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Henry S. Weintraub, Esq. – Executive Director
New York State Board of Professional Medical Conduct
433 River Street Suite 303
Troy, New York 12180

Dear Mr. Weintraub,

I am a licensed medical doctor in the State of New York who went through an investigation that was initiated in 2002 and subsequently two separate hearings by the Department of Health in 2005 and 2007. Not being represented by counsel, this letter is a direct request to have modified the BPMC Order set forth in April of 2008 after all appeal efforts were exhausted. The specific components of the Order I seek to have modified are:

- the $2 million/ 6 million liability insurance requirement
- the requirement of a practice monitor
- the restricted status of my license
- the DOH's web posting of the Determination and Order and ARB Ruling

As to the liability insurance requirement: This particular element of the order has proven to be highly unfavorable in being able to restart and sustain my practice as a physician. Since the final determination by the ARB in April of 2008, I have been only able to work for six of the past thirty-two (32) months due in large part to this requirement.

Among the numerous components that are necessary to open (or now re-open in my case) a medical office practice, the liability insurance is the most foundational. All other pieces of this process rely upon it, including hospital privileges and medical insurance participation. I was able to put all of these components together in June 2009 only to close in January of 2010 due to an inability of meeting the excessive premium. Since then, all remaining elements have reset from the lapse of this policy. I have since searched for work throughout the entire Upstate New York region and have been completely turned away given my license action/restriction and the stipulations therein.

Therefore, in order to remain a practicing physician, I must either attempt to reopen my own practice or find work elsewhere, which, as mentioned, have proven very difficult. There is urgency to this matter as well. In addition to an ongoing office lease commitment (that has fallen way behind) and an entire suite set up to see patients immediately, not having been able to work has created a dire financial circumstance for my family of five children.

Being required to have the above limits ($2/6M) over that of the traditional $1/3 million or $1.3/3.9 million levels has been difficult in both finding a company to write for it and then to afford it, as already seen. What compounds the problem is that the only company in New York State capable of writing me such a policy also attaches a 75% surcharge simply for having had a license action. It seems patently unfair to think that there is only one company available and there is no way out of such an additional cost on top of the huge premium for the $2/6 million limits alone. I have found other companies capable of offering either of the lower limits but not those mandated by the Department of Health.

It must further be pointed out that none of the cases that were cited during the hearings were patient driven or resulted in any malpractice payout/settlement or any negligent injury for that matter. That there is such a liability insurance stipulation would seem inconsistent with these facts. It is my earnest request that this stipulation be modified and that I be required to have a base policy with the upper level liability limits of $1.3/3.9 million which is more readily available from a variety of sources and certainly less cost prohibitive. Please help me with this.

In regards to the practice monitor requirement. While the liability insurance has been difficult in relation to cost, this stipulation has proven nearly impossible to find anyone willing to step into this role. Numerous Ob/Gyn colleagues have been approached to do this for me and all have refused for any number of reasons. Despite reassurance that they would be agents of the Department of Health and would not be garnering any interest into their own affairs, this has remained a significant concern along with certain political implications that have unfortunately followed my case.

There are two components to my request for modification regarding the practice monitor. First, given that I have been completely unable to restart my practice and have been facing difficult financial circumstances, I presently have an opportunity to perform some medical aesthetic procedures at a local health and fitness club and have obtained the appropriate training. This would entail the use of botulinum toxin A, hyaluronic acid and lypolyse injections for cosmetic purposes. These are extremely safe, widely implemented procedures and carry virtually little to no liability risk, albeit not totally devoid. Given this safety profile and that the issues at the center of my Order involved mainly Obstetrics, it would be merciful to modify my Order to allow the practice of aesthetic injections without the requirement of a practice monitor or the $2/6 million liability insurance requirement.

To further assist in this determination, numerous other physicians, specific to this area of aesthetic medicine, have equally been approached about providing a monitoring role and all have refused. Whether is it a factor of getting involved with the Department of Health or simply a competition thing, it is unclear. Nonetheless, it has proven completely fruitless. Therefore, I am unable to work at a job that is essentially waiting for me. So, again, please modify the Order to allow for these procedures without any sort of practice monitor and insurance requirements.

The second aspect of the practice monitor requirement that needs your understanding does indeed pertain to my potential and hopeful future practice of Obstetrics and Gynecology. To reiterate, I have not been able to find anyone willing to act in this capacity for me. There was one colleague who helped last year but he now does not want to be involved. While it might seem a relatively simple matter to cover and has been successful for many others with such an Order, in my case, it has become a major stumbling block.

To support my argument for a modification of the Ob/Gyn practice monitor requirement, I propose the following. Again, I offer that despite the lengthy adjudication of the hearings, the cases involved resulted in no negligent injury to any patient while, concomitantly, a qualified expert (who himself has been a past expert <u>for</u> the Department of Health) supported my management. The criticisms of my work stemmed from nuances involving indications for certain Obstetrical procedures and management of a few highly complex cases. Further, it is unequivocal that my practice performance for the duration of my career, through thousands of cases, has proven to be substantially quality driven. This is evidenced by the fact that when examined, my body of work has consistently been at or near the top of my department for any and all quality assurance parameters that are kept as part of this process. In 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.

While understanding the Department of Health's need to establish the safety of my work pursuant to the Order itself, I propose the following modification. I would be more than willing to submit brief case reports on a monthly (or bimonthly) basis to serve as a form of self monitoring. The cases targeted would be all major surgical cases, higher risk obstetrical cases as well as any case that involved a complication, were one to occur. This is considerably more than what a traditional practice monitor would be providing the State as part of that requirement. In return, the Department of Health would be able to keep very close tabs on what I was doing and determine whether the public interest was being protected.

What this would do for me is several fold. It would enable many closed doors to now be prospectively opened for work. Not only would I be able to potentially re-open my office but a whole world of temporary jobs would be more available which have been impossible to obtain due in part to this one factor alone – the practice monitor. It is a significant obstacle that all potential Ob/Gyn employers either run away from or simply cannot comply with. I am pleading with you to see the merits of this request so that my life and medical career can once again resume for the sake of my patients and family.

As for the "restricted" status of my license: Realizing that the Department of Health spent a considerable amount of effort in adjudicating my case, it did indeed take over six years to reach a final conclusion with the penalty involving an obscure part of the entire specialty of Ob/Gyn. From the start of the process, the subject of my investigation has primarily been in the area of Obstetrical forceps. The final determination and restriction also involved these relatively unusual and infrequent procedures. In fact, in their determination, OPMC plainly stated that my skill and expertise with the use Obstetrical forceps was exceptional. This was because they were aware that no patient or baby has ever been unduly harmed as a result of their usage. The Department of Health's primary issue, again, was with what they held as improper indication of forceps usage.

In the end, my license was restricted from performing only a <u>particular</u> <u>type</u> of forceps delivery that is rarely seen in the overall world of Obstetrical forceps. My license, however, was left intact for the vast majority of forceps deliveries that are encountered. Considering that forceps are utilized by less than 20% of the practicing Obstetricians these days, the type of forceps I was restricted from doing comprise less than 5% of all forceps deliveries as a whole, with even fewer doctors having the skills necessary to ever perform them. Nevertheless, despite the readily apparent insignificance of this restriction to the entirety of Ob/Gyn practice, the fact that my license has the stigma of "restricted" has been extremely damaging to my ability to work as a physician. Additionally, at a time <u>after</u> all of the subject cases for the State were performed, I applied for, had approved by SUNY Upstate Medical University and completed a Continuing Medical Education objective pertaining specifically to the use of forceps that satisfied a stipulation by my admitting hospital at that time. They proceeded to thereafter reinstate all privileges without restriction and I continued to perform them, (when indicated) without incident.

If the Department of Health could please see the merits of reinstating an unrestricted license and instead institute a probationary status pertaining to the use of forceps, it would mean a great deal to my world. As you can see, I am not trying to escape responsibility altogether. It is just putting the overall context of what was the primary subject of the State's investigation and subsequent penalty to my medical license into focus. Of course, any and all forceps deliveries (which is not the current stipulation) would also fall into my mandatory case self-reporting to the DOH (as suggested above) so they can specifically see that I am being totally and completely compliant with the standard of care. Please consider this request to reinstate an unrestricted (albeit probationary on the suggested terms) license on the basis of the facts and assertions made.

The last item listed to address is that of the Department of Health's posting of the Determination and Order and also the ARB Ruling on their website. Again, I realize that this is a standard consequence of any Order. However, if the Department of Health is to see the merits of my above arguments, then I would please ask that this be considered as well. Of course I would have no problem of there being a statement indicating a probationary status in regards to the use of forceps and a period of reporting, since this is where my current license restriction already lies and what I have herein suggested, respectively. With the present documents being posted, it disenables the vast majority of those who encounter them to understand the exact nature of the cases given lack of discernment over highly technical issues pertaining to Obstetrical forceps and other fine distinctions of medical practice.

I accept the criticisms brought by the Department of Health as part of their past investigation and determination, however, no patient was unduly harmed in any of the subject cases. My practice of medicine has admittedly become much more astute as to the careful implementation of the community standard which was at the heart of the matter. Therefore, please consider a modification of how these conclusions are represented on your official site. Were anyone to perform a google search of my name, (which is what I have been told is done automatically by anyone considering me for a job), there is still plenty of disparaging information available. It is asked that some additional mercy be extended along these lines as well as that petitioned above.

One final component to my request begs to be mentioned. When the investigation into my practice commenced in 2002, it might have been expected to be final (by whatever means) within a few years. Were the exact same determination and order imposed in a more timely fashion, it is arguable that by 2010, my record and restrictions would have been long past by now. Given the entanglements that ensued which profoundly delayed the process, I am now suffering greatly eight years after the start of it all. This has been a long and trying experience. Please recognize that the time factor alone has provided a significant degree of castigation. I have indeed learned a lot during this process and have actually become a better man and physician as a result. And my awareness of these issues could not be keener.

Nothing in the OPMC findings or Order ever said or even suggested that they wanted me to stop practicing medicine. Yet, the reality is that these terms are doing just that, unique to my situation. It is, therefore, with great deference that I ask for this plea to be seriously considered. I truly believe that the Department of Health will not lose any of their authority over my license by granting each and every one of these requests. In fact, the monitoring of my work will be at an even greater level than the current mandates demand. The only difference would be how the entire situation is perceived by others outside of our two parties. If it is the interest of the DOH to not only protect the public interest while simultaneously assisting physicians in becoming more compliant with the wishes of the license granting authority, then these two agendas are clearly and convincingly able to be accomplished with what I am proposing. Since my world is hurting in the meantime, I simply ask that this supplication be given a degree of priority consistent with your schedule and my plight. Thank you ever so much for your consideration.

Sincerely,

James R. Caputo, M.D.

c.c. Keith W. Servis
Richard F. Daines, M.D.