STATE OF NEW YORK
DEPARTMENT OF HEALTH

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Nirav R. Shah, M.D., M.P.H.
Commissioner

Sue Kelly
Executive Deputy Commissioner

March 24, 2011

James R. Caputo, M.D.
1200 East Genesee Street
Syracuse, New York 13210

Re: Request for Modification of
BPMC Order #07-271

Dear Dr. Caputo:

I write in response to your December 5, 2010 and January 3, 2011 letters in which you request a Modification of BPMC Order # 07-271 (Board Order). More specifically, you request modification of the two million dollar/six million dollar liability insurance requirement; the practice monitor requirement; your medical license's restricted status; and the posting on the Department of Health's (DOH) web site of the Administrative Review Board's (ARB) Determination and Order and the Hearing Committee's Determination and Order. In your January 3, 2011 letter, you claim that DOH improperly withheld exculpatory evidence from the Hearing Committees.

Because you are seeking a modification of a Board Order, the standards set forth in Public Health Law section 230(10)(q) govern your request. That section provides:

> At any time subsequent to the final conclusion of a professional misconduct proceeding against a licensee, whether upon the determination and order of a hearing committee issued pursuant to paragraph (h) of this subdivision or upon the determination and order of the administrative review board issued pursuant to paragraph (d) of subdivision four of section two hundred thirty-c of this title, the licensee may file a petition with the director, requesting vacatur or modification of the determination and order. **The director shall, after reviewing the matter and after consulting with department counsel, determine in the reasonable exercise of his or her discretion whether there is new and material evidence that was not previously available which, had it been available, would likely have led to a different result, or whether circumstances have occurred subsequent to the original determination that warrant a reconsideration of the measure of discipline.** Upon determining that such evidence or circumstances exist, the director shall have the authority to join the licensee in an application to the chairperson of the state board for professional medical conduct to vacate or modify the determination and order, as the director may deem appropriate. Upon the joint application of the licensee and director, the chairperson shall have the authority to grant or deny such application.

Two million dollar/six million dollar liability insurance

You claim that the liability insurance requirement has proven to be "highly unfavorable in being able to restart and sustain [your] practice as a physician" and that you have been able to work for only six of the past 32 months due in large part to this requirement. In addition, you assert that your inability to work has created a "dire financial circumstance" for your family. While I appreciate the professional and economic hardships that you have undergone, Public Health Law section 230(18)(b) mandates that a "monitored licensee shall be required to maintain medical malpractice insurance coverage with limits no less than two million dollars per occurrence and six million dollars per policy year." Consequently, so long as you are a monitored licensee, I do not have the authority to waive the statutorily-required liability insurance.

The Practice Monitor

You maintain that the practice monitor requirement "has proven nearly impossible" because you cannot find anyone to step into this role, despite your having approached numerous OB/GYN colleagues. In support of your request to delete the practice monitor requirement, you assert "[i]n summary, I have never displayed a pattern of reckless patient care. I am truly a sound physician who is deeply concerned about providing first-rate medicine and surgery." You then proceed to propose an alternative method of monitoring, "a form of self-monitoring," which would involve your submission of brief case reports on a periodic basis with regards to all surgical and higher risk obstetrical cases and any case where a complication occurs.

I deny your request to modify the Board Order insofar as it seeks to delete the practice monitor requirement. You have offered no new and material evidence that was not previously available, which had it been available, would likely have led to a different result. Your attempt to minimize the criticisms of your actions and your references to your historical "body of work" are irrelevant to the modification issue. After hearing all the evidence, the Hearing Committee and the ARB found you guilty of professional misconduct in several cases, including three cases of gross negligence. The ARB, moreover, to protect the public, increased the penalty imposed to include a practice monitor as part of the probation terms.

Nor have circumstances occurred subsequent to the original determination that would warrant a reconsideration of the measure of discipline. Your difficulty in obtaining a practice monitor, for whatever reason, is not a circumstance that would warrant reconsideration of the measure of discipline. The ARB found your actions, including your continuing use of forceps after the hospital suspended your privileges to perform forceps deliveries, sufficiently serious as to require a practice monitor to oversee and review your cases. Nothing in the interim has lessened the need for a practice monitor. To the contrary, that you have not worked for 26 of the last 32 months strongly supports the appropriateness of a practice monitor.

I would further point out that, at the outset, you were able to secure a practice monitor in your specialty when you reopened your office. The practice monitor was a board certified OB/GYN, who was practicing in Syracuse. The practice monitor remained until you decided to close your practice "temporarily" for financial reasons. The monitor did not quit. Numerous licensees have obtained and continued to practice medicine with a practice monitor in place.

You also state that you have an opportunity to perform some medical aesthetic procedures at a local health and fitness club, for which you have received appropriate training,

which is neither documented nor described. You allege these procedures "are extremely safe, widely implemented … and carry very little to no liability risk, albeit not totally devoid" and would entail the use of "botulinum toxin A, hyaluronic acid and lypolyse injections for cosmetic purposes." In addition, you say that despite approaching physicians who specialize in aesthetic medicine, all have refused to act in a monitoring role. Given this safety profile and the fact that obstetrics formed the primary basis of the Board Order, you ask that the practice monitor and liability insurance requirements be modified so that you may perform these aesthetic injections. Based on the misconduct as reflected by the Hearing Committee and ARB orders, I am not supportive of any type of practice without a monitor in place.

Restricted Status of Medical License

You request that the permanent restriction imposed on your medical license – a prohibition on your performing high forceps and mid-forceps deliveries – be lifted and that an unrestricted license be reinstated with a probationary status pertaining to the use of forceps. To support your request, you assert that you have been prohibited from performing only a particular type of forceps delivery, which is rarely seen "in the overall world of Obstetrical forceps." Because you have been barred from performing these relatively unusual and infrequently used procedures, you claim your license bears the "stigma" of a "restricted" license, making it "extremely damaging" to your ability to find work as a physician.

You have not offered any new and material evidence that was not previously available, which had it been available, would likely have led to a different result. The permanent restriction prohibiting you from performing high and mid-forceps rotations and deliveries was recommended after due consideration of the fact that you failed to exercise proper judgment concerning the appropriate circumstances for forceps use. More specifically, the ARB agreed with the Hearing Committee that you failed to assess the level of risk involved in using forceps, preferring to rely on your opinion of your skill level. In addition, the ARB noted that you "demonstrated impaired judgment in this regard by continuing to use forceps after [your] hospital suspended your privileges to perform forceps deliveries."

Nor have you demonstrated any circumstances, which have occurred subsequent to the original determination, that warrant a reconsideration of the measure of discipline. Without identifying a particular time frame, you maintain that you completed a Continuing Medical Education objective at SUNY Upstate Medical University pertaining specifically to the use of forceps, and, thereafter, your admitting hospital reinstated all your privileges without restriction. I understand these events did not occur subsequent to the original determination, but rather were the subject of questioning during the 2005 hearing. As such, these events may not be considered.

Posting of Determination and Orders on DOH Website

While recognizing that posting of the Hearing Committee's Determination & Order and the ARB's Determination & Order is a "standard consequence of any Order," you request that the Department withdraw the posting and substitute "a statement indicating a probationary status in regards to the use of forceps and a period of reporting." I decline to make the modification or substitution you suggest. Public Health Law section 230 (10)(g) requires the committee's findings, conclusions, determinations, and order shall become public upon issuance. There is no durational time limit regarding how long the Orders shall remain public, and it is OPMC's policy to post all disciplinary actions imposed on New York State physicians on its website, without time limitation, so that patients and the public may be informed of actions taken

against a physician's medical license. Furthermore, Public Health Law section 2995-a requires the Department to post "a statement of any action (other than an action that remains confidential) taken against the licensee pursuant to section two hundred thirty of this chapter …, within the most recent ten years." The Department posts section 230 disciplinary orders to fulfill this statutory requirement.

January 3, 2011 Letter – Exculpatory Evidence

In your January 3, 2011 letter, you claim that at your hospital's 2002 Medical Executive Committee hearing you presented an expert witness, Dr. Richard Waldman, who testified that you did not deviate from any standard of care with respect to the patient in question. You then proceed to argue that because the DOH prosecuting attorney, Timothy Mahar, knew about Dr. Waldman's expert testimony, his failure to disclose this "exculpatory evidence" to the Hearing Committees provides further support for your request for modification.

As you describe in your letter, in correspondence between Mr. Mahar and *your attorney,* Mr. Mahar acknowledged that the State knew about Dr. Waldman's expert opinions prior to commencing the hearings. In fact, Mr. Mahar informed your attorney of Dr. Waldman's opinion supporting your care of the patient. Thus, the very evidence that you claim was withheld from the Hearing Committee was disclosed to your attorney. Furthermore, you were well aware of Dr. Waldman's prior opinions in that you retained him to present testimony before the hospital's Medical Executive Committee. You and your attorney had every opportunity to offer that evidence to the Hearing Committee, but chose not to. Mr. Mahar had no legal obligation to bring Dr. Waldman's prior testimony to the Hearing Committee's attention. Pursuant to the Department's policy governing the disclosure of exculpatory evidence in professional misconduct proceedings, Mr. Mahar appropriately disclosed such evidence to you and/or your counsel.

I have reviewed this matter and have consulted with Department counsel. In the absence of new and material evidence, previously unavailable, which, had it been available, would likely have led to a different result, and absent circumstances occurring subsequent to the Board Order that warrant a reconsideration of the measure of discipline, your petition fails to provide me with the authority, under Public Health Law section 230 (10)(q), to join you in an application to the Chair of the State Board for modification.

While the personal and professional hardships you have endured are understood, our priority is to protect the public. We take this obligation very seriously and, therefore, deny your requested modifications at this time.

Sincerely,

Keith W. Servis

Keith W. Servis
Director
Office of Professional Medical Conduct