

The Regents of the University of California

COMMITTEE ON FINANCE

March 15, 2000

The Committee on Finance met on the above date at UCSF-Laurel Heights, San Francisco.

Members present: Regents Atkinson, Bagley, Davies, Hopkinson, S. Johnson, Lee, Montoya, Pannor, and Preuss; Advisory member Miura

In attendance: Regents Bustamante, O. Johnson, Khachigian, Kozberg, Lansing, Moores, Nakashima, Sayles, Taylor, and Vining, Regent-designate Kohn, Faculty Representatives Coleman and Cowan, Secretary Trivette, General Counsel Holst, Provost King, Senior Vice President Kennedy, Vice Presidents Broome, Darling, Gomes, and Gurtner, Chancellors Bishop, Carnesale, Cicerone, Dynes, Orbach, Tomlinson-Keasey, Vanderhoef, and Yang, Laboratory Directors Browne and Shank, and Recording Secretary Nietfeld

The meeting convened at 4:10 p.m. in Regents Only session with Committee Chair S. Johnson presiding.

.....
The Committee went into Open Session at 4:20 p.m.

PROPOSED DISMISSAL OF A MEMBER OF THE FACULTY, IRVINE CAMPUS

The President recommended that Professor Sergio Stone of the College of Medicine, Irvine campus, be dismissed from University employment, effective immediately, for multiple and serious violations of the Faculty Code of Conduct.

President Atkinson observed that the dismissal of a faculty member is a rare and serious step in the University of California, one that is taken only for the most compelling reasons and after the most careful and thorough consideration. It was his judgment that Professor Stone's case had received this kind of painstaking review. The President briefly described how the Regents would proceed in considering the recommendation. First, General Counsel Holst will describe the Board's role and responsibility in this case. Provost King will then present the background information. Professor Stone will be given an opportunity to speak, following which Chancellor Cicerone will respond and answer any questions the Regents may have. The Committee will conduct its deliberations and vote in a Regents Only session. The full Board will then go immediately into a Regents Only session to discuss and vote on the recommendation of the Committee on Finance.

General Counsel Holst noted that the Board of Regents has the authority to terminate a tenured faculty member under the Standing Orders when good cause is established. The process that has resulted in the President's recommendation has been carried out in full compliance with the

requirement for a hearing before the appropriate Academic Senate committee. The formal hearing board of the Committee on Privilege and Tenure of the Academic Senate on the Irvine campus served as the fact finder in this process. Mr. Holst stressed that the Regents' evaluation of the proposed discipline must be based on the facts developed by the hearing board. The Regents' function is to decide whether the recommended discipline is appropriate under the circumstances. In making a determination, the Regents are called upon to exercise their independent judgment. In doing so, the Regents must set aside any assumptions as a result of information which has come to the Board with respect to claims and litigation brought by patients of Dr. Stone and his partners in the Center for Reproductive Health. There are no charges against Dr. Stone with respect to any matters which have been raised in such claims and litigation. The charges for which discipline has been recommended and the facts on which those charges are based are those set forth in the background to item 502XX. It is only as to those facts and charges that the Regents may impose discipline. Mr. Holst advised the Regents that the record holds sufficient evidence to meet the legal standard of good cause for termination. The presentation of the recommendation is occurring in Open Session because Professor Stone has elected to have the matter so presented. The Regents may ask questions of the presenters, but their comments and deliberations should be reserved for the Regents Only session to follow.

Provost King informed the Committee that Dr. Sergio Stone was appointed to the College of Medicine faculty at Irvine in 1978. He is currently Professor Step III, a tenured position, in the Department of Obstetrics and Gynecology, Division of Reproductive Endocrinology and Infertility, and has been on leave with pay since May 19, 1995. In 1990 Dr. Stone formed a partnership with Dr. Ricardo Asch and Dr. Jose Balmaceda called the Center for Reproductive Health (CRH). This case arises out of the circumstances involving the CRH beginning in 1995.

The disciplinary charges at the threshold of this dismissal case fall into four categories:

- \$ conviction of nine counts of felony mail fraud related to insurance billing;
- \$ failure to comply with the University's clinical compensation plan;
- \$ research misconduct; and
- \$ failure to cooperate with the University's investigations into alleged misconduct at the Center for Reproductive Health.

There are no allegations that Dr. Stone was involved in misappropriation of human eggs or embryos.

In September 1995 the Chancellor referred the original charges (failure to comply with the University's clinical compensation plan and failure to cooperate with the University's investigations into alleged misconduct at the Center for Reproductive Health) to the Committee on Privilege and Tenure (CPT) of the Irvine Division of the Academic Senate. Following the criminal conviction in December 1997, that additional charge was forwarded to the CPT with a request that it be added to the other charges and with a recommendation that Dr. Stone be dismissed from the faculty. In accordance with University policies, a hearing board was appointed by the Committee on Privilege and Tenure as a fact finder and to recommend to the Chancellor an appropriate discipline. The

hearing board convened hearings over 13 days in October and November 1998 and heard testimony from 26 witnesses. It also reviewed thousands of pages of documents and exhibits.

The hearing board issued its report of findings and recommendations in September 1999. It found that Dr. Stone had engaged in the misconduct identified in each of the four charges and that such misconduct violated the Faculty Code of Conduct. Because the hearing board found mitigating factors, it recommended that Dr. Stone be demoted from Professor Step III to Professor Step I.

In accordance with the policy of the Irvine Division of the Academic Senate, Chancellor Cicerone wrote to the Chair of the hearing board, indicating that he had carefully reviewed the record and, in exercising his own independent judgment, had concluded that dismissal was an appropriate sanction. The hearing board responded to the Chancellor expressing several concerns about the Chancellor's proposed resolution of the disciplinary case. The hearing board again expressed its opinion that demotion rather than dismissal would be the appropriate sanction. On January 12, 2000 the Chancellor forwarded his recommendation to President Atkinson that Dr. Stone be dismissed.

Provost King reported that on January 24, 2000 he wrote to Dr. Stone providing him with an opportunity to present any additional material to the Office of the President. On February 10, 2000, through his counsel, Professor Stone responded to the request. He did not offer any substantive information that was not already a part of the existing record.

The President has also independently reviewed the record in this case. The President concurs with the Chancellor's recommendation that Professor Stone's conduct, considered collectively, is so serious and egregious as to warrant dismissal.

Provost King then reviewed for the Committee the charges that led to the President's recommendation.

Felony Convictions

The charge: Unacceptable behavior under the Faculty Code of Conduct includes A...commission of a criminal act which has led to a conviction in a court of law and which clearly demonstrates unfitness to continue as a faculty member.@ In October 1997 Professor Stone was convicted in federal court of nine counts of felony mail fraud related to insurance billing.

The evidence: Dr. Stone's surgeries required two surgeons. One was always a resident. Within 24 hours after the conclusion of each surgery, Dr. Stone dictated his surgery report. In nine instances for which Dr. Stone was convicted of a federal felony, he listed as the assistant surgeon one of his partners rather than the resident who actually assisted. By falsely identifying the assistant surgeon as another board certified physician rather than the actual assisting resident, the CRH was able to obtain insurance payment for the professional fees of the assistant. In two cases, Dr. Stone identified one of his partners as the assistant surgeon when the partner was not even in the state at the time of the surgery. Nurses' notes of these surgeries disclosed that in two other cases Dr. Stone permitted

unlicensed foreign fellows to serve as the assistant surgeon, also an illegal practice. In all of these nine cases, there is no record of the partner entering the surgical suite for any reason.

The chair of the department testified before the hearing board that during a faculty meeting in May 1990, he had told the faculty that attending physicians must be present to be listed on the procedure form. Only Professor Stone objected. There was also considerable testimony, including from the former Dean of the College of Medicine, that it would be unethical to list an assistant surgeon as participating in surgery if the physician never appeared during the surgical procedure. The hearing board agreed with this fact, writing in its report that A...we are convinced that every physician at the medical center, including Professor Stone, knew that it was wrong to bill for the surgical services of an attending physician who was not physically present in the operating room during the surgery.®

Conclusion: The President concurs with the Chancellor that the acts underlying the criminal conviction are A...acts of deception and dishonesty [that] concern matters that are substantially related to the qualifications, functions and duties of a physician and a teacher and are, therefore, unacceptable.®

Violations of the Clinical Compensation Plan

The charge: Faculty members in the College of Medicine are required to participate in a Clinical Compensation Plan. Under this plan, the University levies assessments on professional fees earned by physicians from their clinical practices. The assessments are used to support academic programs and to offset the overhead expense of clinical programs. Professor Stone was charged with violations of the Clinical Compensation Plan in three respects: failure to pay amounts that were due, failure to report income, and failure to provide income tax returns to the University.

The evidence: The CRH partnership with Drs. Stone, Asch, and Balmaceda was established in 1990. The partnership was officially dissolved in July 1995. From 1991 through 1994, Professors Stone, Asch, and Balmaceda signed agreements with the University that created an exception to the standard compensation plan. Under these agreements, the three doctors were allowed to practice as a partnership, to bill and collect payments directly, and to pay University assessments on their earnings. In return, the three partners agreed in writing to pay a set assessment every quarter on the CRH revenues and to provide personal and partnership income tax returns, to report billings and collections monthly, to provide an annual reconciliation report on additional professional income, and to provide additional records that the University might request so that income and contributions could be verified. Sometime in 1994 Professor Stone stopped complying with these agreements.

The evidence of failure to pay assessments has several aspects. First, the partnership admittedly owed \$216,376 through fall 1994 on reported professional fee income. This amount is not in dispute and has never been paid. Dr. Stone testified that he did not pay the money because he shared in only 22 percent of the CRH profits and that requiring him to pay the entire amount would be inequitable. There was, however, no agreement that Dr. Stone would be liable only for his share of the partnership assessments. Rather, the partnership law of joint and several liability applies.

The second aspect consists of failure to report income and pay assessments on that income for the fourth quarter of 1994 through July 1995. From fall 1994 until the partnership was dissolved in July 1995, the doctors continued to practice and continued to earn income but failed to report income and pay assessments to UCIMC. Undeniably some assessment is due and owing for that period. Calculating how much is owed for that period has been impossible because Dr. Stone refused to provide the University with his tax returns and the CRH billing records or patient files. The FBI currently has possession of much of the records and has, thus far, refused to release them. However, as an estimate, based on the CRH's average quarterly earnings over the life of the partnership, the assessments owing would have been just over \$200,000 for the three quarters they failed to report.

As to the third aspect, the Center for Reproductive Health also likely underreported income in years prior to 1994. Three KPMG Peat Marwick audits were conducted at the request of the University from April 1995 to January 1996 in response to whistleblower accusations against the partnership practice. The April 7 and May 12, 1995 audits contain findings relating to underreporting of cash income by the partnership. The CRH partners denied KPMG investigators access to billing records of individual patients, and only after extensive requests were the investigators granted partial access. Based on this limited evidence, KPMG found that the CRH partners failed to report cash payments to UCIMC and also failed to pay the required assessments. KPMG found that until May 1994, all cash was picked up each day from the CRH at UCI by Dr. Stone or Dr. Asch and was divided among the partners rather than put into the CRH bank account. Staff was directed by the partners to record the cash payments as an *adjustment* rather than as a payment. Because adjustments are offsets to income to cover medication, laboratory, and other services, they are not reported as income to UCIMC. KPMG estimated that the cash not reported for 1992 was at least \$100,000 to \$166,000, and the cash not reported for 1992 and 1993 was \$167,000. There is no evidence in the record to dispute these audit findings.

The State Auditor also conducted a financial audit of the CRH. The State Auditor estimated that the CRH had failed to report \$7.8 million in income to UCIMC and owed UCIMC \$1.4 million in assessments. The Auditor based these conclusions on his own interpretation of the exception plan agreement between the University and the CRH partners which required the CRH to pay assessments on gross professional fee revenues of the CRH partnership wherever earned. The Auditor interpreted *gross professional fee revenue* to include fees such as laboratory and other technical fees which the University does not consider to be professional fees and therefore does not tax.

The manner in which the Auditor calculated the amount owed surfaced during the hearings. The hearing board concluded that UCI personnel had intentionally misled the State Auditor. This conclusion is not borne out by the evidence. To the contrary, testimony of the State Auditor at the hearing showed that the University gave the State Auditor the appropriate agreement information and that the State Auditor made his own independent judgment to disregard the exception plan agreement. As a result, the President has not relied at all on the State Auditor's findings in making the recommendation of dismissal.

From 1994 forward, Dr. Stone undisputedly failed to provide UCIMC with the agreed and indispensable documentation that would have allowed UCIMC to verify the appropriate CRH assessments. Dr. Stone initially claimed he could not obtain the information because it was seized by the FBI as part of the government's investigation into the CRH scandal. However, the reports were requested of Dr. Stone well before the FBI seized the tax records and the partnership billing and patient records. In addition, Dr. Stone sought and was granted a three-month continuance from hearings before a campus ad hoc compliance committee convened to determine possible Clinical Compensation Plan violations, for the express purpose of obtaining duplicate records from the IRS.

There is no evidence that Dr. Stone ever made the request. Dr. Stone then failed to submit his tax returns or to appear at the rescheduled meeting of the ad hoc compliance committee.

Conclusion: The President concurs with the Chancellor's conclusion that A...the record is clear that Professor Stone failed to pay amounts that were due; failed to report income; and failed to provide his income tax returns. Each of these is a serious, significant, and intentional violation of the compensation plan.@

Research Misconduct

The charge: Dr. Stone was charged with three types of research misconduct: failure to obtain prior written consent for research involving human subjects, failure to obtain Institutional Review Board review for nine research papers involving human subjects, and misrepresentation of the nature of the research conducted as being planned in advance (prospective) rather than analysis of existing clinical data or samples after the fact (retrospective).

The evidence: Research proposals involving human subjects require review by a campus committee known as the Institutional Review Board (IRB). Committees of this nature are federally mandated and exist on all UC campuses. The IRB must review the research proposal in all cases. Where the research is retrospective in nature, IRB review but not approval is required. Where the study involves ongoing treatment of human subjects, IRB review and approval are required. Studies involving experimental procedures also require IRB approval. When IRB approval is necessary, the protocol submitted must include the consent form that will be used to obtain informed consent. This rule is so rudimentary to research that it applies even to the most trivial undergraduate psychology projects involving interviewing friends.

In January 1995 the federal Office of Protection from Research Risk (OPRR) made a site visit to the Irvine campus and expressed concern about violations of regulations governing human subjects protection in clinical research conducted by partners in the Center for Reproductive Health. The

OPRR has the authority to deny all federal funding of research on the entire campus if federal mandates are not followed. The campus quickly appointed two panels of experts to conduct preliminary investigations regarding the allegations of research misconduct. Both panels found sufficient evidence to warrant a formal investigation. A new panel made up of scientists carried out the formal investigation which the hearing board found to have been A...a painstaking examination of over 100 articles and abstracts published by CRH physicians between 1989 and 1995.@ The panel issued its report on November 17, 1997, finding egregious violations of human subject research

requirements on the part of Dr. Stone in nine publications he co-authored. During the hearing the panel chair suggested that a major, major sanctions against Dr. Stone would be appropriate.

The Committee on Privilege and Tenure agreed that A...viewed as a whole, [Dr. Stone-s] behavior as a researcher fell below the ethical standards we expect of a UCI faculty member. While his misconduct was not sufficiently egregious to warrant his dismissal from the faculty, it does warrant a significant punishment.®

The undisputed evidence shows that Dr. Stone engaged in research misconduct in nine publications he co-authored by failing to obtain IRB review in all nine cases; failing to obtain IRB approval in at least five cases, failing to obtain informed consent in those five cases, falsely representing that informed consent had been given in three cases, falsely representing the importance and nature of the articles in at least one case, and falsely representing that IRB approval had been obtained in at least one case.

Conclusion: The President concurs with the conclusion of the Chancellor that A...the evidence clearly demonstrates Professor Stone-s unwillingness to understand and comply with the long-established laws, regulations, policies and procedures on human subjects research. Such unwillingness is unacceptable because it not only puts patients at risk but also puts the entire academic research enterprise in jeopardy, for example, by jeopardizing continuation of UCI-s federal research funds.®

Failure to Cooperate

The charge: The charge has three parts: failing to turn over copies of income tax returns as required by the Clinical Compensation Plan; failing to cooperate with the University-s investigations by refusing to turn over various medical records to the University and by attempting to conceal other records; and failing to notify the University of the ethical misconduct of his partners.

The evidence: Dr. Stone was required to turn over his tax returns as part of his Clinical Compensation Plan agreement. He was also instructed to provide the returns to an internal ad hoc committee convened to determine whether any CRH compensation plan violations might have occurred. Dr. Stone repeatedly refused to provide the University with the returns. Dr. Stone provided several excuses, including that the records were seized by the FBI, that his attorney advised him not to, that income tax records are Aprivileged,® and that he had a privilege against self-incrimination. The hearing board rejected these arguments, concluding that A...Dr. Stone-s withholding his tax returns from the University is a clear and serious case of failure to cooperate.®

Medical records were requested as part of the investigation of research misconduct, primarily in an effort to determine whether consent had been given by patients for research studies in which they were involved. Dr. Stone turned over only a few of the records and then refused all further requests for the information.

Sometime in March 1995, Dr. Stone learned definitively of unethical, non-consensual egg and embryo transfers by his partners Drs. Asch and Balmaceda, but remained silent, never informing anyone. Instead, he continued to practice with his partners. The hearing board found that Dr. Stone's defense on this entire charge was not credible, that his conduct was disturbing, and that he was less cooperative in his attitude and manner than a UCI faculty member should be. Dr. Stone's failure to notify the University of what he had learned was one example of his inappropriate conduct.

Conclusion: The President agrees with the Chancellor that taken together Dr. Stone's refusal to turn over documents and otherwise cooperate was deliberate and that his excuses are not legitimate.

Committee Chair Johnson invited Dr. Stone and his counsel to the table to address the Committee.

Dr. Stone presented a lengthy statement to the Committee in response to the charges which were outlined by Provost King. Dr. Stone's argument included the following points.

With respect to the criminal charges, he reported that he had been charged with 35 felony counts, including conspiracy to commit insurance fraud and income tax fraud. He was convicted of nine counts of billing for services that required an assistant surgeon when no such surgeon was present. Dr. Stone believed that the billing for which he was convicted was consistent with the policy and practices of the University in 1991 and 1992.

With respect to the failure to comply with the Clinical Compensation Plan, Dr. Stone stated his understanding that there had been a dispute over the obligation of the CRH to pay a 5 percent practice development assessment. In addition, he did not believe that he was responsible for the obligations of the partnership for assessments under the Clinical Compensation Plan.

With respect to the charge of research misconduct, Dr. Stone alleged that the retrospective studies were exempt from IRB approval. In addition, senior authors on papers where he was the co-author have not been charged with research misconduct. Dr. Stone stated that he had never put his patients at risk.

With respect to the charge that he failed to cooperate with the investigation, Dr. Stone alleged that medical records had been turned over to the University in connection with a valid research misconduct investigation. The request for all records was a violation of patients' rights, and the court refused to order him to turn them over to the administration.

In response to a question from Regent Kozberg regarding the findings by the Medical Board of California referred to by Dr. Stone in his statement, Dr. Stone's counsel, Ms. Karen Taillon, reported that the accusation before the Medical Board was that Dr. Stone's medical license should be revoked based on his conviction of nine federal felony counts. Evidence was produced at the hearing, and the administrative law judge's decision, which was upheld by the Medical Board, was that Dr. Stone's practice at the University followed a policy in place in 1991 and 1992 concerning the billing for services of licensed residents who were assisting in procedures performed by Dr. Stone

at the Center for Reproductive Health. The administrative law judge found that Dr. Stone had no intention of doing anything wrong and that he had been a scapegoat in the eggs and embryos scandal. The judge recommended that Dr. Stone's license not be suspended or revoked, and the penalty which was imposed was a three-year probationary period consistent with his criminal probation period. In response to a further question from Regent Bagley, Ms. Taillon stated that the Attorney General had sought to revoke Dr. Stone's license because of the criminal conviction. The Medical Board and the hearing officer found that revocation of his license was not an appropriate penalty because there was no criminal intent.

Regent Sayles pointed out that intent is a fundamental element of a fraud conviction. Ms. Taillon conceded that intent is an element of the crime. She continued that the question has been raised as to whether or not the jury convicted Dr. Stone based on intent because of the instructions that were given to the jury. Dr. Stone chose not to appeal because he was incarcerated, and he was told that he would not be released until the appeal was completed. Dr. Stone added that the jury had asked whether it could find him guilty absent of intent. The judge instructed the jury that intent need not be shown in light of the fact that a crime had been committed.

Regent Bagley recalled that Dr. Stone's statement had alleged that the administration's position was inconsistent with the hospital staff, the Committee on Privilege and Tenure, and the Bureau of State Audits and asked Dr. Stone to outline these inconsistencies. Dr. Stone noted that the Committee on Privilege and Tenure had not recommended that he be dismissed. The Bureau of State Audits report stated that he had failed to report \$7 million in partnership income. This result was reviewed by the State Auditor during the hearing and, to the satisfaction of the Committee on Privilege and Tenure, was found to have been in error. This finding was subsequently upheld by the Bureau of State Audits.

In response to a question from Regent Nakashima, Ms. Taillon reported that there were no IRS audits of Dr. Stone during the period 1991 to 1995. Based on an allegation that unreported cash was collected at the Center, there was an indictment for income tax fraud that was brought to trial. Based on the evidence, Dr. Stone was acquitted of that charge. It was found that all cash had been accounted for and all income taxes had been paid.

Regent Montoya asked that Dr. Stone clarify for the Committee the treatment of Dr. Stone's co-authors on papers which resulted in the charge of research misconduct. Dr. Stone reported that on two of the nine papers which resulted in the charge of research misconduct, his co-authors were not members of the Center for Reproductive Health. To his knowledge, these co-authors have not been questioned or reprimanded. Ms. Taillon added that Dr. Asch is the only other tenured faculty member who has been charged with research misconduct as a result of this investigation.

Chancellor Cicerone introduced Counsel to the Chancellor Geocaris. The Chancellor observed that the institution of tenure is important and valuable because it allows the University to attract and retain the best faculty. Tenure also protects faculty members' academic freedom. The review process was thorough, and the matters were reviewed very carefully.

Regent Bagley asked Chancellor Cicerone for his overriding reason for recommending dismissal, given the inconsistencies raised by Dr. Stone. In response, the Chancellor read briefly from his transmittal letter to President Atkinson:

In reaching this judgment, I asked myself the following question: Could the University meet its responsibilities and sustain itself if each and every faculty member behaved as Professor Stone did? For example, if every member of a given academic department were convicted of felonies, that department would not survive, because our students, staff members in the department, and faculty members from other departments could not respect it, nor would the public trust it. If each UC Irvine faculty member would commit research misconduct, we would fail in our research mission because we would be seen as not protecting our patients' rights, not mentoring our students in research methods, and we would place the campus federal research funds at risk. Similarly, if every faculty member in the College of Medicine would refuse to honor the Clinical Compensation Plan, the College would fail financially and its academic program would be compromised. If each faculty member were to fail to cooperate in inquiries and investigations, the University would lose its ability to discharge its own responsibilities. It would suffer enormous inefficiencies, and it would lose the public's trust. In other words, if every professor behaved as Professor Stone did, we would not be able to fulfill our missions of teaching, research, and service.

At the request of Regent Nakashima to discuss Dr. Stone's statement, Counsel Geocaris pointed out that the Medical Board report was not in evidence at the hearing conducted by the Committee on Privilege and Tenure and therefore was not in the record reviewed by the Chancellor or the President. The Medical Board report is privileged and confidential by statute because it has to do with the peer review of a physician. The University was not asked to participate in the hearing before the administrative law judge. A letter was submitted by the State Auditor after Chancellor Cicerone had reviewed the record and made his recommendation. The Committee on Privilege and Tenure raised the issue of whether the State Auditor had been misled by the University. Chancellor Cicerone believes that the State Auditor was fully informed of the way in which the University calculated Clinical Compensation Plan assessments. Ms. Geocaris noted, however, that the President's recommendation does not rely on the finding of the State Auditor because of questions that have been raised since the hearing.

Committee Chair Johnson asked that Ms. Geocaris comment on Dr. Stone's allegation that his billing practices were consistent with those of the University in 1991 and 1992. Ms. Geocaris stated that this was categorically untrue and that there is no evidence to that effect in the record that was before the Committee on Privilege and Tenure. Dr. Stone's conviction for mail fraud was based upon testimony that assistant physicians were not present when surgery was performed.

[Dr. Stone's statement is on file in the Office of the Secretary.]

The Committee went into a Regents Only session at 5:15 p.m.

.....

The meeting adjourned at 5:35 p.m.

Attest:

Secretary