concepts has been eliminated."

In 1977, the Judicial Council recommended to the House of Delegates that the AMA *Principles of Medical Ethics* be revised to clarify and update the language, to eliminate reference to gender, and to seek a proper and reasonable balance between professional standards and contemporary legal standards in our changing society. Given the desire of the Judicial Council for a new version of the *Principles* to be widely accepted and accurately understood, in 1978 the Judicial Council recommended that a special committee of the House be appointed to consider such a revision. This was done and the House of Delegates adopted the 1980 revision of the AMA *Principles of Medical Ethics*.

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.

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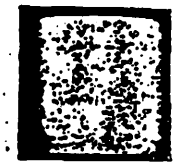
1.00 INTRODUCTION



1.01 TERMINOLOGY. Historically, the term "ethical" has been used in opinions of the Judicial Council and in resolutions adopted by the House of Delegates to refer to matters involving (1) moral principles or practices; (2) customs and usages of the medical profession; and (3) matters of policy not necessarily involving issues of morality in the practice of medicine. The term "unethical" has been used to refer to conduct which fails to conform to these professional standards, customs and usages, or policies.

Unethical conduct involving moral principles, values and duties calls for disciplinary action such as censure, suspension, or expulsion from medical society membership.

Failure to conform to the customs and usages of the medical profession may call for disciplinary action depending upon the particular circumstances involved, local attitudes, and how the conduct in question may reflect upon the dignity of and respect for the medical profession.

In matters strictly of a policy nature, a physician who disagrees with the position of the American Medical Association is entitled to freedom and protection of his point of view.

1.02 THE RELATION OF LAW AND ETHICS. The following statements are intended to clarify the interrelationship between law and ethics.

Ethical standards of professional conduct and responsibility may exceed but are never less than, nor contrary to, those required by law.

Violation of governmental laws may subject the physician to civil or criminal liability. Expulsion from membership is the maximum penalty that may be imposed by a medical society upon a physician who violates ethical standards involving a breach of moral duty or principle. However, medical societies have a civic and professional obligation to report to the appropriate governmental body or state board of medical examiners credible evidence that may come to their attention involving the alleged criminal conduct of any physician relating to the practice of medicine.

Although, a physician charged with allegedly illegal conduct may be acquitted or exonerated in civil or criminal proceedings, this does not discharge a medical society from its obligation to initiate a disciplinary proceeding against a member with reference to the same conduct where there is credible evidence tending to establish unethical conduct.

Ethical pronouncements of the Judicial Council and the House of Delegates should not be so interpreted, construed or applied as to encourage conduct which violates a valid law.

2.00 OPINIONS ON SOCIAL POLICY ISSUES

2.01 ABORTION. The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion in accordance with good medical practice and under circumstances that do not violate the law.

2.02 ALLOCATION OF HEALTH RESOURCES. A physician has a duty to do all that he can for the benefit of his individual patients without assuming total responsibility for equitable disbursement of society's limited health resources. To expect a physician in the context of his medical practice to administer governmental priorities in the allocation of scarce health resources is to create a conflict with the physician's primary responsibility to his patients that would be socially undesirable.

Limited health care resources should be allocated efficiently and on the basis of fair, acceptable, and humanitarian criteria. Priority should be given to persons who are most likely to be treated successfully or have long term benefit. Social worth is not an appropriate criterion.

Utility or relative worth to society should not determine whether an individual is accepted as a donor or recipient of tissue for transplantation, selected for human experimentation, or denied or given preference in receiving scarce health care treatment or resources.

2.03 ARTIFICIAL INSEMINATION. The informed consent of the woman seeking artificial insemination and her husband is necessary. The prospective parents should be informed that any child conceived by artificial insemination is possessed of and entitled to all the rights of a child conceived naturally.

2.04 ARTIFICIAL INSEMINATION: IN *VITRO* FERTILIZATION AND EMBRYO TRANSPLANTATION. *In vitro* fertilization and embryo transplantation, when successfully performed is one mechanism, among others, of human artificial insemination. This method of human artificial insemination holds out new hope for couples who want children but have previously been unable to conceive. Artificial insemination by *in vitro* fertilization and embryo transplantation may allow women previously incapable of conception

to bear normal, healthy children. This method of artificial insemination should be available to such women on the same terms and conditions as other medically acceptable mechanisms of artificial insemination. A physician may perform such procedures within the confines of the professional physician-patient relation upon obtaining the patient's voluntary and informed consent. Only physicians with special knowledge and competence in the use of such procedures should perform them. The patient's expectations of confidentiality should be preserved in all instances.

Social questions on conception—such as potential fetal or newborn damage due to conception, selection of genetic characteristics, the use of surrogate parents, or single parenting,—should not be confused with the appropriateness of any particular method of insemination. These social considerations are not unique to *in vitro* fertilization and embryo transplantation but rather, could apply to any method of conception. Since *in vitro* fertilization and embryo transplantation is a new and experimental procedure, though, research studies are needed for the necessary medical knowledge and skills to be developed. Procedures for selecting and screening donors to control the transmission of infections and genetic disease to the extent current knowledge permits should be required. To protect the interests of women wishing to be involved in such research projects, the following guidelines should apply:

A. Voluntary and informed consent, in writing, should be given by the patient.
B. Alternative treatment or methods of care should be carefully evaluated and fully explained to the patient. If a simpler and safer treatment is available, it should be pursued.
C. If possible, the risk to the embryo or fetus should be as minimal as is scientifically known to be possible.

These standards should also protect the interest of the fetus and potential newborn, to as great an extent as seems analytically possible.

2.05 **CLINICAL INVESTIGATION.** The following guidelines are intended to aid physicians in fulfilling their ethical responsibilities when they engage in the clinical investigation of new drugs and procedures.

(1) A physician may participate in clinical investigation only to the extent that those activities are a part of a systematic program competently designed, under accepted standards of scientific research, to produce data which is scientifically valid and significant.

(2) In conducting clinical investigation, the investigator should demonstrate the same concern and caution for the welfare, safety, and comfort of the person involved as is required of a physician who is furnishing medical care to a patient independent of any clinical investigation.

(3) In clinical investigation primarily for treatment —

A. The physician must recognize that the physician-patient relationship exists and that professional judgment and skill must be exercised in the best interest of the patient.

B. Voluntary written consent must be obtained from the patient, or from his legally authorized representative if the patient lacks the capacity to consent, following: (a) disclosure that the physician intends to use an investigational drug or experimental procedure, (b) a reasonable explanation of the nature of the drug or procedure to be used, risks to be expected, and possible therapeutic benefits, (c) an offer to answer any inquiries concerning the drug or procedure, and (d) a disclosure of alternative drugs or procedures that may be available.

i. In exceptional circumstances and to the extent that disclosure of information concerning the nature of the drug or experimental procedure or risks would be expected to materially affect the health of the patient and would be detrimental to his best interests, such information may be withheld from the patient. In such circumstances, such information shall be disclosed to a responsible relative or friend of the patient where possible.

ii. Ordinarily, consent should be in writing, except where the physician deems it necessary to rely upon consent in other than written form because of the physical or emotional state of the patient.

iii. Where emergency treatment is necessary, the patient is incapable of giving consent, and no one is available who has authority to act on his behalf, consent is assumed.

(4) In clinical investigation primarily for the accumulation of scientific knowledge—

A. Adequate safeguards must be provided for the welfare, safety and comfort of the subject. It is fundamental social policy that the advancement of scientific knowledge must always be secondary to primary concern for the individual.

B. Consent, in writing, should be obtained from the subject, or from his legally authorized representative if the subject lacks the capacity to consent, following: (a) a disclosure of the fact that an investigational drug or procedure is to be used, (b) a reasonable explanation of the nature of the procedure to be used and risks to be expected, and (c) an offer to answer any inquiries concerning the drug or procedure.

C. Minors or mentally incompetent persons may be used as subjects only if:

i. The nature of the investigation is such that mentally competent adults would not be suitable subjects.

ii. Consent, in writing, is given by a legally authorized representative of the subject under circumstances in which an informed and prudent adult would reasonably be expected to volunteer himself or his child as a subject.

D. No person may be used as a subject against his will.

E. The overuse of institutionalized persons in research is an unfair distribution of research risks. Participation is coercive and not voluntary if the participant is subjected to powerful incentives and persuasion.

2.06 **COSTS.** While physicians should be conscious of costs and not provide or prescribe unnecessary services or ancillary facilities, social policy expects that concern for the care the patient receives will be the physician's first consideration. This does not preclude the physician, individually, or through medical organizations, from participating in policy-making with respect to social issues affecting health care.

2.07 **FETAL RESEARCH GUIDELINES.** The following guidelines are offered as aids to physicians when they are engaged in fetal research:

(1) Physicians may participate in fetal research when their activities are part of a competently designed program, under accepted standards of scientific research, to produce data which is scientifically valid and significant.

(2) If appropriate, properly performed clinical studies on animals and nongravid humans should precede any particular fetal research project.

(3) In fetal research projects, the investigator should demonstrate the same care and concern for the fetus as a physician

providing fetal care or treatment in a non-research setting.

(4) All valid federal or state legal requirements should be followed.

(5) There should be no monetary payment to obtain any fetal material for fetal research projects.

(6) Competent peer review committees, review boards, or advisory boards should be available, when appropriate, to protect against possible abuses that could arise in such research.

(7) Research on the so called "dead fetus," mascerated fetal material, fetal cells, fetal tissue, fetal organs, or the placenta should be in accord with state laws on autopsy and state laws on organ transplantation or anatomical gifts. Informed and voluntary consent, in writing, should be obtained from a legally authorized representative of the fetus.

(8) In fetal research primarily for treatment of the fetus:

A. Voluntary and informed consent, in writing should be given by the gravid woman, acting in the best interest of the fetus.

B. Alternative treatment or methods of care, if any, should be carefully evaluated and fully explained. If simpler and safer treatment is known, it should be pursued.

(9) In research primarily for treatment of the gravid female:

A. Voluntary and informed consent, in writing, should be given by the patient.

B. Alternative treatment or methods of care should be carefully evaluated and fully explained to the patient. If simpler and safer treatment is known, it should be pursued.

C. If possible, the risk to the fetus should be the least possible, consistent with the gravid female's need for treatment.

(10) In fetal research involving a viable fetus, primarily for the accumulation of scientific knowledge:

A. Voluntary and informed consent, in writing, should be given by the gravid woman under circumstances in which a prudent and informed adult would reasonably be expected to give such consent.

B. The risk to the fetus imposed by the research should be the least possible.

C. The purpose of the research is the production of data and

knowledge which is scientifically significant and which cannot otherwise be obtained.

D. In this area of research, it is especially important to emphasize that care and concern for the fetus should be demonstrated. There should be no physical abuse of the fetus.

2.08 **GENETIC ENGINEERING.** Whatever form of regulation of gene splicing, recombinant DNA research, chemical synthesis of DNA molecules, or other genetic engineering research is eventually developed, there should be independent input from the scientific community, organized medicine, industry, and others, in addition to the federal government, to prevent abuse from any sector of society, private or public.

If and when gene replacement with normal DNA becomes a practical reality for the treatment of human disorders, the following factors should be considered:

(1) If procedures are performed in a research setting, reference should be made to the Judicial Council's guidelines on clinical investigation and human experimentation.

(2) If procedures are performed in a non-research setting, adherence to usual and customary standards of medical practice and professional responsibility would be required.

(3) Full discussion of the proposed procedure with the patient would be required. The consent of the patient or his legal representative should be informed, voluntary, and written.

(4) There must be no hazardous or other unwanted virus on the viral DNA containing the replacement or corrective gene.

(5) The inserted DNA must function under normal control within the recipient cell to prevent metabolic damage that could damage tissue and the patient.

(6) The effectiveness of the gene therapy should be evaluated as best as possible. This will include determination of the natural history of the disease and follow-up examination of subsequent generations.

(7) Such procedures should be undertaken in the future only after careful evaluation of the availability and effectiveness of other possible therapy. If simpler and safer treatment is available, it should be pursued.

(8) These considerations should be reviewed, as appropriate, as procedures and scientific information are developed in the future.

2.09 ORGAN TRANSPLANTATION GUIDELINES. The following statement is offered for guidance of physicians as they seek to maintain the highest level of ethical conduct in the transplanting of human organs.

(1) In all professional relationships between a physician and his patient, the physician's primary concern must be the health of his patient. He owes the patient his primary allegiance. This concern and allegiance must be preserved in all medical procedures, including those which involve the transplantation of an organ from one person to another where both donor and recipient are patients. Care must, therefore, be taken to protect the rights of both the donor and the recipient, and no physician may assume a responsibility in organ transplantation unless the rights of both donor and recipient are equally protected.

(2) A prospective organ transplant offers no justification for a relaxation of the usual standard of medical care. The physician should provide his patient, who may be a prospective organ donor, with that care usually given others being treated for a similar injury or disease.

(3) When a vital, single organ is to be transplanted, the death of the donor shall have been determined by at least one physician other than the recipient's physician. Death shall be determined by the clinical judgment of the physician. In making this determination, the ethical physician will use all available, currently accepted scientific tests.

(4) Full discussion of the proposed procedure with the donor and the recipient or their responsible relatives or representatives is mandatory. The physician should be objective in discussing the procedure, in disclosing known risks and possible hazards, and in advising of the alternative procedures available. The physician should not encourage expectations beyond those which the circumstances justify. The physician's interest in advancing scientific knowledge must always be secondary to his primary concern for the patient.

(5) Transplant procedures of body organs should be undertaken (a) only by physicians who possess special medical knowledge and technical competence developed through special training, study, and laboratory experience and practice, and (b) in medical institutions with facilities adequate to protect the health and well-being of the parties to the procedure.

(6) Transplantation of body organs should be undertaken only

. after careful evaluation of the availability and effectiveness of other possible therapy.

2.10 **QUALITY OF LIFE.** In the making of decisions for the treatment of seriously deformed newborns or persons who are severely deteriorated victims of injury, illness or advanced age, the primary consideration should be what is best for the individual patient and not the avoidance of a burden to the family or to society. Quality of life is a factor to be considered in determining what is best for the individual. Life should be cherished despite disabilities and handicaps, except when prolongation would be inhumane and unconscionable. Under these circumstances, withholding or removing life supporting means is ethical provided that the normal care given an individual who is ill is not discontinued.

In desperate situations involving newborns, the advice and judgment of the physician should be readily available, but the decision whether to exert maximal efforts to sustain life should be the choice of the parents. The parents should be told the options, expected benefits, risks and limits of any proposed care; how the potential for human relationships is affected by the infant's condition; and relevant information and answers to their questions. The presumption is that the love which parents usually have for their children will be dominant in the decisions which they make in determining what is in the best interest of their children. It is to be expected that parents will act unselfishly, particularly where life itself is at stake. Unless there is convincing evidence to the contrary, parental authority should be respected.

2.11 **TERMINAL ILLNESS.** The social commitment of the physician is to prolong life and relieve suffering. Where the observance of one conflicts with the other, the physician, patient, and/or family of the patient have discretion to resolve the conflict.

For humane reasons, with informed consent a physician may do what is medically necessary to alleviate severe pain, or cease or omit treatment to let a terminally ill patient die, but he should not intentionally cause death. In determining whether the administration of potentially life-prolonging medical treatment is in the best interest of the patient, the physician should consider what the possibility is for extending life under humane and comfortable conditions and what are the wishes and attitudes of the family or those who have responsibility for the custody of the patient.

Where a terminally ill patient's coma is beyond doubt irreversi-

ble and there are adequate safeguards to confirm the accuracy of the diagnosis, all means of life support may be discontinued. If death does not occur when life support systems are discontinued, the comfort and dignity of the patient should be maintained.

2.12 **UNNECESSARY SERVICES.** It is unethical for a physician to provide or prescribe unnecessary services or unnecessary ancillary facilities.

2.13 **WORTHLESS SERVICES.** A physician should not seek compensation for providing services which he knows or should know are generally regarded among reputable physicians as worthless.

3.00 OPINIONS ON INTERPROFESSIONAL RELATIONS

3.01 **NONSCIENTIFIC PRACTITIONERS.** It is wrong to engage in or to aid and abet in treatment which has no scientific basis and is dangerous, is calculated to deceive the patient by giving him false hope, or which may cause the patient to delay in seeking proper care until his condition becomes irreversible.

Physicians should also be mindful of state laws which prohibit a physician from aiding and abetting an unlicensed person in the practice of medicine, aiding or abetting a person with a limited license in providing services beyond the scope of his license, or undertaking the joint medical treatment of patients under the foregoing circumstances.

A physician is otherwise free to accept or decline to serve anyone who seeks his services, regardless of who has recommended that the individual see the physician.

3.02 **OPTOMETRY.** An ophthalmologist may employ an optometrist as ancillary personnel to assist him provided the optometrist is identified to patients as an optometrist.

A physician may send his patient to a qualified and ethical optometrist for optometric services. The physician would be ethically remiss, of course, if before doing so he did not ensure that there was an absence of any medical reason for his patient's complaint, and he would be equally remiss if he sent a patient without having made a medical evaluation of the patient's condition.

Physicians may teach in recognized schools of optometry for the purpose of improving the quality of optometric education. The scope of this teaching may embrace subjects within the legitimate scope of optometry which are designed to prepare students to engage in optometry within the limits prescribed by law.

3.03 **REFERRAL OF PATIENTS.** A physician may refer a patient for diagnostic or therapeutic services to another physician, limited practitioner, or any other provider of health care services permitted by law to furnish such services, whenever he believes that this may benefit the patient. As in the case of referrals to physician-specialists, referrals to limited practitioners should be based on their individual competence and ability to perform the services needed by the patient. A physician should not so refer a patient unless he is confident that the services provided on referral will be performed competently and in accordance with accepted scientific standards and legal requirements.

3.04 **SPECIALISTS.** A physician may choose to limit his practice to a specialty or to certain specialized services. He may also choose to provide services as a consultant to patients sent to him by other physicians, or to all patients at a hospital with which he has a contractual arrangement. He may, as an independent practitioner, choose to accept or decline patients sent to him by licensed limited practitioners, by laymen, or by others.

A physician may choose those persons whom he will accept as patients and also may exercise his choice by the terms of contractual arrangements with other physicians, medical groups, hospitals or other institutions. A physician may freely choose those whom he will serve, in the absence of legal considerations to the contrary.

The obligations which a physician has to provide information to a patient or any other party are those required by customary good medical practice and law. Although a physician may choose to limit his practice to certain diagnostic services, he may not neglect a patient under his care.

3.05 **TEACHING.** Physicians are free to engage in any teaching permitted by law for which they are qualified.

4.00 OPINIONS ON HOSPITAL RELATIONS

4.01 **ADMISSION FEE.** Charging a separate and distinct fee for the incidental, administrative, non-medical service the physician performs in securing the admission of a patient to a hospital is not in keeping with the traditions of the American Medical Association and is unethical.

4.02 **ASSESSMENTS, COMPULSORY.** It is improper to condition medical staff membership or privileges on compulsory assessments for any purpose.

4.03 **BILLING FOR HOUSESTAFF SERVICES.** When a physician assumes responsibility for the services rendered to a patient by a resident, the physician may ethically bill the patient for services which were performed under the physician's personal observation, direction and supervision.

4.04 **HEALTH FACILITY OWNERSHIP BY PHYSICIAN.** A physician may own or have a financial interest in a for-profit hospital, nursing home or other health facility, such as a free-standing surgical center or emergency clinic. However, the physician has an affirmative ethical obligation to disclose his ownership of a health facility to his patient, prior to admission or utilization.

Under no circumstances may the physician place his own financial interest above the welfare of his patients. The prime objective of the medical profession is to render service to humanity; reward or financial gain is a subordinate consideration. For a physician to unnecessarily hospitalize a patient or prolong a patient's stay in the health facility for the physician's financial benefit would be unethical.

If a conflict develops between the physician's financial interests and the physician's responsibilities to the patient, the conflict must be resolved to the patient's benefit.

4.05 **ORGANIZED MEDICAL STAFF.** The organized medical staff is an integral part of the hospital structure. Under authority delegated by the governing board, it performs essential hospital functions. The organized medical staff conducts professional activities that are designed to improve professional skills and to enhance the quality of patient care in the hospital.

The organized medical staff performs essential hospital functions even though it may often consist primarily of independent practicing physicians who are not hospital employees. As a practical matter, however, the organized medical staff may enjoy a dual status. In addition to functioning as a division of the hospital, members of the organized medical staff may choose to act as a group for the purpose of communicating and dealing with the governing board and others with respect to matters that concern the interests of the organized medical staff and its members. This is

ethical so long as there is no adverse interference with patient care or violation of applicable laws.

4.06 **PHYSICIAN-HOSPITAL CONTRACTUAL RELATIONS.** There are various financial or contractual arrangements that physicians and hospitals may enter into and find mutually satisfactory. A physician may, for example, be a hospital employee, a hospital-associated medical specialist, or an independent practitioner with staff privileges. The form of the contractual or financial arrangement between physicians and hospitals depends on the facts and circumstances of each situation. A physician may be employed by a hospital for a fixed annual amount, for a certain amount per hours, or pursuant to other similar arrangements that are related to the professional services, skill, education, expertise, or time involved.

Any conduct that results in the provision of unnecessary services or overutilization of services or facilities is, of course, unethical and should be discouraged. If such problems arise, though, these problems should be addressed directly and considered in the light of the facts and circumstances of the particular situation.

4.07 **STAFF PRIVILEGES.** The mutual objective of both the governing board and the organized medical staff is to improve the quality and efficiency of patient care in the hospital. Decisions regarding hospital privileges are based upon the individual physician's training, experience and demonstrated competence. Physicians who are involved in the granting, denying or termination of the hospital privileges of other physicians have an ethical responsibility to be guided primarily by concern for the welfare and best interests of patients in discharging this responsibility. Personal friendships or antagonisms should be disregarded in fulfilling this responsibility.

5.00 OPINIONS ON CONFIDENTIALITY, ADVERTISING AND COMMUNICATIONS MEDIA RELATIONS

5.01 **ADVERTISING AND PUBLICITY.** There are no restrictions on advertising by physicians except those that can be specifically justified to protect the public from deceptive practices. A physician may publicize himself as a physician through any commercial publicity or other form of public communication (including any newspaper, magazine, telephone directory, radio, television or other advertising) provided that the communication shall not be

misleading because of the omission of necessary material information, shall not contain any false or misleading statement, or shall not otherwise operate to deceive.

The form of communication should be designed to communicate the information contained therein to the public in a direct, dignified and readily comprehensible manner. Aggressive, high pressure advertising and publicity may create unjustified medical expectations. Any advertisement or publicity, regardless of format or content should be true and not misleading.

The communication may include: (a) the educational background of the physician; (b) the basis on which fees are determined (including charges for specific services); (c) available credit or other methods of payment; and (d) other information about the physician which a reasonable person might regard as relevant in determining whether to seek the physician's services.

Testimonials of patients, however, as to the physician's skill or the quality of his professional services should not be publicized. Statements relating to the quality of medical services are extremely difficult, if not impossible, to verify or measure by objective standards. Claims regarding experience, competence and the quality of the physician's services may be made if they can be factually supported and if they do not imply that he has an exclusive and unique skill or remedy. A statement that a physician has cured or successfully treated a large number of cases involving a particular serious ailment may imply a certainty of result and create unjustified and misleading expectations in prospective patients.

Consistent with Federal regulatory standards which apply to commercial advertising, a physician who is considering the placement of an advertisement or publicity release, whether in print, radio or television, should determine in advance that his communication or message is explicitly and implicity truthful and not misleading. These standards require the advertiser to have a reasonable basis for claims before they are used in advertising. The reasonable basis must be established by those facts known to the advertiser, and those which a reasonable, prudent advertiser should have discovered.

As used herein, references to a "physician" applies also to information relating to the physician's group, partners or associates. Any communication or message within the scope of this opinion should include the name of at least one physician responsible for its content.

5.02 **ADVERTISING AND HMOS.** A physician may provide medical services to members of a prepaid medical care plan or to members of a health maintenance organization which seeks members or subscribers through advertising. Physicians practicing in prepaid plans or HMOs are subject to the same ethical principles as are other physicians. Advertising which would lead prospective members or subscribers to believe that the services of a named physician who has a reputation for outstanding skill would be routinely available to all members or subscribers, if in fact this is not so, is deceptive. However, the publication by name of the roster of physicans who provide services to members, the type of practice in which each is engaged, biographical and other relevant information is not a deceptive practice.

5.03 **COMMUNICATIONS MEDIA: PRESS RELATIONS.** A physician should not discuss a patient's medical condition, disease or illness with the press without the patient's authorization. The patient or the patient's lawful representative may authorize a physician to disclose health information concerning the patient to the press. The physician may release only authorized information or that which is public knowledge.

5.04 **COMMUNICATIONS MEDIA: STANDARDS OF PROFESSIONAL RESPONSIBILITY.** Because certain news is a part of the public record or is a matter of concern to civil authorities, it is readily available for publication. Physicians should cooperate with the press to insure that medical news of this sort is available more promptly and more accurately than would be possible without their assistance.

News in this category, known as news in the public domain, includes: births, deaths, accidents, and police cases.

The following information in the public domain can be made available without the patient's consent:

A. Personal information: patient's name, address, age, sex, race, marital status, employer, occupation, name of parents in case of births, name of next-of-kin in case of deaths.

B. Nature of accident: Only general information regarding injuries will be released. This consists of the name of the injured portion of the body, such as back injury and the like. It may be stated that there are internal injuries.

If the patient is unconscious when brought to the hospital, a statement to that effect may be made.

Statements regarding the circumstances surrounding shootings, knifings, and poisonings are properly police matters, and questions whether they were accidental or otherwise should be referred to the appropriate authorities.

A statement may be made to the effect that the patient was injured by a knife or other sharp instrument, but no statement may be made as to whether or not it was assault, accident, or self-inflicted.

A statement may be made that the patient received burns and the member of the body affected may be indicated.

No statement may be made that there was a suicide or attempted suicide.

No statement may be made to the effect that intoxication or drug addiction was involved.

No statement may be made that moral turpitude was involved.

C. Diagnosis and prognosis: Inasmuch as a diagnosis may be made only by a physician and may depend upon X-ray and laboratory studies, no statement regarding diagnosis should be made except by or on behalf of the attending physician. For the same reason, prognosis will be given only by the attending physician or at his direction.

D. Patient's condition: A statement may be made as to the general condition of the patient using the following classifications: minor injuries or similar general diagnosis, good, fair, serious, critical.

When information concerning a specific patient is requested, the physician must obtain the consent of the patient or his authorized representative before releasing such information. The patient's decision is final under the law. Physicians are ethically and legally required to protect the personal privacy and other legal rights of patients. The physician-patient relationship and its confidential nature must be maintained. With these considerations in mind, the physician may assist the representatives of the media in every way possible.

5.05 **CONFIDENTIALITY: ATTORNEY-PHYSICIAN RELATION.** The patient's history, diagnosis, treatment, and prognosis may be discussed with the patient's lawyer with the consent of the patient or the patient's lawful representative.

A physician may testify in court or before a workmen's compensation board or the like in any personal injury or related case.

5.06 **CONFIDENTIALITY: COMPUTERS.** The utmost effort and care

must be taken to protect the confidentiality of all medical records. This ethical principle applies to computerized medical records as it applies to any other medical records.

The confidentiality of physician-patient communications is desirable to assure free and open disclosure by the patient to the physician of all information needed to establish a proper diagnosis and attain the most desirable clinical outcome possible. Protecting the confidentiality of the personal and medical information in such medical records is also necessary to prevent humiliation, embarrassment, or discomfort of patients. At the same time, patients may have legitimate desires to have medical information concerning their care and treatment forwarded to others.

Both the protection of confidentiality and the appropriate release of information in records is the rightful expectation of the patient. A physician should respect the patient's expectations of confidentiality concerning medical records that involve the patient's care and treatment, but the physician should also respect the patient's authorization to provide information from the medical record to those whom the patient authorizes to inspect all or part of it for legitimate purposes.

Computer technology permits the accumulation, storage, and analysis of an unlimited quantum of medical information. The possibility of access to information is greater with a computerized data system than with information stored in the traditional written form in a physician's office. Accordingly, the guidelines below are offered to assist physicians and computer service organizations in maintaining the confidentiality of information in medical records when that information is stored in computerized data bases. It should be recognized that specific procedures adapted from application of these concepts may vary depending upon the nature of the organization processing the data as well as the appropriate and authorized use of the stored data.

Guidelines on a computerized data base:

(1) Confidential medical information entered into the computerized data base should be verified as to authenticity of source.

(2) The patient and physician should be advised about the existence of computerized data bases in which medical information concerning the patient is stored. Such information should be communicated to the physician and patient prior to the physician's release of the medical information. All individuals and organizations with some form of access to the com-

puterized data bank, and the level of access permitted, should be specifically identified in advance.

(3) The physician and patient should be notified of the distribution of all reports reflecting identifiable patient data prior to distribution of the reports by the computer facility. There should be approval by the physician and patient prior to the release of patient-identifiable clinical and administrative data to individuals or organizations external to the medical care environment, and such information should not be released without the express permission of the physician and the patient.

(4) The dissemination of confidential medical data should be limited to only those individuals or agencies with a bona fide use for the data. Release of confidential medical information from the data base should be confined to the specific purpose for which the information is requested and limited to the specific time frame requested. All such organizations or individuals should be advised that authorized release of data to them does not authorize their further release of the data to additional individuals or organizations.

(5) Procedures for adding to or changing data on the computerized data base should indicate individuals authorized to make changes, time periods in which changes take place, and those individuals who will be informed about changes in the data from the medical records.

(6) Procedures for purging the computerized data base of archaic or inaccurate data should be established and the patient and physician should be notified before and after the data has been purged. There should be no commingling of a physician's computerized patient records with those of other computer service bureau clients. In addition, procedures should be developed to protect against inadvertent mixing of individual reports or segments thereof.

(7) The computerized medical data base should be on-line to the computer terminal only when authorized computer programs requiring the medical data are being used. Individuals and organizations external to the clinical facility should not be provided on-line access to a computerized data base containing identifiable data from medical records concerning patients.

(8) Security:

A. Stringent security procedures for entry into the immediate environment in which the computerized medical data base is stored and/or processed or for otherwise having

access to confidential medical information should be developed and strictly enforced so as to prevent access to the computer facility by unauthorized personnel. Personnel audit procedures should be developed to establish a record in the event of unauthorized disclosure of medical data. A roster of past and present service bureau personnel with specified levels of access to the medical data base should be maintained. Specific administrative sanctions should exist to prevent employee breaches of confidentiality and security procedures.

B. All terminated or former employees in the data processing environment should have no access to data from the medical records concerning patients.

C. Involuntarily terminated employees working in the data processing environment in which data from medical records concerning patients are processed should immediately upon termination be removed from the computerized medical data environment.

D. Upon termination of computer service bureau services for a physician, those computer files maintained for the physician should be physically turned over to the physician or destroyed (erased). In the event of file erasure, the computer service bureau should verify in writing to the physician that the erasure has taken place.

5.07 **CONFIDENTIALITY: INSURANCE COMPANY REPRESENTATIVE.** History, diagnosis, prognosis, and the like acquired during the physician-patient relationship may be disclosed to an insurance company representative only if the patient or his lawful representative has consented to the disclosure. A physician's responsibilities to his patient are not limited to the actual practice of medicine. They also include the performance of some services ancillary to the practice of medicine. These services might include certification that the patient was under the physician's care and comment on the diagnosis and therapy in the particular case.

5.08 **CONFIDENTIALITY: PHYSICIANS IN INDUSTRY.** Where a physician's services are limited to pre-employment physical examinations or examinations to determine if an employee who has been ill or injured is able to return to work, no physician-patient relationship exists between the physician and those individuals. Nevertheless, the information obtained by the physician as a result of such examinations is confidential and should not be com-

municated to a third party without the individual's prior written consent, unless it is required by law. If the individual authorizes the release of medical information to an employer or a potential employer, the physician should release only that information which is reasonably relevant to the employer's decision regarding that individual's ability to perform the work required by the job.

A physician-patient relationship does exist when a physician renders treatment to an employee, even though the physician is paid by the employer. If the employee's illness or injury is work-related, the release of medical information as to the treatment provided to the employee may be subject to the provisions of workers compensation laws. The physician must comply with the requirements of such laws, if applicable. However, the physician may not otherwise discuss the employee's health condition with the employer without the employee's consent or, in the event of the employee's incapacity, the family's consent.

Whenever statistical information about employee's health is released, all employee identities should be deleted.

6.00 OPINIONS ON FEES AND CHARGES

6.01 FEES FOR MEDICAL SERVICES. A physician should not charge or collect an illegal or excessive fee. For example, an illegal fee occurs when a physician accepts an assignment as full payment for services rendered to a Medicare patient and then bills the patient for an additional amount. A fee is excessive when after a review of the facts a person knowledgeable as to current charges made by physicians would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(a) the difficulty and/or uniqueness of the services performed and the time, skill and experience required;
(b) the fee customarily charged in the locality for similar physican services;
(c) the amount of the charges involved;
(d) the quality of performance;
(e) the nature and length of the professional relationship with the patient; and
(f) the experience, reputation and ability of the physician in performing the kind of services involved.

6.02 FEES: GROUP PRACTICE. The division of income among members of a group, practicing jointly or in a partnership, may be

determined by the members of the group and may be based on the value of the professional medical services performed by the member and his other services and contributions to the group.

6.03 **FEE SPLITTING.** Payment by one physician to another solely for the referral of a patient is fee splitting and is improper both for the physician making the payment and the physician receiving the payment.

A physician may not accept payment of any kind, in any form, from any source, such as a pharmaceutical company or pharmacist, an optical company or the manufacturer of medical appliances and devices, for prescribing or referring a patient to said source for the purchase of drugs, glasses or appliances.

In each case, the payment violates the requirement to deal honestly with patients and colleagues. The patient relies upon the advice of the physician on matters of referral. All referrals and prescriptions must be based on the skill and quality of the physician to whom the patient has been referred or the quality and efficacy of the drug or product prescribed.

6.04 **FEE SPLITTING: CLINIC OR LABORATORY REFERRALS.** Clinics or laboratories that compensate physicians based solely on the amount of work referred by the physician to the clinic or laboratory are engaged in fee splitting which is unethical.

6.05 **FEE SPLITTING: DRUG PRESCRIPTION REBATES.** A physician may not accept any kind of payment or compensation from a drug company for prescribing its products. The physician should keep the following considerations in mind:

(1) A physician should only prescribe a drug based on his reasonable expectations of the effectiveness of the drug for the particular patient.

(2) The quantity of the drug prescribed should be no greater than that which is reasonably required for the patient's condition.

6.06 **INSURANCE FORM COMPLETION CHARGE.** The attending physician should complete without charge the appropriate "simplified" insurance claim forms as a part of his service to the patient to enable the patient to receive his benefits. A charge for more complex forms may be made in conformity with local custom.

6.07 **INTEREST CHARGES AND FINANCE CHARGES.** Although harsh or commercial collection practices are discouraged in the

practice of medicine, a physician who has experienced problems with delinquent accounts may properly choose to request that payment be made at the time of treatment or add interest or other reasonable charges to delinquent accounts. The patient must be notified in advance of the interest or other reasonable finance or service charges by such means as the posting of a notice in the physician's waiting room, the distribution of leaflets describing the office billing practices and appropriate notations on the billing statement. The physician must comply with state and federal laws and regulations applicable to the imposition of such charges. The Judicial Council encourages physicians who choose to add an interest or finance charge to accounts not paid within a reasonable time to make exceptions in hardship cases.

6.08 **LABORATORY BILL.** When it is not possible for the laboratory bill to be sent directly to the patient, the referring physician's bill to the patient should indicate the actual charges for laboratory services, including the name of the laboratory, as well as any separate charges for his own professional services.

6.09 **SURGICAL ASSISTANT'S FEE.** Each physician engaged in the care of the patient is entitled to compensation commensurate with the value of the services he has personally rendered.

No physician should bill or be paid for a service which he does not perform; mere referral does not constitute a professional service for which a professional charge should be made or for which a fee may be ethically paid or received.

When services are provided by more than one physician, each physician should submit his own bill to the patient and be compensated separately, if possible.

It is ethically permissible in certain circumstances, however, for a surgeon to engage other physicians to assist him in the performance of a surgical procedure and to pay a reasonable amount for such assistance, provided the nature of the financial arrangement is made known to the patient. This principle applies whether or not the assisting physician is the referring physician.

6.10 **COMPETITION.** Competition between and among physicians and other health care practitioners on the basis of competitive factors such as quality of services, skill, experience, miscellaneous conveniences offered to patients, credit terms, fees charged, etc., is not only ethical but is encouraged. Ethical medical practice thrives best under free market conditions when prospective patients have

adequate information and opportunity to choose freely between and among competing physicians and alternate systems of medical care.

7.00 OPINIONS ON PHYSICIAN RECORDS

7.01 RECORDS OF PHYSICIANS: AVAILABILITY OF INFORMATION TO OTHER PHYSICIANS. The interest of the patient is paramount in the practice of medicine, and everything that can reasonably and lawfully be done to serve that interest must be done by all physicians who have served or are serving the patient. A physician who formerly treated a patient should not refuse for any reason to make his records of that patient promptly available on request to another physician presently treating the patient. Proper authorization for the use of records must be granted by the patient. Medical reports should not be withheld because of an unpaid bill for medical services.

7.02 RECORDS OF PHYSICIANS: INFORMATION AND PATIENTS. Notes made in treating a patient are primarily for the physician's own use and constitute his personal property. However, on request of the patient a physician should provide a copy or a summary of the record to the patient or to another physician, an attorney, or other person designated by the patient.

Several states have enacted statutes that authorize patient access to medical records. These statutes vary in scope and mechanism for permitting patients to review or copy medical records. Access to mental health records, particularly, may be limited by statute or regulation. A physician should become familiar with the applicable laws, rules or regulations on patient access to medical records. The record is a confidential document involving the physician-patient relationship and should not be communicated to a third party without the patient's prior written consent, unless it is required by law or is necessary to protect the welfare of the individual or the community. Medical reports should not be withheld because of an unpaid bill for medical services. Simplified, routine insurance reimbursement forms can be prepared without charge, but a charge for more complex, complicated reports may be made in conformity with local custom.

7.03 RECORDS OF PHYSICIANS ON RETIREMENT. A patient's records may be necessary to the patient in the future not only for medical care but also for employment, insurance, litigation, or other reason. When a physician retires or dies, patients should be

notified and urged to find a new physician and should be informed that upon authorization records will be sent to the new physician. Records which may be of value to a patient and which are not forwarded to a new physician should be retained, either by the physician himself, another physician, or such other person lawfully permitted to act as a custodian of the records.

7.04 SALE OF A MEDICAL PRACTICE. A physician or the estate of a deceased physician may sell to another physician the elements which comprise his practice, such as furniture, fixtures, equipment, office leasehold and goodwill. In the sale of a medical practice, the purchaser is buying not only furniture and fixtures, but also goodwill, i.e., the opportunity to take over the patients of the seller.

The transfer of records of patients is subject, however, to the following:

1. All active patients should be notified that the physician (or his estate) is transferring the practice to another physician who will retain custody of their records and that at their written request, within a reasonable time as specified in the notice, the records or copies will be sent to any other physician of their choice. Rather than destroy the records of a deceased physician, it is better that they be transferred to a practicing physician who will retain them subject to requests from patients that they be sent to another physician.
2. A reasonable charge may be made for the cost of duplicating records.

8.00 OPINIONS ON PRACTICE MATTERS.

8.01 APPOINTMENT CHARGES. A physician may charge a patient for a missed appointment or for one not cancelled 24 hours in advance if the patient is fully advised that the physician will make such a charge. The practice, however, should be resorted to infrequently and always with the utmost consideration for the patient and his circumstances.

8.02 CLINICS. Physicians practicing in a group or clinic are, both individually, and as a group, subject to the Principles of Medical Ethics.

8.03 CONSULTATION. Physicians should obtain consultation whenever they believe that it would be helpful in the care of the patient or when requested by the patient or the patient's representative.

When a patient is referred to a consultant, the referring physician should provide a history of the case and such other information as the consultant may need and the consultant should advise the referring physician of the results of the consultant's examination and recommendations relating to the management of the case. A physician selected by a patient for the purpose of obtaining a second opinion on an elective procedure is not obligated to advise the patient's regular physician of the findings or recommendations.

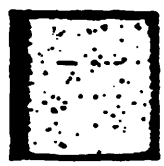
8.04 **CONTINGENT PHYSICIAN FEES.** If a physician's fee for medical service is contingent on the successful outcome of a claim, there is the ever-present danger that the physician may become less of a healer and more of an advocate. Accordingly, a physician's fee for medical services should be based on the value of the service provided by the physician to the patient and not on the uncertain outcome of a contingency that does not in any way relate to the value of the medical service.

8.05 **CONTRACTUAL RELATIONSHIPS.** The contractual relationships that physicians assume when they enter prepaid group practice plans are varied.

Income arrangements may include hourly wages for physicians working part time, annual salaries for those working full time, and share of group income for physicians who are partners in groups that are somewhat autonomous and contract with plans to provide the required medical care. Arrangements also usually include a range of fringe benefits, such as paid vacations, insurance and pension plans.

Physicians may work directly for plans or may be employed by the medical group or the hospital that has contracted with the plan to provide services. The AMA recognizes that under proper legal authority such plans may be established and that a physician may be employed by, or otherwise serve, a medical care plan. In the operation of such plans, physicians should not be subjected to lay interference in professional medical matters and their primary responsibility should be to the patients they serve.

8.06 **DRUGS AND DEVICES: PRESCRIBING.**



(1) A physician should not be influenced in the prescribing of drugs, devices or appliances by a direct or indirect financial interest in a pharmaceutical firm or other supplier. Whether the firm is a manufacturer, distributor, wholesaler or repackag-

er of the products involved is immaterial. Reputable firms rely on quality and efficacy to sell their products under competitive circumstances and do not appeal to physicians to have financial involvements with the firm in order to influence their prescribing.

(2) A physician may own or operate a pharmacy if there is no resulting exploitation of patients.

(3) A physician should not give patients prescriptions in code or enter into agreements with pharmacies or other suppliers regarding the filling of prescriptions by code.

(4) Patients are entitled to the same freedom of choice in selecting who will fill their prescription needs as they are in the choice of a physician. (See 9.05). The prescription is a written direction for a therapeutic or corrective agent. A patient is entitled to a copy of the physician's prescription for drugs, eyeglasses, contact lenses, or other devices as required by the Principles of Medical Ethics and as required by law. The patient has the right to have the prescription filled wherever the patient wishes.

(5) Patients have an ethically and legally recognized right to prompt access to the information contained in their individual medical records. The prescription is an essential part of the patient's medical record. Physicians should not discourage patients from requesting a written prescription or urge them to fill prescriptions at an establishment which has a direct telephone line or which has entered into a business or other preferential arrangement with the physician with respect to the filling of the physician's prescription.

8.07 **INFORMED CONSENT.** The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his own determination on treatment. Informed consent is a basic social policy for which exceptions are permitted (1) where the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent; or (2) when risk-disclosure poses such a serious psychological threat of detriment to the patient as to be medically contraindicated. Social policy does not accept the paternalistic view that the physician may remain silent because divulgence might prompt the patient to forego needed therapy. Rational, informed patients should not be expected to act uniformly, even under similar circumstances, in agreeing to or refusing treatment.

8.08 LABORATORY SERVICES.

(1) A physician should not misrepresent or aid in the misrepresentation of laboratory services performed and supervised by a non-physician as the physician's professional services. Such situations could involve a laboratory owned by a physician who directs and manages its financial and business affairs with no professional medical services being provided; laboratory work being performed by technicians and directly supervised by a medical technologist with no participation by the physician; or the physician's name being used in connection with the laboratory so as to create the appearance that it is owned, operated, and supervised solely by a physician when this is not so.

(2) If a laboratory is owned, operated, and supervised by a non-physician in accordance with state law and performs tests exclusively for physicians who receive the results and make their own medical interpretations, the following considerations would apply:

The physician's ethical responsibility is to provide his patients with high quality services. This includes services which he performs personally and those which he delegates to others. A physician should not utilize the services of any laboratory, irrespective of whether it is operated by a physician or non-physician, unless he has the utmost confidence in the quality of its services. He must always assume personal responsibility for the best interests of his patients. Medical judgment based upon inferior laboratory work is likewise inferior. Medical considerations, not cost, must be paramount when the physician chooses a laboratory. The physician who disregards quality as the primary criterion or who chooses a laboratory solely because it provides him with low cost laboratory services on which he charges the patient a profit, is not acting in the best interests of his patient. However, if reliable, quality laboratory services are available at lower cost, the patient should have the benefit of the savings. As a professional, the physician is entitled to fair compensation for his services. A physician should not charge a markup, commission, or profit on the services rendered by others. A physician should not charge for services that are not provided. A markup is an excessive charge that exploits patients if it is nothing more than a tacked on amount for a service already provided and accounted for by the laboratory. A physician may make an ac-

quisition charge or processing charge. The patient should be notified of any such charge in advance.

8.09 **LIEN LAWS** In states where there are lien laws, a physician may file a lien as a means of assuring payment of his fee provided his fee is fixed in amount and not contingent on the amount of settlement of the patient's claim against a third party.

8.10 **NEGLECT OF PATIENT.** Physicians are free to choose whom they will serve. The physician should, however, respond to the best of his ability in cases of emergency where first aid treatment is essential. Once having undertaken a case, the physician should not neglect the patient, nor withdraw from the case without giving notice to the patient, the relatives, or responsible friends sufficiently long in advance of withdrawal to permit another medical attendant to be secured.

8.11 **PATIENT INFORMATION.** The Principles of Medical Ethics require a physician to make relevant infomation available to patients, colleagues and the public. The physician must properly inform the patient of the nature and purpose of the treatment undertaken or prescribed. The physician may not refuse to so inform patient.

8.12 **SUBSTITUTION OF SURGEON WITHOUT PATIENT'S KNOWLEDGE OR CONSENT.** To have another physician operate on one's patient without the patient's knowledge and consent is a deceit. The patient is entitled to choose his own physician and he should be permitted to acquiesce in or refuse to accept the substitution.
The surgeon's obligation to the patient requires him to perform the surgical operation: (1) within the scope of authority granted by the consent to the operation; (2) in accordance with the terms of the contractual relationship; (3) with complete disclosure of all facts relevant to the need and the performance of the operation; and (4) to utilize his best skill in performing the operation.
It should be noted that it is the operating surgeon to whom the patient grants consent to perform the operation. The patient is entitled to the services of the particular surgeon with whom he or she contracts. The surgeon, in accepting the patient is obligated to utilize his personal talents in the performance of the operation to the extent required by the agreement creating the physician-patient relationship. He cannot properly delegate to another the duties which he is required to perform personally.

Under the normal and customary arrangement with private patients, and with reference to the usual form of consent to operation, the surgeon is obligated to perform the operation, and may use the services of assisting residents or other assisting surgeons to the extent that the operation reasonably requires the employment of such assistance. If a resident or other physician is to perform the operation under the guidance of the surgeon, it is necessary to make a full disclosure of this fact to the patient, and this should be evidenced by an appropriate statement contained in the consent.

If the surgeon employed merely assists the resident or other physician in performing the operation, it is the resident or other physician who becomes the operating surgeon. If the patient is not informed as to the identity of the operating surgeon, the situation is "ghost surgery."

An operating surgeon is construed to be a performing surgeon. As such, his duties and responsibilities go beyond mere direction, supervision, guidance, or minor participation.

The physician is not employed merely to supervise the operation. He is employed to perform the operation. He can properly utilize the services of an assistant to assist in the performance of the operation, but he is not performing the operation where his active participation consists merely of guidance or standby responsibilities in the case of an emergency.

9.00 OPINIONS ON PROFESSIONAL RIGHTS AND RESPONSIBILITIES

9.01 AGREEMENTS RESTRICTING THE PRACTICE OF MEDICINE. The Judicial Council discourages any agreement between physicians which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment or a partnership or a corporate agreement. Such restrictive agreements are not in the public interest.

9.02 CIVIL RIGHTS AND PROFESSIONAL RESPONSIBILITY. The American Medical Association is in favor of equality of opportunity in medical society activities, medical education and training, employment, and all other aspects of medical professional endeavors regardless of race, color, religion, creed, ethnic affiliation, national origin, or sex.

The American Medical Association is unalterably opposed to the denial of membership privileges and responsibilities in county medical societies and state medical associations to any duly

licensed physician because of race, color, religion, creed, ethni affiliation, national origin, or sex.

The American Medical Association calls upon the medical pro fession and all individual members of the American Medica Association to exert every effort to end any instance in which such equal rights, privileges, or responsibilities are denied.

9.03 **DISCIPLINE AND MEDICINE.** A physician should expose, without fear or favor, incompetent or corrupt, dishonest or unethical conduct on the part of members of the profession. Questions of such conduct should be considered, first, before proper medical tribunals in executive sessions or by special or duly appointed committees on ethical relations, provided such a course is possible and provided, also, that the law is not hampered thereby. If doubt should arise as to the legality of the physician's conduct, the situation under investigation may be placed before officers of the law, and the physician-investigators may take the necessary steps to enlist the interest of the proper authority.

An ethical physician will observe the laws regulating the practice of medicine and will not assist others to evade such laws.

The Judicial Council cannot pass judgment in advance on a situation that may later come before it on appeal. The Judicial Council cannot be an attorney for a society or a member thereof and later judge in the same factual situation. The local medical society has the initial obligation of determining all of the facts and whether or not disciplinary action is indicated. Questions asking for a review of a proposed course of action or an evaluation of an existing factual situation should be presented to the appropriate official of the physician's local society.

9.04 **DUE PROCESS.** The basic principles of a fair and objective hearing should always be accorded to the physician whose professional conduct is being reviewed. The fundamental aspects of a fair hearing are: a listing of specific charges, adequate notice of the right to a hearing, the opportunity to be present and to rebut the evidence, and the opportunity to present a defense. These principles apply when the hearing body is a medical society tribunal or a hospital committee composed of physicians.

These principles of fair play apply in all disciplinary hearings and in any other type of hearing in which the physician may be deprived of valuable property rights. Whenever physicians sit in judgment on physicians and whenever that judgment affects a physician's reputation, professional status, or livelihood, these

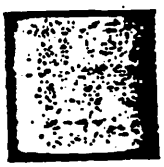
principles of fair play must be observed.
All physicians are urged to observe diligently these fundamental safeguards of due process whenever they are called upon to serve on a committee which will pass judgment on physicians. Medical societies and hospital medical staffs are urged to review the constitution and bylaws of the society or hospital medical staff to make sure that these instruments provide for such procedural safeguards.

9.05 **FREE CHOICE.** Free choice of physicians is the right of every individual. One may select and change at will one's physicians, or one may choose a medical care plan such as that provided by a closed panel or group practice or health maintenance or service organization. The individual's freedom to select a preferred system of health care and free competition among physicians and alternative systems of care are prerequisites of ethical practice and optimal patient care.
In choosing to subscribe to a health maintenance or service organization or in choosing or accepting treatment in a particular hospital, the patient is thereby accepting limitations upon free choice of medical services.
The need of an individual for emergency treatment in cases of accident or sudden illness may, as a practical matter, preclude free choice of physician, particularly where there is loss of consciousness.
Although the concept of free choice assures that an individual can generally choose a physician, likewise a physician may decline to accept that individual as a patient. In selecting the physician of choice, the patient may sometimes be obliged to pay for medical services which might otherwise be paid by a third party.

9.06 **PATENT FOR SURGICAL OR DIAGNOSTIC INSTRUMENT.** A physician may patent a surgical or diagnostic instrument he has discovered or developed. The laws governing patents are based on the sound doctrine that one is entitled to protect his discovery.

9.07 **PEER REVIEW.** Medical society ethics committees, hospital credentials and utilization committees, and other forms of peer review have been long established by organized medicine to scrutinize physician's professional conduct. At least to some extent, each of these types of peer review can be said to impinge upon the absolute professional freedom of physicians. They are, nonetheless, recognized and accepted. They are necessary. They

balance the physician's right to exercise his medical judgment freely with his obligation to do so wisely and temperately.



APPENDIX

The Judicial Council, a standing Council of the AMA, consists of five active members of the AMA elected by the House of Delegates on nomination of the President for terms of five years. The duties of the Judicial Council, as defined in 6.40 of the AMA Bylaws, are set forth in the Appendix. The Council's Rules of Procedure are also set forth here.

AMERICAN MEDICAL ASSOCIATION CONSTITUTION AND BYLAWS

JUDICIAL COUNCIL

FUNCTIONS. The functions of the Judicial Council are:
To have original jurisdiction in:
All questions involving membership as provided in 1.111, 1.121, and 1.131.
All controversies arising under this Constitution and Bylaws and under the Principles of Medical Ethics to which the American Medical Association is a party.
Controversies between two or more state associations or their members and between a constituent association and a component society or societies of another state association or associations or their members.
The interpretation of the Principles of Medical Ethics of the American Medical Association, and the interpretation of the Constitution, Bylaws and rules of the Association.
To have appellate jurisdiction in questions of law and procedure but not of fact in all cases which arise:

A. Between a constituent association and one or more of its component societies;
B. Between component societies of the same constituent association;
C. Between a member or members and the component society to which said member or members belong;
D. Between members of different component societies of the same constituent association.

APPEAL MECHANISMS. Notice of appeal shall be filed with the Judicial Council within thirty (30) days of the date of the decision by the state association and the appeal shall be perfected within sixty (60) days thereof; provided, however, that the Judicial Council, for what it considers good and sufficient cause, may grant an additional thirty (30) days for perfecting the appeal.
To receive appeals filed by applicants who allege that they, because of color, creed, race, religion, ethnic origin, national origin or sex, have been unfairly denied membership in a component and/or constituent association, to determine the facts in the case, and to report the findings to the House of Delegates. If the Council determines that the allegations are indeed true, it shall admonish, censure, or in the event of repeated violations, recommend to the House of Delegates that the constituent association involved be declared to be no longer a constituent member of the American Medical Association. To investigate general ethical conditions and all matters pertaining to the relations of physicians to one another or to the public, and make recommendations to the House of Delegates or the constituent associations.
To request the President to appoint investigating juries to which it may refer complaints or evidences of unethical conduct which in its judgment are of greater than local concern. Such investigating juries, if probable cause for action be shown, shall submit formal charges to the President, who shall

appoint a prosecutor to prosecute such charges against the accused before the Judicial Council in the name and on behalf of the American Medical Association. The Council may acquit, admonish, suspend or expel the accused.
To approve applications and nominate candidates for affiliate membership as otherwise provided for in 1.141 of these Bylaws.

AUTHORITY. The Judicial Council is the judicial authority of the American Medical Association and its decisions shall be final.

MEMBERSHIP. The Judicial Council shall consist of five Active members. The members of the Council shall be elected by the House of Delegates on nomination by the President. Members elected to the Judicial Council shall resign all other positions held by them in the Association upon their election to the Judicial Council. No member, while serving on the Judicial Council, shall be a delegate or an alternate delegate to the House of Delegates, or a General Officer of the Association, or serve on any other council or committee of the American Medical Association. This provision shall not apply to any member serving on the Judicial Council as of July 1, 1976. (This last provision of 6.403 shall automatically be removed from the Bylaws at the conclusion of the 1985 Annual Meeting.)

TERM OF SERVICE. Members of the Judicial Council shall be elected by the House of Delegates for terms of five years, so arranged that at each Annual Convention the term of one member expires.

TENURE. Members of the Judicial Council shall serve for no more than two terms, but a member elected to serve an unexpired term shall not be regarded as having served a term unless such member has served three or more years.

VACANCIES. Any vacancy occurring on the Judicial Council shall be filled at the next meeting of the House of Delegates. The new member shall be elected by the House of Delegates, on nomination by the President, for the remainder of the unexpired term.

RULES OF THE JUDICIAL COUNCIL AMERICAN MEDICAL ASSOCIATION

RULE I. ADMINISTRATION

A. *Meetings.* The Judicial Council will meet during the Annual and Clinical Convention of the American Medical Association. Other meetings of the Council may be called, on reasonable notice, by the Chairman of the Council; or they shall be called, on reasonable notice, by the Executive Vice President of the American Medical Association on the written request of at least three members of the Council.

B. *Chairman and Vice-Chairman.* The Judicial Council shall elect from among its members a chairman and vice-chairman every two years at the meeting of the Council held during the Annual Convention of the Association. Each shall retain the right to vote on all matters. No member of the Council shall serve more than two consecutive years as chairman or two consecutive years as vice-chairman.

The chairman and vice-chairman to be so elected shall be elected on separate, secret ballots. The balloting and voting for chairman shall be completed and a chairman elected before the balloting and voting for vice-chairman begins. A majority vote of the entire Council shall be required to so elect either a chairman or a vice-chairman, with balloting and voting to be repeated, if necessary, until a member is elected to each position.

In the event that the position of chairman becomes permanently vacant for any reason during the term of the then currently serving chairman, the then currently serving vice-chairman shall immediately assume the position of chairman for the remainder of the term. A new vice-chairman shall then be elected by secret ballot at the ensuing meeting of the Council to serve the remainder of the immediately preceding vice-chairman's term. A majority vote of the entire Council, as then constituted, shall be required to so elect a vice-chairman, with balloting and voting to be repeated, if necessary, until a member is elected vice-chairman. The serving of the balance of a term as chairman or vice-chairman due to such a vacancy shall not be counted in determining whether a member of the Council has served more than two consecutive years as chairman or two consecutive years as vice-chairman.

In the event that the position of vice-chairman becomes permanently vacant for any reason during the term of the then currently serving vice-chairman, a new vice-chairman shall be elected by secret ballot at the ensuing meeting of the Council to serve the remainer of the immediately preceding vice-chairman's term. A majority vote of the entire Council, as then constituted, shall be required to so elect a vice-chairman, with balloting and voting to be repeated, if necessary, until a member is elected vice-chairman. The serving of the balance of a term as vice-chairman due to such a vacancy shall not be counted in determining whether a member of the Council has served more than two consecutive years as vice-chairman.

C. *Quorum.* Three members of the Judicial Council shall constitute a quorum but a majority vote of the entire Council shall be required to adopt any action.

RULE II. APPLICATION FOR MEMBERSHIP

A. *Regular, Service and Associate Membership.* Applications for membership in the American Medical Association will be considered by the Judicial Council at any meeting upon presentation of the applications by the Executive Vice President of the Association.

B. *Affiliate Membership.* Applications for affiliate membership submitted by (1) physicians who are members of the national medical societies of foreign countries, (2) American physicians located in foreign countries or possessions of the United States and engaged in medical missionary educational or philanthropic labors, (3) dentists who hold the degree of D.D.S. or D.M.D., who are members of the American Dental Association and their state and local dental societies, (4) pharmacists who are active members of the American Pharmaceutical Association, (5) teachers of medicine or of the sciences allied to medicine who are citizens of the United States and are not eligible to membership, or (6) scientists in sciences allied to medicine and others who have attained distinction in their fields of endeavor who are not otherwise eligible to membership, will be considered at any meeting of the Judicial Council on presentation of the applications by the chief executive officer of the Association. The Council will consider and approve only those applications which are accompanied by a statement of a responsible and qualified individual attesting to the requirements set forth above.

C. *Refusal of Approval.* An applicant for membership in the American Medical Association whose application has not been approved by the Judicial Council will be promptly notified of such fact and will be given twenty days within which to request reconsideration of his application in accord with the provisions of Rule III.

RULE III. RECONSIDERATION OF APPLICATIONS FOR MEMBERSHIP

A request for reconsideration of a refusal to approve an application for membership should be initialized by a written statement setting forth the reasons for reconsideration.

RULE IV. PHYSICIANS DENIED MEMBERSHIP IN COMPONENT OR CONSTITUENT ASSOCATIONS

Pursuant to 6.4014 of the Bylaws, any physician whose application for membership in a component and/or constituent association has allegedly been denied unfairly because of color, creed, race, religion, ethnic origin, national origin, or sex may appeal to the Judicial Council. The Council shall determine the facts in the case and report the findings to the House of Delegates. If the Council determines that the allegations are indeed true, it shall admonish, censure or, in the event of repeated violations, recommend to the House of Delegates that the state association involved be declared to be no longer a constituent member of the American Medical Association.

Proceedings for such determination shall be initiated by a written statement. Such statement shall: (1) identify the parties to the case, (2) show that the appellant has exhausted remedies made available by the constitution and bylaws of the component society and the state association, and (3) include a concise factual resume of the case in sufficient detail to enable the Council to ascertain the facts. The appellant should also furnish such other information as may be requested by or helpful to the Council in determining the facts.

RULE V. ORIGINAL CONTROVERSIES

Original proceedings before the Judicial Council shall be initiated by a written statement. Such statement shall include information (1) identifying the parties to the controversy, including membership affiliations, if applicable, and (2) explaining the nature of the controversy, setting forth the provisions of the Constitution, Bylaws, Rules, or Principles of Medical Ethics concerned.

RULE VI. APPEALS

Appellate proceedings before the Judicial Council shall be perfected by a written statement of appeal. Such statement shall include information (1) identifying the parties to the case and indicating membership affiliations when appropriate, (2) showing that the appellant has exhausted remedies made available by the constitution and bylaws of the component society and the state association, and (3) describing the error of law or procedure which is believed to have occurred during the proceedings. The statement shall also include a concise, factual resume of the case. Appellant shall submit with the statement, the charges, complaints, findings, opinions, and decisions previously entered in the case.

RULE VII. INTERPRETATION OF THE CONSTITUTION, BYLAWS, RULES AND PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION

A. *Requests for Interpretation.* Requests for interpretation of the Constitution, Bylaws, Rules, or Principles of Medical Ethics of the Association shall be in writing and shall describe the matter to be interpreted in sufficient detail to enable the members of the Judicial Council to evaluate the request in all its aspects.

B. *Interpretations Initiated by the Council.* The Judicial Council, on its own motion, may render an opinion concerning the interpretation or application of the Constitution, Bylaws, Rules or Principles of Medical Ethics of the Association and may, on its own motion, consider and decide the constitutionality and validity of all rules and regulations adopted by Councils and Committees of the Association pursuant to the Bylaws of the Association.

C. *Discretionary Power.* The Judicial Council may, in its discretion, refuse to consider requests for interpretation of the Principles of Medical Ethics which in the opinion of the Council should be resolved by a component society or a state association. Requests for interpretation of the Principles of Medical Ethics which are not of national interest and relate to the observance of local customs and ideals may be readdressed to the component society or constituent association primarily responsible for knowledge of the requirements of such local customs and recognized ideals.

RULE VIII. JURISDICTION

The Judicial Council may, on its own motion or on the motion of any party, determine the question of jurisdiction at any stage of the proceedings.

RULE IX. ADDITIONAL STATEMENTS AND RECORD

After a statement has been submitted to the Judicial Council with the intention of initiating an action, all other parties in interest shall have the right

to submit a statement on their behalf. Such statements shall be filed within thirty days after the filing of the initiating statement unless additional time is granted by the Council.

The Judicial Council may thereafter require the parties to submit such transcripts of testimony, records, written statements supporting their contentions, or other material as the Council may deem necessary.

RULE X. HEARINGS

A. *Notice of Hearings.* The Council may in its discretion determine whether a hearing is necessary or advisable. The Council will designate the time and place for all hearings, giving reasonable notice thereof to all parties.

B. *Attendance.* The attendance at hearings may be limited to the members of the Judicial Council, the staff, witnesses, if any, the parties, and counsel, who may speak in their behalf. Should any party to the controversy fail to appear, the Council may in its discretion continue, dismiss, or decide the matter.

C. *Evidence and Argument.* The Judicial Council will not be bound by technical rules of evidence usually employed in legal proceedings but may accept ny evidence it deems appropriate and pertinent.

In any appeal case the review, if any, of the evidence will be limited to the evidence presented in the proceedings before the component society and constituent association or appropriate committee, board, or group thereof; provided, however, that in the event the Council is of the opinion such evidence is inadequate to determine the question of law or procedure presented, the Council, on its own motion or on the suggestion of any party, may require the production of additional evidence before the Council or refer the matter to the appropriate body for additional evidence.

In matters other than appeal cases, the Judicial Council will grant the parties the right to present evidence to the extent the Council believes appropriate to the particular matter in controversy.

In all hearings, the Council, within reasonable limitations, will allow oral argument.

D. *Record.* In hearings of original controversies, appeals, and in other proceedings, a transcript may be made at the discretion of the Council.

RULE XI. OPINIONS

All opinions or decisions of the Judicial Council shall be in writing. Copies of the opinion or decision and the dissent, if any, will be filed as a part of the record and furnished to all the parties involved.

RULE XII. FILING AND COPIES

Eight (8) copies of all documents shall be submitted to the Secretary of the Judicial Council. One copy of each document shall be submitted at the same time o each of the other parties to the controversy.

RULE XIII—DIRECT MEMBERSHIP APPLICATIONS

A. Section 1.121 of the AMA Bylaws provides that Active Direct members shall be admitted to membership upon application to the Executive Vice President of the AMA, provided that there is no disapproval by the AMA Judicial Council. Section 1.123 of the AMA Bylaws provides that objections to applicants for Active Direct membership will be referred to the Judicial Council for prompt disposition pursuant to the rules of the Judicial Council.

B. In reviewing applications for Active Direct membership, the Judicial Council shall consider information contained in the application, information from other available sources and objections raised in response to notification to the state medical association or associations in the jurisdiction or jurisdictions in which the applicant practices. The Judicial Council may consider information pertaining to the character, ethics, professional status and professional activities of the applicant.

C. Following review of the application for Active Direct membership and related information, the applicant shall be notified of either approval of the application or of allegations of objection, which if true, would justify denial of AMA membership. The applicant shall have thirty (30) days following receipt of the notice in which to file a written response. The Judicial Council shall consider any written response and determine whether additional information is needed to dispose of the matter in a fair and equitable manner. Failure of the applicant to respond within the thirty (30) day period waives any further consideration of the application.

D. Where additional information is needed to resolve disputed issues of fact or in cases where the Judicial Council finds cause for disapproving an application, the applicant shall be notified in writing of the disputed issues of fact or reasons for disapproval and shall have fifteen (15) days following receipt of the notice to request a hearing. Failure to request a hearing within the fifteen (15) day period waives any further consideration of the application.

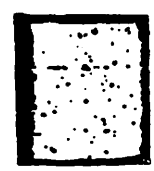
E. If the applicant submits a written request for a hearing, the Judicial Council shall notify the applicant of the date, place and time of the hearing and shall provide the applicant with a copy of these rules. Notice shall also be sent to anyone who submitted written objections to AMA membership by the applicant, informing them of the right, within 7 days after the date of the notice, to request to appear at their own expense to present evidence in support of the objections or refute evidence presented by the applicant. No objector shall have the right to cross-examine the applicant or any witnesses.

F. The Judicial Council shall not be bound by technical legal rules of evidence and may accept any evidence or information deemed reliable or relevant. The applicant shall not be required to, but may be accompanied by legal counsel and either the applicant or legal counsel may cross-examine any witnesses who appear in opposition to the applicant's application for AMA membership.

G. If a written transcript is made of the hearing, any party requesting a copy shall have it made available at his or her own expense.

H. The Judicial Council shall, within 30 days after the hearing, notify the applicant and anyone who appeared at the hearing, of its decision.

I. If the decision is to deny membership, the applicant may reapply for membership after one year following the date of the decision.



RULES OF THE JUDICIAL COUNCIL IN ORIGINAL JURISDICTION CASES

PREAMBLE

At the Annual Convention of the House of Delegates of the American Medical Association, held in June, 1962, Chapter IV of the AMA Bylaws, relating to disciplinary action, was amended. The Bylaws now provide that the Association may take disciplinary action with respect to a physician's AMA membership (1) when a state medical association to which a member belongs requests the AMA to take such action or (2) when, at the request of the American Medical Association, a state association to which the member belongs consents to such action.

6.4016 of the Bylaws provides that the Judicial Council may request the President of the Association to appoint investigating juries to which the Council may refer complaints or evidences of unethical conduct which, in its judgment, are of greater than local concern.

The following Rules of Procedure, respecting notice of charges and the conduct of hearings before the Judicial Council, are based upon these sections of the Bylaws.

INVESTIGATING JURY

At the request of the Judicial Council the President has appointed an investigating jury. Complaints or evidence of unethical conduct of greater than local concern will be submitted to this jury by the Council.

INSTITUTION OF PROCEEDINGS

If after investigation a probable cause for action is shown, the investigating jury shall submit a statement of charges to the President. The President shall submit o the Judicial Council the statement of charges presented to him by the investigating jury for prosecution in the name and on behalf of the American Medical Association.

STATEMENT OF CHARGES

The statement of charges shall allege in writing an infraction of the AMA's Constitution or Bylaws or a violation of the Principles of Medical Ethics of the AMA. Exhibits may be attached.

NOTICE

A copy of the statement of charges shall be sent to the respondent physician by personal delivery or by registered or certified mail.

ANSWER

The respondent physician shall have thirty (30) days after personal delivery or mailing of the notice of statement of charges to file a written answer. If the respondent physician fails to file a written answer, the allegations shall be considered to be admitted.

PROCEEDINGS

The Chairman of the Judicial Council shall designate one or more members of the Council to conduct a hearing on the statement of charges. This member or these members shall be known as the Hearing Officer.

Hearings shall be held at such reasonable time and place, designated by the Hearing Officer, as may be consistent with the nature of the proceedings and the convenience of the parties. The parties shall receive not less than fifteen (15) days of notice of the hearing.

The General Counsel of the American Medical Association or his designee shall prosecute the charges against the respondent physician.

Attendance at hearings may be limited to the members of the Judicial Council, the staff, witnesses, if any, the parties and counsel who may speak in their behalf.

The respondent physician or his counsel may cross-examine witnesses and enter objection to the material offered in evidence. The respondent shall also have the right to call witnesses and enter evidence in his behalf.

The Hearing Officer or his counsel may question the parties and their witnesses.

The Hearing Officer shall not be bound by technical rules of evidence usually employed in legal proceedings but may accept any evidence he deems appropriate and pertinent.

Should any party to the controversy fail to appear at the hearing, the Hearing Officer may, in his discretion, continue, dismiss or proceed with the hearing.

FINDINGS AND CONCLUSIONS

At the conclusion of the hearing, the Hearing Officer shall render a report in writing containing findings and conclusions and recommendations, if any. This report, together with a transcript of the proceedings, shall be submitted to the Judicial Council. A copy of the report shall be mailed to all parties of record.

WRITTEN OBJECTIONS

Any party to the proceedings may submit written objections to the report to the Judicial Council. These objections must be submitted within twenty-one (21) days after the report has been submitted by the Hearing Officer to the Judicial Council.

ORAL ARGUMENT

In addition to written objections, any party may request an opportunity to present oral arguments on its objections to the report of the Hearing Officer before the Judicial Council. This request must be made within twenty-one (21) days after the report has been submitted to the Judicial Council. The granting of oral arguments shall be discretionary with the Judicial Council. If granted, the parties shall be notified by the Judicial Council of the place and date for such oral argument; all parties shall be given an opportunity to be heard and the time allotted to argument may be limited by the Judicial Council with due regard to the magnitude and complexities of the issues involved.

If any party fails to appear, the Judicial Council may continue or proceed with the oral argument.

FINAL DECISION

The Judicial Council, including the member or members who serve as the Hearing Officer, shall render a final decision. A copy of that decision shall be mailed or otherwise served upon all parties.

DISCIPLINARY ACTION

The Judicial Council shall have the authority to acquit, admonish, or censure the accused physician or suspend or expel him from AMA membership as the facts may justify. This action shall be in accordance with the authority vested in the Council by Chapter IV, Section (1) (B) and Chapter XIII, Section (4) (a) (6) of the Bylaws.

TRANSCRIPT

A written transcript shall be made of the proceedings and of the oral argument before the Judicial Council.

If any party to the controversy requests a copy of the transcript, it shall be made available to him at his expense.

FILING OF COPIES

Three (3) copies of all pleadings and exhibits shall be submitted to AMA Headquarters to the Chairman of the Judicial Council. One copy of each document shall be submitted at the same time to each of the other parties to the controversy.

VIRGINIA

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

RAPHAEL J. OSHEROFF, :

Plaintiff, :

vs. : Chancery No. 11345

ROBERT GREENSPAN, et al., :

Defendants. :

Alexandria, Virginia

Friday, May 27, 1983

The proceedings commenced at 10:00 o'clock a.m.

BEFORE:

THE HONORABLE WILEY R. WRIGHT, JR.

APPEARANCES:

PHILIP J. HIRSCHKOP, Esq. and
DAVID J. FUDALA, Esq., counsel for complainant.

HARRISON PLEDGER, JR., and
JOSEPH PEREZ, esq. and
ROBERT P. TROUT, Esq., counsel for the defendants

intentionally misled the Court.

MR. PLEDGER: I don't think anybody has. The question now is, where are we, and if this is an important foundation for the Court's opinion as I interpret the opinion, it appears to have significance.

THE COURT: If it didn't have significance it wouldn't be in the opinion.

MR. PLEDGER: That's the way I interpreted the Court's opinion, that's why I raise the issue. I think those documents were not sought to be introduced to explain the changes that had taken place.

THE COURT: All right, are you ready to take up the next section?

MR. TROUT: Your Honor, if I could just point out, I believe that it is not simply that the AMA changed their canons of ethics, but I believe it is also important, perhaps most important as to why they changed because the existing ones were held to be unlawful.

We are now drawing the line and moving to the next issue.

I think, your Honor, what is clear now is that Dr. Osheroff has taken Dr. Greenspan, rather Dr. Fletcher's

testimony and he's taken the Court's opinion, and it is clear what he intends to do with it. I think it is clear that he intends to use it to the extent he possibly can to drive Dr. Greenspan out of business, to drive him out of the area, to ruin him.

I think it is clear that when he showed up at the HSA hearing in January of 1983 his only interest in being there was to interfere in Dr. Greenspan's business. He wanted the world to know what he believes he knows about Dr. Greenspan, and he is intent on kind of passing the word wherever he can.

I was kind of loath to include the entire transcript in my brief to your Honor--I know the Court has plenty of paper already to read, but I must say that I just found it so illuminating about Dr. Osheroff's intent and what Dr. Osheroff intended to do, and the irony of Dr. Osheroff kind of explaining about Dr. Greenspan trying to ruin his business as he then marches off and tries to ruin Dr. Greenspan.

I just think that hearing, the entire transcript speaks volumes for Dr. Osheroff and what is going on here.

I think that it is clear that he proved

prophetic when he suggested that the only question in January of 1983 was how much money, the only real question which he was posing to the HSA was how much money the Court was going to award to Dr. Greenspan, and that the Court had accepted Dr. Fletcher's testimony, it certainly proved prophetic, but to the extent that the HSA thought he was accurately stating what had gone on in Court, I think is overstating the case.

I think when you compare what went on in the HSA against what went on in this confidential setting before the Alexandria Hospital, and you condemn one, I think you cannot condone the other.

THE COURT: I am only going to try one case at a time, Mr. Trout.

MR. TROUT: I understand that, your Honor. I suppose one might say let Dr. Greenspan file his own lawsuit.

I really urge the Court to consider that the Court is a Court of equity, is desirous of reaching a fair result, an equitable result. I believe it is not simply what Dr. Osheroff has been doing and the intent with which he's been doing it, I think the other very important point is the extent to which he's indicated

what he is going to do with the Court's opinion in his effort. I think that's significant.

I think we go now to the Alexandria Hospital. Dr. Osheroff has brought a complaint against Dr. Greenspan which Dr. Greenspan never did against Dr. Osheroff, and he's charged him with perjury. He's charged him with unethical conduct. He's charged him with abusing the hospital processes.

He's made all of those charges, your Honor, and Exhibit A is this Court's Memorandum Opinion. Exhibit B, I might add, is a highly inflammatory vitriolic manuscript which he has drafted up, in which he makes charges against a whole host of people, including Dr. Greenspan's wife.

I think when you compare that with what is being condemned on Dr. Greenspan's part, I kind of come away thinking there is something fundamentally unfair here. I think we have presented the evidence which demonstrates that.

Your Honor, there is only so much I can say on this point. I suppose I would conclude by saying that I think the record speaks for itself. I think it is illuminating.

Dr. Greenspan, for instance, what is he going to do when he goes to Alexandria Hospital. He's now got a hearing in the Alexandria Hospital on June 7th. That's not your Honor's problem, that's his.

Presumably there is going to be a rehash of exactly what happened on January, 1980.

I gather Dr. Osheroff is going to be, I take it, filing or has the right to file a lawsuit against them because Dr. Greenspan appears at a hearing, has malice, which I suggest to the Court he does not, but if the Court finds that he has malice, he appears at the hearing and responds to questions, it's kind of like an odometer and keeps clicking off the lawsuits, and it is going to compound itself.

If it is sufficient that Dr. Greenspan appeared at a hearing and testified, and there is a finding of malice that equals liability, then we are going to run into the same problem at every turn.

I just think there is such a fundamental unfairness about this situation that I think the Court really should reconsider its ruling, and reconsider whether or not it wishes to enter a judgment in this case which so clearly will be used vindictively and

obsessively by Dr. Osheroff to skewer Dr. Greenspan.

Your Honor, with as much passion as decorum permits, I urge the Court to consider the fairness of the current situation. I urge the Court to consider Dr. Osheroff's unclean hands, and I urge the Court to withhold, under its exercise of equity jurisdiction, to withhold judgment in Dr. Osheroff's favor because he has revealed himself to be unworthy of the Court's equity jurisdiction.

THE COURT: All right, sir.

MR. HIRSCHKOP: I neednt be very long, your Honor. I wish counsel had as much passion for the truth as he does for Dr. Greenspan.

Your Honor found in your opinion, and I will read it--I know you know it well--concerning Dr. Greenspan, "his conduct was so unprincipaled and over-reaching as to convince me he did in fact act wilfully and maliciously."

Mr. Trout won't accept it, no matter what you say, that a Judge,approved by the Legislature of this State, has made such a finding. He thinks it is a cavil of yours, that maybe you were out running around not looking at the evidence, whatever, but a rather lengthy

Circuit Court of Alexandria
Virginia

FRANKLIN P. BACKUS
Judge Retired

Courthouse
520 King Street
Alexandria, Virginia
22314-3164

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July 1, 1983

Philip J. Hirschkop, Esquire
Hirschkop & Grad
Post Office Box 1226
Alexandria, Virginia 22313

R. Harrison Pledger, Jr., Esquire
1489 Chain Bridge Road
McLean, Virginia 22101

Robert P. Trout, Esquire
8320 Old Courthouse Road, Suite 200
Vienna, Virginia 22180

Re: Osheroff, et al v. Greenspan, et al
Chancery No. 11345

Dear Counsel:

A hearing was held in this cause on March 23, 1983, during the course of which the Court clarified its memorandum opinion of February 8, 1983, by stating that the constructive trust to be imposed on one-half of the profits of the Prince William Dialysis Facility will terminate when the damages awarded the complainants have been fully paid. During a subsequent hearing on April 13, 1983, the Court denied the motion of the defendants to take testimony from patients of the Prince William Dialysis Facility. A third post-trial hearing was held on May 27, 1983, and the Court heard argument on several motions, the pendency of which has prevented the entry of the final decree in this cause. The motions will be ruled on in the order in which they were argued. The Court will also prescribe the terms of the final decree.

Application for Attorney's Fees and Costs

In its memorandum opinion of February 8, 1983, the Court awarded the complainants a reasonable attorney's fee and costs as a part of the recovery under Counts I and II against the defendant, Robert Greenspan, M.D. This award was made pursuant to § 18.2-500(a), Code of Virginia, 1950, as amended.

Counsel for the complainants have supported the claim for legal fees and costs with an itemized billing statement and affidavits from lead counsel and two other respected members of the Northern Virginia Bar. As supplemented, the complainants claim a base fee in the amount of $187,976.25 and costs of $27,716.76 for all of the legal work done and costs incurred in connection with this cause. The complainants request that the base fee be multiplied by a factor of 2.0 in order to fairly reflect the highly contingent nature of success in this complex suit and the exceptional results obtained by counsel.

Dr. Greenspan contends that the number of hours claimed and the hourly rates sought by counsel for the complainants are grossly excessive, and that the circumstances of this case do not justify an adjustment of the base fee. He further points out that the fees to be awarded are limited to Counts I and II and that he was but one of several defendants against whom recovery was sought in Counts I and II.

The authorities cited by counsel which set forth the criteria to be applied in determining a reasonable attorney's fee all seem to support the proposition that the Court should first determine the base or "lodestar" fee by multiplying the number of hours reasonably expended by a reasonable hourly rate. The base or "lodestar" fee may then be adjusted to compensate for other factors which primarily reflect the risk inherent in the case and the quality of the work performed.

Disciplinary Rule 2-106 of the Virginia Code of Professional Responsibility lists the following factors to be considered as guides in determining the reasonableness of a fee:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

I have carefully reviewed the itemized billing statements submitted by counsel for the complainants; and, subject to minor adjustments, they fully document the base fee claimed in connection with the entire case. They do not, however, distinguish between the work devoted to the different counts of the bill of complaint or divide the work between the different defendants. Understanding that the entries in the billing statements were made as the work progressed, it would be unrealistic to expect the billing statements to be divided into separate categories as to counts and defendants. Nonetheless, the Court is in the position of either having to reject the claim out of hand or attempting to strike a reasonable balance between the legal work for which Dr. Greenspan is chargeable and that for which there is no permissible recovery. In following the latter course, I have taken cognizance of the fact that there was a considerable overlap between the work necessary for the preparation and trial of Counts I and II and Count VI. Furthermore, although the case began with six different defendants, it has been apparent from early on that Dr. Osheroff's desire for recompense focused primarily on Dr. Greenspan.

I have reached the conclusion that the base fee attributable to Counts I and II should be $90,000.00. When taken together, the number of hours billed and the hourly rates charged are sufficiently high to fairly compensate counsel for all of the other factors that should be taken into consideration when arriving at a reasonable fee; and, therefore, the Court will not adjust the base fee. Accordingly, Dr. Osheroff will be awarded a reasonable attorney's fee in the amount of $90,000.00 plus the costs of suit. The costs will be restricted to those items which are traditionally recoverable in Virginia, such as filing fees, witness fees and the like. Expert witness fees and the costs of discovery depositions will not be included. If counsel for the complainants will identify the allowable costs, they will be included in the final decree.

Motion to Reconsider Ruling Concerning Margaret Hess

Dr. Osheroff has moved the Court to reconsider its ruling that the defendant, Margaret Hess, did not defame him as a result of the article published in the Alexandria Journal on March 12, 1980 (complainant's exhibit 120[j]). Counsel for the complainant have

called the Court's attention to the fact that, notwithstanding the statement to the contrary at pages 18 and 24 of the memorandum opinion, the article was admitted into evidence for the purpose of proving that Nurse Hess was the source of two of the statements contained in the article; and counsel for Nurse Hess have conceded that such was the case.

Having reconsidered the evidence, I now find as a fact that Nurse Hess made the statement in the paragraph that includes the quote "might well have died." The truthfulness of this statement has not been proven to the satisfaction of the Court. Although the Court gave Nurse Hess the benefit of the doubt and found in her favor as to Counts I and II, she crossed the line of permissible behavior when she impugned Dr. Osheroff's competency to practice medicine; and I have concluded that she must respond in damages for the unprivileged statement she made to the Alexandria Journal. Accordingly, Dr. Osheroff will be awarded compensatory damages against Nurse Hess in the amount of $5,000.00.

Motion of Defendants for Reconsideration

Dr. Greenspan has moved the Court to reconsider the findings and conclusions that form the basis for the damages awarded pursuant to Counts I, II, III and VI. The defendants also question whether the evidence is sufficient to support the imposition of a constructive trust pursuant to Count V.

Dr. Greenspan contends that the evidence fails to establish that Dr. Osheroff sustained damage as a result of Dr. Greenspan's violation of subsection (b) of Code Section 18.2-499. He says that damages are not recoverable for an attempt to violate subsection (a) of Code Section 18.2-499. This argument runs counter to the language of Code Section 18.2-500(a), which provides that treble damages may be recovered by any person who is injured in his reputation, trade, business or profession by reason of a violation of Code Section 18.2-499. If the General Assembly intended to limit recovery of civil damages to violations of subsection (a), it would have done so. Furthermore, the Court did not find, as suggested in the defendants' memorandum, that Dr. Greenspan unsuccessfully attempted to cause damage. The Court found that Dr. Greenspan's prohibited conduct resulted in great damage to Dr. Osheroff and his professional corporation; and the Court concluded that Dr. Greenspan was guilty of an attempted rather than a completed conspiracy only because the other persons that Dr. Greenspan involved in his nefarious scheme did not share the malevolent motive or purpose the Court deems the statute to require.

I find no merit to Dr. Greenspan's contention that the punitive damages are excessive and unreasonable in light of the public policy to punish and deter. The case of Weatherford v. Birchett, 158 Va. 741, 164 S.E. 535 (1932) stands for the proposition that evidence of the financial standing of the defendant may be considered in assessing punitive damages; however, I am unaware of any authority requiring the plaintiff to prove the financial standing of the defendant as a prerequisite to an award of punitive damages. Nevertheless, there was evidence relating to the issue of punitive damages which the Court carefully considered; and it is too late for Dr. Greenspan to complain that the Court should have been given more information upon which to base its award.

Dr. Greenspan further contends that he cannot be found to have violated Section V of the Principles of Medical Ethics of the American Medical Association because a 1979 order of the Federal Trade Commission, which became final in 1982, made illegal the prohibition against solicitation contained in Section V. He argues that, since this finding is the linchpin of Dr. Osheroff's case against him, the case must fail. This argument has two flaws. First, although significant, the finding is not critical to the conclusions reached by the Court. Second, the order of the Federal Trade Commission provides that nothing contained therein prohibits the American Medical Association from adopting and enforcing reasonable ethical guidelines with respect to "uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence." Thus, even if it can be said that the order applies retroactively to the Principles of Medical Ethics in effect in 1979, it is clear that the order does not make illegal a ban on the kind of solicitation that occurred in this case. Parenthetically, I might add that even if the Court had admitted complainant's exhibit 135 into evidence, which demonstrates that in 1980 the American Medical Association deleted the ban against solicitation found in Section V, it would not change my view of the case. Whether banned by the Principles of Medical Ethics or not, Dr. Greenspan's tactics in encouraging the patients receiving treatment in the Northern Virginia Dialysis Center to refuse further treatment from Dr. Osheroff and acknowledge Dr. Greenspan as their physician were improper. If Dr. Greenspan was faced with a dilemma as suggested by his counsel, it was the result of his own misconduct.

The defendants assert that there is insufficient evidence to support the finding that Dr. Osheroff probably could have obtained both the consent and the waiver requisite to opening a separate dialysis facility in Prince William County. They argue that absent this finding the Court could not award compensatory damages or impose a constructive trust. After reviewing the evidence, I am

satisfied that the finding is not without support. Furthermore, this contention does not square with Dr. Greenspan's claim that he intended for the new dialysis center to be a part of Dr. Osheroff's practice because, if such were the case, he either intended to proceed without the consent and the waiver in violation of Dr. Osheroff's contract with National Medical Care, Inc. or thought that the consent and the waiver would be forthcoming.

Dr. Greenspan also asks the Court to reconsider its ruling that he defamed Dr. Osheroff during the hearing before the Executive Committee of the Alexandria Hospital. In support of this request he correctly points out that the Court did not specify which of his statements were false and defamatory. This omission is not fatal to the Court's ruling. When considered in their entirety, the statements were defamatory per se and it was Dr. Greenspan's burden to prove that they were substantially true. This he failed to do. Insofar as the qualified privilege is concerned, I am satisfied that Dr. Greenspan's statements were actuated by a motive to injure Dr. Osheroff by depriving him of his privileges to practice medicine in the Alexandria Hospital, which was in furtherance of his goal to take over Dr. Osheroff's practice. Consequently, Dr. Greenspan may not avail himself of the qualified privilege afforded by Code Section 8.01-581.16.

The Remaining arguments advanced by the defendants in support of their motion for reconsideration are without sufficient merit to warrant further comment.

The Final Decree

In addition to being consistent with the memorandum opinion dated February 8, 1983, as modified and supplemented by this letter opinion, the final decree shall make provision for the following:

1. The judgment will bear interest at the legal rate from the date of the decree.

2. Assuming the complainants still desire a constructive trust, they will not be permitted to enforce the judgment by the attachment or sale of the stock of the Prince William Dialysis Facility, Inc.

3. The constructive trust will be structured in the manner set forth in the defendants' proposed decree except that the profits will include unit professional fees attributable to Dr. Greenspan as well as dialysis fees charged by the Center.

4. The annual accounting will take place within thirty days following the end of the fiscal year of the Prince William Dialysis Facility, Inc. and the profits will be payable within thirty days following the completion of the annual accounting.

If counsel are unable to agree on the selection of a trustee, the Court will make the selection.

Counsel for the complainants should submit a sketch of a final decree consistent herewith endorsed by counsel for the defendants. Counsel for both sides are urged to meet for the purpose of drafting the final decree in order to avoid further delays in the conclusion of this case. If need be, I will meet with counsel in chambers or confer with counsel by conference call in order to facilitate the entry of the decree.

Very truly yours,

Wiley R. Wright, Jr.

WRW:jk

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

RAPHAEL J. OSHEROFF, M.D.	:	
and	:	
RAPHAEL J. OSHEROFF, M.D., INC.,	:	
Complainants,	:	
v.	:	IN CHANCERY NO. 11345
ROBERT GREENSPAN, M.D.,	:	
STEVEN TOLKAN, M.D.,	:	
PRINCE WILLIAM DIALYSIS FACILITY, INC.,	:	
and	:	
MARGARET HESS,	:	
Defendants.	:	

D E C R E E

For the reasons stated in the Memorandum Opinion of the court filed in this matter on February 8, 1983, and, as stated in the July 1, 1983 letter opinion of the court, both of which are hereby made a part of this Decree, it is hereby

DECREED that the Motion for Reconsideration filed by defendants Greenspan and Prince William Dialysis Facility, Inc. is denied; and it is further

DECREED that the Motion to Take Testimony from Patients filed by defendants Greenspan and Prince William Dialysis Facility, Inc. is denied; and it is further

DECREED that, as to Counts I and II, complainants are

awarded compensatory damages against Dr. Robert Greenspan in the amount of $184,804.00, to be trebled pursuant to Virginia Code §§18.2-499 and 18.2-500, in a total amount of $554,412.00, with interest at 10% per annum from April 13, 1983 to July 1, 1983 and at 12% per annum thereafter and bearing such interest until the amount is paid in full and the judgment satisfied; and it is further

DECREED that, as to Counts I and II, complainants are awarded against Dr. Robert Greenspan reasonable attorney's fees in the amount of Ninety Thousand Dollars ($90,000); and it is further

DECREED that, as to Count III, Dr. Osheroff is awarded compensatory damages in the amount of Ten Thousand Dollars ($10,000.00) plus punitive damages in the amount of Twenty Thousand Dollars ($20,000.00) against Dr. Robert Greenspan, with interest at 10% per annum from April 13, 1983 to July 1, 1983 and at 12% per annum thereafter and bearing such interest until the amount is paid in full and the judgment satisfied. These damages, however, will not be in addition to the damages awarded as to Counts I, II, and VI; and it is further

DECREED that as to Count III, Complainants' Motion to Reconsider Ruling Concerning Margaret Hess is Granted; and Dr. Osheroff is awarded compensatory damages against defendant Hess in the amount of Five Thousand Dollars ($5,000.00), with interest at 12% per annum from the date of this decree and bearing such interest until the amount is paid in full and the judgment satis-

fied, and it is further

DECREED that, as to Count IV, defendants are granted summary judgment; and it is further

DECREED that, as to Count V, a constructive trust is imposed on one-half of the profits of the Prince William Dialysis Facility, Inc. and on one-half the unit professional fees attributable to Dr. Greenspan for his patients treated in the Facility in favor of complainants, to continue until the judgment, fees, costs and interest awarded in this cause against Dr. Greenspan are paid in full.

Profits shall be determined by taking the gross revenues of the Prince William Dialysis Facility, Inc. produced by charges made by the Facility for dialysis treatments, less expenses for reasonable and necessary costs relating to the provision of dialysis services, including, but not limited to, salaries of the staff, compensation to the medical director of the Facility and the officers and directors of the Facility, and payments made for loans and debts incurred in operating the Facility.

Complainants shall have an annual accounting within thirty (30) days following the end of the fiscal year of the Prince William Dialysis Facility, Inc. and the appropriate share of profits shall be paid to complainants within thirty (30) days following the completion of the annual accounting.

Upon notification of complainants' desire for the trust to be imposed the court shall appoint a trustee who shall conduct

the annual accounting and otherwise execute the terms of the constructive trust.

The trustee shall have the power to examine the necessary books of accounts and records of the Prince William Dialysis Facility, Inc. and conduct any other examination necessary to determine the profits of the Prince William Dialysis Facility, Inc. as heretofore set forth, and shall pay to complainants their respective share of the profits. The fees and expenses of the trustee shall be shared equally by defendants Greenspan and Prince William Dialysis Facility, Inc and complainants.

Should complainants elect to enforce the judgment by attachment or sale of the stock of the Prince William Dialysis Facility, Inc., in lieu of imposition of the constructive trust, they shall first notify the court and defendants within ninety (90) days of the date of this decree by filing written notice with the court and hand-delivering such notice to all counsel. Upon such election, the foregoing provisions declaring imposition of the trust shall not take force and effect~~, and it is further~~ So long as ~~In the event~~ the complainants pursue the constructive trust remedy prescribed herein, the complainants shall have no other interest in the Prince William Dialysis Facility and the stock of said corporation may not be attached by complainants in an attempt to enforce the judgment hereby entered. It is further

DECREED that, as to Count VI, complainants are awarded compensatory damages against Dr. Greenspan in the amount of $184,804.00 and punitive damages in the amount of $369,608.00,

with interest at the rate of 10% per annum, from April 13, 1983 until July 1, 1983 and at 12% per annum thereafter and bearing such interest until the amount is paid in full and the judgment satisfied. These damages, however, are not in addition to the damages awarded as to Counts I, II, and III; and it is further

DECREED that with respect to defendants Tolkan, Hess and Prince William Dialysis Facility, Inc., to the extent that awards are not made against them, the respective Counts are dismissed with prejudice as to each of them; and it is further

DECREED that, as to Counts I, II, III, V and VI, complainants are awarded costs in the amount of Fifty Dollars ($50.00); and it is further

DECREED that, in furtherance of this decree, and to ensure proper performance of the terms imposed by this decree, complainants shall have the continuing right to reinstate this cause, on motion, for the purpose of securing to complainants the complete benefit of this decree; and it is further

DECREED that the transcript of the proceedings in this cause are hereby made a part of the record; and it is further

DECREED that for purposes of appeal, and for all other purposes, subject to complainants' continuing right to reinstate this cause on motion to enforce this decree,

THIS CAUSE IS FINAL.

Entered this 7th day of July, 1983.

HONORABLE WILEY R. WRIGHT, JR.

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A COPY TESTE:
Edward Semonian, Clerk

By: _____, Deputy Clerk

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PHILIP J. HIRSCHKOP
DAVID J. FUDALA

Counsel for Complainants

Complainants object to dismissal of Counts I and II as to Tolkan and Hess, the amount of attorney's fees as to defendant Greenspan; and the limitations on the trust in Count V.

Seen and Objected to:

R. HARRISON PLEDGER, JR.

Counsel for all Defendants

ROBERT TROUT

Counsel for Robert Greenspan and Prince William Dialysis Facility, Inc.

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 831646

ROBERT GREENSPAN, M.D., and

PRINCE WILLIAM DIALYSIS FACILITY, INC.

vs.

RAPHAEL J. OSHEROFF, M.D., and

RAPHAEL J. OSHEROFF, M.D., INC.

PETITION FOR APPEAL

ASSIGNMENTS OF ERROR

The trial court erred in awarding judgment to the appellees because:

1. Dr. Greenspan did not not act unethically.

2. Dr. Greenspan cannot be found liable under Va. Code §§18.2-499, and -500 because the court found that his conduct was motivated in part by legitimate purposes.

3. Dr. Greenspan cannot be liable for tortious interference with prospective contractual relations because his conduct was justified.

4. The imposition of a constructive trust upon the profits of the Prince William Dialysis Facility was unwarranted and improper.

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5. The court's finding that Dr. Greenspan acted with actual malice is plainly erroneous.

6. Dr. Greenspan's testimony before a hospital Executive Committee was absolutely privileged and therefore cannot be defamatory.

7. The award of damages is grossly excessive and unwarranted as a matter of law.