In the matter of James R. Caputo, M.D.

Appeal Brief

to the

Administrative Review Board

of the

New York State Department of Health

for

Determination and Order (No. 07-271)
December 7, 2007

NY State Department of Health
Bureau of adjudication – ARB
433 River Street, Fifth Floor
Troy, NY 12180

Attn.: Honorable James F. Horan, Esq.

Dear Judge Horan,

Thank you very much for the opportunity to once again present the following appeal and request for Judicial review to you opposing the findings in the latest Determination and Order (No. 07-271) submitted by the New York State Board of Professional Medical Conduct dated December 7, 2007. Again, the court is asked to excuse the unofficial format of this submission as it is being submitted by me, James R. Caputo, M.D. with continued support from my Legal Counsel. Supporting documents are attached and labeled as Extra Exhibits (EE 1-18).

This now marks the second time I am forced to make an appeal to your body in an effort for truth and justice to make an appearance into these proceedings which bear the official mark of the State of New York. This document will be extensive in argument and frank with comment. Unless otherwise declared, all statements of disapproval are entirely directed towards OPMC and my own personal experience in dealing with them. My deference to the ARB continues out of respect for what it has already **proven** to be. What my family and I have had to endure for the past six years from the disgrace we have come to know as the Office of Professional Medical Conduct is unspeakable. The entire experience has been foul, save for the glimmering ray of truth which appeared with your 2006 ruling and subsequent upholding of that ruling upon challenge by State's Attorney, on these very same issues.

What I will do in this appeal document is paint a very clear picture of bias, corruption, erroneous decisions, rules violations, intellectual dishonesty, indifference to the truth and malice. Throughout this brief will be continued reference to various definitions from within the law itself. These are pertinent to get out on the table since the level below you has repeatedly either forgotten them or more likely chosen to ignore them despite their duty to the contrary. Most important here is the central theme of this whole thing. When an agency or legal body has at its purpose that of carrying out a prosecution based on fraudulence and deceit, it must therefore itself lie and cheat in order to be successful. This cannot be emphasized enough as you consider the arguments contained herein. It is clear all throughout the Hearing as evidenced by the transcript alone that there was a pre-conceived plan to control the proceedings in such a manner as to limit the abilities and rights of Respondent and to manipulate its outcome. Compelling argument will be made to definitively establish these truths.

Due to limits in time, especially given the holiday season upon which I was yet again served, some evidentiary examples will be limited to the first few patients named in the charges. There are two points that must be made here. First, there is more than sufficient evidence that will be cited for these first few patients that it will clearly establish the veracity of the claim of bias. And second, once the ARB reads the full transcript of all testimony form all submitted material (including those attached to this appeal), it will reveal how replete the record is will further examples of what was already pointed out.

In addition, I would like to introduce the term **Sham Peer Review** for your understanding. Its unofficial definition can be found on Wikipedia, if not already familiar to you. I have attached a copy for your review and point out the extensive references at the bottom to further substantiate the information. (EE-15) Essentially it describes the process of how to carry out a malicious prosecution. It is scarily the blueprint from which OPMC operated in prosecuting these spurious, trumped up charges all the way to a conviction without so much as having to rely on anything but an agenda to make it happen. Is this what this agency was founded for? Was it created to be used as a vendetta tool by whoever might have connections within the agency itself? Or is it that once challenged on baseless accusations, the arrogance of OPMC simply cannot admit it was wrong? Remember, the cover up is usually much worse than the original crime. This is what I have been witness and subject to and it must stop.

Dishonest and unscrupulous behavior has been the norm from individuals within this agency every step of the way which culminated in 'someone' illegally leaking the Determination and Order to the public before appeal options were exhausted.

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PHL 230 9. Notwithstanding any other provisions of law, neither the
proceedings nor the records of any such committee shall be subject to
disclosure under article thirty-one of the civil practice law and rules
except as hereinafter provided. No person in attendance at a meeting of
any such committee shall be required to testify as to what transpired
thereat.  The prohibition relating to discovery of testimony shall not
apply to the statements made by any person in attendance at such a
meeting who is a party to an action or proceeding the subject matter of
which was reviewed at such meeting.
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They knew I would certainly appeal their kangaroo court findings and that the law gave me the right to push off any public knowledge of it until after appeal. That is why they had to leak it. It's all about dirty rotten adolescent behavior. The impact experienced by applying this unfounded stigma to my practice has had a devastating effect and has seriously jeopardized the livelihoods of thirteen employees and their families. This is sham peer review at its finest. The Department of Health through its function as a governmental entity is supposed to uphold the laws. Nothing at all about the actions I have witnessed from OPMC is consistent with this charge. However, if they thought they were going to scare me away with this stunt they were wrong. In fact, it has finally given my family and me a chance to tell the world what has

gone on here. We have never had anything to hide once it came right down to it. The truth is the truth is the truth. And I refuse to be continuously bullied in this malicious manner.

Additionally, I was forced to rebut this public shaming with a statement on my practice website. The public outcry has been tremendous and there has been heavy traffic on-line for all to know the truth of what's going on here from someone many in the community have grown to eminently trust. The Department of Health now has a public relations problem on their hands thanks to whoever authorized the posting of that material and most certainly alerted the local print media of the info. The people that perpetrate these sorts of things never see the ramifications of their actions beyond their own personal agenda. Because of the dishonest and unlawful actions of OPMC, all eyes are on the ARB to see what they have to say once and for all about this sham that has been my prosecution. Attached are copies of the online blogs and letters to the editor (EE-16) that were posted in and around Syracuse at the time of the leak. Keep in mind that these entries are controlled and limited by the host. These are all in addition to the dozens of cards and letters. There is a lot at stake here for thousands of patients and the public who now know the truth of what has gone on here.

Notwithstanding the fact that there are rules and objectives for the ARB in reviewing appeals as this, I submit the following, referring to law references U, V and W below. The law states that any appellate review must first exhaust determinations on procedural issues before even getting to any argument on substantial evidence. While it is the belief of this appeal that a plentitude of procedural matters are in violation, it cannot be requested anymore passionately that the ARB, this time, once and for all gets to the merits of the cases. Remanding this to a new hearing, like last time, is not going to be sufficient enough to establish completeness and moreover justice for this licensee when such atrocious behavior has been at the heart of this entire proceeding.

The main arguments in this appeal will focus on:

1. Violations of the rules of the proceeding and rules of deliberation.
2. A failure to exercise due diligence by the Department of Health combined with unmeritorious consideration of expert testimony by the Hearing Committee.
3. Committee Member bias
4. Malice on part of OPMC
5. Abuse of Public Health Law - Section 230 which governs these proceedings with infringements upon constitutional rights.
6. Whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

The following definitions, rules and entries from the law are listed to first define some of the regulations by which these proceedings are governed.

(A) OPMC Mission: The mission of the Office of Professional Medical Conduct (OPMC) is to protect the public through the investigation of professional discipline issues involving physicians and physician assistants.

(B) "In enforcement cases, the Department has the burden of proof and of going forward." (Summary of Department of Health Hearing Rules section 10NYCRR section 51.11)

(C) If the Hearing Panel feels they are not sufficiently convinced on any given issues by the testimony of the State's expert, then the state has failed in their burden of proof and there is no need nor should the panel go on to consider the testimony of Respondent or any of Respondent's experts. To do so would be improperly shift to Respondent a burden of proof when he has none. This is the law.

(D) If the Hearing Panel has considered the State's expert proof as well as Respondent's expert proof and is not convinced that one is more believable than the other, then the Hearing Panel has no option other than to find that the State has failed to prove their case against Respondent. This is the law.

(E) "The charges shall state the substance of the alleged professional misconduct and shall state clearly and concisely the <u>material facts</u> but not the evidence by which the charges are to be proved." (New York State Public Health Law 230 section 10(b))

(F) "The committee shall not be bound by the rules of evidence, but its conclusion shall be based on a preponderance of the evidence." (New York State Public Health Law 230 section 10(f))

(G) "Hearings shall be conducted in an impartial manner." (State Administrative Procedure Act – section 303)

(H) "…Where there is an adverse party there shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent`s action complained of." (New York State Civil Practice Law and Rules Article 78, section 7804(d))

(I) "Findings of fact shall be based exclusively on the evidence and on matters officially noticed." (State Administrative Procedure Act – section 302(3))

(J) "Evidence. 1. Irrelevant or unduly repetitious evidence or cross-examination may be excluded. Except as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding. *No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence.* Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law. *Objections to evidentiary offers may be made and shall be noted in the record.* Subject to these requirements, an agency may, for the purpose of expediting hearings, and when the interests of parties will not be substantially prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." (State Administrative Procedure Act – section 306(1)).

(K) Decisions, determinations and orders. 1. A final decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record and shall include *findings of fact and conclusions of law or reasons for the decision, determination or order*. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding. A copy of the decision, determination or order shall be delivered or mailed forthwith to each party and to his attorney of record. (State Administrative Procedure Act – section 307(1)).

(L) The attorney representing the office of professional medical conduct shall have the burden of going forward and proving by a preponderance of the evidence that the licensee's condition, activity or practice constitutes an imminent danger to the health of the people." (New York State Public Health Law 230 section 12(a))

(M) The hearing shall be conducted by a committee on professional conduct. *The members of the hearing committee shall be appointed by the chairperson if the board who shall designate the committee chairperson.* In addition to said committee members, the commissioner shall designate an administrative officer, admitted to practice as an attorney in the state of New York, who shall have the authority to rule on all motions, including motions to compel disclosure of information or material claimed to be protected because of privilege or confidentiality, procedures and other legal objections and *shall draft the conclusions of the hearing committee pursuant to paragraph* (g). The administrative officer shall have the authority to rule on objections to questions posed by either party or the committee members. The administrative officer shall not be entitled to vote. (New York State Public Health Law 230 section 10(e))

(N) Results of hearing. The committee shall make (*1) findings of fact*, (2) conclusions concerning the charges sustained or dismissed, and (3) a determination regarding charges sustained or dismissed, and in the event any of the charges have been sustained, of the penalty to be imposed or appropriate action to be taken and *the reasons for the determination*…(New York State Public Health Law 230 section 10(g))

(O) "A medical record that fails to convey objectively meaningful medical information concerning the patient treated to other physicians is inadequate" (Matter of Mucciolo v. Fernandez, 195 A.D.2d 623, 625, 599 N.Y.S.2d 757 [1993])

The following entries, along with those above, are submitted in support of my right to seek a dismissal on the issue of substantial evidence and failure of the Hearing Committee to perform due diligence in exercising their duties.

(P) "while the members of this panel have the right to question witnesses and use their own expertise to analyze the evidence, they may not substitute their expertise for the evidence" (Matter of Khan, 794 NYS2d 145; Matter of Weisenthal, 671 NYS2d 568, lv. denied 678 NYS2d 594).

(Q) "The findings, conclusions, determination and the reasons for the determination of the committee shall be served upon the licensee and the department within sixty days of the last day of hearing…" (New York State Public Health Law 230 section 10(h))

(R) **"The determinations of a committee on professional conduct of the state board for professional medical conduct may be reviewed by the administrative review board for professional medical conduct."** (New York State Public Health Law 230 section 10(i))

(S) "**Failure to comply with a provision of this subdivision requiring that a specified action shall be taken within a specified period of time shall be grounds for a proceeding pursuant to article seventy-eight of the civil practice law and rules for an order staying the hearing or dismissing the charges or any part thereof or any other appropriate relief… The court shall not stay the hearing or dismiss the charges or grant any other relief unless it determines that failure to comply was not caused by the article seventy-eight petitioner and has caused substantial prejudice to the article seventy-eight petitioner."** (New York State Public Health Law 230 section 10(j))

(T) **"The only questions that may be raised in a proceeding under this article are:**

1. **whether the body or officer failed to perform a duty enjoined upon it by law; or**
2. **whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or**
3. **whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or**
4. **whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."**

(New York State Civil Practice Law and Rules Article 78, section 7803.)

(U) **"Where the substantial evidence issue specified in question four of section 7803 is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue."** (New York State Civil Practice Law and Rules Article 78, section 7804(g))

(V) **"On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review, upon terms including notice, security and payment of costs, except that the enforcement of an order or judgment granted by the appellate division in a proceeding under this article may be stayed only by order of the appellate division or the court of appeals. Unless otherwise ordered, security given on a stay is effective in favor of a person subsequently joined as a party under section 7802."** (New York State Civil Practice Law and Rules Article 78, section 7805)

(W) "**The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity."** (New York State Civil Practice Law and Rules Article 78, section 7806)

(X) "…may, report to the board any information which such person, medical society, organization institution or plan has which reasonably appears to show that a licensee is guilty of professional misconduct as defined in sections sixty-five hundred thirty and sixty-five hundred thirty-one of the education law. Such reports shall remain confidential and shall not be admitted into evidence in any administrative or judicial proceeding except that the board, its staff, or the members of its committees may begin investigations on the basis of such reports and may use them to develop further information." (New York State Public Health Law section 230 11(a))

(Y) "Notwithstanding the foregoing, no physician shall be responsible for reporting pursuant to paragraph (a) of this subdivision with respect to any information discovered by such physician solely as a result of:

(i) Participation in a properly conducted mortality and/or morbidity conference, departmental meeting or a medical or tissue committee constituted pursuant to the by-laws of a hospital which is duly established pursuant to article twenty-eight of the public health law, unless the procedures of such conference, department or committee of such hospital shall have been declared to be unacceptable for the purpose hereof by the commissioner, and provided that the obligations of reporting such information when appropriate to do so shall be the responsibility of the chairperson of such conference, department or committee." (New York State Public Health Law 230 section 11(c)(i))

Violation of the Rules of the Proceeding/Lack of Due Process

OPMC has consistently violated the rules by which they themselves are supposed to operate. I could refer to my first Appeal when various time frames of the process were blatantly disregarded despite clearly defined rules on the matter. Or when I was not afforded an official record of the first two interviews which were both used against me by falsifying what I said. Of course, after I repeatedly made an issue out of it and subsequently included the argument in my first appeal, they mysteriously now had a policy whereby they could provide a written transcript of the interview I was then forced to take on December 27, 2006.

OPMC has shown that they can pick and choose which rules they will follow. And when they are outside of the boundaries there is often an untoward agenda. The arguments contained below will address several areas of concern as they apply to this proceeding. Areas covered include OPMC's violation of the rules of expediency, the modification of the Statement of Charges and denial of my right to an interview before charges can be levied. Additionally, there was a failure to exercise due diligence by the Department of Health combined with unmeritorious consideration of expert testimony by the Hearing Committee.

The rules are so important to have pointed out here since they are so frivolously handled by what I have seen. Even the most critical of rules like that of deliberation and the fact that the State has the burden of proof are subject to this glancing over. Please keep this in mind as you not only read this brief but that of

the transcripts as well. Intellectual dishonesty is what pervades this proceeding in addition to bias. It can be seen at the level of the Hearing Panel when considering the fact that nearly every reference they cite for their Determination was from the direct testimony of State's expert Tatelbaum. And when there is alternate citing, they are either manipulations of the true testimony or just completely taken out of context.

It is clear that OPMC has modified their actions this time around. Subtle changes in the way they have conducted themselves have been done so as to "fix the leaks" as a figure of speech. They now offer a record of the interview. They now rigidly stick to the time frame issues except for the most profound violation that being the delay in starting a new Hearing after remand. They even go so far as to give credibility to Respondent's expert in the Hearing Committees Determination and Order. This is after a large fuss was made in the last appeal to the ARB about the fact that my entire defense was summarized as "conflicting evidence, if any, was rejected…" They also have figured out which evidence and testimony is damaging to their ability to pull of a fraudulent prosecution and they go to great lengths, with the assistance of both the ALJ and the Committee Foreman, to make sure they either keep it out or shut it up. Critical rulings and motions by ALJ Lynch helped create an uneven playing field which ultimately prejudiced Respondent. What's pitiful is that they are so obvious such that this charade is getting old and tired. Doesn't Timothy J. Mahar have anything better to do with his time? Seriously, he is bordering on the pathetic.

Hearing Officer Bias

The ARB has defined bias in an administrative proceeding as the following; advanced knowledge of facts, personal interest, animosity, favoritism, and prejudgment.

Each individual from the Hearing will be discussed separately since they all are subject to this definition of bias. The findings of your first ruling on these matters must also be heavily emphasized here as well. The essential basis for the ARB ruling was that there were serious improprieties going on within a proceeding that was supposed to be fair and honest. Not only was the one panel member cited in your decision but the state's expert **and** state's attorney are implicated as well. This is very important to remember for a couple of reasons. First, the juror (panel member) was revealed as being connected to certain individuals from within my department. It is clear as to why he was biased because he was again connected to those at Crouse Hospital in Syracuse who have been directing this whole sham from the very beginning. And it is also clear as to why this first Hearing was overturned by this bias. What should be of greatest concern is the fact that he was even there in the first place since the process by which these panel members are chosen is mysteriously vague in the law and is subject to abuse. While the following establishes some understanding as to who is responsible, it does not describe any process on how panel members are screened as in the fair and lawful voir dire process of a constitutionally based justice system.

PHL Sec 230 5. From among the members of the board two or more committees on professional conduct shall be appointed by the board chairperson.

6. Any committee on professional conduct appointed pursuant to the provisions of this section shall consist of two physicians and one lay member.

PHL sec 230 10(e) Committee hearing. The hearing shall be conducted by a committee on professional conduct. The members of the hearing committee shall be appointed by the chairperson of the board who shall designate the committee chairperson. In addition to said committee members, the commissioner shall designate an administrative officer, admitted to practice as an attorney in the state of New York, who shall have the authority to rule on all motions, including motions to compel disclosure

Abuse of these vague empanelling procedures is absolutely what happened in the first Hearing which was established by your own ruling. Despite these on-the-table facts, it did not stop OPMC from doing it again. The only thing, they thought they were being just smarter this time. A fundamental to cheating is that when someone is looking for it and knows there is a history of it, it is nearly impossible to hide. This can best be compared to a parent catching a child in a lie for something you know they have a habit of doing and that they know how to look for but are always amazed at how crafty the child can be in trying to continue getting away with it. In actuality, this type of behavior is by definition juvenile. But again, when an underhanded agenda is at hand and certain participants are necessary to pull it off, badness always finds a way to reveal itself loud and clear while at the same time thinking itself to be so smart and so inconspicuous. This will be apparent upon further discussion below as each hearing officer and the State's attorney are indicted for bias and/or misconduct.

Administrative Law Judge Patrick Lynch Bias:

The following are examples of bias by ALJ Lynch which are a basis for this appeal. The first evidence of what appeared to be favoritism or bias is seen in his ruling on the start date for the actual hearing. There was some confusion early on as to when the first day was to the hearing. When it was learned that it was to be June 22, it posed a scheduling problem for Respondent. It was believed that this was going to be the day where attorneys convened to discuss evidentiary issues and any motions. By this being the actual hearing day, it left little time at all for preparation since this new hearing involved new charges and new theories by OPMC. My attorney even admitted that he was in error in the date mix up. Additionally, I had an already scheduled surgical training course that day out of state that was booked long before we knew of this hearing date. Again this was revealed to Judge Lynch as well as justification in pushing off this start date. He was inexplicably rigid in his ruling that we could not delay the start of this

hearing due to the rules of the proceeding. Several points beg to be made here. First, since when is OPMC that concerned with the very rules by which they are supposed to operate? They have violated these very statutes multiple times over the past six years. Plus, as the ALJ, he has every right to offer a temporary adjournment if the circumstances were warranted. Second, here we have the State of New York accusing me of medical misconduct in the name of negligence and incompetence yet they are ironically denying me the chance to further my education through an expensive training course where new and more advanced surgical procedures are taught. Getting this thing started on that day was that important that all of these plans had to be cancelled. And third, if that day was so critical to the process of adjudicating these matters, then why is it that the next time the hearing convened after that day was greater than a month later. Nothing would have been lost were that first day adjourned for two weeks. This was an unjustifiable decision by the judge and established early on that this man was showing favoritism for the Petitioner.

More examples of bias are evident during the Pre-Hearing Conference on June 14, 2007 **(EE-3)**. Several very significant arguments were proficiently made by my attorney in front of ALJ Lynch and State's Attorney Mahar. This was a very revealing meeting with major motions being made on solid basis. It is important to carefully read this transcript, especially pages 45- as well as the motion papers themselves **(EE-2)** submitted by my attorney in advance of this meeting. Several areas of concern with this meeting are important to understand. They deal with how the facts are presented by Mahar and interpreted and thereafter ruled on by Lynch. Most of our arguments were based on the ARB's remand ruling. When the ARB remanded the first Hearing to an all new set of people, there were many inferences from this decision that must be made here.

First, it is our position, which was also raised with ALJ Lynch, that the ARB's remand constituted a direct order to simply retry the first Statement of Charges. A remand order is not a common occurrence but in fact a very serious matter. Nowhere in their Determination was there any instruction to do anything other than this. And with that remand came very specific rules as far as time interval to a new hearing. There was also not a directive to create a new list of charges by dropping some and adding others. The original charges were the very charges at the center of the ARB's remand. In fact, the remand was based on a panel member's bias throughout the proceeding and therefore ordered a new trial so to speak. Essentially up to that point all the requisite departmental processes had occurred in getting to the point of a Hearing with the creation of a Statement of Charges. Once the remand was ordered, it simply meant that a new Hearing was to be held if the State was to pursue these charges further. Therefore, by this rule, the process was technically put back at the point where the statement of charges was now the subject of a Hearing. When this is the case, by law, the Department of Health has 60 days by which to commence a Hearing.

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PHL 230: 10,vi,(f) Conduct of hearing. All hearings must be commenced within sixty
days of the service of charges except that an adjournment of the initial
hearing date may be granted by the hearing committee upon request by
either party upon good cause shown. No adjournment shall exceed thirty days.
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Instead OPMC took 16½ months from the first remand order and 12½ months from the ARB's ruling on the Motion to Reconsider their original remand Order No 05-252A. There was no written request to allow for such a time frame. And whatever excuse that can be given for having any right to an adjournment from this obligation, it is clear that any extension of time that could be granted shall not exceed thirty days. So a total of 90 days was all they were allowed by law and they took over a year.

According to the ARB's ruling on the Motion to Reconsider (05-252A), the ARB saw "**no reason to force the respondent to bring this matter to the courts and delay matters further in order to begin the new hearing**."

Petitioner will possibly argue that he needed time to prepare two new cases that were now before the OPMC. While these cases were simply added to the original ones as a further attempt to bully me with an overburden of charges, they were not even the subject of any departmental disclosure to respondent until late 2006, long after their 90 day limit for a new hearing to commence. And again, where was anything in writing seeking any sort of permission to allow for a 12+ month interval before a new hearing?

It will be our speculation as well that they needed this time to prepare a new member of the board of professional medical conduct so that they could get him seated on the new panel. Such conspiratorial thought is justified by the actions that have already been demonstrated and will be pointed out as having again occurred.

But the time of the new hearing, the charges were different. Some charges that were actually brought to a conviction in the first Hearing were now suddenly dropped. Concomitantly, there were a slew of new charges as well. These were never brought to the proper attention of the Respondent such that appropriate preparation and defense of them could be dealt with through the department's interview process prior to said charges being brought to a Hearing.

There were several very valid arguments along these lines presented by Michael Ringwood before ALJ Lynch in his Defenses, Requests and Motions of the Respondent (**EE-2**). This is a very important document with compelling argument and relevant legal reference. The various subjects of his argument somewhat intertwine. Additional issues raised were that of the differences in the statement of charges, the right of the State to do this in the presence of an ARB remand on an already established, (and partially

determined) Statement of Charges, the right of Respondent to have had advance notice of these new charges and that many of these charges be nullified. These are some of his most salient points. On the request that certain repeat charges be dismissed because they were not found to be proven by the first Panel, Mr. Ringwood makes very valid argument on pages 48 and 49. These concern the specification of charges number 1-12 and 14. Mahar then tries to justify his position to the contrary by stating that because the first Panel was deemed biased, their decision not to convict on certain charges is now invalid. These are not the positions of someone who is interested in the integrity of the process or the truth of the matter at hand. It must be emphasized here how much Mahar himself points out the bias and prejudice of the first Hearing Panel on pages 49 and 50, **"…the first hearing committee, which we railed against as being biased, untrustworthy…"**, and **"…they were biased and prejudicial."** It is imperative to see how much he recognized these important aspects of a Hearing Panel – in that they ought not to be prejudicial and biased.

Furthermore, it was inferred in the ARB's remand order 05-252, that Mahar was party to some of the impropriety between the panel member and the state's expert during the first Hearing when altered testimony was elicited by him as a result of the biased panel members influence during his questioning of the expert. And his façade of caring about the integrity of the process gets exposed even further during the pre-Hearing conference the first day of the actual Hearing when we pointed out that there was yet again an infiltrator on my panel.

So Mahar's argument on the motion to have these original charges that were originally dismissed kept out of the new Hearing is an illogical attempt to deter the fact that the bias that was found by the ARB was bias **against** the Respondent. This means that any unfavorable ruling must be therefore invalidated because of this bias. It does also infer that a favorable ruling by these same people should fall outside of this invalidation because the existence of this cited bias could not be present by such a finding. (**EE-3** page 49) **"The remand was on the subject they made adverse findings on because there was bias. So, that is the reason for requesting that those charges as currently specified be dismissed. They already were, and there has been no adjudication to the contrary."** Mr. Ringwood then goes on to state that the ARB appeal was solely on the adverse findings and **"nothing other than that."** He then correctly points out that **"the position placed by the state when filing their request for ARB review was specifically, totally limited to the subject matter opposing us – Actually, their review request was limited to penalty, limited to penalty. And that is the only focus that was ever brought up before the ARB."** (**EE-3** Page50, lines15-22) Therefore, these specific charges were already dismissed and therefore cannot be retried. This is regardless of whether a remand was ordered. The remand was ordered based on the **adverse** findings by a biased proceeding.

Another motion made on June 14th was to have the new charges (A1,2and 5;B1;and F1,2 and 5) dismissed as well. 10NYCRR 51.6 requires that amendments to the statement of charges must be approved

by request made to the ALJ. This was not done and therefore these charges simply cannot be permitted by law into these proceedings.

Additionally, a motion was made about the lack of interview on these new charges. The agenda by OPMC in responding to this motion is very important to consider when discussing Mahar's reasoning behind justifying new charges without the interview process having been carried out. For ease, I would encourage you to read the transcript for this part (pages 51-) What kind of jurisprudence is Mr. Mahar rendering when he states that despite the fact that there are new very specific charges, they do not require an interview because the larger issues of the case were covered in the interviews that were already done in the past. Is this some kind of a joke? The law states that I have the right to be informed of the charges and that I have a right to be interviewed on those charges. To now say that because certain terms and clinical issues were peripherally discussed in the original interviews that I was afforded my due process right to have addressed these charges is absurd.

For example, Mahar uses the fact that I wrote an extensive response (ex: 24) following the report of the first interview to establish my having been given this right on the subject of rupturing membranes on Patient A. The discussion about rupturing membranes during that document was in the context of being accused of wrongful induction without an indication. There was no issue at the time about the fact that her water was wrongfully broken or exposed her to undue risks while having the cervical exam she had. This was because breaking water with the exam parameters of that patient happens everyday throughout the entire specialty of Obstetrics. To think that this would now be a charge is, in my opinion, the most absurd thing I think I have seen during this entire sham of a prosecution. So absurd was this charge and moreover the conformity to it by Dr. Tatelbaum that I made it very clear in my closing statement that anyone who would ever testify that this was a deviation must immediately be disqualified as a valid witness in these proceedings. This is the most intellectually dishonest diatribe conceivable such that is establishes a new standard of care that will essentially implicate every Obstetrician in New York State. Exhibit 24 does not address this ridiculous accusation and any assertion to the contrary is totally improper.

Mahar also uses this twisted logic to deal with the new charge involving the use of pitocin as well. Again, merely discussing the use of pitocin in an interview or the fact that another patient had a past medical condition, when these matters themselves were never the subject of criticism, does not constitute my afforded rights. Either ALJ Lynch is biased favoring Mahar or he is simply uninformed of the law which he was entrusted to uphold when he states throughout **(EE-3)** the following on page 56, **"you know, I do think there is a distinction between what is required at interview and what is required in the charges**. **And the interview just requires that the broader issues be discussed…"** page 57 **"It is within the broader distinction…"** page 58 **"The broader issue is…** page 60 **"If the respondent wanted the opportunity…** and all of his statement on page 66.

Essentially what Judge Lynch is saying is that just because the Investigation Committee has other issues that it feels it can justifiably pursue, the respondent is not required to be interviewed if undisclosed charges are now piled on. Forget about the obvious absurdity of this statement when put in context of bona fide legal proceeding. Please read all of this section in this pre-hearing conference because there are pertinent statements made by my attorney as well as intellectually dishonest statements by Mahar. Examples can be found on pages 55-56 where he states that we were given the opinions of Tatelbaum on April 6th , two months before the hearing and that these were the bases for the charges. He then states (page 56) that we had **"the opportunity …to have submissions if he wished to regarding submission of the care, and no objection or request was done."** But on page 55 he states, **"And on – I believe it was April 11th I sent a copy of a draft Statement of Charges which included the charges which respondent is now reacting to."** This man is an officer of the court and of the laws governing the "investigation of professional discipline issues involving physicians." (OPMC mission statement) Does he even know this law? This law is very clear and states that providing an opportunity for an interview is mandatory **before** an investigation committee is even established. And any comment written or otherwise by Tatelbaum cannot be constructed for the purposes of OPMC investigation and charge formation until **after** the interview.

This is because if the issues are baseless, the respondent has the opportunity to establish this and avoid an investigation committee from convening and levying a formal charge. So in order for an issue to become a charge, an investigation committee must make this determination. And according to the law, an interview is a condition "***Precedent***" to any investigation committee's existence. So how does Mahar explain the fact that on April 6th we were given the criticisms of Tatelbaum and now on April 11th these criticisms are now formal charges from OPMC all without the obligatory interview as stated in the law.

PHL 230 section 10,a,(iii) In the investigation of cases referred to an investigation committee, the licensee being investigated **shall have an opportunity to be interviewed by the office of professional medical conduct in order to provide an explanation of the issues under investigation.** The licensee may have counsel present. **Providing an opportunity for such an interview shall be a condition *precedent* to the convening of an investigation committee on professional misconduct of the board for professional medical conduct.** Within ninety days of any interview of the licensee, an investigation committee on professional conduct of the board of professional medical conduct shall be convened. **The licensee shall be given written notice of issues identified subsequent to the interview. The licensee may submit written comments or expert opinion to the office**

First, if we supposedly had our opportunity for an interview or even to submit written responses as he states on page 55, how much time were we supposed to be given for such a prospect? How is it possible that it only took 5 days for such a committee to be put together and render the decision to pursue these issues as charges when the law gives a ninety day window to carry out this obvious time-consuming task? And doesn't the Investigation Committee, itself, know the rules of the proceeding when they assigned these

charges in the absence of interviewed facts and assertions? Everything about these arguments and the subsequent decision by Judge Lynch stinks of a sham. By law, the respondent is entitled to an interview BEFORE the establishment both an investigation committee and of charges. By the looks of what happened here, the charges were all set to go contemporaneously with the opinions of the state's expert. This is a violation of the rules with premeditation by Mahar as part of his ongoing misconduct. And there is nothing anywhere here in the law that states as long as "broader" issues are discussed and not the specifics of the issues an interview can be waved and due process maintained. This is again, ridiculous. And lastly, once an interview is granted and issues identified, then the law requires that respondent be given written notice after the convening of said investigation committee. The comments by a hired expert are not the same as a formal written notice of concerns raised by a formal investigation committee as is written in the law. By this not having been done, they are in violation.

And the most important motion of this day was to have Timothy J. Mahar removed or step down. There is again so much to say about this man, as I alluded to in the last appeal. His continued depraved manners and conduct introduce a new standard for insidiousness within that which is known as the Office of Professional Medical Conduct. I don't know what type of oversight there is at this agency but for this man to have been able to behave and yield the power of the State of New York in such a debauched way is damn near criminal. At the very least, he should be under investigation himself for professional misconduct. The long and well known history of abuse that leads off any discussion on OPMC was personified immediately upon contact with this man. And he no doubt is very familiar with the practice of sham peer review. He is being challenged on the grounds of rules violations, misconduct, conspiracy, malice and having himself been implicated as part of the bias that "pervaded the entire proceeding" which was the conclusion of your last intercession of these matters on appeal back in 2006.

Submitted for consideration in this argument again is the Defenses, Requests and Motions of the Respondent dated June 8, 2007 **(EE-2)**. Compelling arguments are made for the stepping down of this man. Since the very beginning, Timothy J. Mahar has shown such abuse and arrogance with his apparent limitless authority that the number of instances cannot be justifiably represented here. It will be clear from the text of this document the number of times he represents himself in this manner. I have even noticed several instances throughout the proceeding where it is obvious that subtle adjustments were made in how he conducted himself this time around. It was intended to not give the appearance or a record of a sham all the while actually doing it. However, how he behaved here in many ways was a continuation of the how he behaved in the first hearing – dishonest.

Upon the completion of this document I urge you to consider the actions of this man and the arguments made against him so as to understand why the motion to have him removed was made in the first place. Mr. Mahar's exercise in due diligence is that of a man on a mission. He chooses what procedures to follow and what evidence to bring. There are nary any exculpatory materials introduced. Not once has he ever verified my clinical record since I have been out of my training. Isn't the charge of the OPMC to protect the public from imminent danger? If so, then I would personally like an explanation of how it is that I am even under investigation in the first place. I really do. I make this request because if one were to compile every single office case, obstetrical case and surgical case over the past 10½ years of my practice, it would be unbeatable as far as achievement by anyone in New York State. I understand the brashness of this statement however, I have put forth a tireless body of work over these years that has been an accomplishment not even I thought I was capable of. I have worked very hard to get here with my overall complication rate for every aspect of my practice being zero percent. I am not immune to everything and have had three major complications in this time, all the result of odd occurrences. I have otherwise performed thousands of cases with many being highly advanced pelvic reconstructive surgery. I take on cases that most would not be confident in their skills to so themselves. This was so evidenced with the various physicians I have worked these tens years.

I have always tried to exemplify the inner drive of trying to master everything I do. With my records as a testimony, I have achieved this goal to a personal level of satisfaction. Absolutely nothing exists anywhere in my record that speaks at all to anyone who is in any way close to putting the public in imminent danger and Mahar **knows it**. He would never introduce my clinical record as a means of thoroughly carrying out the order entrusted in him by the people of New York. Again, this would have been exculpatory. And when a state level official with the taxpayers dollars at his disposal deviates from that which he is supposed to do in protecting the public with his hidden and ominous agenda, he carries down more than what his little game can imagine. Several livelihoods are at stake because of this man as well as the reputation of the Department of Health.

ALJ Lynch should have been more diligent in ensuring the absolute transparency of these proceedings as being fair and impartial given that this Hearing was being carried out under remand from the Appellate Division of the Department of Health for the State of New York because of a lack of such guarantees. His ruling was erroneous and biased against Respondent.

There was also an issue after the conclusion of the Hearing with Respondent's Proposed Findings of Fact **(EE-1)**. When it was wholly written and submitted by Mr. Ringwood, it was immediately objected to by Mahar because there were references about the modification of the charges from the first to the second hearing. Mahar's objection was immediately met with justification by Mr. Ringwood in that the entire

transcript for Dr. Burkhart was in evidence and not portions of it. Please refer to the attached copies of e-mails between myself and Mr. Ringwood concerning these issues raised by Mahar. **(EE-13 and EE14).**

Nothing had been redacted and there were multiple references to the old charges that were no longer in the new Statement of Charges. Therefore, due to the rules of evidence, there is no argument that can be made to exclude these references and thus no argument to exclude the entire Findings of Fact. As far as the importance of the Findings of fact. This document served as the foundation of my defense. It was brilliantly written by Mr. Ringwood and put the Hearing Panel on notice by apprising them of the rules of deliberation and their duties in their capacity as adjudicators in these proceedings. It set clear, the way in which expert testimony was to be considered and how it pertained to the DOH's position of having the burden of proof in these proceedings.

It additionally impeached every charge and every testimonial argument put forth by the State. In essence, it was a home run. So conclusive were his arguments that it had to be kept out of the proceeding by some maneuver. While we can never know what it was that compelled ALJ Lynch to avoid a direct and decisive ruling on this issue, several points must be made here. First, this was a simple matter to decide. The rules of evidence are fairly basic. If the complete testimony is in evidence, then any reference to it is therefore valid, acceptable and allowable. The ruling that **was** made by ALJ Lynch **is** consistent with nearly all of his previous rulings in that despite the law and associated argument clearly establishing our position, he inexplicably chose to either rule against, or in this case, put it off in such a manner as to let it get lost in the shuffle. His ruling was the following:

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Dear Mr. Ringwood and Mr. Mahar,
Mr. Mahar's motion to strike portions of Respondent's brief will be addressed in the
Determination.
Regarding the typographical error, it was obvious, as you indicated, that you intended
the word "irrelevant."

William J. Lynch, Esq.
Administrative Law Judge
NYS Department of Health
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This motion was **not** addressed at all in the Determination. Not one mention despite the absolute charge for them to do so. In fact, there is nothing the ARB can read on the record that confirms that the Hearing Panel saw this summation document **(EE-1)** at all. They were duty bound to address each and every finding of fact submitted in their Determination. They did not at all and thus "failed to perform a duty enjoined upon it **by law".** See below. In fact, the entire section of New York State Civil Practice Law and Rules Article 78, section 7803 has been violated by this Hearing Panel. Based on this alone, their Determination and Order should be disqualified. However, this just adds to the basis for why these entire proceedings should be thrown out for good. This is the second time in a row they did not do this. There is a reason.

There is no way a sham proceeding can cover up on the record the findings of fact as they were presented by Mr. Ringwood in his Brief to the Hearing Panel (**EE-1)**

> **Decisions, determinations and orders. 1. A final decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record and shall include *findings of fact and conclusions of law or reasons for the decision, determination or order*. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. <u>If, in accordance with agency rules, a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding</u>. A copy of the decision, determination or order shall be delivered or mailed forthwith to each party and to his attorney of record.** (State Administrative Procedure Act – section 307(1)).

> **"The only questions that may be raised in a proceeding under this article are:**
>
> 1. **whether the body or officer failed to perform a duty enjoined upon it by law; or**
> 2. **whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or**
> 3. **whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or**
> 4. **whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."**
>
> (New York State Civil Practice Law and Rules Article 78, section 7803.)

Without a single reference by the Hearing Panel to these submitted Findings of Fact, it must be concluded that they never saw it or they simply ignored it. There is nothing the Department of Health can say to correct this fact. They cannot go back and say that the Hearing Panel did see it because it is not evidenced or decided upon anywhere in their Determination. It's too late.

The ultimate conclusion here is that this document was **prevented** from getting to the Hearing Panel which was a prerequisite for them **before** they started deliberations. It would have also been imprudent for the Hearing Panel to have gotten these Findings of Fact at anytime after the start of deliberations, which again there is no evidence for as well. ALJ Lynch, by his illogical ruling and unconventional means by which these issues would be decided through the Determination, in essence enabled it to be excluded altogether. This is not only a violation of law, it eliminate from the game the most compelling argument to date in refuting these spurious charges. This all has the markings of a very troubled and contrived process.

It is evident from the above that ALJ Lynch not only was exhibiting favoritism towards Petitioner, but that these rulings significantly biased Respondent from getting a fair and honest adjudication of the material facts and charges. A list helps establish this very clearly.

As for ALJ Lynch's ruling on the motion challenging the entry of new charges – against Respondent.

As for ALJ Lynch's ruling on the motion challenging the legal right to have been interviewed on new concerns before new charges can be formulated – against Respondent.

As for ALJ Lynch's ruling on the motion challenging the time to a new hearing as being a clear violation of the laws governing these proceedings – against Respondent.

As for ALJ Lynch's ruling on the motion seeking a short adjournment of the start date due to pre-existing commitments – against Respondent.

As for ALJ Lynch's ruling on the motion challenging the persistence of the Gross Negligent and Gross Incompetent charges in the new hearing when they were not found to have been proven during the first hearing – against Respondent.

As for ALJ Lynch's ruling on the motion asking that Timothy J. Mahar step down – against Respondent.

As for ALJ Lynch's ruling on the motion by Mahar to have certain portions of Dr. Burkhart's testimony redacted that dealt with the no longer listed charges so that there was no official record of the Findings of Fact (**EE-1)** to the panel knowing the damaging impact of this information – against Respondent. To this day, he has made no official ruling on these matters and clear and convincing evidence exists that the Panel was excluded from seeing it wholly or partially.

Transcript Examples and other related arguments:

This section is presented in a form where transcript testimony is cited and argument is offered associated with it. Many issues will be covered including but not limited to bias, error in law, contradictory statements and dishonesty. Some are blatant and some are subtle with varying lengths of discussion.

These further our arguments for this appeal and should cause everyone on the ARB to completely question the integrity of this Hearing. And moreover, it should cause everyone on the ARB grave concern that the agency is being used in this way. This entire experience has confirmed for me as to why there are honorable individuals nationwide pushing for reform in peer review proceedings because of this widespread abuse of the process. The ARB has a chance to make a statement here.

There is so much disturbing information that can be garnered from the transcript that there is simply not enough time to cite it all here nor should there be a need to inundate this appeal with redundant examples of a central claim of a fraudulent proceeding on fraudulent charges. The language and demeanor of this ALJ seems to be that of someone who has an agenda to provide as little help and ability to the Respondent in

defending these charges. It is with great importance that the ARB's exam of the record and transcripts identify that these thwarting tendencies and themes continue throughout. The transcript references listed below allow the reader to clearly recognize the associated points that are made. Unless otherwise noted, all page numbers refer to the Hearing transcript of testimony. All other references will be specific.

Page 64 lines 8 – 15: Opening statement bias:

Dr. Caputo: ….Secondly, my record as a physician –

ALJ Lynch: Time's up.

Dr. Caputo: That's 20 minutes? I feel like it's 10 minutes, your Honor.

ALJ Lynch: I'm sorry. I did calculate improperly. That is 10 minutes.

Page 153 vs. page 294:

Tatelbaum implies on direct that the blood lost from the baby could very well be explained by the existence of a diffuse subgaleal hemorrhage caused by the skin area being disrupted with instruments, however, on cross Mahar objected to Respondent questioning Tatelbaum on the proper placement of forceps and ALJ Lynch sustained saying it was irrelevant to the charges even though Mahar and Tatelbaum imply that the placing of the instruments caused the hemorrhage. Respondent was not allowed to counter this wrong information being given to the jury. Mahar is again allowed to bring up placement issues in his closing when Respondent was not allowed to question Tatelbaum on this issue because the ALJ said it wasn't part of the charges.

Page 153 and 154 lines 21 – 11:

Dr. Tatelbaum: A subgaleal hemorrhage is bleeding between the skin of the scalp and the bone. And there's a space there where the skin attaches to the skull, and in situations where that skin area is disrupted with instruments or vacuum, depending on what's used, there could be bleeding in that space and that is called a subgaleal hemorrhage. And that space, it would be all the skin over this part of the head. And if there's bleeding under that skin, there's a lot of space there for blood to go.

So when it says diffuse subgaleal hemorrhage, that could be hundreds of cc's of blood from the baby that could accumulate in that space if that skin was traumatized by an instrument. So that's what diffuse subgaleal hemorrhage means.

Page 154 and 155 lines 25 – 6

Dr. Tatelbaum: …So the only other place that was described in the data that the blood could have actually gone is the space in the head, the subgaleal hemorrhage. So that could account for, you know, a rather large amount of blood loss from the baby.

Page 294 and 295 lines 11 – 11

Mr. Mahar: Judge, I'm going to object. I mean, I don't think there was any charge regarding the type and actual technique with the forceps.

ALJ Lynch: I'm looking at the –

Mr. Mahar: The indications for the forceps, yes, but not the technique or –

ALJ Lynch: It was a whether or not there was adequate medical indication for use of the forceps. There's no charge here that says that the putting on the forceps themselves was done inappropriately. It was that they were put on without adequate medical indication.

Dr. Caputo: Your Honor, I mean he testified to markings on the baby, abrasions on the baby, implying that the forceps may have been put on incorrectly.

ALJ Lynch: I think his testimony was they may have shifted and I don't think there was any testimony that –

Dr. Caputo: Okay, okay.

Page 1848 (in closing) lines 13 through 19:

Mr. Mahar: Looking at Patient A case, Dr. Tatelbaum testified regarding the abrasions and the bruising that was down on the fetus's—down to the level of the left clavicle. He opined that at some point in time the forceps must have slipped during the course of the surgery to create this – these types of markings. **Allowing the above to happen unduly prejudiced the panel and the written record of the proceeding.**

Page 203: ALJ Lynch sustains objections from Mahar when Respondent begins to challenge Tatelbaum on levels of pitocin needed during the course of her labor. He contradicts himself with the following lines page 203 lines 11-18 and page 202 lines 10-19. Then the immediate objection. These pages illustrate completely the evasiveness and duplicity of Tatelbaums testimony. This was far from honest, direct and forthright as described by the hearing Panel in their Determination and order. And further, sustaining the objection illustrates that ALJ protects Tatelbaum and Petitioner's case.

Page 614: ALJ Lynch denies yet another motion by Respondent to reschedule a hearing day. Respondent had already rescheduled many patients onto this day from previously cancelled appointments due to this hearing. It was a big problem for Respondent's practice since he is a solo practitioner. Isn't the Department of Health charged with looking out for patient rights and interests?

Page336: ALJ Lynch said that Respondent must not ask broad questions and that he could only ask specific questions directly in regard to what questions the petitioner asked as to standard of care. This limitation was

aptly countered by Mr. Ringwood as being "unduly restrictive." Also on **page 337** Mahar objects to Respondent's attorney participating in the discussion as to what he feels is allowed in the hearing as to law. Mahar states that because Respondent is doing the cross examination he can get no help from his attorney on the objections. This is an unfair and biased.

Page 345: ALJ Lynch did not allow Dr. Hingre's interview notes into evidence. The interest of a fair process supersedes the Judge's previous order. Especially since the evidence in question was created by the State and available to the State and its witness for quite some time. The State has an obligation to show the entire record, even if it includes exculpatory evidence, to its witness in order to make the process fair and lawful. This was not a piece of evidence that unavailable to all parties before this day. It was part of the State's file. To say that he needed it ten days in advance has no basis in law and logic. First, it was not new evidence so every side has already had their chance to review it. Thus, setting a ten day limit has no merit. Second, it was not going to be needed until the end of the Hearing anyway since it was submitted for the benefit of the Panel during deliberations. And deliberations were not to take place for weeks to come. The testimony was as follows:

Dr. Caputo: Judge, at this time, if I could, I'd like to introduce this document into evidence. This is a interview with Robert Hingre, the neonatologist who was present for the delivery by the New York State Department of Health.

Mr. Ringwood: Provided to us by the Department of Health.

Mr. Mahar: Object. Not without Dr. Hingre.

ALJ Lynch: The other issue is that it's quite clear that any exhibits that are being offered in evidence, they had to be offered 10 days in advance per my order. I'm not accepting any exhibits today.

Mr. Ringwood: Let me quickly respond to that. At our interhearing conference I believe, and in my papers, I indicated depending upon testimony, other exhibits might become necessary and this is one of those circumstances, that's our opinion.

ALJ Lynch: And I'll state for the record here, my order said that if there were, they were to be given, provided to me 10 days in advance. You can move on please.

Page 341 - 343: Respondent tries to cross examine Dr. Tatelbaum as to his opinion that it only should take 30 seconds to get the baby to the NICU team. As Respondent tries to establish the individual steps to perform on the baby and the time they take to perform in order to refute Dr. Tatelbaum's opinion that those steps altogether should only take 30 seconds Mr. Mahar objects and the ALJ Lynch tells Respondent to move

on thus not allowing him to properly challenge Tatelbaum's opinion. Tatelbaum is continually allowed to provide his opinion without having to back it up with facts. Such continued restrictions of cross exam is wrong.

Page 355 and 356: ALJ Lynch states he won't allow argument in questioning, but that it could be included during summation and in the brief. This statement by the ALJ clearly establishes my right to a summation brief and that he expects one to be submitted with the objected to argument. As already alluded to above, upon submission of this Summation Brief or Findings of Fact, there is no record of the Panel ever having seen it either partially or in total.

Lines 24 – 8

Mr. Mahar: Again, it's argumentative, Judge.

ALJ Lynch: You know, this is – I'm going to sustain the objection. This is the type of thing that is argument. You can include it in your brief later on our your summation, the fact that that is not in here, this witness can't testify to that.

Page 350 – 355. On cross examination of Tatelbaum, Respondent begins to go through Tatelbaum's theory of the cause of death. Because the autopsy does not support Tatelbaum's theory, he suggests that the autopsy report is wrong because whoever did the autopsy should have characterized the findings differently. As soon as Respondent starts to connect the dots of all the facts and demonstrates that Tatelbaum's opinion is not supported by the facts of the autopsy and the placental report Mr. Mahar objects and the ALJ again sustains. Again, these are foundational principles that are being brought into the discussion and moreover defense and they are being denied over and over again. The obviousness is blatant.

Page 356 – 357. Again, Dr. Tatelbaum continues to discount the pathologist's finding on autopsy and changes the facts that exist. This sets up yet another sustained objection by ALJ in favor of Petitioner.

Line 15 – 18 : Tatelbaum: It was pretty clear the pathologist knew it was a forceps delivery but that was a total mischaracterization of what the cause of death was in my opinion.

Line 25: Tatelbaum: I think that the report is an inaccurate reflection of what happened.

This witness has continually violated his duty as a Fellow of ACOG all throughout this proceeding given the rules that govern expert testimony. In this case, he is clearly speaking way outside of his area of knowledge

by concluding that a board certified medical examiner, medical doctor, pathologist doesn't know what he is doing in performing an autopsy. This is even a stretch by sham peer review standards.

Page 358 - 362. Respondent tries to challenge Dr. Tatelbaum on his opinion that the autopsy and pathology report must be wrong. He tries to show how the reports are in fact correct and the material evidence supports another cause of death. As soon as it's obvious that Respondent is gaining ground, making Tatelbaum look uninformed, and proving another cause of death and the true place the excessive blood loss occurred the ALJ interrupts for a break and to disallow any more cross examination about Patient A. Respondent is allowed only 5 more minutes on the matter. This is a direct limitation of Respondent's right to cross. If there is an area pertinent to the case that is the subject of cross of exam, it cannot legally and jurisprudently be restricted.

Page 362 – 363 lines 20 - 6.

Tatelbaum: I don't have any idea why there was focal villi edema.

ALJ: Stop for a minute, please. It's now 9:30 and at this point I feel like we've covered more than sufficiently Cross-examination of the September 2001 delivery. We were opening this morning and just to finish up on Cross-Examination, it was rather extensive last month, so at this time Cross-Examination is concluded.

Page 364 and 365 lines 4 - 9: Respondent is making Tatelbaum look very bad. Tatelbaum is not answering the questions because to do so would support defense's case. The ALJ interrupts and rescues Tatelbaum from himself and says that Tatelbaum doesn't have to anwer if he doesn't know the answer to a very basic medical question.

Dr. Caputo: Doctor, I wanted to ask you about the word focal on that pathology report. Doesn't focal mean that it's limited, would you say?

Dr. Tatelbaum: I would say so, yes.

Dr. Caputo: So limited amount of edema or a focal amount of edema would infer a relatively short time frame that that had been present, correct, otherwise it would be diffuse, is that not an assumption, a reasonable assumption?

Dr. Tatelbaum: I think, could you clarify for me where, what issue it is that you're trying to get me to answer for.

Dr. Caputo: I'm trying to clarify the significance of the word focal, meaning that it was limited, correct?

Dr. Tatelbaum: If it – can I ask a question for you? Does it relate to –

Dr. Caputo: No, I don't want to –

Dr. Tatelbaum: Does it relate to my opinion in terms of whether it's possible for that baby to have bled sufficiently into the placenta to cause the hematocrit to be as low, is that what we're getting at?

Dr. Caputo: I'm asking you the questions here, sir, as to whether or not focal means longstanding or shortstanding?

ALJ Lynch: Doctor, if you can't answer a question, that's fine, if you can't answer that.

Dr. Tatelbaum: I can't answer.

ALJ Lynch: If it's not clear enough for you, say you can't answer it because you don't understand.

This is absolutely incredible of the ALJ to have done this. These are not difficult questions at all but Tatelbaum is clearly being his evasive self knowing full well that not only was his theory wrong but that Respondent had him cornered as to the truth of what happened to this baby. A quick note about the theory in question here. There can be no claim that Tatelbaum had no prior knowledge of this theory since it has been in evidence since the first Hearing. This is exhibit 24. This was Respondent's first lengthy document to the OPMC after being sandbagged following the first interview. It describes in great detail every single aspect of the two cases in question at that time. There was definitely a sour tone given the treatment of the facts and the dishonesty already being displayed by OPMC. Nonetheless, this information has been in the possession of the Department of Health for years. As an aside, after having learned the rules of the proceeding so well, it boggles the mind as to how those first two cases got through the investigation committee and were recommended for a Hearing? Exhibit 24 couldn't have been more explicit with the facts, science and practice of the medicine in these instances.

Page 381, line 24: Mahar suggesting testimony by answering question for Dr. Tatelbaum.

Erroneous ruling during 8/13/07 Inter-Hearing Conference. (EE-6) Page 31

ALJ rules that it is appropriate to proceed with the new charges even though the experts have different opinions. It is a violation of the rules of the proceeding, but it also demonstrates malice on the part of Mahar and the OPMC. The fact that two state experts do not have similar findings upon review of the records demonstrates that there exists a **range of standard of care.** To the extent that respondent and respondent's expert agree as to the standard of care in these same cases and the hearing committee gave the expert equal weight also establishes an even further legitimate range to the standard. The record clearly indicates that there is a range in standard of care and ACOG acknowledges this as well, **(EE-12).** How can the OPMC pursue these charges when such a range in the expert testimony exists? And it is it completely inappropriate for Mahar put on the record some fantasy of a confrontation between his expert Ponterio and

Respondent Caputo. Nothing of the sort ever occurred. And if Mr. Mahar is going to mention Crouse Hospital's review of Patient A's first case and the opinions of their expert, he should be complete in that this expert was confounded on many conclusions and states that if he were to have been given the entire record, he could understand what happened better. (**EE-6** page 30)

Erroneous ruling on placental grading documents. (EE-6, page 12; EE-9 and EE-10))

ALJ Lynch does not allow these into evidence. By not allowing this evidence in, the committee made an erroneous finding of fact especially in light of my own and Dr. Burkhart's testimony. The result of the omission of these materials is an inappropriate ruling. There was testimony on Grade 3 placentas by three witnesses – Caputo, Burkhart and Tatelbaum. And the panel was confronted with a significant issue that being of the placenta and its relationship to the fetal lungs in evaluating for maturity. This subject matter was the basis of much discussion. It would have been helpful and probative if they were able to see this in writing. This is exculpatory evidence and was purposefully kept from them and from entry as an official exhibit.

Furthermore, these articles are from major journals in the field of OBGYN. ALJ Lynch rules that **"they are articles which are used to bolster the testimony of the experts."** (his next two sentences are critical). These articles are journal publications of medical evidence. They authenticate any statement about placental grading and its association with fetal lung maturity. It clearly establishes a scientifically acceptable method of addressing the issue of lung maturity in a 37 wk gestation. Absent any credible testimony from Dr. Tatelbaum on this issue because of his admitted lack of knowledge in this area, this expert for the state cannot adequately testify as to the range of the standard of care. Nowhere in the charges does it state that the respondent deviated from the "gold standard". And further, Tatelbaum is wrong when he states that the two standards for determining lung maturity are the amniocentesis and the biophysical profile (BPP). The BPP is only used as a means of assessing fetal well being usually after a non-reactive non-stress test. That's it. If the easiest means of determining the oxygenation status of a baby (the non-stress test – NST) is equivocal, then the BPP is done as the next level up in making this determination. The BPP is **never** used to assess fetal lung maturity. This is intellectual dishonesty by this witness while offering up testimony that otherwise sounds clinically accurate. Has these documents been allowed, this Hearing Committee would and should have been compelled to rule that respondent **did** adequately assess the fetus following a non-stress test on December 4, 2003 and thus a finding of not guilty on this charge.

Erroneous ruling August 13 interhearing conference (EE-6).

Also, Dr. Hingre's interview notes were given to Respondent on the first hearing day. This would constitute a violation of the rules of the procedure by OPMC**.** Producing a document at the last minute that the DOH had in their possession since 2003 demonstrates a lack of due diligence on their part. Again this kind of stuff is seen over and over with Mahar leading this prosecution. It contained exculpatory evidence as to the charge of the delay in getting the baby to the NICU team. Had the new charges been the subject of a required interview while at the concerning issue stage of the proceedings and all documents then sent to an investigative team on these issues, this charge may never have been brought. Especially since this charge is based on subjective information (a nurse in the room anxiously waiting for a baby they know they had to resuscitate) and not any verifiable data. Dr. Hingre is much more experienced in these matters and his opinion that the time did not seem excessive should have brought the investigation committee to the necessary conclusion that this concerning issue has no merit and no true material evidence and therefore ought not to be subject to charges.

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Committee Member Srishkandaraja Bias:

This is a very important section of this appeal. As has already been established here, the findings from the last hearing were overturned by the ARB due the bias that "pervaded the entire proceeding" from one panel member. That was the Ob/Gyn member of the panel. It was recognized that this man could unduly influence the opinions and determinations of the other panel members by being biased. Therefore, in order to avoid a problem with a new hearing, due diligence should have been the order of the day in selecting the new Ob/Gyn member of this panel. This is Dr. Srishkandaraja. We were given notice of these three new panel members within a month of the new hearing. It was not immediately apparent that anything was amiss. However, given a history of impropriety at every level from my experience with OPMC, an automatic level of suspicion developed before and certainly during the hearing as to the authenticity of the process by which these panel members are chosen. The morning of the first day of the new hearing, it was realized that Dr. Sriskandaraja was directly connected to one of my adversaries at Crouse hospital, Dr. Byuong Steven Ryu. I am now batting two for two in terms of this exercise. A motion was made to ALJ Lynch on these issues and can be followed in transcript **(EE-4).**

It must be emphasized here that Dr. Ryu was for a while considered a friendly colleague thus the references that appear to indicate this. It was not until later that I would learn of his true motives such that we have little interaction anymore. This fellow member of my Ob/Gyn department has been a behind the scenes participant in the department's effort of perpetrating this sham peer review technique on me these past six plus years.

The following are presented as to his classification as an adversary of mine. We were medical school classmates and graduated together in 1993. We sort of hung with a similar crowd. We both went into Ob/Gyn. He, the son of a very successful Ob/Gyn doctor, did not match for his residency his first year applying. I did and went off to Michigan. He ended up having to settle on training here in Syracuse, which was the last place he said he wanted to be. He ended up becoming the "golden boy" of the department at Crouse because he was a sound doctor and moreover seasoned to be an Ob/Gyn by his father. He graduated residency and joined the most successful practice in Syracuse.

I now return to my wife's home town of Syracuse in 1998 and put up a clinical body of work which results in my name being recommended throughout the hospital as a doctor worth seeing. I must conclude that this was received as a threat to his "golden boy" status and it became somewhat obvious in his behavior towards me. After patient A's first delivery in September of 2001 with the loss of the baby, he came to my house the next evening after I took a day off work. He supposedly came as a friend to see "what had happened". At that time, it was one day before the preliminary autopsy report would be available revealing that the baby was unscathed by the use of forceps which were ultimately vindicated as a cause of death in the final report. So when we discussed the case, I detailed what I knew and that I really did not have an explanation at that time as to how that baby could have died. While he said that he was concerned about how I was doing and about the obvious implications this case might create for me medical legally and in the department, he never followed up once thereafter.

The day after this meeting, Ryu was boasting around his office all proud saying that "Caputo killed a kid the other day with forceps." I did not know he did this until last year when in preparation for this new hearing, I was discussing this above home encounter between us with one of my office staff. This particular staff member used to be the nurse manager of Ryu's practice and the actual nurse that worked directly with him. She was there when he was prideful of his misunderstanding of the facts as he was sure to announce them to everyone. While this was going on, I thought this guy was just a comrade who was concerned for his friend. He had deep rooted connections within the department which made him advantageous to have as an advocate during these days.

Well, not only did I not hear back from him, nine days later, I was called at night by the Chairman of my Department and told that my privileges to perform operative vaginal delivery were suspended. This was all without a single ounce of due process and furthermore due cause. It has always been my belief that Ryu, whose main political connection is that he chairs the Gyn QA committee, went back to his fellow cronies in the department and filled them in with what his conclusions were from our conversation some few days earlier. I'm sure they too were told,"Caputo killed a kid…" Hospital bylaws were violated by my department and thus the hospital in levying such a sanction. I now know that this was, back then, a clear example of sham peer review. It follows the recipe with great precision all the way up to a hearing in front

of the hospital's medical executive committee. So unscrupulous were their actions that I filed a formal complaint with the department of health in September of 2002 and never had a single thing come of it - (OPMC # 02-09-4875). I never got a single letter from OPMC that they had a conclusion to their investigation. They did, however, assign it a formal case number. So how is it that the Department of Health, although required to investigate every complaint of misconduct just happens to not follow through with this one? This has been brought up before.

In September of 2003, I felt duty-bound to send another complaint to the department of health over issues involving funneling of patients from an infertility clinic to a particular practice. This not only resulted in loss of my own patients but a horrible case of negligence with a set of twins in a patient from a different referring practice that, were it not for this funneling of patients, this outcome would have no doubt been avoided. The practice receiving the patients was that of Dr. Ryu's. I truly hesitated to make this complaint because it was clear that there is selective investigation and I simply did not want to be any more involved with OPMC than I needed to. However, the egregiousness of the twin case gave me no choice by my obligation to report misconduct. I was clear to the investigator that I did not want anyone to get into trouble but that I wanted it to simply stop. I recorded the conversation for verification of what was said. I never heard back from them and the funneling from my practice stopped. The point here is that Ryu eventually found out that it was me that wrote the letter of complaint after they must have felt the heat of some level of investigation. This is so because the infertility doctor also named 'cordially' confronted me one day about it. Clearly he knew enough to ask me and I stated that I had no problem acknowledging it and I thanked him for correcting his actions. To think that this did not get back to Ryu would be ignorant.

Additionally, Ryu is the one that personally led me to join Jeffrey B. Chick, M.D. in March of 2000 whereby I eventually agreed to purchase his practice. He and Chick had become good friends while working within the same shared office space. Well, Chick and I engaged in a contract which he would eventually breach resulting in a lawsuit that is currently pending with the Onondaga County State Supreme Court under Caputo v. Chick. The point here is that within the heinousness of what Chick did while breaching the contract, he admitted that he intended to pull it off from the beginning. And who led me to him – Dr. Ryu.

It cannot be denied that this guy is not only an adversary, but that he had motive and has already shown an ability to act on his untoward desires. So how is it that the new Ob/Gyn member of the Hearing Panel is the partner of Ryu's now retired father? Honestly, could there be any more of a long-shot by the department in selecting this man to think that is was not planned ahead of time.

It was mentioned above that it can be speculated that this man was made a board member for the purposes of this very proceeding. This is supported by the fact that when his name is searched on google, there is nothing at all that comes up with him and anything to do with OPMC. In contrast, there are multiple search results for the other two members of the panel. The implication here is either he has never presided

over a hearing before despite being a member of the board. Or, just maybe, when put in context with the fact that he is connected to Ryu, he was recruited for this panel to ensure a conviction. Whether these last few assertions bear out as truth or not is irrelevant. They are offered however as a means by which it can be understood how he got there and why the OPMC took so long to bring another hearing. Again, one would think that getting someone to commit to sitting on a state level hearing panel for the purposes of being dishonest in order to bring a conviction on bogus charges would take some time. And if there was no one reliable enough to make it happen, then someone would need to be sought out. Sriskandaraja was that man. And if he wasn't already a member of the board, that could be easily fixed. The time it takes to go through this process is unknown to me at this time.

The morning of the first hearing was filled with much concern. Knowing the past performance by OPMC, I was very suspicious of this new endeavor. I had not put any emphasis up to this point on the actual panel members as I was trying desperately to prepare for a hearing in which we had only a few weeks to prepare. I remembered the e-mail with the names of the panel members mentioned that the Ob/Gyn member was from the Poughkeepsie area. With the knowledge of how Ryu paraded around his office, I recalled that he too was from this area. So I did an on-line search of this new juror and much **not** to my surprise, he was not only another infiltrator, he was Ryu's father's partner in practice. I shouldn't have to even argue the obviousness of this finding. This is so much a conflict of interest to say the least and a clear violation of everything constitutional to say the most. This is the very reason why some of the processes within the rules of the proceedings at the Department of Health in adjudicating matters of Profession misconduct are dangerous. They are clearly easily manipulated to achieve whatever purpose desired. In this instance, this marks the second time in as many hearings that the Ob/Gyn member of the panel was fraudulent. Does anyone at the Department of Health recognize this as being very bad?

Well, this issue was brought up immediately upon contact with the ALJ. Please read the transcript for this pre-hearing conference of June 22, 2007 (**EE-4**). In addition to my statements, Mr. Ringwood makes some very important points for the ALJ to consider. These can be found on page 17:

When this information was revealed, it was suggestive from the immediate lack of response by Mahar that a preconceived effort had been busted. If there were an honest agenda with his case, he would have been equally disturbed with this news and the obvious stain it would leave on the proceeding before it even got started. Instead, he offered up a lame explanation of how he understood panel members to be selected and how their voir dire based screening is carried out to avoid the appearance of bias. He states that the panel members are first selected. It is only then that they are asked if they know anyone involved with the proceeding. (**EE-4,** page 14) How is it then that these Panel Members survived this latter stage of empanelment? Wasn't Dr. Srishkandaraja asked by the board or better yet, didn't he recognize himself that

he was connected to Respondent. Whether the appropriate questions were asked or not, this panel member knew that his partner's son not only lived in Syracuse but that he was an Ob/Gyn physician in the same department as the very Respondent for whom he will now sit in judgment.

The ALJ ruled that he would query the entire panel as to any advance knowledge of the participants or any of the issues. You could imagine how reassuring this was to me given all that had occurred up to this point. Does anyone really think a rat is going to admit he's a rat when the objective is to hide that very fact? To have relied on this means to ensure the integrity of the Hearing Panel in light of these serious adversarial connections and the astronomical odds that it was just a coincidence he was empanelled, opens up this entire proceeding to bias. This was made clear to the ALJ that because of his ruling to keep him, it would be a basis for appeal. You see, I already knew at that very moment I had no chance in this thing. The fix was in and it was sealed by the judge.

What's apparent as well is the fact that Mahar and the ALJ try to give the appearance that they are concerned with the integrity of the panel during the brief Intra-Hearing conference on July 27,2007 **(EE-5).**

Hearing Panel Member Vacanti Bias:

It will be clear as the ARB reads these transcripts that Panel Member Vacanti was biased from the very beginning of these proceedings and carried throughout. PHL230(10)(e) indicates that the ALJ rules on all motions, procedures, and other legal objections. Vacanti was acting outside of his authority with timely objections and was making legal rulings which are reserved to the ALJ and that the rulings were incorrect and unfair. Again, for arguments sake, when reading these transcripts, it must be in RAM that this entire thing is a charade fixed on lies and deception in order to achieve a conviction. Please note the number of times Vacanti interrupts just as Tatelbaum is either cornered on cross exam or is providing testimony deemed too beneficial for the defense. It is blatant.

And while on this subject, how is it then that Dr. Vacanti was selected? Once more, this Hearing is being held as a remand for committee member bias. The Department of Health should have been ultra careful in how they selected this panel especially since they ought to have thought I would be looking. Or are they that shameless? First we have Sriskandaraja as a clear cut person on the inside. And after he was approved by the ALJ to continue to sit on this panel by simply saying that he would be unbiased, we now have Vacanti as being from Rochester, the same town as the State's Expert Tatelbaum. He tried to give the illusion of transparency when he came forward at the inception of the Hearing and revealed that he was aquainted with Robert Tatelbaum but that they were not friends, that he had no personal interest in his testimony and that he could be impartial. While he stated that he peripherally knew this man, it is hard to

imagine that two sixty-plus year old doctors, (one being an Ob/Gyn and the other being an Anesthesiologist), from the same town would never have worked clinically together or moreover be some degree of friends after simply occupying these professional ranks for the duration that they have. It is hard **not** to get to know one another when you are active physicians within a community and have children in the same schools, especially with that generation. If ever there was an age range where the good 'ol boy network was in full force it's that one. And with how Vacanti behaved, as will be illustrated below, there can be no doubt as to his motives to direct this proceeding in the favor of Petitioner.

Even the lay person on the Panel was of the same age and from the same town as the State's witness and Panel foreman. What a shocker. By this association alone in the face of what we already know about ALJ Lynch, Srishkandaraja and what will be detailed about Vacanti, she cannot be trusted as well. The entire Hearing Committee and the ALJ have continued to demonstrate what it takes to prosecute bogus charges at the OPMC. This is a disgrace and should be admonished definitively.

Transcript Examples and other related arguments: again, in the interest of time that was available to prepare this appeal, the number of entries here will be limited. It is not necessary to list each and every example of Vacanti's prejudice. The following illustrate the point loud and clear with the remaining transcripts replete with more instances

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Page 120 Stopped Tatelbaum after he recites proper indications to use forceps. These just so happened to meet Respondent's indications. Vacanti immediately calls for a break right after Tatelbaum stops talking. When they come on the record, Mahar changes his tactic to the indications not being properly documented. It's clear from the record and witness testimony that maternal exhaustion and potential fetal compromise existed, Tatelbaum now criticizes the way it's documented.

Page 119 and 120 lines 15 – 7 (education law for documenting the medical record)

Dr. Tatelbaum: Well, if the mother was exhausted and the baby was down to the point where you thought the patient could be delivered, forceps would be an appropriate way to deliver the baby. So that if she had been pushing for a while and got the baby down to a station that was deemed, you know, appropriate to put the forceps on, that would be one thing. I suppose in an emergency situation, if you thought the patient could be delivered vaginally and the baby was having problems with fetal heart that were non-reassuring, you were worried about the status of the baby sufficiently that you wanted to get the baby delivered and you thought the baby could be delivered vaginally, then you could use forceps in a situation like that.

I think basically you have to give a lot of thought these days to why you were using forceps and under what circumstance and weigh and balance the risk of the forceps versus the risk of the c-section versus the risk of letting the patient stay on delivery.

Mahar: Okay.

Vacanti: Why don't we take a five minute break.

Page 158 – 159 lines 12 – 9: Vacanti's tone is belligerent and jumps in when the Respondent is addressing the ALJ. More specifically lines 7,8,9:

Vacanti: Listen, the objection was made and sustained. Go on to your next question, please.

Page 195 lines 9 - 19: Vacanti, without any objection from the State on the table, interrupts Respondent's cross exam to support Dr. Tatelbaum's assertion that he only wishes to testify to the standard of care for this patient, not all patients. Vacanti cannot do this and furthermore, he is there to be impartial not to support one side or the other. Vacanti basically bailed Tatelbaum out by not allowing the question to be answered.

Page 205: Vacanti sustains an objection by Mahar again protecting Tatelbaum from answering a question. Isn't this the job of the ALJ? How can you play both judge and jury?

Page 249 line11: After an objection is made by Mahar and sustained by ALJ Lynch, Vacanti calls for an executive session. At this point Respondent is questioning Tatelbaum about the level of pitocin being administered and the rapid response of her labor. The panel (Vacanti since he called the session) conveyed they thought Respondent was going into areas that are beyond the statement of charges. How would Vacanti know this until Respondent finished his line of questioning. Tatelbaum has been allowed all through his testimony to state that one needs to look at the whole picture(**page 382** line 15 -16), but when Respondent attempts to do this he is denied based on these broader areas are not part of the statement of charges. However, they are necessary to look at the whole picture of circumstances that were happening in real time when decisions needed to be made. Again, they try to not allow Respondent to bring in facts other than what they wish to discuss, because these facts will help to exonerate him.

Page 292 line 17: Without an objection from Mahar, Vacanti interrupts Respondent and says his question is too broad and to only ask direct questions.

Page 298: Vacanti sustains an objection, thus acting outside of his authority and was making legal rulings which are reserved to the ALJ. This ruling was unfair and unjust because it allowed Tatelbaum to not answer the question.

Page 457 line 25: Vacanti asks Tatelbaum a question about assigning a number to the level of risk of delivering a baby at 37 2/7. Tatelbaum talks a lot but never answers the question. Vacanti says thank you, you've answered the question.

Page 539: Vacanti interrupts without an objection by Mahar and says to Respondent "That's the second time you've asked the question, that's the second time, you're bound by the answer, so go on to something else now, please."

States Expert Witness Dr. Tatelbaum Intellectual Dishonesty and Inconsistencies:

The Hearing Committee in their Determination and Order describes Dr. Tatelbaum as testifying in an "honest, direct and forthright manner." As you read this mans testimony, I ask you, does this statement hold up? It is convincing from Tatelbaum's testimony that he is doing everything in his power to be the antithesis of this very statement. For the Panel to now make such a ludicrous statement further indicates the level of performance of the duties entrusted it. Of course, a conviction cannot be engineered without giving recognition on the record to its participants in order to provide some form of quasi authenticity.

This man violated every code of ethic applicable to a Fellow of the American College of OB/Gyn in how he has testified throughout this Hearing. See **(EE12)** We have repeatedly asked the DOH that their expert submit to signing the official Expert Witness Affirmation **(EE-11)** which would provide a signatory duty to him as a Fellow on how he must testify in such a capacity. Whatever Tatelbaum's motives are, they are not for honest to goodness purposes. The following are enough examples of intellectual dishonesty and inconsistency in testimony that he must be impeached as a witness having any bearing on the outcome of these proceedings. Again, entries are limited in the interest of time and, in reality, the size of this appeal. If I were to comb the remaining several thousand pages of testimony, this document would be prohibitively long and redundant in making the points necessary. As the ARB demonstrated upon my last appeal, it does a very

thorough job of reviewing the record such that further examples of bias and dishonesty will be evident by all those already listed.

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Page 384 line5: Tatelbaum changes the indications for forceps use by ACOG by adding the phrase "given the appropriate circumstances." This phrase is not in the written standards given by ACOG and by attempting to change them by adding his own verbage at his whim it is a clear case of intellectual dishonesty. Maternal exhaustion and potential fetal compromise, which Tatelbaum **admits** in testimony existed (T. 264), in and of themselves are the appropriate circumstances that ACOG has described. If ACOG did not intend these to be specific appropriate circumstances in and of themselves, then there would be no need to mention them specifically. ACOG would just leave the indications as forceps may be used under appropriate circumstances, but it did not do this. It mentioned specifically maternal exhaustion and SUSPICION of potential fetal compromise, not absolute knowledge of compromise. And with the fetal heart rate tracing showing moderate to severe variable decelerations, by definition this represents potential fetal compromise.

Page 565 lines 7 – 14. Tatelbaum says it's within the standard of care to top off epidural and let the patient push, that there was no contraindication to giving her more epidural and allowing her to push.
Page 602 lines 18 to 603 line 12 Tatelbaum says that his concern with this patient being in agony and begging for relief after having had an epidural top-off, is that she could very well be in the process of rupturing the uterus and he would consider doing a c-section.
Respondent calls him out on this and asks why would he top off an epidural if he were concerned with the incision opening up. Tatelbaum's answer is all over the place. He has difficulty directly answering the question.

Page 122 lines 5-10: Talelbaum states on direct that he found no fetal indications for forceps delivery at 2:15.
Page 264 lines 19-20: Tatelbaum states that the baby was in potential risk for compromise, which is an indication for forceps delivery.

Page 260 lines 13-17: Tatelbaum states it's not a contraindication to deliver a baby without a woman pushing in the second stage of labor.
Page 290 lines20-24: Tatelbaum states that there is no indication for forceps use because
Dr. Caputo did not allow patient to deliver on her own.

The very reason for using forceps is because you don't have time for her to deliver on her own because of the potential risk of fetal compromise. Tatelbaum's reasoning is backwards.

Page 119 lines 15- 18: Tatelbaum testifies that if a mother is exhausted and the baby was down to a point you thought the baby could be delivered, forceps would be an appropriate way to deliver a baby.
Page 266 lines 20 – 22: Tatlebaum testifies he would believe the mother if she testified to the fact that she was exhausted. Patient testifies that she pushed and pushed with everything I had. (T. 276) Patient was at plus 2 station which would indicate a midforceps delivery.
Page 260 lines 13 – 17: Tatelbaum testifies that's it's not a contraindication to deliver a baby without pushing in the second stage of labor.
Page 133 lines 7 – 8: Talelbaum testifies that he believed the pelvis was felt to be adequate.

Page 269 lines 5 – 7: Tatelbaum testifies he doesn't know why this patient, whose cervix was at anterior lip, would be asked to push if she weren't fully dilated.
Page 269 lines 13- 19: Tatelbaum testifies that sometimes a patient who is posterior will have an anterior lip, making it longer to reach full dilation. Respondent then asks Tatelbaum if he ever pushes a patient when they have an anterior lip and he says sometimes.

Page 503, lines 13 – 19: Talelbaum is not direct in answering questions.

Page 578 line 13 – Page 579 line 11: not being direct

Page 743 line 13-25: not being direct

Page 752 lines 9 – 12, 23 – 25, **Pages 753** 2-5: not being direct

Page 799 line 6-9: When asked that a subchorionic bleed doesn't necessarily have to involve the placenta, he does not answer yes or no, but says it is bleeding in some area of the pregnancy implantation.

Page 800 line 4 – 11: Respondent elicits different testimony as to subchorionic bleed.

Page 808 – 810. Tatelbaum not answering the questions posed.

Page 821 - 822: Tatelbaum is not answering the questions directly.

Abuses of Public Health Law/Infringements upon constitutional rights

A petition was made in the last appeal about the abuses of the process and how I believed my constitutional rights to have been violated. Upon review, the ARB simply didn't understand the specifics of my argument and upon reviewing what I wrote, it s clear as to why. I will be succinct with the same argument here. There are certain inalienable rights as provided by the Establishment clause of the Constitution. The founding fathers knew of the dangers of a sham prosecution. That is why they created certain protections within the process of legal adjudication in order for fairness and honesty to be the order of the day. A legal system has no merit in legitimacy and fairness if it can be manipulated to deny due process. That is why certain aspects of the legal system were developed so as to protect the rights of the accused, especially if they are innocent of the crime. No such protection can be understated when discussing the importance of the deposition and the voir dire events in a constitutionally based proceeding.

How my rights were infringed upon were several fold. My right to have the DOH follow their own rules has been clearly violated with demonstration over the course of two proceedings and now two appeals. However, my constitutional rights were also denied since this is a legal proceeding by which accusations are made, evidence is admitted, sworn testimony given, determinations made and penalty imposed. With such a parallel to a legitimate legal proceeding, certain rights must be guaranteed.

My right to a record of the interview was denied for two out of the three interviews I did with the DOH over the past six years. The first one was a telephone conference call with the state's medical evaluator. I had asked that I record it so not to be misrepresented with what I said. I was denied. The result was every single thing I said was distorted and used against me in the report of interview. This is why I was so angry when I wrote exhibit 24. They did the very thing I wanted to prevent. I had heard about OPMC up to this point and that they did not play by the rules. And when it happened to me I fought back. Fighting for your rights and the truth with this agency became the worst thing I could do. It led to repeated rules violations by the agency culminating in the procurement of multiple cases with trumped up charges.

The second interview was also conducted after a request denial by DOH to have a record made. My attorney was present for this one taking extensive notes and OPMC still distorted the testimony in bringing further charges. Again, if this were the homologous proceeding of a deposition, there is no way it can ever be considered valid were it not recorded word for word. This is the basis for this protection so that words spoken have a record to rely upon as having established them as verified evidence.

So after two interviews and two sabotages, we were adamant about having Interview number three transcribed since there was no case law or rule prohibiting it. Now, after they were able to rail-road me for five years by denying me this constitutional right, it was granted. The funny thing is that despite this interview being transcribed, it mattered not. The department simply ignored anything valid and scientific I had to say and brought even more bogus charges as they continued to carry out this fraud.

The second way in which my constitutional rights have been violated is by the empanelling of not one but two corrupt Hearing Committees. In a Constitutionally based proceeding, a jury decides the fate of the accused. Therefore, the founders knew that it was imperative to ensure the fairness of the jury. The only way to do this was to allow for probative questioning of them by the actual parties involved in the proceeding. By way of challenges, these parties can eliminate a certain number of potential jurors that portend bias against their client or the interest of the State. With the already mentioned parallels established here, an OPMC Hearing must not fall outside this mandate.

With the absence of such a voir dire guarantee, The Department of Health has managed to seat two panels that have been proven corrupt and biased. The rules of the proceeding that govern OPMC are seriously flawed and have been proven the subject of abuse at the highest level. The very reason for why jury selection is so important is demonstrated when these realizations are made. These were not a jury of my peers. In fact, in addition to all the bias I have eluded to above, another such one exists as well with that being age bias. How is it that every single one of the panel members over two Hearings was greater that 60 years old. This is such ageism but against a younger generational foe, that it again defines the absolute need for the elimination of bias at the jury selection stage. I have been damaged very badly by the repeated abuse of the process of Hearing Panel formation given its unconstitutional methods and rules.

Dismissal on Substantial Evidence Claim and Inappropriate Reliance on State's Expert

The Primary Arguments to oppose the findings of fact and conclusions of law by the Hearing Panel are contained in (**EE-1)** which is hereby submitted once again in support of my reason to have the cases thrown out on the substantial evidence clause. Again, this was withheld from the Hearing Panel. Each and every single charge was addressed and totally disproved through more qualified expert testimony and **material evidence**. I urge you to consider the quality of the testimony by all witnesses in this hearing. The ramblings of Dr. Tatelbaum are quite obvious as he offers up nothing more than his opinion or person style to each and every charge. Please look at the exhibit list. Not one document was produced by the State to support anything that was testified to by Dr. Tatelbaum. He creates the illusion of misconduct through innuendo and supposition and nothing more. Then look at the testimony of Dr. Burkhart and myself. Both are clinically founded and offer documented written standards of care by the American College of Obstetrics

and Gynecology as our basis in argument. Written, documented, established, formal standards of care that were completely and totally ignored by not one but now two Hearing Panels.

The State and thus the Hearing Panel have the burden of proof in these matters. Note the veritable absence of any testimony references by respondent's expert or respondent himself in supposedly meeting this burden. They make the statement right in their Determination that they gave great weight to Dr. Burkhart's testimony as well. (page 50) The argument here is that if the state has this burden of proof and the law states that they must provide reasons for the determination, then how do they explain their complete and total reliance on Dr Tatelbaum's testimony in writing their findings of fact in their Determination. Look at all the transcript references in the Determination on pages 4-47. Every single one of them was for Tatelbaum's direct exam. If Dr. Burkhart's testimony had such "great weight", then where are his testimony references? Where are his definitive opposing statements on these same topics so that they can explain why they chose Tatelbaum over Burkhart when again they were both given the stamp of authority? They could not do this because it is wholly inconsistent with prosecuting a sham. And moreover, the law states loud and clear - **If the Hearing Panel has considered the State's expert proof as well as Respondent's expert proof and is not convinced that one is more believable than the other, then the Hearing Panel has no option other than to find that the State has failed to prove their case against Respondent.** The conclusion here must be the following. If the Hearing Panel gave "great weight" to both experts, they by default cannot convict respondent on anything his expert testified to. According to this law, one cannot be more believable than the other if they are established as being equal. And if the Hearing Panel has it to say that Tatelbaum was more believable, it would have been required to have stated so – this was not done. Further, if the Hearing Panel by citing Tatelbaum's testimony only is saying that they believe him more, then by virtue of the fact that they give Burkhart great weight, they would have been required to provide a reason as to why Burkhart was now **not** being given "great weight" and they did not do this. Regardless of how OPMC wants to justify this conviction, there is no basis for it by rule of law.

And how is it that in the first hearing the panel gave Dr. Burkhart no weight, but was able to exonerate Dr. Caputo on certain charges and only take his forceps privileges. Yet, this panel gave great weight to Dr. Burkhart's testimony and found Dr. Caputo guilty of almost all charges and takes his license away. How is it that the panel gave Dr. Burkhart's testimony great weight, but not once do they sight his testimony except to mischaracterize it. These officers therefore **failed to perform a duty enjoined upon it by law.**

The substantial evidence argument for this appeal is supported by the entries below and by the written summation mentioned above. It is an embarrassment to the Department of Health, the original mission of the OPMC and to all that is just when it is realized how substandard this panel was in considering the material evidence throughout the entire proceeding. For example, how many times does ACOG's written

standard of care for operative vaginal delivery have to be read, explained and presented in front of their faces before they acknowledge its existence? It is the established standard no matter how much they want to ignore it in carrying out this sham. There are many instances of impropriety with this panel in considering the evidence and what they carefully "selected" to put in their determination. Not only do they simply choose to leave out exculpatory testimony from Dr. Tatelbaum, they continue to misrepresent the medical record in favor of their position to convict. Is this how it is in the legal world? Is this level of dishonesty everywhere? Can't get a conviction with playing by the rules? I can only imagine what the analogous state of affairs would be like if the delivery of medical services operated in similar fashion as OPMC. Complete disregard for the facts is a dangerous practice and sets an even more dangerous precedent when it is condoned. The Hearing Panel's determination is inconsistent with the findings of fact and with their conclusions of law.

Below are further challenges to the findings of fact and to the conclusions of law. While it is an incomplete counter of each stated in the Determination, enough of an example can be understood as to how these facts here continue to be the subject distortion and misrepresentation.

Page 54: of the Determination and Order states that "Dr. Burkhart addressed consideration of this correlation in the context of whether an obstetrician should try to inhibit a person's labor or allow it to progress; however, the circumstances in this instance was an elective delivery prior to 39 weeks." The panel is wrong. His statement of "let me back up here a little bit" demonstrates that he realized he should have described the importance of fetal lung maturity in general first. So he talks about why a physician would want to know fetal lung maturity and an example of when it would be useful. His <u>example</u> was a patient whose gestation was earlier than that of Patient A. This was a general statement as to the benefit of knowing the fetal lung maturity in making clinical decisions. He did not say that placental grading for fetal lung maturity purposes are only done when a patient is already in labor. This is a complete mischaracterization of his testimony. Anyone can see this. He states earlier (Transcript 1215) that grade three placentas correlate with fetal lung maturity. That's it. To suggest that Dr. Burkhart means anything but this is intellectually dishonest on the part of the hearing panel and thus demonstrates their bias against respondent. Also, Dr. Tatelbaum testifies that another method utilized to determine fetal lung maturity is placental grading. (T. 404) This testimony reaffirms Dr. Burkhart's.

As to the Findings of fact:

The hearing officers have the responsibility of due diligence: The hearing officers did not do their job in finding the inconsistencies in Dr. Tatelbaum's testimony. This is illustrated in the Determination and Finding where the committee only recites Dr. Tatelbaum's direct testimony.

13. The hearing panel has this finding of fact wrong. The panel ignores the full testimony that the baby was not experiencing just recurrent variable decels but recurrent moderately severe variable decels (T. 223) The panel also ignores the fact that Tatelbaum testifies that these recurrent moderately severe variable decels put the baby at risk of hypoxia even if the heart rate tracing looks normal in real time. (T. 242, 243)

18. The hearing panel did not even address the maternal indications for the use of forceps as they do exist. (ACOG Bulletin) Patient A testifies that she pushed and was exhausted (exhibit28). Also, Dr. Tatelbaum contradicts himself on page 290 by saying that Dr. Caputo did not have an indication for an opereative vaginal delivery because Dr. Caputo did not allow the patient to push first. However, on page 260 lines 13 - 17, Dr. Tatelbaum testifies that it is not a contraindication to deliver a baby without a woman pushing in the second stage of labor.

19. The hearing panel found there were no fetal indications for a forceps rotation and delivery. On the contrary Dr. Tatelbaum himself admits that "The baby on that finding was in potential fetal compromise, yes." (T. 264) The panel refers to testimony of Dr. Tatelbaum on direct (T. 124) that if the condition of Patient A's fetus worsened, the obstetrician would not wait for Patient A to deliver spontaneously, but would perform either a forceps delivery, vacuum delivery or a cesarean section. He stated that circumstance did not exist. They relied on this yet to be challenged testimony on direct to come to their conclusion. However, when challenged on cross examination on the issue of the nature of recurrent moderately severe variable decelerations, Dr. Tatelbaum has to now admit that the nature of this being recurrent can, existing on their own, can cause the baby to be hypoxic. (T. 239-243) Dr. Tatelbaum testifies that hypoxia in a baby can cause the baby to be acidotic which would cause suppression of the nervous system, and it would mean "that you would have to be more active in getting the baby delivered." (T 238-239). This all leads to Dr. Tatelbaum's testimony that "The baby on that finding was in potential fetal compromise, yes." (T. 264)

The failure to acknowledge any of this scenario occurring in Patient A on direct is intellectually dishonest on the part of Dr. Tatelbaum. We offer this as contradictory testimony on the behalf of Dr. Tatelbaum and incorrect findings of fact on the part of the hearing committee.

20. The panel again cites in their findings only the unchallenged testimony of Dr. Tatelbaum on direct when stating that it is only at the time of full cervical dilation that a patient is allowed to push. This is a wrong finding by the panel. Had they looked at Dr. Tatelbaum's testimony on cross as to when a patient can push they would have found that Dr. Tatelbaum contradicts himself again. It is established through his own testimony that some patients take a long time to go from 9 to 10 centimeters dilated because of an anterior lip and that sometimes you push a patient when they have an anterior lip in order to reduce it to get to 10 centimeters dilated.

It is also during the testimony of the pushing of Patient A that Tatelbaum is found to contradict himself again. He states that it is not a contraindication to deliver a baby without a woman pushing in the second stage of labor. (T. 260) He then goes on to say that the reason for Dr. Caputo not having an indication for operative delivery is based on the fact that he didn't allow the patient to deliver on her own. (T. 290)

21. The panel uses subjective opinion as fact. There exists no evidence that the nurse actually used a clock of any kind to obtain an accurate measurement of time. It was a guess which is evidenced by her approximation of one and one half minutes to two minutes. The panel was never allowed to see evidence to the contrary because Dr. Hingre's interview was not allowed into evidence. To use a subjective opinion as true and absolute fact is disturbing and wrong. ALJ Lynch made an erroneous ruling by not allowing in this interview. On page 8 of the intrahearing conference on 8/28 ALJ Lynch allows another interview into evidence because it was prepared by the Health Department itself, an interview, and the interviewee had the opportunity to ask any—interviewee did have opportunity to fully question Patient E.

22. The hearing panel states that the standard of care where an infant is limp, flaccid and non-responsive is to cut the umbilical cord as quickly as possible and transfer the infant to the pediatrician or neonatologist as quickly as possible. Dr. Burkhart testifies that there's no standard of care on how to reduce a nuchal cord.(Ex. B T. 1157) A physician reduces it in the manner they are able to reduce it and there are several ways to accomplish this.(Ex. B T. 1158) The hearing panel states that it gave Dr. Burkhart's testimony great weight. It is law that the panel must take the opinion of the respondent's expert over that of the State's expert if both experts are given the same weight. The State has the burden of proof and did not provide any material evidence to support the testimony of Dr. Tatelbaum.

23. Again, Dr. Burkhart testified to the contrary.

35. The standard of care for this patient could be managed in the same way Dr. Caputo managed this patient or she could have been managed with continuing observation. (Ex B 103). The panel must take the testimony of Dr. Burkhart over Dr. Tatelbaum.

36. There is documentation by way of ultrasonic pictures that there were pockets of amniotic fluid, a visual assessment was all that was necessary (I believe per Dr. Burkhart although I think this is a new charge) Dr. Caputo did obtain the necessary information to make a management decision. The biophysical profile is not a way to determine lung maturity contrary to what Tatelbaum says. Placental Grading is another according to Dr.Tatelbaum (T. 404)and Dr. Burkhart (Ex. B 1215). All the data points of the biophysical profile were not needed to make a management decision. The documentation of the fetal lungs being matured, the occurrence of a late decel on the NST, and the mother's emotional state was the information obtained which allowed Dr. Caputo to make his management decision.

37. The panel is wrong on the facts again. Dr. Caputo did order other monitoring in the form of an abdominal ultrasound. Dr. Tatelbaum testified that he is not very familiar with placental grading and fetal lung maturity although it exists. Dr. Burkhart testifies that Dr. Caputo did not even need to go any further in documenting lung maturity as the patient is deemed to be term because of having a gestation beyond 37 weeks. (Ex B 1214). Dr. Tatelbaum also testifies that a preterm is less than 37 weeks. Dr. Burkhart testifies that documenting fetal lung maturity by way of placental grading through ultrasound is a way of documenting that the lungs are mature. (Exhibit B, 1215-1216) Dr. Burkhart testifies that Dr. Caputo's management of Patient A Case 2 did not deviate from the standards of care (B94, B100) The panel must accept his testimony over Dr. Tatelbaum, it's the law. It is not a deviation of standard of care that a biophysical profile be performed of this patient before this C-section was scheduled. (B 102).

38. The fetal lungs were in fact mature therefore NOT exposing the baby to an increased risk of respiratory distress necessitation resuscitation.(Ex. B 96-97) This Obstetrician did NOT ASSUME because of its age alone that the baby would not suffer respiratory distress, rather he looked at the age and the grade 3 placenta.
39. The patient did not need an amniocentesis to determine lung maturity. The patient's gestational age of 37 2/7 weeks along with a grade 3 placenta on ultrasound documents fetal lung maturity. (B106 –

B107) See (**EE-9 and EE-10)**. In many hospitals they do not do amniocentesis after a certain gestational age, normally term, normally 37 weeks. An amniocentesis is not without risk because it is putting a needle inside to draw out fluid. (B105). Respondent's delivery of Patient A on December 4, 2003 WAS NOT a deviation of the standard of care. (B94, B100) The State would have you believe that giving the patient the least riskiest option is the standard of care by way of many of their own arguments, but they contradict themselves here by contending ordering an amniocentesis was the standard of care. An amniocentesis could be causing unnecessary risk when the very information you are seeking from it already exists. The State can't have it both ways.

40. A grade III placenta at 37 2/7 week gestation would not be considered totally abnormal, it would be a good thing. (B 105). It is not a deviation on Dr. Caputo's part to not send this placenta to pathology. Placentas get sent to pathology when a delivery goes badly or if one sees something funny about it. There is a healthy baby here and there's nothing in the record that indicates an abnormality so there's no reason to send a placenta. (B100, 101). Again, Dr. Burkhart's testimony supersedes that of Tatelbaum, it's the law.

One Additional argument concerning Patient D and the claim that I refused to admit that I was wrong. I have never had a problem with admitting that a misdiagnosis was made. The facts as to how this happened are also clear in the record. Page 746: Respondent establishes that he does admit to a misdiagnosis by way of his addendum. He wrote the addendum, he made the diagnosis, the misdiagnosis. For the committee to state differently and punish Respondent for this is absurd and a complete wrongdoing.

As to the Conclusions of law.

Patient A – 2001 Delivery

The first charge they find me guilty for is rupturing the membranes while this patient had a labor station of minus three. They state that the patient was placed at risk for doing this and thus I was cited for negligence. This is the most absurd thing I have ever heard. First, it must be emphasized that this is a charge that was never the subject of any interview which is my right as detailed above. There is no way such a charge could ever survive that setting. However, it somehow was brought all the way to a conviction due to repulsively dishonest testimony. If this is a standard by which Obstetricians must now abide, then I will be forced, under the rules of OPMC to report known misconduct by another physician, to report every single Obstetrical provider in the entire state of New York. Breaking water at such a station is a routine of the specialty and

OPMC knew this. The intellectual dishonesty of Dr. Tatelbaum to even suggest that performing such a procedure is misconduct in itself misconduct and should be admonished. I was certain to make this point during my closing statement. This is exactly what a sham peer review instructs those carrying it out to do. Come up with as many bogus charges as you can and see how many you can make stick. And without having to deal with an interview on this matter and by getting a liar to testify to a loaded jury, OPMC got it to stick 'real good'. The panel concurred with him without so much as having testimony from any expert from respondent. This was due to the improper establishment and notice of this new charge derived from the old cases. While Dr. Tatelbaum offers his opinion on what he would have done, hiding it in a more global affront by using the term "a reasonably prudent physician", he offers not a single bit of material evidence as a foundation for this statement. If this were such a risk that I was found guilty on it, then there must be something in writing somewhere that establishes this terribly risking venture. Nothing was produced because nothing exists. The burden of proof is on the State. This is the law for the millionth time. How is it that they met their burden without anything to back it up other than opinion? My testimony clearly contrasts with this assertion and the Ob panel member must certainly know these truths as well. Sham peer review is why. This conclusion in the determination must therefore be dismissed on its face alone.

The next charge of inappropriate pitocin management was another new charge. Again, they were prepared to impose yet another bogus conviction until they were met with something they were not prepared for and that "expert opinion" could swat away. This is the conclusion that was made on the pressure catheter as not having been zeroed. Doesn't Dr. Tatelbaum as an Obstetrical expert for the State understand the function of internal fetal monitors to not have thought of this possibility before he put forth written criticism that he knew would lead to a formal charge in these proceedings? What they were prepared to do with this charge was gong to be equally heinous. Using the techniques of information distortion, they were fishing to use the artifactual data from the catheter not having been zeroed to bring a conviction on yet another trumped up charge. Another example of the malicious tactics of sham peer review. They didn't count on my assertion and figured that they could be kind and let me go on this one.

As for the Penalty

The Hearing panel imposed a two year suspension of my license with a stay after thirty days served and a permanent limitation on my license to perform high forceps and midforceps including rotations. This illustrates a lack of key fundamental understandings of the matters at hand. The limitation from doing High forceps is preposterous since they are already outlawed by ACOG. I do not even have privileges for High

forceps to lose. Unbelievable. Additionally, they themselves say in their Determination that they have never questioned my ability or knowledge of forceps but my decision to use them. This is double speak. If I have the requisite knowledge and ability in the use of Obstetrical forceps, then I, by default, know when it is right to use them and when it is wrong. The ACOG technical bulletin has supported everything I have done but has been repeatedly ignored and discounted by OPMC and their dishonest Hearing committees. And again, to qualify this for fear of being superfluous, I have done nearly eighty forceps deliveries over the past ten years without incident and have stood as the primary trainer in this skill for Upstate's Ob/Gyn Residency Program during that time. It is with great emphasis that these penalties be seen as unjustified and thus overturned. They are not consistent with either the findings of fact or any conclusion of law.

Malice by OPMC

For the past six years, my family has literally been tormented by the actions and behavior of individuals with untouchable and unchecked power who sit in positions of public confidence and do very bad things. This would be both certain individuals at Crouse Hospital in Syracuse and the Office of Professional Medical Conduct. Having to endure years of lies and tortuous exploits to bring about two Hearings has taken its toll. While Mahar may stay up late plotting how he is going to get me this time, I have five children who continue to wonder when mom and dad are ever going to be happy and not so upset all the time. The impact on my children has been unforgivable. And now, with the leak of the Determination, my entire reputation has been called in to question. Can you imagine what it's like when you are considered among the best doctors in the hospital, a record to prove it and a thriving practice to then all of a sudden see it all destroyed by the publication of illegally leaked lies that have been pile-driven by OPMC for six years.

OPMC has shown a propensity for malice throughout their entire involvement in my life. A list of examples to illustrate this goes as follows:

a. Allowing Crouse cronies to influence a state level agency. I have been claiming for years that all of these matters with the State are the result of certain factions within my department of Ob/Gyn at Crouse Hospital. I know for a fact who they are and that they have the ability to seat their friends or even their father's partner. I also believe that one of then has a brother at the Department of Health in some type of administrative capacity. So you see, the connections cannot be denied. For me to have raised these issues and not have the DOH at least look into these claims to see if their agency was being used for mal-purposes is a dishonor. And for these very abuses to continue into the second Hearing

gives further evidence to malicious intentions by this agency. What in the name of the Lord is going on there? Who is running this place?

Further evidence to support a conspiracy between Crouse and OPMC is the construction and submission of the NYPORTS report on the case for Patient D. Please see **(EE17 and EE-18)** A root cause analysis was held on this case. A secretary from the Medical Staff Office of Crouse was there contemporaneously filling out the NYPORTS long form as we discussed the case. The conclusions of this meeting was that no violations of the standard of care were found and that certain changes would be made for morbidly obese patients of the practice.

When the form was complete I got a copy of it and was highly disturbed with what it had become. It was filled with nonsensical statements obtained from several non-medical sources such as blogs off the internet and used as an authoritative basis as the report goes on to illustrate that I was in great error in providing care to patient D. I was furious and asked that I know who made these changes and that I confront them face to face. They stated that a secretary did it despite an e-mail earlier stating that the only ones that can contribute to the report are those at the RCA, the chairman and QA. And the certain individuals at Crouse who have continually done this to me sit on that very QA, of course.

Please see (**EE-17)** for the final document that was constructed. It is a sound and honest representation of what was discussed and concluded upon. You will see in the e-mail that I was sent a communication from the hospital administration that the report was sent to the Department of Health. Now I refer you to testimony during cross exam of Tatelbaum on patient D where I mentioned to the ALJ, after objection from Mahar, that I was essentially exonerated of any wrongdoing in this case by a Root Cause Analysis and subsequent NYPORTS report. The room was cleared and Mahar then goes on to state that he never got a copy of the NYPORTS Report. While he was saying this, he was holding in his hand a document with big bold letters visible through the paper – **IPRO.** I immediately pointed it out to my attorney and knew that I had been deceived by Crouse Hospital once again. Now I suspect that Mahar actually did see the MYPORTS report, but admitting to it would likely compel it to be admitted in to evidence and it has already been established how he selectively discloses things. These events alone are so hurtful to think that I am the subject of such concerted efforts to do nothing but destroy an otherwise exceptional Ob/Gyn practitioner and his family. I could not even have imagined such malice.

The following offer continued examples of mailice or indifference towards Respondent.

b. Failing to investigate my complaint to OPMC against my department specifically detailing what they had done. A formal case number was assigned. Nothing was ever done.
c. Sandbag after first and second interviews with distortion to the answers I provided.
d. False encouragement to cordially follow their investigational procedures while they further bury you.
e. Fraudulent charges and distortion of medical standards and practices
f. Mahar eliciting altered expert testimony during the first Hearing.
g. Increase in penalty. Mahar has persistent increased the penalty he sought throughout these past three years. Without basis other than the fact that I appealed the first Determination, he increased the penalty for which he sought. I no longer was I just a "danger" with just forceps, but just because I wouldn't admit in court that I did anything wrong with them, I was now a danger to the entire community and must therefore have my license restricted from practicing Obstetrics altogether. This is an absolute outrage. My record in Obstetrics is without question exemplary. There is no basis for such an attempt other than to be malicious abusive with his power at OPMC. This motive continued with the new Hearing where these same cases are now worthy of my entire license. I am being punished for not complying with the master. Because I refused to settle, like others have mistakenly done before me, I was impugned. And there can be no argument that the two new cases now up the ante since the NYPORTS report clearly establishes no culpability and the case for patient E was never the subject of any departmental review or concern and was totally and completely within the standards as detailed in testimony. Again, this demonstrates malice.

More examples of OPMC malice:

h. Denying opportunity for interview on new charges on old cases.
i. Not acknowledging dismissal of original Gross Charges by first panel.
j. Mahar still being on the case.
k. Two rigged Hearing Committees.
l. Manipulation of the evidence within the discussion in Determination
m. Christmas ruination times four years. OPMC seems to like the Christmas season to impose some of their dirty work. The past four years have seen the Holidays for my

family ruined by the timely actions of OPMC. Just look at the Hearing of 2005. It ended in the month of June with final statements due in mid July. With a 60 day requirement to render a Determination, they took 146 days just so I would be facing the turmoil of their fraudulent ruling at the Holidays. I did not see my family for six weeks from early December to mid January dealing with writing the first appeal and having to learn the law in order to do so. This is no coincidence. Well they not only did it again this time but they leaked the Determination illegally 12 days before Christmas. How nice. I hope they are so happy with themselves. How do people like this get appointed at the Department of Health?

Dismissal of Penalty, Official Record Correction and Restitution

The ARB not only has the right to throw the entire thing out, there is also a restitution provision as well. Discussion of the latter will occur below.

For there to be absolute transparency in this process so that justice and legitimacy are restored to it, the actions of all hearing officers, the state's attorney and the state's expert should be rejected. I have more than done my part in trying to bring a fair and just conclusion to this entire thing. It seems that despite this hope, the onslaught just keeps on coming. It did with OPMC. The harder I fought the harder they came. It has been like trying to hold back a steam roller. Well it seems old habits die hard. I am now being investigated for three new cases of bogus deviations of the standard of care at Crouse Hospital while they are simultaneously building a flimsy case of "disruptive physician" charges as well. If you haven't already read the extra exhibit (**EE-15**) on Sham Peer Review, this is taken right out of the book. This needs to stop and the ARB has the power to stop it all. The laws below govern your ability to do so.

> **Notwithstanding any other provision of law, no member of a committee on professional conduct nor an employee of the board shall be liable in damages to any person for any action taken or recommendation made by him within the scope of his function as a member of such committee or employee provided that (a) such member or employee has taken action or made recommendations within the scope of his function and without malice, and (b) in the reasonable belief after reasonable investigation that the act or recommendation was warranted, based upon the facts disclosed.**

"**The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity."** (New York State Civil Practice Law and Rules Article 78, section 7806)

Not only am I pleading with you to throw this entire disgrace that has been my prosecution by OPMC out completely without any sort of remand, I implore you to set the record straight at the National Practitioner Data Bank. This is the most sacred document a physician has and is one of the primary goals of a sham peer review protocol. Once this is tarnished, it forever inhibits a physician from freely practicing ever again. This is so wrong and so unjustified. I have never once had a bad or even questionable outcome from the use of forceps. The OPMC depicts me as some maverick with them, however, when the numbers are actually analyzed, the overall rate of forceps use is less than ten percent. This is less than that of my expert. And the insinuation that I am braggadocios with their use is unfounded. The only time I have ever had to talk as much about my ability with them is when I have had to defend myself against false accusations with the use of them. How else am I going to be able to defend against such things but to illustrate a skill and knowledge that is necessary to be in the discussion. Therefore, for there to be anything derogatory about forceps at the NPDB is wrong and I ask that you order it off. Crouse hospital was taken to task when they suspended my privileges without due process knowing that it would automatically trigger a reporting to NPDB which is in line with protocol. They had the power to change it when I revealed to the MEC at Crouse how they themselves had been deceived by my department in getting them to officially make the imposition upon me. Rather than having to answer to the DOH as to why they changed an already placed report upon withdrawing a ruling, they did nothing and continued to feed cases anonymously to OPMC. This having to report to the DOH on such matters further evidences your jurisdiction in being able to expunge all reporting to NPDB and you will be dong it for honorable reasons.

I must make an argument on the subject of restitution. My family and I have been hurt very badly by the actions and baseless six year persecution by OPMC. My poor mother has been sick over what she has

seen her son go through and this has hurt me deeply. My poor wife has had to endure so much anguish and heartache that has forever altered the course of our marriage and lives. Our children have felt the brunt as depicted above. I have had to be clinically treated for an ulcer. And financially I have been destroyed. On top of the legal costs, my practice has been mortally wounded since the leak of the Determination.

These past six years saw me consumed by this whole ordeal. While trying to work sixty hours a week and involving myself with everything my five children did, I was victimized further by my ex-associate Jeffrey B. Chick, M.D. who did some horrible things to the practice as a means to financially destabilize it and thus steal it back after he was completely paid off under a 2001 contract to buy. This all occurred in December of 2006. I have worked with only six days vacation for the past year in order to recover financially from the acts of Chick. While he was the primary party to that lawsuit, I indirectly blame OPMC as well for how that all could have come about in the first place. Were it not for my total consumption with defending myself and the angst that comes with it, I would have been able to transition certain aspects of the business management to myself for full control. Chick maintained certain signatory rights due to the fact that I simply could not set up all the accounts the way I wanted on the computer for accounting purposes. So the business account remained being run out of a checkbook. While I may not have needed to take over the entire business operations of the practice to have seen what was going on, I might have picked up on what he was doing sooner and experienced no loss at all were it not for these spurious actions.

However, since the leak of the Determination, the delicate balance that was been maintained this past year to keep the office afloat until another doctor can be found, has been tipped in a negative direction. As it currently stands, I might not be in business by the time I get your Determination on this appeal.

Therefore, it cannot be understated that I have been irreparably damaged both mentally, emotionally, physically and financially by the fraudulent actions of OPMC for six long years. While monetary damages are nice, it cannot replace these years lost to whatever happiness might have occurred during them. It cannot repair the damage done to my kids who have now had impressed upon them behaviors of extreme emotion and distress from parents they look to for guidance and role modeling. This probably hurts the most. If one were to look at what I should have made income wise these past six years if the distractions of OPMC were nonexistent, it would be in the millions. My practice, before Chick committed his improprieties, was generating over two million dollars a year. I now know that Chick had been manipulating the overhead figures with the accountant such that had this not been done, my income would have been generous and mutually beneficial to my family. As it stands today, I have taken only one paycheck in the past three months. While I still see patients and it keeps the doors open, I have thirteen employees in a once booming office who are wondering if they might not get a paycheck soon.

I have no choice but to pursue damages by OPMC in these matters for the reasons contained herein. Were I to take the contingency offer of an attorney, I would be seeking enough damages to not only financially recover to a level that expected had this never occurred but to also force a change to the Department of Health and its Office of Professional Medical conduct. I have always lauded the purpose of ensuring good healthcare. How OPMC has behaved borders on both the criminal and the unconstitutional. It must be reformed. Inasmuch as I have the right to seek restitution, that value is not to be less than that of one million dollars. This is not a joke or some kind of get rich scheme. With what we have been through and what I can prove in a legitimate court of law, the Department of Health is getting some leniency from a Respondent who is more than deserved to be making such a statement.

As I have alluded to already, there has now been a public shaming, however wrong it may have been, and an undue stigma has now been attached to my practice of medicine. I have had to come out swinging in order to defend myself. This has resulted in postings on my web site and the realization that I must simply reveal everything I know and have about all of this to let everyone know about what we have been victims of. This brief will be the interest of hundreds of patients who have cried foul. I will be making it available so they can see how I had to once again officially fight these charges that everyone now knows.

I thank you very much for your consideration of the facts contained within this brief. I have faith that truth and justice will again enter into these proceedings by action of the ARB. I have tried to provide compelling argument in the time frame I have had to prepare this appeal. Just because certain areas of argument have been curtailed, they still underscore the significance of providing further brushstrokes to a much larger picture. It is with great deference that once again this portrait of what has occurred here is as clear to the ARB as it is to everyone who has stood witness.

Respectfully,

James R. Caputo, M.D.