



**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

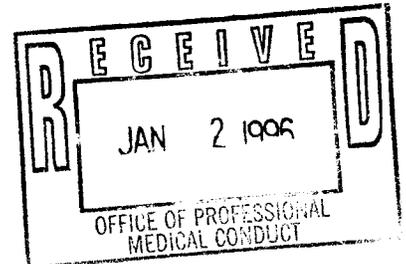
William Capote, M.D.
945 B Morris Park Avenue
Bronx, New York 10462

Dianne Abeloff, Esq.
NYS Department of Health
5 Penn Plaza-Sixth Floor
New York, New York 10001

James R. Slater, Esq.
10 East 40th Street
New York, New York 10016

Vincent M. DelGuidice, Esq.
511 Avenue U
Brooklyn, New York 11223

RE: In the Matter of William Capote, M.D.



Dear Dr. Capote, Ms. Abeloff, Mr. Slater and Mr. DelGuidice:

Enclosed please find the Determination and Order (No. 96-01) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:

NEW YORK STATE DEPARTMENT OF HEALTH 19

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,



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 : HEARING COMMITTEE
OF : DETERMINATION
WILLIAM CAPOTE, MD. : AND ORDER
NO. BPMC-96-01**

Andrew Conti, M.D., Chairperson, Kenneth Kowald, and Kenneth J. Freese, M.D., duly designated members of the State Board of Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230 (1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Sections 230 (10) (e) and 230 (12) of the Public Health Law. Stephen Bermas, Esq., Administrative Law Judge, served as Administrative Officer for the Hearing Committee.

Dr. Freese was appointed to serve in place of Gerald Ansell, M.D. who died during the pendency of this matter. It should be noted that Dr. Freese was not present at either hearing date but he has duly affirmed that he had read and considered the full transcript of proceedings and all admitted evidence prior to the deliberations.

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

SUMMARY OF THE PROCEEDINGS

Notice of Hearing dated:	July 27, 1995
Statement of Charges dated:	September 12, 1995
Hearing Dates:	September 18 and October 25, 1995
Deliberation Date:	November 28, 1995
Place of Hearing:	NYS Department of Health 5 Penn Plaza New York, New York
Petitioner Appeared By:	Dianne Abeloff, Esq. Associate Counsel Bureau of Professional Medical Conduct NYS Department of Health
Respondent Appeared By:	James R. Slater, Esq. 10 East 40th Street New York, NY 10016 and Vincent M. DelGuidice, Esq. 511 Avenue U Brooklyn, NY 11223

STATEMENT OF CHARGES

The Statement of Charges has been marked as Petitioner's Exhibit 1 and hereto attached as

Appendix A

RESPONDENT'S MOTIONS

In papers filed after the conclusion of the Hearings, Respondent's counsel renewed his motion to strike the record of the hearing held on September 18, 1995 on the grounds that Respondent was deprived of his right to counsel. This motion was originally made at the hearing on October 24, 1995 and was denied at that time. (T. 124-132) For the reasons stated then (T. 132), the renewed motion is denied.

FINDINGS OF FACT

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 cited evidence.

1. Respondent is a physician licensed to practice Medicine in the State of New York and was so licensed at all times pertinent to this proceeding. (T.8; Ex. 2)
2. On or about November 30, 1993, Respondent was excluded, after a hearing, from the Medicaid Program for a period of five years for violating 18 NYCRR 515.2, specifically, Respondent billed for services not rendered, ordered unnecessary laboratory tests, failed to follow up on abnormal laboratory results, improperly performed spirometry tests and failed to document medical records in conformity with Medicaid requirements. (T. 11, Ex. 3)

3. From in or about August 1988 through in or about March 1989, Respondent provided prenatal care to Patient A. At the time of the care of Patient A, Respondent knew that he did not have admitting privileges at Our Lady of Mercy Hospital. (T. 38-34, 53, 55, 57, 63; Ex. 4, 5)
4. From in or about August 1989 through in or about March 1990, Respondent provided prenatal care to Patient B. At the time of the care of Patient B, Respondent knew that he did not have admitting privileges at Our Lady of Mercy Hospital. (T. 19-27, 36; Ex. 4,6)
5. Both Patient A and Patient B believed that Respondent was going to deliver their babies. (T. 21, lines 3 to 12; T. 40, lines 4 to 7; T. 54, line 23 to T. 55, line 5)
6. There was no testimony by Patient A or B that the Respondent ever affirmatively represented that he would delivery their babies. (T. 34, line 14 to T. 35, line 12; T.39, line 24 to T. 40, line 3)
7. Respondent and his two staff members testified that it was office policy to inform all patients that Respondent would not deliver their babies. (T. 72, line 22 to T. 73, line 21; T. 86, line 21 to T. 87, line 3; T. 202, line 17 to T. 203, line 13; T. 215, lines 7 to 20; T. 223, line 15 to T. 224, line 19; T. 233, line 16 to T. 234, line 21)
8. Seven other patients of the Respondent testified that they were informed that Respondent would not deliver their babies. (T. 153, lines 18 to 21; T. 165, lines 10 to 13; T. 173, lines

12 to 20; T. 181, lines 4 to 9; T. 189, lines 12 to 21; T. 193, lines 15 to 21; T. 196, line 19 to T. 192, line 2)

DISCUSSION

The Hearing Committee believes that the Respondent had an office policy to inform his patients that he would not personally deliver their babies. The Committee found Patients A and B to be credible in their testimony that they were not informed that Respondent would not deliver their babies. The other seven patients of Respondent who appeared as witnesses testified that they were informed. However, a comparison of their testimony shows the lack of uniform procedure in informing them and the generally haphazard manner in which the office policy was carried out. Furthermore, the medical records of Respondent not only failed to indicate anything concerning the delivery by Dr. Yara, but they generally were inadequate and failed to meet acceptable medical standards.

The Committee concluded that although this appeared to be negligent conduct by Respondent, it does not establish the "willfulness" necessary to sustain a charge of fraud. For this reason, the Committee determined that the Petitioner had not met its burden of proof with respect to the Second and Third Specifications of the charges.

The Committee noted that the Respondent's activities that fell within the First Specification of the Charges involved the general practice of medicine, and did not involve obstetrics or gynecology. The sanctions imposed herein reflect this fact.

CONCLUSIONS OF LAW

FIRST: Respondent is found to have engaged in professional misconduct as defined in N.Y. Education Law Sec. 6530 (9) (c) (McKinney Supp. 1995) by reason of having been found guilty in an adjudicatory proceeding of having violated a state regulation, pursuant to a final decision, and no appeal is pending, when the violation constitutes professional misconduct pursuant to N.Y. Education Law Secs. 6530 (2), (3) and (35), as set forth in Finding of Fact 2, supra.

SECOND: Respondent is found not to have engaged in professional misconduct as defined in N.Y. Education Law Sec. 6530 (2) (McKinney Supp. 1955) by practicing the profession of medicine fraudulently as alleged in the Second and Third Specification of the Statement of Charges, as set forth in Findings of Fact 3 through 8, supra.

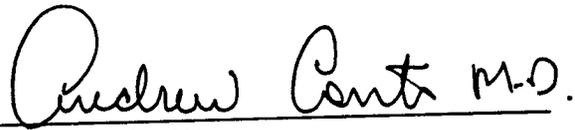
ORDER

The Hearing Committee determines and orders that Respondent's license to practice medicine be limited to the practice of obstetrics and gynecology until such time as he is able to convince the Office of Professional Medical Conduct that he has successfully completed additional accredited training in any other field or fields of medical practice.

The Hearing Committee further determines and orders that Respondent be placed on probation for five years during which time the Office of Professional Medical Conduct or its designee shall review the professional performance of Respondent. Respondent shall maintain

legible and complete medical records which accurately reflect evaluation and treatment of patients. Records shall contain a comprehensive history, physical examination findings, chief complaint, present illness, diagnosis and treatment. Respondent shall make available for review by the Office of Professional Medical Conduct or its designee complete copies of any and all medical and office records maintained by him.

Date: New York, N.Y.
December 24, 1995



Andrew Conti, M.D.
Chairperson

Kenneth Kowald
Kenneth J. Freese, M.D.

IN THE MATTER
OF
WILLIAM CAPOTE, M.D.

STATEMENT
OF
CHARGES

WILLIAM CAPOTE, M.D., the Respondent, was authorized to practice medicine in New York State on or about September 16, 1974, by the issuance of license number 121375 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. On or about November 30, 1993, Respondent was excluded, after a hearing, from the Medicaid Program for a period of five years for violating 18 NYCRR 515.2, specifically, Respondent: billed for services not rendered; ordered unnecessary laboratory tests; failed to follow up on abnormal laboratory results; improperly performed spirometry tests; and failed to document medical records in conformity with Medicaid requirements.
- B. From in or about August 1988 through in or about March 1989, Respondent provided prenatal care to Patient A. During that prenatal care he represented to Patient A that he would deliver her baby at Our Lady of Mercy Hospital, Bronx, New York. At the time of the representations to Patient A, Respondent knew that he did not have admitting privileges at Our Lady of Mercy Hospital.
- C. From in or about August 1989 through in or about March 1990, Respondent provided prenatal care to Patient B. During that prenatal care he represented to Patient B that he would deliver her baby at Our Lady of Mercy Hospital,

APPENDIX A

Bronx, New York. At the time of the representations to Patient B, Respondent knew that he did not have admitting privileges at Our Lady of Mercy Hospital.

SPECIFICATION OF CHARGES

**FIRST SPECIFICATION
EXCLUSION FROM MEDICAID**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(9)(c)(McKinney Supp. 1995) by reason of having been found guilty in an adjudicatory proceeding of violating a state statute or regulations, pursuant to a final decision, and no appeal is pending, and when the violation would constitute professional misconduct pursuant to N.Y. Educ. Law Sections 6530 (2),(3),(35), as alleged in the facts of the following:

1. Paragraph A.

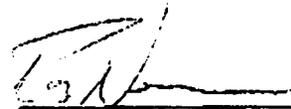
**SECOND THROUGH THIRD SPECIFICATIONS
FRAUDULENT PRACTICE**

Respondent is charged with committing professional misconduct as defined by N.Y. Educ. Law §6530(2)(McKinney Supp. 1995) by practicing the profession of medicine fraudulently as alleged in the facts of the following:

2. Paragraph B.

3. Paragraph C.

DATED: September 12, 1995
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

NYS DEPT. HEALTH ST BD PROF. MED. CONDUCT
COUNTY OF

GLOBAL PROCESS SERVICE CO., INC.
291 BROADWAY, SUITE 1504
NEW YORK, NY 10007
LIC. # 887-054

IN RE : WILLIAM CAPOTE, M. D.

- against -

Plaintiff(s)

- Defendant(s) -

Index No.

COURT DATE 09/18/95

AFFIDAVIT OF SERVICE

NOT. OF HEAR. ST. CHARGES

STATE OF NEW YORK: COUNTY OF NEW YORK ss:

SAMUEL PADMORE

BEING DULY SWORN DEPOSES AND SAYS DEPONENT IS NOT A PARTY TO THIS ACTION AND IS OVER THE AGE OF EIGHTEEN YEARS AND RESIDES IN THE STATE OF NEW YORK.

That on 08/13/95 at 0345PM Hours at 945 B MORRIS PARK AVENUE BRONX, NEW YORK
deponent served the within NOT. OF HEAR. ST. CHARGES

therein named,

on

WILLIAM CAPOTE, M. D.

INDIVIDUAL

A

by delivering a true copy of each to said personally; deponent knew the person so served to be the person described as said person therein. (S) He identified (her) himself as such.

CORPORATION

B

a (domestic) (foreign) corporation by delivering thereto a true copy of each to personally, deponent knew said corporation so served to be the corporation described in legal papers and knew said individual to be thereof

SUITABLE AGE PERSON

C

by delivering thereto a true copy of each to a person of suitable age and discretion. Said premises is recipient's (actual place of business) (dwelling house) (usual place of abode) within the state. (S) He identified (her) himself as of recipient

AFFIXING TO DOOR, ETC.

D

by affixing a true copy of each to the door of said premises, which is recipient's (actual place of business) (dwelling house) (usual place of abode) within the state. Deponent was unable, with due diligence to find recipient or a person of suitable age and discretion, thereto, having called there on the dates below:

MAILING USE WITH C or D

Deponent also enclosed a copy of same in a postpaid sealed wrapper properly addressed to the above recipient and deposited at said wrapper in (a post office) official depository under exclusive care and custody of the United States Postal Service within New York State.

Deponent further states that he describes the person actually served as follows					
Sex	Skin Color	Hair Color	Age (Approx.)	Height (Approx.)	Weight (Approx.)
MALE	BROWN	BROWN	45	5' 6	150

GLASSES

MILITARY SERVICE

Above person has asked, whether the recipient (s) was (were) in the military service of the State of New York or the United States and received a negative reply. Upon information and belief based upon the conversation and observation as aforesaid deponent avers that the recipient (s) is (are) not in the military service of the State of New York or the United States as that term is defined in the statutes of the State of New York or the Federal Soldiers and Sailors Civil Relief Act.

That at the time of such service deponent knew the person (s) so served as aforesaid to be the same person (s) mentioned and described as the defendant(s) in this action.

USE IN NYC CIVIL CT.

The language required by NYCRR 2900.2(e). (f) & (h) was set forth on the face of said summons (ss).

Sworn to before me on the

08/04/95

SAMUEL PADMORE
Notary Public in and for New York
No. 414764241
Qualified in Queens County

SAMUEL PADMORE
LICENSE No.

778 810

NEW YORK STATE DEPARTMENT OF HEALTH 19

NEW YORK STATE DEPARTMENT OF HEALTH 19

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

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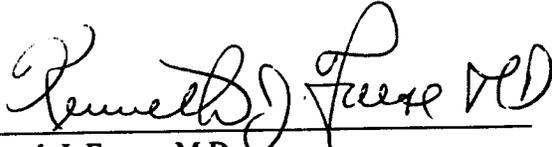
IN THE MATTER
OF
WILLIAM CAPOTE, MD.

AFFIRMATION
: OF MEMBER OF THE
: HEARING COMMITTEE
:

-----X

Kenneth J. Freese, M.D., a duly designated member of the State Board of Professional Medical Conduct and of the Hearing Committee thereof designated to hear the MATTER OF WILLIAM CAPOTE, M.D., hereby affirms that he was not present at the hearing sessions conducted on September 18 and October 25, 1995. He further affirms that he has read and considered the transcript of proceedings of, and the evidence received at such hearing days prior to deliberations of the Hearing Committee on the 28th day of November, 1995.

Date: East Meadow, New York



Kenneth J. Freese, M.D.