

Exhibit E

NEW YORK STATE DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

JAMES R. CAPUTO, M.D.

DEFENSES, REQUESTS AND
MOTIONS OF THE RESPONDENT

James R. Caputo, M.D., with the assistance of his attorneys, Smith, Sovik, Kendrick, and Sugnet, P.C., raises the following defenses, requests and motions for determination prior to and/or during the re-hearing of this matter.

1. Respondent takes the position that State Attorney Timothy J. Mahar is unfairly and improperly biased against him. The bases for these concerns are as follows. He acknowledges observing interaction at the original hearing between hearing panel member Ellison and petitioner expert Pontiero and failed to independently bring this misconduct to the attention of the Hearing Officer or respondent. Certain of the improper comments by panel member Ellison suggested testimony to State Expert Pontiero on the subject matter of quality of fetal heart decelerations. Subsequent to executive session regarding Mr. Ellison's improprieties, it appears that Mr. Mahar, via leading questions to the State expert, elicited this very testimony which had been suggested by panel member Ellison. In his post hearing submission Mr. Mahar, on his own and under his own signature announces that Dr. Caputo deserved to have his license permanently restricted to prohibit forceps deliveries and vacuum deliveries and rotations with the exception of outlet deliveries. What motivates this request is his notion that Dr. Caputo "will not

reform his practices with forceps” and “would absolutely manage these three cases the same today”. How can this be the sole justification for a penalty when, (a) the hearing panel had yet to make a finding, and (b) Dr. Caputo, when giving this testimony had been told (as were Mr. Mahar and the hearing panel) by Board Certified OB-GYN Steven Burkhardt, MD. that there were no deviations on the part of Dr. Caputo. This bias and animus on the part of Mr. Mahar reached its zenith after the panel decision/penalty was promulgated. The panel imposed the very penalty requested by attorney Mahar. Despite this and only after respondent sought ARB review, petitioner under Mr. Mahar’s name and signature not only sought ARB review but sought an increased and different penalty to the extent of a permanent prohibition of the practice of obstetrics.

Based upon the above, it is requested that Mr. Mahar be directed to step down from the prosecution of this matter.

2. As to patients A, B, C, and F as designated in the pending statement of charges – a prior hearing panel dismissed all claims of gross negligence, gross incompetence, and incompetence on more than one occasion.

To the extent that both the respondent and petitioner sought ARB review, neither made any claim that the hearing panel determination as to gross negligence, gross incompetence and multiple acts of incompetence was improper or inappropriate. The ARB review did not alter those findings and neither petitioner nor respondent has challenged the ARB decision via Article 78.

Those determinations must be considered the “law of the case” and as such all pending

claims alleging gross negligence, gross incompetence, and multiple acts of incompetence must be dismissed pursuant to provisions and principles of res judicata, collateral estoppel, double jeopardy, waiver, equity, and petitioners failure to exhaust administrative remedies and/or Article 78 remedies.

Therefore specifications 1-12, 14 must be dismissed.

3. The current statement of charges arises out of an ARB decision which found that a hearing panel member demonstrated a pre-judgement on the facts of the case; demonstrated a confrontational attitude toward respondent's expert witness; may have engaged in ex parte communication with Petitioner's expert; may have suggested testimony in his questioning of Petitioner's expert and that said bias pervaded the entire hearing.

The ARB decision ordered that the case be remanded for a new hearing and that said hearing take place before an entire new hearing panel.

There was no authority provided via said decision/order to allow Petitioners to add new and additional alleged theories of deviations from accepted standards of medical care as to Patients A, B, C, & F into this new hearing. In fact there was no invitation within the ARB decision or in law, to authorize Petitioners to draw up, file and serve a new statement of charges in relation to Patients A, B, C & F.

Petitioners, without legal authority to do so, have drawn up, filed and served a new statement of charges dated 5/10/07 which adds new theories under A (1, 2, 5); B(1); F (1, 2, 5).

It is believed that some or all of these new theories are the product of questions posed by the biased panel member and also some questions posed by one of the other panel members (but

ruled inadmissible in subject matter) by the ALJ at the initial hearing. In other words, hearing members became sources of evidence, a practice from which they are prohibited.

The original statement of charges have never been withdrawn, nullified or rendered moot (other than the dismissal of claims alleging gross negligence, gross incompetence and incompetence on more than one occasion), and the re-hearing order was specifically limited to those original charges as drafted.

At no time was Dr. Caputo given the opportunity to be interviewed or provide written submissions regarding these new theories nor any of the other rights and protections outlined in PHL §230.10(A)(iii).

Therefore all those claims per A (1, 2, 5); B(1); and F(1, 2, 5) must be dismissed for lack of jurisdiction, lack of procedural and substantive due process.

4. The ARB decision was finalized 8/23/06. This was the trigger to convene a hearing on the original statement of charges relative to multiple acts of negligence. Per PHL §230.10(F) said hearing was to be commenced within sixty days. The State did not attempt a new hearing until 5/11/07 when they placed into the mail the new expanded statement of charges.

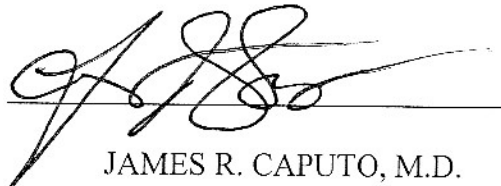
Based upon PHL §230.10 (f)(J) and 10 NYCRR §51.11(b)(2), 51.11 (d)(10) all the charges must be dismissed based upon unreasonable delay, prejudice, and inconvenience to the respondent. Alternatively, all the claims per Patients A, B, C & F must be dismissed for time violation and delay.

6. PLEASE TAKE NOTICE that respondent Caputo reserves his right to and intends to examine and/or cross examine witnesses separate and apart from any such examination

conducted by his legal counsel.

7. Respondent Caputo requests an adjournment of the 6/22/06 hearing date as his schedule will not permit and he had been told by his attorney that 6/22/07 was for the pre-hearing conference.

Dated: June 8, 2007


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