

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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BEFORE THE STATE OF WISCONSIN  
MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST

KENNETH M. SMIGIELSKI, M.D.,  
RESPONDENT.

:  
:  
:  
:  
:

AFFIDAVIT OF SERVICE

Pamela Haack, being first duly sworn on oath deposes and states that she is in the employ of the Department of Regulation and Licensing, and that on July 7, 1992 she served the following upon the respondent's attorney:

Final Decision and Order, LS9106111MED, dated June 24, 1992

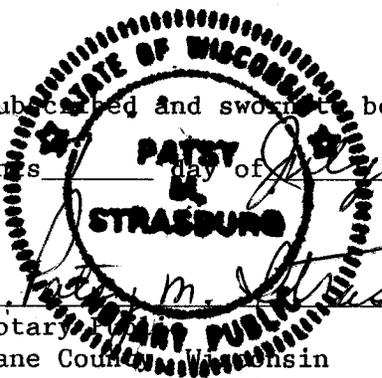
by mailing a true and accurate copy of the above-described document, which is attached hereto, by certified mail with a return receipt requested in an envelope properly addressed to the above-named respondent's attorney at:

Daniel Resheter, Jr., Attorney  
Daniel D. Resheter Jr. Law Office  
3757 S Howell Ave  
Milwaukee, WI 53207  
Certified P 568 982 389

*Pamela A Haack*

Pamela A. Haack  
Department of Regulation and Licensing

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 1992.

  
*Patsy M. Strasburg*  
Notary  
Dane County, Wisconsin  
My Commission Expires 11/6/94

STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

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IN THE MATTER OF  
DISCIPLINARY PROCEEDINGS AGAINST

LS9106111MED

KENNETH M. SMIGIELSKI, M.D.,

---

RESPONDENT

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The parties to this proceeding for purposes of s. 227.53, Stats., are:

Kenneth M. Smigielski, M.D.  
3615 West Oklahoma Avenue  
Milwaukee WI 53215

Medical Examining Board  
Department of Regulation and Licensing  
P.O. Box 8935  
Madison WI 53708

Division of Enforcement  
Department of Regulation and Licensing  
P.O. Box 8935  
Madison WI 53708

The rights of a party to petition the board for rehearing and to petition for judicial review are set forth in the attached "Notice of Appeal Information."

A hearing was held in this matter on November 19, 1991, with final arguments presented on December 18, 1991. Arthur Thexton appeared for the Division of Enforcement, and Kenneth Smigielski, Respondent, appeared in person and with counsel Daniel Resheter, Jr., of Daniel D. Resheter Jr. Law Office, 3757 South Howell Avenue, Milwaukee, Wisconsin 53207.

The Administrative Law Judge filed his Proposed Decision in the matter on March 2, 1992. Respondent, by Attorney Resheter, filed his objections to the Proposed Decision on or about March 23, 1992. Mr. Thexton filed his response to the objections on March 30, 1992. The Medical Examining Board considered the matter on June 24, 1992.

On the basis of the entire record and proceedings in this matter, the Medical Examining Board makes the following Findings of Fact, Conclusions of Law and Order.

#### FINDINGS OF FACT

1. Respondent Kenneth M. Smigielski, M.D., is licensed to practice medicine and surgery in the state of Wisconsin, and has an address of 3615 West Oklahoma Avenue, Milwaukee, Wisconsin. He is retired from private practice, but is Health Commissioner for the City of St. Francis and Chief Physician for the City of Milwaukee Police Department.

2. In August, 1979, Respondent saw patient Anna Watry, who was born on May 7, 1922, in his practice as a physician. Mrs. Watry told Respondent that she was experiencing rectal bleeding, with some clots. Respondent did a rectal examination and found no obstructions. Respondent performed a proctoscopic examination, and diagnosed internal hemorrhoids and proctitis. A barium enema x-ray of the colon and upper gastro-intestinal tract was also negative. Respondent did not schedule any additional examination or consultation.

3. Mrs. Watry saw Respondent in June, 1980, when she was complaining of chest pains, and told Respondent that the rectal bleeding was more frequent, and that her stools were frequently very loose. Respondent neither performed nor ordered any examination or testing, and did not make any notes in his charts about any complaint other than the chest pain, diagnosed as a muscle tear.

4. Mrs. Watry returned to Respondent in October, 1982, repeating complaints of increased rectal bleeding, and increased frequency of loose stools. Mrs. Watry reported that she was having to get up at night for bowel movements, and that there would regularly be blood in the toilet afterward. Respondent diagnosed diverticulosis without further examination or tests, and did not suggest or order any action beyond a restricted diet, and Lomotil, on the judgment that nothing further was medically necessary.

5. Respondent saw Mrs. Watry again in October, 1983, and noted in his chart that her condition, which he identified as diverticulitis, was worse since October, 1982. Mrs. Watry told Respondent that the rectal bleeding was much worse than before, that she was frequently getting up at night for loose bowel movements, and that she was frequently dizzy and faint. Respondent changed the prescription to Combid from Lomotil because he believed Mrs. Watry to be a nervous person in need of the tranquilizer effect of Combid, and ordered Hydrocil, a bulk laxative, but neither performed nor ordered any other examination or test.

6. In October, 1984, Mrs. Watry saw Respondent again, reporting that she had frequent loose and bloody stools throughout the day and night on the order of every 20 minutes, and constant abdominal distress and tenderness. Respondent performed a rectal examination, discovering evidence of a large, obstructing tumor. Proctoscopy and biopsy confirmed a malignant tumor. On surgical intervention, the tumor was discovered to have metastasized through the colon wall and into the uterus.

7. Respondent's records of this patient do not contain reasonably complete details of the patient's complaints, Respondent's impressions, results of examinations or tests, or support for diagnoses made by Respondent. Respondent relied upon his memory for substantially all of his baseline data about this patient, and affirmatively chose not to record most of the information he obtained from this patient about her condition at each of her visits.

#### CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to s. 448.02(3), Stats.

2. Respondent's failure to follow up on Anna Watry's continued complaints of increasing rectal bleeding and associated symptoms with physical examinations and laboratory studies sufficient to support differential diagnosis and to rule out possibilities other than hemorrhoids, proctitis, and diverticulosis between 1979 and the discovery of the tumor in 1984 constitutes a less than minimally competent course of practice which constituted a danger to the health, welfare and safety of Anna Watry, in violation of s. MED 10.02(2)(h), Wis. Admin. Code.

3. Respondent's failure to keep adequate records of Anna Watry's condition between August, 1979 and October, 1984, constitutes less than minimally competent conduct which tended to constitute a danger to Anna Watry's health, welfare and safety, in violation of s. MED 10.02(2)(h), Wis. Admin. Code.

#### ORDER

NOW, THEREFORE, IT IS ORDERED that the license previously granted to Kenneth M. Smigielski, M.D., to practice medicine and surgery in the state of Wisconsin be, and hereby is, suspended for a period of six months, commencing 30 days from the date hereof.

IT IS FURTHER ORDERED that Dr. Smigielski shall, within seven months from the date hereof, successfully complete a course in risk management approved in advance by the board.

IT IS FURTHER ORDERED that Dr. Smigielski shall, within seven months from the date hereof, successfully complete 30 hours of continuing medical education satisfactory to the board in the area of gastroenterology.

IT IS FURTHER ORDERED that pursuant to Wis. Stats. sec. 440.22, the assessable costs of this proceeding, in the amount of \$5071.60, be imposed on respondent.

EXPLANATION OF VARIANCE

The board has adopted the ALJ's Findings of Fact and Conclusions of Law in their entirety. The board has not, however, accepted the ALJ's recommendation that Dr. Smigielski's license be revoked. Instead, it is ordered that the license be suspended for six months and that Dr. Smigielski complete relevant continuing medical education courses prior to termination of the period of suspension.

While revocation of the license in this case could perhaps be justified, the board considers the disciplinary objectives of protection of the public, rehabilitation of this licensee, and deterrence of other licensees to be properly subserved by the order imposed hereby. See *State v. Aldrich*, 71 Wis. 2d 206, and *State v. McIntyre*, 41 Wis. 2d 481. Dr. Smigielski is now in the twilight of a long and successful career and he no longer maintains an active office practice. The Administrative Law Judge was mindful of this factor, but nonetheless considered the goal of deterring other physicians from similar conduct to militate for revocation. The board agrees that deterrence is a disciplinary factor even where, as here, the misconduct cannot be ascribed to bad intent. The board concludes that suspension of the license for six months appropriately responds to that goal, however. And, when the suspension is combined with the requirement for completion of relevant continuing medical education, the ordered discipline appropriately addresses the goals of rehabilitation and public protection as well.

Dated this 24 day of June, 1992.

STATE OF WISCONSIN  
MEDICAL EXAMINING BOARD

by B. Ann Neviasser  
B. Ann Neviasser  
Secretary

STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST

KENNETH M. SMIGIELSKI, M.D.,  
RESPONDENT.

AFFIDAVIT OF COSTS  
OFFICE OF BOARD LEGAL SERVICES  
LS 9106111 MED

State of Wisconsin,  
County of Dane, ss.:

James E. Polewski, being first duly sworn on oath, deposes and says:

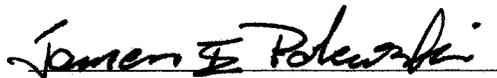
1. He is an attorney licensed to practice law in Wisconsin, and is employed by the Division of Administrative Services, Department of Regulation and Licensing.

2. In the course of that employment, he was assigned to act as Administrative Law Judge in the above captioned case, and in the course of that assignment expended the following time and incurred the following expenses on behalf of the Office of Board Legal Services, Division of Administrative Services:

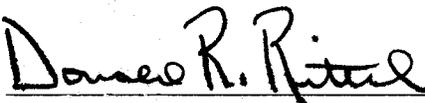
<u>Date</u>	<u>Activity</u>	<u>Time</u>
8/13/91	Prepare prehearing notice	10 minutes
8/20/91	Prehearing conference	20 minutes
	Prepare prehearing memorandum	20 minutes
11/5/91	Prehearing/motions	10 minutes
	Draft Adjournment order	10 minutes
11/19/91	Hearing	8 hours
12/18/91	Final Arguments	1 hour, 5 minutes
2/26/92	Draft decision	3 hours
2/27/92	Draft decision	3 hours
2/28/92	Draft decision	<u>3 hours, 15 minutes</u>
	TOTAL	19 hours, 30 minutes

Costs, ALJ Salary and Benefits (\$24.75/hr.)	\$482.62
Expenses, Transcript and Reporter	<u>923.20</u>

TOTAL ASSESSABLE COSTS, BOARD LEGAL SERVICES      \$1405.82

  
James E. Polewski

Sworn to and Subscribed before me this 5th day of March, 1992.



Notary Public  
My Commission is Permanent

STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

---

IN THE MATTER OF THE DISCIPLINARY :  
PROCEEDINGS AGAINST :  
 :  
KENNETH M. SMIGIELSKI, M.D., : AFFIDAVIT IN SUPPORT  
RESPONDENT. : OF MOTION FOR COSTS

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STATE OF WISCONSIN )  
 ) ss.  
COUNTY OF DANE )

Arthur Thexton, being duly on affirmation, deposes and states as follows:

1. That he is an attorney licensed in the state of Wisconsin and is employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement:

2. That in the course of those duties he was assigned as a prosecutor in the above captioned matter; and

3. That set out below are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

<u>Date</u>	<u>Activity</u>	<u>Time Spent</u>
2/4/91	Review file, telephone call with Dr. Enders, letter to Dr. Enders	1.0
4/16/91	Telephone conference with Dr. Enders	0.4
4/17/91	Prepare complaint	1.5
6/3/91	Prepare Notice of Hearing	0.4
8/20/91	Pretrial conference	0.6
8/28/91	Prepare for and meet with Atty Resheter	1.0
9/5/91	Travel to Eau Claire, conference with Dr. Enders and Atty Resheter	8.0

9/10-11/91	Telephone conference with UW Medical School CME staff, letter to same, review file	1.0
9/23/91	Telephone conference with Dr. Meyer, letter to Atty Resheter	0.6
10/15/91	Telephone conference with Atty Resheter. Draft stipulation. Letter to Dr. Meyer.	2.0
10/21/91	Telephone conference with Atty Resheter. New draft of stipulation. Telephone conference with Dr. Meyer.	1.0
11/1/91	Telephone conference with Atty Resheter, revise draft of stipulation. Telephone conference with board advisor.	1.2
11/4/91	Telephone conference with Atty Resheter. Draft motion for postponement. Conference with Inv. Schaut.	1.0
11/12/91	View videotaped deposition of Mrs. Watry	0.5
11/13/91	Review depositions of witnesses.	2.0
11/14/91	Review videotaped deposition of Mrs. Watry	3.0
11/15/91	Review depositions, telephone conference with Atty Resheter.	3.0
11/18/91	Trial preparation. Conference with Dr. Enders.	12.0
11/19/91	Trial.	9.0
11/22/91	Telephone conference with Atty Resheter	0.2
12/4/91	Review transcript of Hanson deposition	1.0
12/5/91	Telephone conference with ALJ and Atty Resheter.	0.3
12/17/91	Prepare final argument.	4.0
12/18/91	Conduct final argument before ALJ.	1.5
3/6/92	Review proposed ALJ decision.	0.5
3/23/92	Receive, review and file Respondent's Objections and Argument.	0.7

3/24/92	First draft of response to Respondent's Objections, telephone conference with Atty Resheter. Draft stipulation. Telephone conference with board advisor. Confer with Atty Zwiieg.	4.0
6/23/92	Review file for oral argument before MEB.	1.0
6/24/92	Prepare for and conduct oral argument.	1.0
6/24/92	Telephone conferences with Atty Resheter re: order provisions and effective date.	0.6
6/25/92	Review file for billings and time records. Letter to Dr. Enders.	0.8
6/29/92	Prepare Affidavit of Costs.	2.0
TOTAL HOURS		<hr/> 64.6

Total attorney expense for 64.6 hours and minutes at \$30.00 per hour (based upon average salary and benefits for Division of Enforcement attorneys) equals: \$ 1,938.00

INVESTIGATOR EXPENSE FOR SUE SCHAUT

<u>Date</u>	<u>Activity</u>	<u>Time Spent</u>
1/25/90	Review file, telephone calls and letters.	0.8
3/1/90	Summarize depositions	1.0
4/26/90	Telephone call and memo of same.	0.4
5/2/90	Prepare file for board advisor review.	1.0
5/23/90	Review file with board advisor, memo of same.	0.2
7/13/90	Summarize depositions.	3.0
11/4/91	Conference with Atty Thexton	0.2
11/19/92	Attend trial.	9.0
TOTAL HOURS		<hr/> 15.6

Total investigator expense for 15.6 hours and minutes at \$18.00 per hour (based upon average salary and benefits for Division of Enforcement investigators) equals: \$ 280.80

EXPERT WITNESS FEES

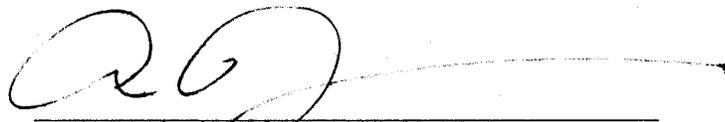
1. Gene G. Enders \$ 1,135.68

MISCELLANEOUS DISBURSEMENTS

1.. Mileage to and from Eau Claire. \$ 88.00  
2. Meal expense in Eau Claire. \$ 6.30  
3. Special shipping of video to Atty Resheter. \$ 5.00  
4. Atty Zwieg preparation for oral argument (until postponed), 4.0 hrs @ 30.00. \$ 120.00  
5. Copy of videotaped deposition of Mrs. Watry. \$ 73.00  
6. Medical record copies of Mrs. Watry's chart. \$ 19.00

TOTAL MISCELLANEOUS \$ 311.30

**TOTAL ASSESSABLE COSTS \$ 3,665.78**



Arthur Thexton, Prosecuting Attorney

Subscribed and affirmed to before me this 29 day of June, 1992.



Notary Public  
My commission is permanent.

## NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review,  
the times allowed for each, and the identification  
of the party to be named as respondent)

The following notice is served on you as part of the final decision:

### 1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Medical Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

### 2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Medical Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Medical Examining Board.

The date of mailing of this decision is July 7, 1992.

JUL 13 1993

STATE OF WISCONSIN                      CIRCUIT COURT                      MILWAUKEE COUNTY

KENNETH M. SMIGIELSKI, M.D.,  
Plaintiff,

-vs-

CASE NO. 92-CV-011251

MEDICAL EXAMINING BOARD,  
DIVISION OF ENFORCEMENT,  
Defendant.

**MEMORANDUM DECISION**

Kenneth M. Smigielski, M.D. (Petitioner) seeks review of the June 24, 1992, decision of the Medical Examining Board (Board) affirming the conclusions of law of Administrative Law Judge (ALJ) James Polewski, and modifying the order. The Board ordered petitioner's license suspended for six months and required him to not only complete a risk management course but also take thirty hours of continuing medical education in gastroenterology.

On June 3, 1991, a complaint was filed against petitioner by the Department of Regulation and Licensing - Division of Enforcement (Department) alleging professional wrongdoing for his treatment of Mrs. Anna Watry (between August of 1979 until October of 1984), mainly his failure to competently diagnose and treat her for symptoms suspecting cancer of the rectum and his failure to keep adequate records in her charts. Petitioner is licensed to practice medicine and surgery in Wisconsin and is retired from his practice. However, he currently is Health Commissioner for the City of St. Francis and Chief Physician for the City of Milwaukee Police Department.

An initial hearing was held on November 19, 1991, and final arguments were heard on December 18, 1991. The ALJ made, in his March 2, 1992, proposed decision, the following conclusions of law: first, that petitioner's failure to follow up on Mrs. Watry's continued complaints of rectal bleeding with lab studies to rule out possibilities other than hemorrhoids, proctitis and diverticulosis, coupled with the discovery of the cancerous tumor in 1984, constituted a less than minimally competent course of practice in violation of Wis. Admin. Code §MED10.02(2)(h); and second, petitioners' failure to keep adequate records of Mrs. Watry's condition also constituted a less than minimally competent course of conduct in violation of §MED10.02(2)(h). The ALJ then ordered petitioner's license revoked. Petitioner filed his objections to the ALJ's proposed decision on March 23, 1991, with the Board filing its response on March 30, 1992.

The matter proceeded to oral arguments before the Board on June 24, 1992, and the Board issued a written decision the same day. The Board affirmed the ALJ's conclusion of law and modified his order by suspending petitioner's license for six months instead of revoking it. Additionally, the Board went on to order petitioner to complete a course in risk management and complete thirty hours of continuing medical education in gastroenterology. Petitioner now appeals the Board's written decision.

§227.57 Wis. Stats. sets forth the standard of review, which states in pertinent part:

(1) The review shall be conducted by the court without a jury and shall be confined to the record . . . .

(2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action. . . .

(6) The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record. . . .

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.

The scope of the judicial review of the Department's findings is whether there is any credible evidence in the record sufficient to support the findings made by the Department. R. T. Madden, Inc. vs. ILHR Dept., 43 Wis 2d 528 (1969). Generally, the reviewing court should not upset an administrative agency's interpretation if there exists a rational basis for the interpretation. Wisconsin's Environmental Decade vs. DILHR, 104 Wis. 2d 640, 644 (1981). Deference is to be given to the commission's findings of fact. Princess House, Inc. vs. DILHR, 111 Wis. 2d 46, 54 (1983). The LIRC's findings must be upheld even though they are contrary to the

great weight and clear preponderance of the evidence. Goranson vs. ILHR Dept., 94 Wis 2d 537, 554 (1980).

§MED10.02(2)(h) states:

MED 10.02 Definitions

(2) The term "unprofessional conduct" is defined to mean and include but not be limited to the following, or aiding or abetting the same:

(h) Any practice or conduct which tends to constitute a danger to the health, welfare, or safety of patient or public.

Petitioner challenges the alleged bias of the ALJ. The record reflects that both petitioner and his attorney agreed that they had no problem with ALJ Polewski hearing the matter. Because petitioner did not ask the ALJ to recuse himself at the November 19, 1991, hearing, this matter is not part of the record and therefore not reviewable by this Court. §227.57(1) Wis. Stats. The record goes on to reflect the ALJ did not find petitioner's expert credible, stating:

. . . that physicians' deposition is notable for the patronizing, evasive, incomplete, and willfully obstructionist character of the answers given to almost every question bearing upon Respondent's treatment of Anna Watry. On the whole, Respondent's expert's opinion is entitled to very little weight.

[March 2, 1992, Written Decision at Pgs. 4-5]

The weight and credibility of testimony are to be decided by the [LIRC]. E. F. Brewer Co. vs. ILHR Dept., 82 wis. 2d 634, 636-37

(1978). Farmers Mill of Athens, Inc. vs. ILHR Dept., 97 Wis. 2d

576 (Ct. App. 1980) states the following in pertinent part:

"When one or more inferences may be drawn from the evidence, the drawing of one such permissible inference by the commission is an act of fact-finding and the inference is conclusive on the court." [Id. at 580]

Further, the ALJ made the following pertinent findings:

"The evidence presented by Dr. Smigielski himself demonstrates a lack of curiosity for why a woman would experience years of increasing rectal bleeding, abdominal distress, and disturbing elimination patterns that never responded to any of the treatments prescribed to deal with them. Dr. Smigielski never seemed to conclude that his patient's symptoms were normal, or even normal for Anna Watry, but he exhibited no particular interest in the cause of the condition or its long term effects. His records of his care for Anna Watry are of very little value, since they are, by Respondent's admission, incomplete. There is no support in his records that Respondent had any more than a superficial knowledge of his patient's health. Dr. Smigielski testified that he knew his patients well enough that all he required were notes of his positive findings, and that his memory was sufficient to guide his judgment for the course of his care of his patients.

Dr. Smigielski's testimony indicates that he regularly saw 25 patients a day. His records indicate that he saw Anna Watry about once a year. His claim of sufficient memory to remember her specific condition from one visit to the next, or to evaluate changes in her condition from year to year, is suspect simply on the basis of the number of individuals about whom he would have to be maintaining a detailed memory if this was indeed his standard record keeping practice.

Given his inability to recall specific details of authoritative cancer screening recommendations, and various other gaps and inaccuracies of described memory in his testimony, I conclude that he does not have sufficient memory to reliably recall the myriad details of dozens of patients' histories, and correctly assign the details to the individuals to whom they pertain.

This case is not one of a single incident, or of a brief relationship with a patient in which a doctor misjudges a condition, or fails to accurately diagnose a critical condition, and the patient dies within hours or days of first seeing the physician. This is a case where the physician, over a course of several years, develops a relationship with a patient who trusts him to be her primary physician for all her needs, and the physician fails to exhibit ordinary curiosity as to the cause of her continuing and increasingly frequent and severe symptoms. Indeed, there is no reason to believe the physician even recognized that there might possibly be a significant problem.

The overwhelming weight of the evidence is that this man did not practice medicine in a competent fashion in this case, that he does not recognize or will not admit that he was not practicing in a minimally competent fashion, and that almost every physician who reviewed this patient's care was critical of Respondent's conduct as being less than the necessary care. [Id. at pgs. 3-4]

The ALJ concluded by stating:

The purposes of discipline in this situation are the protection of the public, the deterrence of similar conduct by other licensees, and the rehabilitation of the Respondent. Respondent testified that he has retired from the active practice of medicine, and is now limiting his work to activities in which he does not take on responsibility for patients. To that extent, Respondent does not

pose a threat to the health, safety or welfare of any particular individual, having already removed himself from physician-patient relationships. However, there is a continuing threat to general public welfare in that he continues to advise civic authorities on matters of public health and has some responsibility for the health, safety, and welfare of the police officers of a large city. Rehabilitation of the licensee is not an issue where the licensee has retired, but the goal of deterring similar conduct would be thwarted by permitting Respondent to maintain his license simply because he has left the active clinical practice of medicine. [Id. at pg. 5]

Petitioner contends that the Board failed to take his retirement into account in their decision. The Court disagrees. The fact that petitioner is retired is adequately reflected in the Board's explanation of their modification of the ALJ's order, in which they stated:

#### EXPLANATION OF VARIANCE

The board had adopted the ALJ's Findings of Fact and Conclusion of Law in their entirety. The board has not, however, accepted the ALJ's recommendation—that Dr. Smigielski's license be revoked. Instead, it is ordered that the license be suspended for six months and that Dr. Smigielski complete relevant continuing medical education courses prior to termination of the period of suspension.

While revocation of the license in this case could perhaps be justified, the board considers the disciplinary objectives of protection of the public, rehabilitation of this licensee, and deterrence of other licensees to be properly subserved by the order imposed hereby. See State v. Aldrich,

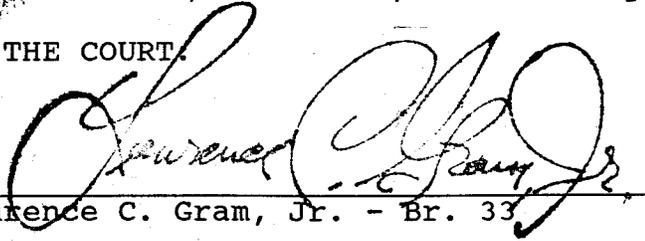
72 Wis.2d 206, and State v. McIntrye, 41 Wis2d 481. Dr. Smigielski is now in the twilight of a long and successful career and he no longer maintains an active office practice. The Administrative Law Judge was mindful of this factor, but nonetheless considered the goal of deterring other physicians from similar conduct to militate for revocation. The board agrees that deterrence is a disciplinary factor even where, as here, the misconduct cannot be ascribed to bad intent. The board concludes that suspension of the license for six months appropriately responds to that goal, however. And, when the suspension is combined with the requirement for completion of relevant continuing medical education, the ordered discipline appropriately addresses the goals of rehabilitation and public protection as well. [June 24, 1992, Written Decision at Pg. 4]

THEREFORE, the Court holds that the Board's June 24, 1992, written decision is supported by substantial evidence in the record.

IT IS ORDERED that the June 24, 1992, decision of the Medical Examining Board is hereby affirmed.

Dated at Milwaukee, Wisconsin, this 9th day of July 1993.

BY THE COURT.

  
Laurence C. Gram, Jr. - Br. 33

cc: Atty. Daniel D. Resheter, Jr.  
Atty. William H. Wilker