



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen
Executive Deputy Commissioner

September 16, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Robert S. Asher, Esq.
295 Madison Avenue
New York, New York 10017

Adam Faiwischewski, M.D.
66 Dover Street
Brooklyn, New York 11222

RE: In the Matter of Adam Faiwischewski, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 97-225) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Hedley Park Place
433 River Street - Fourth Floor
Troy, New York 12180

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 penalties **other than suspension or revocation** 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:

Larry Storch, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

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 black ink that reads "Tyrone T. Butler/nm". The signature is fluid and cursive, with the initials "nm" written at the end.

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

ADAM FAIWISZEWSKI, M.D.

**A proceeding before a Hearing Committee (Committee) from the State
Board for Professional Medical Conduct (BPMC) into charges concerning
professional misconduct by a physician.**

COPY
DETERMINATION
AND
ORDER
BPMC-97- 225

**Before: PETER D. KUEMMEL, R.P.A.,(Chair), RUFUS A. NICHOLS, M.D. and ROBERT
B. BERGMANN, M.D., Hearing Committee.**

A Notice of Hearing and Statement of Charges (Appendix II) alleges that 1.) a jury in Kings County convicted **ADAM FAIWISZEWSKI, M.D.** (Respondent) for grand larceny in the second degree and filing a false instrument in the first degree and that 2.) such convictions constitute physician professional misconduct under New York Law. This duly designated Committee conducted a hearing into the charges, pursuant to N.Y. Pub. Health Law § 230(10)(e)(McKinney's Supp. 1997), on July 24, 1997. At that hearing, the Committee received exhibits into evidence from both the Respondent and the New York State Department of Health (Petitioner) and the Respondent presented several witnesses, who testified under oath and subject to cross-examination. A stenographic reporter recorded the proceeding. After considering the entire record from the hearing, the Committee renders this Determination that includes our Findings of Fact and Conclusions of Law. We vote to sustain the charge against the Respondent. We vote further to revoke the Respondent's New York Medical License, to stay the revocation, to suspend the Respondent's License for a time concurrent with the incarceration period from his criminal sentence and to place the Respondent on probation for three years following the suspension.

Administrative Law Judge **JAMES F. HORAN**, served as the Committee's Administrative Officer and drafted this Determination. The Petitioner appeared by **DIANNE ABELOFF, ESQ.** The Respondent appeared by **ROBERT ASHER, ESQ.**

STATEMENT OF THE CASE

The Petitioner brought this case pursuant to N.Y. Pub. Health Law § 230(10)(p) (McKinney's Supp. 1997) and N. Y. Educ. Law § 6530(9)(McKinney's Supp. 1997). Those statutes provide for an expedited hearing when the case against a licensee arises solely from a prior criminal conviction in New York or another jurisdiction, or from a prior administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. In such an expedited hearing, the statutes limit the Committee to determining the nature and severity for the penalty to impose against the licensee.

In the instant case, the Petitioner alleges that the Respondent committed professional misconduct under N.Y. Educ. Law § 6530(9)(a)(i) (McKinney's Supp. 1997), because a Kings County Supreme Court Jury convicted the Respondent for committing crimes under New York Law, by billing the Medicaid Program for services the Respondent never rendered. The Respondent filed no answer denying the allegations, but rather introduced evidence in mitigation and asked that the Committee allow the Respondent to retain his medical license.

SIGNIFICANT LEGAL RULINGS

The Committee's Administrative Officer, Judge Horan, conducted pre-hearing conferences with the parties on July 17, 1997, by telephone, and on July 24, 1997, immediately before the hearing commenced. The conferences concerned the Respondent's request to delay the hearing, the Petitioner's request to preclude certain witnesses from testifying for the Respondent and the Administrative Officer's request that the parties stipulate as to what documentary evidence would enter the record.

Motion to Delay the Hearing: The Respondent requested a delay in the hearing until the Supreme Court Appellate Division for the Second Department renders a decision in the pending appeal to the criminal conviction that forms the basis for this disciplinary proceeding. The Petitioner

opposed the motion. During the telephone conference, the Administrative Officer rejected that motion, because a BPMC proceeding based upon a criminal conviction may proceed, even though there is a pending criminal appeal, Matter of Kirsch v. Board of Regents, 79 AD2d 823, 435 NYS2d 151 (Third Dept. 1980).

Motion to Preclude Witnesses: Prior to the hearing, the Respondent's counsel informed the Petitioner and the Administrative Officer that the Respondent wished to call three character witnesses: Rabbi Joel Smilchensky, New York City Councilman Howard Lasher and Joseph Iwanicki, M.D. During the telephone conference, the Petitioner objected to those witnesses testifying, because the Respondent was introducing written statements from all those persons along with other evidence in the Respondent's Exhibit A. The Administrative Officer ruled that the witnesses could testify.

Evidence: The Petitioner offered four exhibits into evidence:

Petitioner's 1 - Notice of Hearing and Statement of Charges.

Petitioner's 2 - The Respondent's Licensing Documents from the New York Education Department.

Petitioner's 3 - New York State Supreme Court Indictment.

Petitioner's 4 - New York State Supreme Court Conviction.

The Respondent had no objection to the Petitioner's Exhibits 1, 2 & 4. The Respondent requested, however, that the Administrative Officer delete certain pages from Exhibit 3, the twenty-three count Indictment against the Respondent, relating to counts that the Trial Judge dismissed (Indictment Counts 20 & 22) or on which the Jury found the Respondent not guilty at trial (Indictment Counts 2, 7, 13, 19 & 23). The Petitioner objected to the request because the certification authenticating the document related to the entire document. The Administrative Officer allowed the entire document into evidence, but on copies that the Committee received prior to the hearing, the Administrative Officer drew an X across the pages relating to Counts 2, 7, 13, 19, 20, 22 & 23 and he advised the Committee in writing to disregard those pages. The Respondent offered three documents into evidence:

Respondent A - Psychosocial Pre-Sentencing Report

Respondent B - Fee Chart, Larynx

Respondent C - Fee Chart, Trachea/Bronchi

The Petitioner had no objection to Respondent's A. Exhibits B & C constituted pages from the 1985 and 1996 Medicaid Provider (MMIS) Manual, that provided the codes under which physicians bill for certain medical procedures. When the Respondent offered those exhibits during the telephone conference, the Administrative Officer ruled that the Respondent would need to authenticate the pages first. The Respondent provided such authentication through his testimony at the hearing [see Transcript pages 32-33]. The Administrative Officer then admitted Exhibit B into evidence with no objection and admitted Exhibit C over the Petitioner's objection. During the telephone conference, the Respondent also requested to introduce a copy of the Respondent's brief to the Appellate Division for the Second Department, appealing his criminal conviction. The Petitioner objected. After reviewing the document, the Administrative Officer refused admission, because the document would serve only to relitigate the Respondent's criminal conviction.

The record also contained the hearing transcript, pages 1-70. The record closed with the transcript's receipt on August 14, 1997.

FINDINGS OF FACT

The Committee makes the following Findings of Fact after reviewing the entire record in this matter. The references in brackets following the Findings refer to the exhibits [Petitioner's/ Respondent's] or testimony from the transcript [Tr.] that the Committee found persuasive in arriving at a particular finding. If any evidence in the record appears to conflict with these findings, the Committee considered and rejected that evidence in favor of the cited evidence.

1. The New York State Education Department authorized the Respondent to practice medicine in New York State on April 3, 1981, by issuing license number 145419 [Petitioner Exhibit 2].

2. The Respondent practiced medicine previously in Israel, until emigrating to the United States in 1976 [Tr. 29-30].
3. The Respondent specializes in ear, nose and throat (ENT) and practices currently in Brooklyn, providing care to an immigrant population who speak Russian, Polish and Hebrew [Tr. 31].
4. The Respondent holds a long standing reputation in his community for providing medical care without regard to a patient's ability to pay [Tr. 12-13, 17, 20, 27; Respondent Exhibit A].
5. In his practice, the Respondent performed diagnostic procedures using an otolaryngal microscope [Tr. 32].
6. Few physicians used that instrument and until recently Medicaid had no code for the procedure [Tr. 32].
7. When billing Medicaid for such procedures during the years 1988-1992, the Respondent used the code number 31575, the code for the procedure under the Current Practice Codes (CPT) for insurers other than Medicaid [Tr. 33-35, 39-41, 56].
8. Under the Medicaid codes, however, the code number 31575 represented the code for Microlaryngoscopy, with laser excision of the papillomata [Respondent Exhibit B; Tr. 34].
9. The Respondent never performed a microlaryngoscopy with laser excision of papillomata [Tr. 35].
10. In August, 1995, a Kings County Grand Jury indicted the Respondent for Grand Larceny in the Second Degree (one count) and Offering a False Instrument for Filing in the First Degree (twenty-two counts) for billings to Medicaid from 1988-1992, for procedures the Respondent never performed [Petitioner's Exhibit 3].
11. A Kings County Supreme Court Jury found the Respondent guilty on the Larceny Count and on eleven False Filing Counts on June 25, 1996 [Petitioner's Exhibit 4].
12. On November 19, 1996, Supreme Court Justice Joseph Bruno sentenced the Respondent to serve four months incarceration, to pay a One Hundred Thousand Dollar (\$100,000.00) Fine,

to pay Sixty-Six Thousand One Hundred Dollars (\$66,100.00) Restitution and to serve five years on probation [Petitioner's Exhibit 4].

13. Although a stay exists against the Respondent's criminal conviction pending an appeal, the Respondent has paid the entire amount in Restitution [Tr. 49].
14. Following the Respondent's conviction, Medicare, Medicaid and private insurers have suspended the Respondent from participation in their programs [Tr. 50].
15. The Respondent continues to practice and still sees Medicare and Medicaid patients, even though he may not charge the patients for the care [Tr. 51]

CONCLUSIONS OF LAW

The Committee made the following conclusions pursuant to the above Findings of Fact. All conclusions resulted from a unanimous vote by the Hearing Committee.

The Hearing Committee concluded unanimously that the Petitioner sustained their burden to prove the charge. Preponderant evidence demonstrates that the Respondent stands convicted for a crime under New York Law. Such criminal conviction constitutes professional misconduct under N.Y. Educ. Law § 6530(9)(a)(i) (McKinney's Supp. 1997). After sustaining the charge, the Committee then considered whether to impose any sanction against the Respondent's New York License.

DETERMINATION AS TO PENALTY

Pursuant to the Findings of Fact and Conclusions of Law that we set forth above, the Committee votes unanimously to revoke the Respondent's New York License, to stay the revocation, to suspend the Respondent's License for a period to run concurrently with his incarceration and to place the Respondent on three years probation, following the suspension. We enumerate the probation terms in the Appendix I to this Determination. The Committee reached this Determination

after considering all the penalties available under N.Y. Pub. Health Law § 230-a (McKinney Supp. 1997) and after considering the Petitioner's request that we revoke the Respondent's License.

The Committee decided against revocation a.) due to the Respondent's service to his community, b.) because the criminal sentence and the penalty that we are imposing provide sufficient sanctions for the Respondent's misconduct and c.) because the criminal sentence and our penalty will provide a sufficient deterrent against such misconduct by others. First, the Respondent has long provided medical services without regard to a patient's ability to pay and he continues to do so now. The Respondent's fluency in many languages and his specialty make him a valuable asset in his community. The Committee believes that we will serve the public in the best way by allowing the Respondent to continue in practice. In addition, the Respondent indicated that the criminal action and this proceeding had ruined his life already. He faces time in jail, he must pay a substantial fine, he has already paid restitution and he may no longer bill government or private insurers for reimbursement. Although the Respondent committed serious misconduct, the penalties against him provide an appropriate penalty for that misconduct. If the Respondent continues in practice, he may accept only self-paying or non-paying patients, so no danger exists that the Respondent could repeat his misconduct. The Probation Terms include, at Paragraph 5, a provision allowing for inspection upon his billing as well as his patient records. Finally, the Committee concludes that no danger exists that our decision against revoking the Respondent's License will encourage other physicians to commit misconduct similar to the Respondent's, because such physicians would still have to be willing to risk incarceration, fines, restitution, suspension and losing any possibility for third party reimbursement to commit such misconduct.

Medical practice requires integrity and compassion. The Respondent has demonstrated integrity and compassion in his medical practice through the years. The Committee concludes from the evidence that the Respondent's misconduct resulted from inattention to or disregard for proper coding, rather than from greed or from a lack of integrity. Although the Respondent's actions constitute criminal and professional misconduct, the Committee concludes that the facts justify us in acting with compassion toward the Respondent and his patients and in allowing him to continue

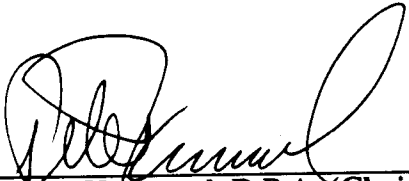
to practice medicine.

ORDER

Based upon the foregoing, **THE COMMITTEE ISSUES THE FOLLOWING ORDER:**

1. The Committee **SUSTAINS** the charge that the Respondent's criminal conviction constitutes misconduct under New York Law.
2. The Committee votes unanimously to **REVOKE** the Respondent's License, to **STAY** revocation, to **SUSPEND** the Respondent's License for a period to run concurrently with his incarceration from his criminal sentence, and, to **PLACE THE RESPONDENT ON PROBATION** for three years following his suspension, under the terms we set out in Appendix I to this Determination.

**Dated: Stony Brook, New York
September 15, 1997**



Peter D. Kuemmel, R.P.A. (Chair)

**Rufus A. Nichols, M.D.
Robert B. Bergmann, M.D.**



APPENDIX I
PROBATION TERMS

Terms of Probation

1. Respondent shall conduct himself/herself in all ways in a manner befitting his/her professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his/her profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), Corning Tower Building, 4th Floor, Empire State Plaza, Albany, New York 12237; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.
5. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, billing records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his/her staff at practice locations or OPMC offices.
6. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.
7. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.

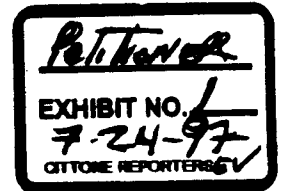
APPENDIX II
STATEMENT OF CHARGES

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

IN THE MATTER
OF
ADAM FAIWISZEWSKI, M.D.

NOTICE OF
REFERRAL
PROCEEDING

TO: ADAM FAIWISZEWSKI, M.D.
66 Dover Street
Brooklyn, N.Y. 11222



PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law §§230(10)(p) (McKinney Supp. 1997) and N.Y. State Admin. Proc. Act §§301-307 and 401 (McKinney 1984 and Supp. 1997). The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on July 24, 1997, at 10:00 a.m., at the offices of the New York State Department of Health, 5 Penn Plaza, Sixth Floor, New York, New York 10001.

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, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION (Telephone: (518-402-0748), (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, no later than twenty days prior to the scheduled date of the Referral Proceeding, as indicated above.

Pursuant to the provisions of N.Y. Pub. Health Law §230(10)(c), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. You may file a written brief and affidavits with the Committee. Six copies of all papers you submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen days prior to the scheduled date of the Referral Proceeding, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to §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. Pursuant to the terms of N.Y. State Admin. Proc. Act §401 (McKinney Supp. 1997) and 10 N.Y.C.R.R. §51.8(b), the Petitioner hereby demands disclosure of the evidence that the Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence and a description of physical or other evidence which cannot be

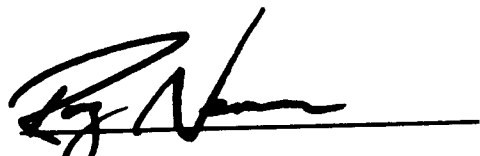
photocopied.

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: New York, New York
May 17 1997


ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be addressed to:

Dianne Abeloff
Associate Counsel
NYS Department of Health
Division of Legal Affairs
5 Penn Plaza, Suite 601
New York, New York 10001
(212) 613-2615

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

IN THE MATTER
OF
ADAM FAIWISZEWSKI, M.D.

STATEMENT
OF
CHARGES

ADAM FAIWISZEWSKI, M.D., the Respondent, was authorized to practice medicine in New York State on or about April 3, 1981, by the issuance of license number 145419 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. On or about November 19, 1996, after a jury trial, Respondent was convicted of violating N.Y. Penal Law §155.35, grand larceny in the second degree, and §175.35, offering a false instrument for filing in the first degree, in that he billed Medicaid in excess of fifty thousand dollars for services not rendered. Respondent was sentenced to four months of incarceration, ordered to pay a fine of \$100,000, and to make restitution in the amount of \$66,100 plus 5% interest. Respondent was also placed on probation for a period of five years.

SPECIFICATION OF CHARGES


CRIMINAL CONVICTION (N.Y.S.)

Respondent is charged with committing professional misconduct as defined in

N.Y. Educ. Law §6530(9)(a)(i)(McKinney Supp. 1997) by having been convicted of committing an act constituting a crime under New York state law as alleged in the facts of the following:

1. Paragraph A.

DATED: May 17, 1997
New York, New York



ROY NEMERSON
Deputy Counsel
Bureau of Professional
Medical Conduct