

BEFORE THE BOARD OF MEDICAL QUALITY ASSURANCE  
DIVISION OF MEDICAL QUALITY  
STATE OF CALIFORNIA

In the Matter of the Accusation

Against:

MICHAEL L. GERBER, M.D.  
45 Camino Alto  
Mill Valley, California 94941  
Certificate No. C-35438

Respondent.

NO. D-2990

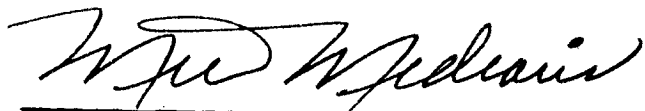
N 20092

DECISION

The attached Proposed Decision of the Third District Medical Quality Review Committee is hereby adopted by the Board of Medical Quality Assurance as its Decision in the above-entitled matter.

This Decision shall become effective on June 20, 1984.

IT IS SO ORDERED May 21, 1984.



MILLER MEDEARIS  
Secretary-Treasurer

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PROPOSED DECISION

This matter was heard on a First Amended Accusation before a panel of the Third District Medical Quality Review Committee on July 18, 19, 20 and 22, 1983. The panel reconvened for further hearing on November 28, 29, 30, December 1, 2, 5, and 7, 1983. Finally, the matter was deemed submitted after hearings on March 5, 6 and 7, 1984. On March 9, 1984, the panel met in executive session and rendered its proposed decision which was unanimous.

The panel consisted of Fred David, M.D. (chairman and physician member); Stephen L. Taller, M.D. (physician member); and Kenneth P. Bubbs (public member). Robert S. Kendall, Administrative Law Judge, Office of Administrative Hearings, presided at all sessions, except the executive session at which he was present.

The complainant Board of Medical Quality Assurance (BMQA), Division of Medical Quality, was represented by Vivien Hara Herish, Deputy Attorney General.

Respondent was present and was represented by John A. Burgess, Attorney at Law, his counsel. Respondent, on advice of counsel, declined to testify in his own behalf during his case in chief.

Pursuant to the provisions of Government Code section 11513, complainant's counsel called respondent as an adverse witness, whereupon respondent, after being sworn, invoked his

privilege against self-incrimination under the United States and California Constitutions and thereafter refused to answer the questions asked of him. On the hearing record at the invocation of privilege and in executive session, the Administrative Law Judge instructed the panel of the provisions of Evidence Code sections 931 and 413 concerning the drawing of inferences and presumptions from respondent's failure to testify.

All facts found by the panel were established by clear and convincing evidence to a reasonable certainty, unless otherwise stated.

Accordingly, this proposed decision, signed by the panel chairman, is hereby forwarded pursuant to the provisions of Government Code section 11517 and Business and Professions Code section 2335.

DISPOSITION OF SPECIAL MATTERS IN DEFENSE  
AND RESERVED RULINGS ON MOTIONS

1. Admissibility of Exhibits 2 and 3 (Patient Records of B.C.T. and D.C.T.)

Respondent's objections to admission of these exhibits are overruled. Respondent failed to establish the right of a parent of a minor patient to deny BMQA access to the minor's medical records obtained under provisions of an administrative subpoena duces tecum.

2. Admissibility of Exhibits 4a and 4b (Patient Records of J.T.)

Respondent's objections to admission of this exhibit are overruled. The record establishes the documents were obtained properly and in compliance with all applicable laws under a validly issued and executed administrative subpoena duces tecum.

3. Objections by Respondent to Dismissal of Subparagraph f, Paragraph 10, First Cause for Disciplinary Action (page 7, lines 1 through 5, First Amended Accusation) by Complainant

Respondent's objections to complainant's motion to dismiss are overruled in that respondent failed to establish how and in what manner such dismissal would be prejudicial. In any event complainant's failure to introduce evidence on the allegations of the subcount makes the issue moot.

4. All Respondent's Objections to Introduction of Exhibits and Other Evidence on which rulings were reserved are overruled.

5. Respondent's Continuing Objection to Initiation and Continuation of the Proceedings herein is overruled on all grounds raised, including motions to dismiss the accusation on all United States and California constitutional grounds.

## FINDINGS OF FACT

### I

Complainant Kenneth J. Wagstaff is the Executive Director of the Board of Medical Quality Assurance, State of California (the Board). He made the charges and allegations in the Accusation and First Amended Accusation solely in his official capacity.

### II

At all times material, Michael L. Gerber, M.D. (respondent) has held physician and surgeon certificate No. C-35438, issued to him by the Board on October 4, 1973. He is in good standing at present. No prior disciplinary action has been taken against respondent's certificate.

### III

a) Official notice is taken of section 2220 (formerly sections 2116 and 2360) of the Business and Professions (B & P) Code, which provides that the Division of Medical Quality of the Board (the Division) may take action against all persons guilty of violating the provisions of the Medical Practice Act (MPA) (B & P Code sections 2000, et seq.).

b) Official notice is taken of B & P Code section 2234 (formerly section 2361), which provides in pertinent part, that the Division shall take action against a licensee charged with unprofessional conduct. Unprofessional conduct is defined to include, but is not limited to: violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision of the MPA, gross negligence, repeated similar negligent acts, and incompetence.

c) Official notice is taken of B & P Code section 2252 (formerly section 2378.5), which provides in pertinent part, that violation of Chapter 7 (commencing with section 1700) of Division 2 of the Health and Safety (H & S) Code, relating to the treatment of cancer, constitutes unprofessional conduct.

d) Official notice is taken of H & S Code section 1700 which provides in pertinent part:

"The effective diagnosis, care, treatment or cure of persons suffering from cancer is of paramount public importance. Vital statistics indicate that approximately 16 percent of the total deaths in the United States annually result from one or another of the forms of cancer. It is established that accurate and early diagnosis of many forms of cancer, followed by prompt application of

methods of treatment which are scientifically proven, either materially reduces the likelihood of death from cancer or may materially prolong the useful life of individuals suffering therefrom.

"Despite intensive campaigns of public education, there is a lack of adequate and accurate information among the public with respect to presently proven methods for the diagnosis, treatment, and cure of cancer. Various persons in this state have represented and continue to represent themselves as possessing medicines, methods, techniques, skills, or devices for the effective diagnosis, treatment, or cure of cancer, which representations are misleading to the public, with the result that large numbers of the public, relying on such representations, needlessly die of cancer, and substantial amounts of the savings of individuals and families relying on such representations are needlessly wasted.

"It is, therefore, in the public interest that the public be afforded full and accurate knowledge as to the facilities and methods for the diagnosis, treatment, and cure of cancer available in this state and that to that end there be provided means for testing or investigating the value or lack thereof of alleged cancer remedies, devices, drugs, or compounds and informing the public of the facts found, and protecting the public from misrepresentation in such matters."

e) Official notice is taken of H & S Code section 1707.1 which prohibits the sale, offering for sale, holding for sale, delivering, giving away, prescribing or administering of any drug, medicine, compound or device to be used in the diagnosis, treatment, alleviation or cure of cancer unless an application with respect thereto has been approved by the designated federal or state agencies.

f) Official notice is taken of H & S Code section 1709 which provides the failure to comply with any of the regulations promulgated under Chapter 7 (commencing with section 1700) is a misdemeanor. These regulations include the following:

(a) Title 17, California Administrative Code (CAC) section 10400 states, in pertinent part:

"(a) The Department of Public Health has carefully considered a document entitled Report and Findings of the Cancer Advisory Council with Respect to the Hoxsey Treatment of Internal Cancer to the Director of the California State Department of Public Health, dated May 31, 1962, and is satisfied beyond a reasonable doubt that the findings therein are true. The Department hereby ratifies and adopts said report as its own.

"(b) The Department of Public Health hereby finds that the commonly designated Hoxsey method for the treatment of cancer, and all the ingredients of which it is composed, to wit, potassium iodide, lactated pepsin, red clover blossoms, cascara sagrada, licorice, burdock root, stillingia root, berberis root, pook root, echinacea root, prickly ash bark, and buckthorn bark, whether singly or in any combination, and in any dosage whatever, are of no value in the diagnosis, alleviation, treatment or cure of cancer, and that some of these ingredients may in certain circumstances be harmful to persons whether or not cancer is present. (The Department recommends that the public refrain from using any of the said substances, whether singly or in any combination, in the diagnosis, alleviation, treatment or cure of cancer.)

"(c) The prescription, administration, sale or other distribution of the commonly designated Hoxsey agents for treatment of cancer, or any of the ingredients thereof as described in subsection (b) of this section, whether singly or in any combination, or in any dosage or guise whatever, in the diagnosis, alleviation, treatment or cure of cancer, or for treatment of any patient who has or believes he has cancer is prohibited...." (Emphasis added.)

g) Official notice is taken of B & P Code section 725 (formerly section 700) which provides that repeated acts of clearly excessive prescribing or administering of drugs or treatment, repeated acts of clearly excessive use of diagnostic or treatment facilities, as determined by the standard of the local community of licensees, is unprofessional conduct for a physician and surgeon.

#### FIRST CAUSE FOR DISCIPLINARY ACTION

#### IV

a) Beginning on October 25, 1977 and continuing until on or about February 4, 1980, respondent undertook the care and treatment of

patient J. T., a 56-year-old female who presented herself with a well-differentiated early stage adenocarcinoma of the endometrium, which had been diagnosed by biopsy on October 22, 1977. J.T. expired as a result of metastases of her disease on April 4, 1980.

It was established, and it is hereby found, that in treating and caring for J.T., respondent, who identifies himself as an orthomolecular practitioner, treated J.T.'s adenocarcinoma for approximately twenty-seven months with ineffective methods of therapy, including, but not limited to, repeated prescriptions or administrations of vitamins, herbal preparations, enzymes, enemas, and chelation therapy. It is found respondent should have known and recognized that surgery and/or radiation treatment were the recognized, effective and sole medically acceptable means of treatment of adenocarcinoma of the endometrium, according to the standard of medical practice in California.

b) It was contended by respondent's counsel throughout the hearing in argument, and in the form of objections, that respondent was not treating J.T.'s cancer, but was solely supporting her "metabolically and nutritionally," because she had refused conventional therapy, including surgery which had been scheduled. Respondent offered no evidence in support of this contention, other than his own records.

Respondent's contentions through counsel, and testimony of his own expert witnesses' opinions, that the prescribed substances and treatment methods employed were solely for nutritional and metabolic support only, and were not in treatment of J.T.'s adenocarcinoma are rejected as not being supported by the weight of credible evidence.

It is found respondent failed to sustain his burden of proof in this regard after complainant had established by clear and convincing evidence that most of the substances, as well as several treatment modalities used by respondent in caring for J.T. had, in the past and are still used in unconventional and inefficacious treatment of cancer (i.e., Hoxey Method, chelation therapy, enemas, pangymic acid, yellow dock, megavitamin dosage, slippery elm, enzyme therapy, red clover, licorice, wheat grass juice, shepard's purse, benzaldehyde, adrenocortical extract, etc.). In fact, some of respondent's own expert witnesses testified certain of these substances and methods used were believed to be effective in cancer therapy, or in some cases were believed to be cancer "inhibitors," in orthomolecular medical practice.

Further, respondent failed to establish by credible evidence that the various substances he prescribed for J.T. had nutritional worth and metabolic support value for patients suffering adenocarcinoma of the endometrium, or for any other patients requiring nutritional and metabolic support for any other reason.

c) It was established by and through respondent's medical records (Exhibits 4a and b) that within a few days of taking J.T. as a patient, respondent, who was aware of J.T.'s diagnosis of endometrial carcinoma, initiated for her a series of treatment modalities and substance ingestions, most of which were continued throughout approximately 27 months and which used all of the substances and treatment modalities set out above at one point or another.

d) It was established by and through the expert opinion testimony of complainant's expert witnesses that none of the substances used or treatment modalities employed by respondent in treatment of J.T. had, or have, any recognized effectiveness in the treatment of cancer.

It was established by complainant's evidence that none of the substances or treatment modalities employed by respondent for "...general improvement of your nutritional and metabolic status..." (Exhibit 4a, page 79) had either nutritional or metabolic value for a patient suffering an endometrial carcinoma.

The expert opinion testimony of respondent's expert witnesses did not establish that these substances, or treatments, were then, or are now, generally accepted by any significant segment of the community of California physicians as having any worth, efficacy, or value for either the treatment of cancer, or for the nutritional and metabolic support of cancer patients.

e) It was established by and through the testimony of complainant's expert witnesses that, had prompt, conventional cancer treatment been extended to patient J.T. commencing at the time she first presented to respondent, she would have come within the 90% five-year survival group.

f) It was established from respondent's medical records that he was aware of patient J.T.'s contacts during the time she was his patient, with various practitioners of unconventional, unproven cancer treatment procedures (i.e., Exhibit 4a, pages 1, 16, 45, 60, and 63). Respondent's records do not reflect that he remonstrated with or discouraged patient J.T. from these contacts, or that he employed a strategy to encourage and persuade her to seek conventional treatment for her condition. It was established patient J.T. was scheduled for surgery within a few days after she first presented to respondent, and that respondent was aware of this, and also knew patient J.T. cancelled this surgery within a few days of first consulting him professionally.

It is found that the accepted standard of medical treatment and care for a patient presently with a well-differentiated adenocarcinoma of the endometrium, and who



adamantly refuses conventional accepted treatment therefor, is:  
1) continuously and emphatically to encourage the patient to seek conventional treatment; 2) strongly discourage any patient attempts to seek out unproven modalities and nostrums for cancer treatment offered by the subculture of practitioners, medical and nonmedical; and 3) not to undertake courses of unproven treatment and/or substance use, because these have the effect of lulling patient fears or misleading her to conclude that effective cancer therapy is in progress. It was established and it is found such activity falsely reassures cancer patients concerning their prognosis and discourages them from seeking effective and timely treatment.

g) It was established that on numerous occasions respondent ordered pap smears and mimark tests for patient J.T. It was established by complainant that the use of such tests is needless and without medical significance or worth in following a patient with endometrial adenocarcinoma. Respondent offered no evidence wherefrom it could be concluded these tests had any significant medical purpose or reason.

#### SECOND CAUSE FOR DISCIPLINARY ACTION

##### V

a) Findings of Fact IV is incorporated here as though fully set out.

b) It was established that, pursuant to both federal and California statutes and regulations, no substance or therapy may be used in the treatment of cancer unless the specific substance or therapy has received prior approval by appropriate agencies, federal and/or state.

c) It was established that none of the substances or therapies hereafter listed have received such approval: Hoxey's formula, vitamin megadoses, chelation therapy, ACE, Arthur's Test, vabe mujos enzyme, chaparral tea, yellow dock, pangymic acid, A emulsion, benzaldehyde, wheat grass juice, coffee or enzyme enemas, apricot pits, red clover, slippery elm. Respondent prescribed the use of these substances and treatments in course of his care of J.T.

#### THIRD CAUSE FOR DISCIPLINARY ACTION

##### VI

a) Findings of Fact IV is incorporated here as though fully set out.

b) It was established respondent used Hoxey's method throughout the course of his care and treatment of patient J.T.'s cancer.

c) It was established the use of Hoxey's method has been prohibited by a regulation promulgated pursuant to H & S Code section 1709.

#### FOURTH CAUSE FOR DISCIPLINARY ACTION

##### VII

a) Findings of Fact IV is incorporated here as though fully set out.

b) It is found respondent's course of conduct in connection with treatment of this patient over a period of approximately 27 months, as set forth in his treatment records, establishes clearly respondent excessively prescribed or administered drugs and treatment and clearly used excessive diagnostic or treatment facilities.

c) Respondent offered no evidence to establish his treatment/prescribing were justified under the conditions and circumstances after the burden of going forward on his own behalf had shifted to him.

#### FIFTH CAUSE FOR DISCIPLINARY ACTION

##### VIII

a) Beginning in April 9, 1981, and continuing at least until about June 24, 1981, respondent undertook the care and treatment of B.C.T. and D.C.T., twin boys, 37 months old (the patients), who presented through their parents, for treatment of chronic otitis media. It was established that between April 9, 1981 and May 1, 1981, in diagnosing, treating, and caring for the patients, respondent treated the otitis media by prescribing for the patients approximately 120,000 to 130,000 units of Vitamin A daily for one week, and in excess of 70,000 units of Vitamin A per day, 5 days a week, for a period of at least three weeks following the first week.

It is true counsel stipulated that the Vitamin A dosage given the patients was approximately 70,000 units per day. Examination of respondent's patient treatment records (Exhibits 2 and 3) shows the true and accurate dosage and the time span to be as set out here. Therefore, in its deliberations and proposed decision, the panel rejects the stipulation of counsel and in lieu, makes its own findings based on the evidence before it.

It was established by the expert opinion testimony of complainant's expert witnesses that Vitamin A has no proven efficacy in the treatment of otitis media and, that in the dosages prescribed by respondent, presented a significant risk of harm through toxicity, particularly to 37-month-old children. On advice of the patients' pediatrician, the Vitamin A dosage was stopped on or about May 1, 1981.

b) It was not established respondent failed to instruct the parents of the patients concerning toxicity dangers and symptoms resulting from large Vitamin A ingestion.

c) Respondent prescribed coffee enemas for the patients to be given twice daily. It was established by the weight of expert medical opinion there is no known use or efficacy in the use of coffee enemas in treatment of otitis media by any significant segment of physicians in California or elsewhere.

#### SIXTH CAUSE FOR DISCIPLINARY ACTION

##### IX

a) Findings of Fact VIII is incorporated here as though fully set out.

b) It was established the prescribing of Vitamin A for 7 days commencing on April 9, 1981 at levels of 120-130,000 units per day, followed thereafter by dosage of 70,000 plus units per day for five days of the week until approximately May 1, 1981, constitutes clearly excessive prescribing or administration.

#### GENERAL DETERMINATION OF ISSUES

The provisions of subsection (f), paragraph 10, First Cause for Disciplinary Action, on page 7, lines 1 through 5 of the First Amended Accusation should be dismissed for failure to introduce evidence thereon, and over the objections raised by respondent's counsel on motion by complainant's counsel so to dismiss.

#### DETERMINATION OF ISSUES

#### FIRST CAUSE FOR DISCIPLINARY ACTION

##### I

The matters set forth in Findings of Fact IV a) through g) establish respondent has violated the provisions of B & P Code section 2234(b) and (d) and has thereby demonstrated gross negligence and incompetence by treating an adenocarcinoma of the endometrium with ineffective and unproven therapies, substances and procedures.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## II

The matters set forth in Findings of Fact IV g) establish respondent has violated the provisions of B & P Code section 2234(d) (incompetence) by use of repeated, excessive and useless pap smears and mimark tests in following an adenocarcinoma of the endometrium.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## III

The matters set forth in Findings of Fact IV f) establish respondent has violated the provisions of B & P Code section 2234(b) and (c) (gross negligence and repeated similar negligent acts) by failing to use, or to recommend to his patient, medically accepted, effectual treatment for her cancer, and in that he failed to discourage his patient from seeking ineffective treatment and substances from himself and others.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## IV

The matters set forth in Findings of Fact IV a), b), c), and d) establish respondent has violated the provisions of B & P Code section 2234(b) (gross negligence) in that respondent prescribed/administered potentially toxic dosages of Vitamin A. It was not established respondent likewise prescribed/administered potentially toxic dosages of Vitamin D, however.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## V

The matters set forth in Findings of Fact IV a), b), c), and d) establish respondent has violated the provisions of B & P Code section 2234(d) (incompetence) by treating a cancer patient nutritionally and/or metabolically with unproven, ineffective therapy, drugs, herbs, vitamins and such means.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## SECOND CAUSE FOR DISCIPLINARY ACTION

The matters set forth in Findings of Fact V establish respondent has violated the provisions of B & P Code section 2234(b) (gross negligence) and H & S Code section 1701.1, by using unapproved substances and treatment methods in the treatment of cancer.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code sections 2252 and 2227.

## THIRD CAUSE FOR DISCIPLINARY ACTION

The matters set forth in Findings of Fact VI establish respondent has violated the provisions of H & S Code section 1707, B & P Code section 2234(d) (incompetence) and California Administrative Code Title 17, section 10400 by using a prohibited procedure in treatment of a cancer patient.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code sections 2252 and 2227.

## FOURTH CAUSE FOR DISCIPLINARY ACTION

The matters set forth in Findings of Fact VII establish respondent has violated the provisions of B & P Code sections 725 and 2234(d) (incompetence) by clearly utilizing excessive drugs, substances and treatment and tests for treatment of his patient's cancer.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## FIFTH CAUSE FOR DISCIPLINARY ACTION

### I

The matters set forth in Findings of Fact VIII a) establish respondent has violated the provisions of B & P Code sections 2234(b) and (d) (gross negligence and incompetence) by prescribing of potentially toxic dosages of Vitamin A which has no efficacy in treatment of chronic otitis media.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## II

The matters set forth in Findings of Fact VIII b) do not establish respondent has violated the provisions of B & P Code section 2234(b) or any other section of the Medical Practice Act.

Therefore, no grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## III

The matters set forth in Findings of Fact VIII c) establish respondent has violated the provisions of B & P Code section 2234(b) and (d) (gross negligence and incompetence) by prescribing coffee enemas which have no known efficacy in treatment of otitis media.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## SIXTH CAUSE FOR DISCIPLINARY ACTION

The matters set forth in Findings of Fact IX establish respondent has violated the provisions of B & P Code sections 725 and 2234(d) (incompetence) by clearly excessive prescribing/administering.

Therefore, grounds have been established for imposing disciplinary action pursuant to the provisions of B & P Code section 2227.

## PROPOSED ORDER

### I

The allegations set out in the First Cause for Disciplinary Action, subcount (f), paragraph 10, page 7, lines 1 through 5 of the First Amended Accusation are hereby dismissed for failure of proof.

### II

The allegations set out in the Fifth Cause for Disciplinary Action, subcount (b), paragraph 18, page 9, lines 14 through 16 of the First Amended Accusation are hereby dismissed for failure to establish the facts by clear and convincing evidence.

III

Respondent's Certificate No. C-35438 is hereby  
revoked on each, every and all of the First, Second, Third,  
Fourth, Fifth and Sixth Causes for Disciplinary Action, singly,  
severally, and separately.

DATED: March 30, 1984

Fred David MD  
FRED DAVID, M.D., Chairman