



STATE OF NEW YORK DEPARTMENT OF HEALTH

Coming Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Karen Schimke
Executive Deputy Commissioner

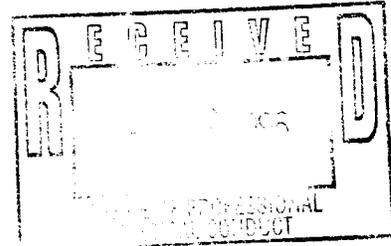
January 2, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Frederick Zimmer, Esq.
NYS Department of Health
Corning Tower-Room 2438
Empire State Plaza
Albany, New York 12237

Milos Klvana, M.D.
E-47395, 1313x, POB 8101
San Luis Obispo, California 93409-8101

RE: In the Matter of Milos Klvana, M.D.



Dear Mr. Zimmer and Dr. Klvana:

Enclosed please find the Determination and Order (No. 95-315) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

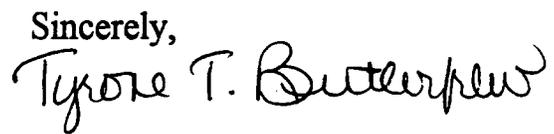
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Empire State Plaza
Corning Tower, Room 2503
Albany, New York 12237-0030

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's
Determination and Order.

Sincerely,

A handwritten signature in cursive script that reads "Tyrone T. Butler".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm
Enclosure

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

**IN THE MATTER
OF
MILOS KLVANA, M.D.**

**DETERMINATION
AND
ORDER**

BPMC-95-315

A Notice of Hearing and Statement of Charges, both dated October 19, 1995, were served upon the Respondent, **MILOS KLVANA, M.D., JOSEPH G. CHANATRY, M.D., (Chair), NANCY J. STUBBE, M.D. and D. MARISA FINN**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **CHRISTINE C. TRASKOS, ESQ.**, Administrative Law Judge, served as the Administrative Officer. A hearing was held on November 29, 1995. The Department of Health appeared by **JERRY JASINSKI, ACTING GENERAL COUNSEL**, by **FREDERICK ZIMMER, ESQ.**, Assistant Counsel. The Respondent did not appear and was not represented by counsel. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing where a licensee is charged solely with a violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York or another jurisdiction, or upon a prior administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, Respondent is charged with professional misconduct pursuant to Education Law Section 6530 (9) (a) (iii), 6530 (9)(b) and 6530 (9)(d). A copy of the Notice of Referral Proceeding and Statement of Charges is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Respondent was authorized to practice medicine in New York State on March 1, 1974, by the issuance of license number 119181 by the New York State Education Department.
(Pet. Ex. #2)

2. The California Superior Court of Los Angeles County, in case # A791288, convicted Respondent of violating the following provisions of California Law:
 1. Nine counts of violating Penal Law §187(a) relating to second degree murder, a felony; and
 2. Five counts of violating Business and Professions Law (hereinafter "B & P") §2053 relating to Respondent's having aided and abetted the unlicensed practice of medicine, a felony; and
 3. One count of violating Penal Law §182(1) and B & P §2053 relating to Respondent's having conspired to practice medicine without a license, a felony; and
 4. Nineteen counts of violating Insurance Law §556(a) (3) relating to Respondent's having prepared fraudulent insurance claims, a felony; and
 5. Ten counts of violating Insurance Law §556(a)(1) relating to Respondent's having presented a fraudulent insurance claim, a felony; and
 6. Two counts of violating Penal Law §487(1) relating to Respondent's having committed grand theft, a felony; and
 7. Two counts of violating California Penal Law §118 relating to Respondent's having perjured himself by declaration, a felony.

3. The Division of Medical Quality, Board of Medical Quality Assurance, Department of Consumer Affairs of the State of California (hereinafter "the California Board") by a Decision dated December 16, 1993, adopted an Administrative Law Judge's Proposed Decision, dated September 17, 1993. The Decision of the California Board, which became effective on January 15, 1994, revoked Respondent's license to practice medicine in the State of California. The California Board found Respondent guilty of, among other things, violating California Business and Professions Code (hereinafter "BPC") §4290 [having been convicted of a crime substantially related to the qualifications, functions or duties of the profession], California BPC §2234(b) [Gross negligence] and California BPC §2234(c) [repeated negligent acts].

4. The conduct resulting in the California Board's finding of guilty and their revocation of Respondent's license included Respondent's having been found guilty, on or about February 5, 1990, by the Los Angeles Superior Court in a case entitled People of the State of California v. Milos Klvana and convicted of numerous counts of violating of California Law including the counts listed in "2" above.

5. The California Board took official notice of facts and circumstances set forth in the case of People v. Klvana, 11 Cal. App. 4th 1679 (1992) which detailed the facts and circumstances behind Respondent's nine (9) second-degree murder convictions. Their facts and circumstances included Respondent's having maliciously caused the deaths of at least nine (9) infants which he delivered, as follows:
 1. In causing these deaths, Respondent repeatedly ignored obvious basic indicia of high risk pregnancies (e.g., Meconium staining, RH factor) and failed to monitor said risks properly through his lack of emergency hospital referral, insufficient fetal monitoring and failure to provide neo-natal care.
 2. Respondent repeatedly disregarded warnings from peers about inadequacies in his practices, such as the need for high risk deliveries to be performed in a hospital.
 3. Respondent repeatedly omitted and/or misrepresented material information about his professional standing (licensure, hospital privileges); about the sophistication of his practice (clinical equipment, ability to handle emergencies); and about patient medical options (advisability of Cesarean section delivery).
 4. Respondent repeatedly administered the drug Pitocin improperly and failed to manage the risks presented by said drug.

6. The facts and circumstances underlying Respondent's convictions of violating §2053 were found by the California Board to demonstrate that between November 9, 1983 and July 17, 1985, Respondent's co-defendant, who at no time held a California medical license, and Respondent, willfully and unlawfully practiced medicine and held themselves out as so practicing, under circumstances which caused or created the risk of great bodily harm and serious physical or mental illness to patients.

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Hearing Committee unanimously concluded that the Department has sustained its burden of proof. The preponderance of the evidence demonstrates that Respondent was convicted of nine counts of second degree murder, aiding and abetting the unlicensed practice of medicine, insurance fraud, grand theft and perjury in violation of California Penal Law and other statutes. Section 6530 (9)(a)(iii) of the Education Law defines professional misconduct as "being convicted of committing an act constituting a crime under the law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York state law." Pursuant to the aforementioned convictions, the California Board found Respondent guilty of gross negligence, repeated negligent acts and that his practicing medicine with an unlicensed partner caused or created the risk of bodily harm and serious physical or mental illness to patients. As a result, the California Board revoked Respondent's license. Section 6530 (9)(b) of the Education Law defines professional misconduct as "having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitutes professional misconduct under the laws of New York state." Section 6530(9)(d) of the Education Law defines professional misconduct in part as having his or her license to practice medicine revoked, after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation would, if committed in New York State, constitute professional misconduct under the laws of New York state. As a result, the Hearing Committee voted to sustain the First, Second and Third Specifications of professional misconduct contained within the Statement of Charges.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine in New York State should be revoked. This determination was reached upon due consideration of the full spectrum for penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

Respondent did not appear at the hearing due to his incarceration by the State of California. He, however, requested in writing that his New York license be suspended until he can successfully appeal his California conviction. (Resp. Ex. B) As a matter of law, the Federal Courts have held that it is constitutional for a disciplinary proceeding to commence prior to the completion of a criminal proceeding or appeal. Arthurs v. Stern 560 F.2d 477 (1977).

The Hearing Committee finds Respondent's mishandling of his obstetrical cases to be egregious. In one instance, a baby who been delivered by Respondent's labor sitter, had developed respiratory problems. When summoned, Respondent refused to see the baby because he was too tired. (Pet. Ex. 3, p.519) In another instance, Respondent delivered a stillborn with "meconium present in the amniotic fluid." Respondent advised the parents that he wanted to spare the family the cost and emotional upset of an autopsy so he disposed of the fetus in the trash. (Pet. Ex. 3, p. 520) In another instance, Respondent left a patient fully dilated almost overnight before a stillborn fetus covered with meconium was delivered. (Pet. Ex. 3, p. 523)

Respondent also lied to his patients about the availability of his hospital privileges when he knew they had been revoked. (Pet. Ex. 3, p. 519) When a baby was in a life-threatening condition, Respondent stated that he did "not like to transfer babies to hospitals because he doesn't want to be evaluated by doctors at the hospital" (Pet. Ex. 3, p. 522)

In addition to his conviction of nine counts of second degree murder, Respondent was also found guilty of insurance fraud, perjury and aiding and abetting the unlicensed practice of medicine. Respondent received a full review by the California Court of Appeals who affirmed the initial conviction. In rendering their decision the Court of Appeals stated:

"After reviewing the evidence presented at trial, we conclude sufficient evidence was presented from which the jury could reasonably infer that Klvana was subjectively aware his methods of home and office deliveries were life-endangering, but consciously and deliberately disregarded these risks."

Although Respondent is incarcerated for 15 years to life, he had practiced medicine in New York State early in his career, prior to completing his fourth year of residency. (Pet. Ex. 3, p. 515) The Hearing Committee believes that Respondent should never have the opportunity to practice in New York State in the event he is released from prison. Therefore, revocation is the appropriate sanction in this instance.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The Specification of professional misconduct contained within the Statement of Charges (Petitioner's Exhibit #1) is **SUSTAINED**:

2. Respondent's license to practice medicine in New York State be and hereby is **REVOKED**.

Dated: Albany, New York
12/27, 1995

Joseph G. Chanatry M.D.
JOSEPH G. CHANATRY, M.D. (Chair)

**NANCY J. STUBBE, M.D.
D. MARISA FINN**

TO: Frederick Zimmer, Esq.
Assistant Counsel
NYS Department of Health
Corning Tower-Room 2438
Empire State Plaza
Albany, New York 12237

Milos Klvana, M.D.
E-47395, 1313x, POB 8101
San Luis Obispo, CA 93409-8101

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

-----x

IN THE MATTER : NOTICE OF
OF : REFERRAL
MILOS KLVANA, M.D. : PROCEEDING

Respondent

-----x

TO: MILOS KLVANA, M.D.
Inmate #E 47395
California Men's Colony
St. Prior
Room 1313
P.O. box 8108
San Luis Obispo, California 93409-8108

E 47395, POB 8101, 1313X
CMC-East
San Luis Obispo, California, 93409-8101

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law Section 230(10)(p) (McKinney Supp. 1995) and N.Y. State Admin. Proc. Act Sections 301-307 and 401 (McKinney 1984 and Supp. 1995). The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 29th day of November, 1995 at 10:00 a.m. in the forenoon of that day at Room E, on the Concourse Level of the Cultural Education Center, New York State Museum, Empire State Plaza, Albany, New York 12237.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the proceeding will be made

and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered which would show that the conviction would not be a crime in New York State. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Corning Tower Building, 25th Floor, Empire State Plaza, Albany, New York 12237, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before November 23, 1995.

You may file a written answer, brief, and affidavits with the Committee. Six copies of all papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before November 23, 1995, except that the answer may be served on or before November 27, 1995 and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to Section 301(5) of the

State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the administrative review board for professional medical conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
October 19, 1995

Peter D. Van Buren

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be addressed to:

Frederick Zimmer
Associate Counsel
NYS Department of Health
Division of Legal Affairs
Corning Tower Building
Room 2429
Empire State Plaza
Albany, New York 12237
(518) 473-4282

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

-----X

IN THE MATTER : STATEMENT
OF : OF
MILOS KLVANA, M.D., : CHARGES
Respondent

-----X

MILOS KLVANA, M.D., the Respondent, was authorized to practice medicine in New York State on March 1, 1974 by the issuance of license number 119181 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. The California Superior Court of Los Angeles County, in case # A791288, convicted Respondent of violating the following provisions of California Law:

1. Nine counts of violating Penal Law §187(a) relating to second degree murder, a felony; and
2. Five counts of violating Business and Professions Law (hereinafter "B & P") §2053 relating to Respondent's having aided and abetted the unlicensed practice of medicine, a felony; and
3. One count of violating Penal Law §182(1) and B & P §2053 relating to Respondent's having conspired to practice medicine, without a license, a felony; and
4. Nineteen counts of violating Insurance Law §556(a) (3) relating to Respondent's having prepared fraudulent insurance claims, a felony; and
5. Ten counts of violating Insurance Law §556(a) (1) relating to Respondent's having presented a fraudulent insurance claim, a felony; and

6. Two counts of violating Penal Law §487(1) relating to Respondent's having committed grand theft, a felony; and
7. Two counts of violating California Penal Law §118 relating to Respondent's having perjured himself by declaration, a felony.

The acts for which Respondent was convicted in California included acts which, if committed in New York State, would have constituted crimes under New York State Law.

B. The Division of Medical Quality, Board of Medical Quality Assurance, Department of Consumer Affairs of the State of California (hereinafter "the California Board") by a Decision dated December 16, 1993 adopted an Administrative Law Judge's Proposed Decision, dated September 17, 1993. The Decision of the California Board which became effective on January 15, 1994 revoked Respondent's license to practice medicine in the State of California. The California Board found Respondent guilty, among other things, of violating California Business and Professions Code (hereinafter "BPC") §4290 [having been convicted of a crime substantially related to the qualifications, functions or duties of the profession], California BPC §2234(b) [gross negligence] and California BPC §2234(c) [repeated negligent acts].

C. The conduct resulting in the California Board's finding of guilt and their revocation of Respondent's license included Respondent's having been found guilty, on or about February 5, 1990, by the Los Angeles Superior Court in a case entitled People of the State of California v. Milos Kilvana and convicted of numerous counts of violating of California Law including the

counts listed in "A" above.

D. The California Board took official notice of facts and circumstances set forth in the case of People v. Klvana, 11 Cal. App. 4th 1679 (1992) which detailed the facts and circumstances behind Respondent's nine second degree murder convictions. These facts and circumstances included Respondent's having maliciously caused the deaths of at least nine infants which he delivered, as follows;

1. In causing these deaths, Respondent repeatedly ignored obvious basic indicia of high risk pregnancies (e.g., Meconium staining, RH factor) and failed to monitor said risks properly through his lack of emergency hospital referral, insufficient fetal monitoring and failure to provide neo-natal care.
2. Respondent repeatedly disregarded warnings from peers about inadequacies in his practices such as the need for high risk deliveries to be performed in a hospital.
3. Respondent repeatedly omitted and/or misrepresented material information about his professional standing (licensure, hospital privileges), about the sophistication of his practice (clinical equipment, ability to handle emergencies) and about patient medical options (advisability of Cesarean section delivery).
4. Respondent repeatedly administered the drug Pitocin improperly and failed to manage the risks presented by said drug.

E. The facts and circumstances underlying Respondent's convictions of violating §2053 were found by the California Board to demonstrate that between November 9, 1983 and July 17, 1985, Respondent's co-defendant who at no time held a California medical license, and Respondent, willfully and unlawfully practiced medicine and held themselves out as so practicing, under circumstances which caused or created the risk of great

bodily harm and serious physical or mental illness to patients.

F. Further facts and circumstances underlying Respondent's numerous convictions are more specifically set forth in the Decision of the California Board and in the case of People v. Klvana, 11 Cal. App. 4th 1679 (1992).

G. The conduct resulting in the revocation of Respondent's California Medical License and in the California Board's findings that he committed professional misconduct would, if committed in New York State, constitute professional misconduct under the following provisions of New York State Law;

1. N.Y. Educ. Law §6530(2) [practicing the profession fraudulently]; and/or
2. N.Y. Educ. Law §6530(3) [practicing the profession with negligence on more than one occasion]; and/or
3. N.Y. Educ. Law §6530(4) [practicing the profession with gross negligence on a particular occasion]; and/or
4. N.Y. Educ. Law §6530(9)(a)(iii) [being convicted of committing an act constituting a crime under the law of another jurisdiction which, if committed within New York State would have constituted a crime under N.Y. State Law]; and/or
5. N.Y. Educ. Law §6530(11) [permitting, aiding or abetting an unlicensed person to perform activities requiring a license]; and/or
6. N.Y. Educ. Law §6530(16) [a willful or grossly negligent failure to comply with substantial provisions of state laws governing the practice of medicine]; and/or
7. N.Y. Educ. Law §6530(20) [conduct in the practice of medicine which evidences moral unfitness to practice medicine]; and/or
8. N.Y. Educ. Law §6530(25) [delegating professional responsibilities to a person when the licensee

delegating such responsibilities knows or has reason to know that such a person is not qualified, by training, by experience or by licensure to perform them].

SPECIFICATIONS

FIRST SPECIFICATION

Respondent is charged with professional misconduct by reason of his having been convicted of committing an act constituting a crime under the law of another jurisdiction which, if committed in New York State would have constituted a crime under New York State Law, in violation of N.Y. Educ. Law §6530(9)(a)(iii) (McKinney Supp. 1995) in that the Petitioner charges:

1. The facts in Paragraphs A and A.1, A.2, A.3, A.4, A.5, A.6, A.7, D, D.1, D.2, D.3, D.4, E and F.

SECOND SPECIFICATION

Respondent is charged with professional misconduct by reason of his having been found guilty of improper professional practice or professional misconduct by the duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitute professional misconduct, in violation of N.Y. Educ. Law §6530(9)(b) (McKinney Supp. 1995) in that the Petitioner charges:

2. The facts in Paragraphs B and C, D, D.1, D.2, D.3, D.4, E, F, G, G.1, G.2, G.3, G.4, G.5, G.6, G.7 and/or G.8.

THIRD SPECIFICATION

Respondent is charged with professional misconduct by reason of his having had his license to practice medicine revoked where the conduct resulting in the revocation would, if committed in New York State constitute professional misconduct under the laws of N.Y. State in violation of N.Y. Educ. Law §6530(9)(d) (McKinney Supp. 1995) in that the Petitioner charges:

3. The facts in Paragraphs B and C, D, D.1, D.2, D.3, D.4, E, F, G, G.1, G.2, G.3, G.4, G.5, G.6, G.7 and/or G.8.

DATED: *October 19*, 1995
Albany, New York

Peter D. Van Buren
PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct

SUMMARY OF DEPARTMENT OF HEALTH HEARING RULES

(Pursuant to Section 301 SAPA)

The following items are addressed by the Uniform Hearing Procedures Rules of the New York State Department of Health:

Applicability

Definitions

Notice of Hearing

Adjournment

Answer or Responsive Pleading

Amendment of Pleadings

Service of Papers

Discovery

Hearing Officer/Pre-Hearing Conference

Pre-Hearing Conference

Stipulations and Consent Orders

The Hearing

Hearing Officer's Report

Exceptions

Final Determination and Order

Waiver of Rules

Time Frames

Disqualification for Bias

The exact wording of the rules is found at 10 NYCRR Part 51 of Volume 10 of the New York Code of Rules and Regulations. Each of the above items may be summarized as following:

51.1 Applicability. These regulations apply to most hearings conducted by the Department of Health.

51.2 Definitions.

1. "Commissioner" means Commissioner of the New York State Department of Health.
2. "CPLR" means Civil Practice Law and Rules.
3. "Department" means New York State Department of Health.
4. "Hearing Officer" means the person appointed to preside at the hearing or the person designated as administrative officer pursuant to Public Health Law Section 230.
5. "Party" means all persons designated as petitioner, respondent or intervenor.
6. "Report" means the Hearing Officer's summary of the proceeding and written recommendation or the findings, conclusions and determination of the hearing committee pursuant to Public Health Law Section 230.

51.3 The Department's Notice of Hearing and/or Statement of Charges should be served at least 15 days prior to the first hearing date, specify time, place and date(s) and should contain the basis for the proceeding.

51.4 Adjournment. Only the Hearing Officer may grant an adjournment and only after he/she has consulted with both parties. In hearings pursuant to Public Health Law Section 230, an adjournment on the initial day may be granted by the hearing committee.

51.5 Answer to Responsive Pleading. A party may serve a response to the allegations of the Department.

51.6 Amendment to Pleadings. A party may usually amend papers if no substantial prejudice results by leave of the Hearing Officer.

51.7 Service of Papers. Except for the Notice of Hearing and/or Statement of Charges, all papers may be served by ordinary mail.

51.8 Disclosure. Generally, there is no disclosure of any kind and the Hearing Officer cannot require it, unless all parties agree. If agreed to, the Hearing Officer will ensure all parties proceed in accordance with their agreement. However, in a hearing in which revocation of a license or permit is sought or possible, a party may demand in writing that another party disclose the names of witnesses, documents or other evidence such other party intends to offer at the hearing. A demand for such disclosure must be served at least 10 days prior to the first scheduled hearing date. Disclosure or a statement that the party has nothing to disclose must be made at least 7 days before the first scheduled hearing date. A party that determines to present witnesses or evidence not previously disclosed must supplement its disclosure as soon as practicable. The Hearing Officer may, upon good cause shown, modify the times for demands for and response to disclosure or allow a party not to disclose or limit, condition or regulate the use of information disclosed and may preclude the introduction of evidence not disclosed pursuant to a demand.

51.9 Hearing Officer. He/she presides over the hearing and has the authority to ensure it is conducted in an orderly fashion. He/she may also order the parties to meet before the hearing to discuss the procedure. He/she does not have the authority to remove testimony from the transcript and/or dismiss charges unless authorized by delegation.

51.10 Stipulation and Consent and Surrender Orders. At any time prior to a final order, parties may resolve all or any issues by stipulation. An order issued pursuant to a stipulation has the same force and effect as one issued after hearing.

51.11 The Hearing. A party may have an attorney represent him or her. Failure to appear may result in an adverse ruling. A hearing may be combined with or separated from another hearing depending on whether such action will result in delay, cost or prejudice. While the rules of evidence as applied in a courtroom are not observed, witnesses must be sworn or give an affirmation

and each party has the right to present its case and to cross-examine. The Department has broad discretion to place documents into evidence. A record of the proceeding must be made. In enforcement cases, the Department has the burden of proof and of going forward. In matters relating to neglect or abuse of patients under Public Health Law Section 2803-d, the Hearing Officer may not compel disclosure of the identity of the person making the report or who provided information in the investigation of the report.

Complaints relating to Public Health Law Section 230 may not be introduced into evidence by either party and their production cannot be required by the Hearing Officer.

Claims that a hearing has been unreasonably delayed is treated as an affirmative defense (Section 51.5) or as part of claimant's case. The burden of going forward and of proof are on the claimant.

A verbatim record of the proceeding shall be made by any means determined by the Department. The record shall include notice of hearing and any statement of charges, responsive pleadings, motions, rulings, transcript or recording, exhibits, stipulations, briefs, any objections filed, any decision, determination, opinion, order or report rendered.

51.12 Hearing Officer's Report. In matters governed by Public Health Law Sections 230, 230-a and 230-b, the final report should be submitted not more than 52 days after completion of the hearing if service is effectuated by mail and not more than 58 days of service if effectuated personally. In all other matters, the Hearing Officer, within 60 days of the completion of the hearing, should submit a report.

51.13 Filing of Exceptions. Within 30 days of the date of a copy of the report of the Hearing Officer and proposed order or, within 15 days of a date a report of the hearing committee and proposed recommendation for hearings conducted pursuant to Public Health Law Section 230 is sent to the parties, any party may submit exceptions to said report and proposed order to the Supervising Administrative Law Judge. On notice of all parties, a party may request, before the expiration of the exception period, the Supervising Law Judge to extend the exception period. All parties have the opportunity to state their position on the extension on the record. Extensions may be granted on good cause shown; however, they are not granted to allow a party to respond to exceptions already filed.

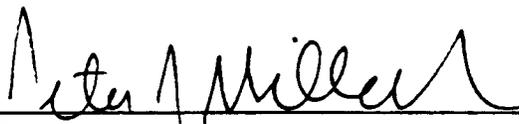
51.14 Final Determination Order. The hearing process ends when an order is issued by the Commissioner or his designee or the appropriate board of council. The order should state a basis for the decision. Each party receives a copy of the order.

51.15 Waiver of Rules. These rules and regulations may be dispensed with by agreement and/or consent.

51.16 Establishment, Construction, Rate Hearings. Hearings involving any of these issues have time limits concerning the issuance of notices of hearing of 365 days of receipt by the Department of a request for hearing.

51.17 Disqualification for Bias. Bias shall disqualify a Hearing Officer and/or a committee member in hearings governed by Public Health Law Section 230. The party seeking disqualification must submit to the hearing officer an affidavit pursuant to SAPA Section 303. Mere allegations are insufficient. The Hearing Officer rules on the request.

DATED: Albany, New York
February 7, 1992



PETER J. MILLOCK
General Counsel