



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

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

May 21, 1996

Karen Schimke  
Executive Deputy Commissioner

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Frederick Zimmer, Esq.  
Assistant Counsel  
NYS Dept. of Health  
Corning Tower-Room 2438  
Albany, New York 12237

Jeffrey J. Sherrin, Esq.  
Sherrin & Glasel  
74 North Pearl Street  
Albany, New York 12207

Kenneth Malamud, M.D.  
San Gabriel Eye Center  
Georgetown, Texas 78626

Effective Date: 05/28/96

RE: In the Matter of Kenneth L. Malamud, M.D.

Dear Mr. Zimmer, Mr. Sherrin and Dr. Malamud:

Enclosed please find the Determination and Order (No. 96-127) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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.

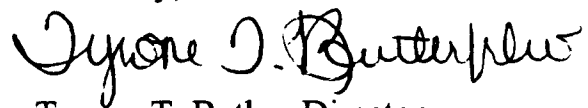
The notice of review served on the Administrative Review Board should be forwarded to:

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 black ink that reads "Tyrone T. Butler". The signature is written in a cursive style with a large initial "T" and a prominent flourish at the end.

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:rlw  
Enclosure

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

**COPY**

**IN THE MATTER**  
**-OF-**  
**KENNETH L. MALAMUD, M.D.**

**Respondent**

DETERMINATION

AND

ORDER

BPMC-96-127

A Notice of Referral Proceeding and Statement of Charges, both dated February 7, 1996, were served upon the Respondent, Kenneth L. Malamud, M.D. **WILLIAM P. DILLON, M.D. (Chair), JOSEPH G. CHANATRY, 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. **JEFFREY W. KIMMER, ESQ., ADMINISTRATIVE LAW JUDGE**, served as the Administrative Officer. The Department of Health appeared by Frederick Zimmer, Esq., Assistant Counsel. The Respondent appeared by Sherrin and Glasel, Jeffrey J. Sherrin of Counsel and was present at the proceeding. Evidence was received, statements were 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). This statute provides for an expedited proceeding 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 prior professional disciplinary action or criminal conviction. The scope of this expedited proceeding 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 § 6530(9)(b) (found guilty of misconduct by another state). The charges herein arise from Respondent informing a patient he would perform a certain procedure on the patient and then performing a different one and subsequently altering and placing addenda in this patient's record which were not in an acceptable format. The allegations in this proceeding are more particularly set forth in the Statement of Charges, a copy of which is attached to this Determination and Order as Appendix One.

## 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 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. KENNETH L. MALAMUD, M.D. (hereinafter, "Respondent"), was licensed to practice medicine in New York State on September 16, 1977, license number 132330 by the New York State Education Department. (Pet. Ex. #2).

2. On or about May 11, 1995, Respondent was found to have committed unprofessional conduct by the Texas State Board of Medical Examiners. (Pet. Ex. #3)

3. The Texas State Board of Medical Examiners based its determination on the fact that the Respondent informed a patient that a laser posterior capsulotomy was necessary, obtained the patient's consent to perform this procedure, performed a posterior capsule polishing instead and subsequently altered the patient's record by placing addenda in an unacceptable format. (Pet. Ex. # 3)

4. The Texas State Board of Medical Examiners issued a Public Reprimand of the Respondent and placed a number of conditions on the his practice of medicine for a period of two (2) years. (Pet. Ex. #3)

### **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 concluded that the Department has sustained its burden of proof in this matter. The preponderance of the evidence demonstrates that Respondent was found guilty of professional misconduct by a professional disciplinary agency of another state. The underlying conduct which was the basis for the finding by the Texas Board of Medical Examiners would constitute professional misconduct in New York. Specifically, the Hearing Committee found the Respondent's actions would fall within the definitions of misconduct set forth at N.Y. Education Law §6530(26) (Performing services which have not been authorized by the patient) and N.Y.

Education Law §6530(32) (Failing to maintain a record which accurately reflects the patient's treatment).

### **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 should be **Censured and Reprimanded**. Furthermore the Respondent is placed on one (1) year **Probation** under the terms and conditions set forth in Appendix II, attached hereto and made a part of this Order. This determination was reached upon due consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

The Hearing Committee found the Respondent to be credible and determined that he had truly learned from his mistake, thus revocation or suspension are not warranted. Additionally, the case involved one incident. He has complied with the conditions imposed by Texas and is being monitored there. Furthermore, he took the additional step of informing the local medical community in his geographic area of practice, about the action taken by Texas. It is the Hearing Committee's duty to protect the consumers of medical services of this state. The committee believes the imposition of a one (1) year probation with monitoring provisions relating to the Respondent's record keeping will fulfill that duty.

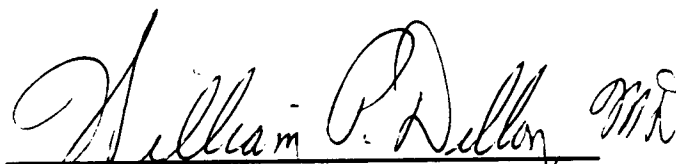
**ORDER**

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

1. The Specification of professional misconduct, as set forth in the Statement of Charges (Appendix I) is **SUSTAINED**;
2. Respondent's license to practice medicine in New York State is hereby **CENSURED AND REPRIMANDED**.
3. Respondent is hereby placed on **PROBATION** for a period of one (1) year pursuant to the terms set forth in Appendix II.

**DATED: Buffalo, New York**

*May 18<sup>th</sup>*, 1996



**WILLIAM P. DILLON, M.D. (CHAIR)**

Joseph G. Chanatry, M.D.

D. Marisa Finn

**TO: FREDERICK ZIMMER, ESQ.**  
Assistant Counsel  
Bureau of Professional Medical Conduct  
New York State Department of Health  
Corning Tower Building  
Empire State Plaza  
Albany, N.Y. 12237





**JEFFREY J. SHERRIN, ESQ.**  
Sherrin & Glasel  
74 North Pearl Street  
Albany, New York 12207

**KENNETH L. MALAMUD, M.D.**  
San Gabriel Eye Center  
950 University Avenue  
Georgetown, Texas 78626

## APPENDIX ONE

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

-----X  
IN THE MATTER : STATEMENT  
OF : OF  
KENNETH L. MALAMUD, M.D., : CHARGES  
: Respondent  
-----X

KENNETH L. MALAMUD, M.D., the Respondent, was authorized to practice medicine in New York State on September 16, 1977 by the issuance of license number 132330 by the New York State Education Department.

**FACTUAL ALLEGATIONS**

Respondent and the Texas State Board of Medical Examiners (hereinafter the "Texas Board") entered into an Agreed Order of May 11, 1995 pursuant to which Respondent received a public reprimand. The Agreed Order imposed remedial measures upon Respondent for a period of two years including, among other things, requirements that Respondent keep adequate ophthalmological medical records, that he adopt or establish a system of patient record keeping and billing to insure that all patient records accurately reflect the patient's name, service rendered, date of service and amount to be charged for the service and that Respondent not perform any medical procedure on a patient unless prior to performing the procedure, he thoroughly explained the procedure to the patient and obtained the patient's

prior written consent. Respondent was also required to obtain at least 50 hours of continuing medical education including at least 10 hours in ethics. The Texas Board found that Respondent violated §3.08(18) of the Medical Practice Act, V.A.C.S. Article 4495b [failing to practice medicine in an acceptable manner consistent with public health and welfare].

B. The conduct resulting in the Texas Board's finding that Respondent violated the Texas Medical Practice Act included his having seen patient J.A. in May 1989 for swelling to the patient's left eye. Respondent informed J.A. that a laser posterior capsulotomy was necessary and obtained J.A.'s consent to perform such a procedure. Respondent thereafter did not perform the posterior capsulotomy on patient J.A., and in lieu thereof, performed a posterior capsule polishing procedure with a laser. The written consent from J.A. was not for posterior capsule polishing but for posterior capsulotomy. Respondent's documentation of the posterior capsule polishing procedure was not adequate. Respondent admitted to altering J.A.'s medical record and placing addendums to the patient's record. Although the addendums were made, notations were not made so as to meet the recognized format for addendums to a patient's medical record. Respondent agreed that he kept inadequate medical records for patient J.A.

C. The conduct underlying the Texas Boards's finding that


Respondent violated the Texas Medical Practice Act would constitute professional misconduct under the laws of New York State under N.Y. Educ. Law §6530(32) (McKinney Supp. 1996) [failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient] and/or N.Y. Educ. Law §6530(26) (McKinney Supp. 1996) [performing professional services which have not been duly authorized by the patient or his/her legal representative].

#### SPECIFICATION

Respondent is charged with professional misconduct within the meaning of N.Y. Educ. Law §6530(9)(b) (McKinney's Supp. 1996) by reason of his 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, constitute professional misconduct under the laws of New York State in that Petitioner charges:

1. The facts in paragraphs A, B and C.

DATED: *February 7*, 1996  
Albany, New York

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

## APPENDIX II

### TERMS OF SUSPENSION

The Respondent's license to practice medicine in New York is placed on probation for a period of one (1) year. This probationary period will not take effect until informs the New York State Department of Health, Office of Professional Conduct (hereinafter OPMC) by certified mail that he intends to practice medicine in New York and is permanently residing in New York and he provides OPMC with certified documentation from the Texas State Board of Medical Examiners that he has satisfactorily complied with the requirements and remedial measures of that Board's Order of May 11, 1995.

### TERMS AND CONDITIONS OF PROBATION

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct imposed by law and by his profession.
2. Respondent shall comply with all federal, state and local laws, rules and regulations governing the practice of medicine in New York State.
3. Respondent shall submit prompt (within 20 days) written notification to the Board, addressed to the Director, Office of Professional Medical Conduct, Empire State Plaza, Corning Tower Building, Room 438, Albany, New York 12237, regarding any change in employment, practice, residence or telephone number, within or without New York State.
4. In the event that Respondent leaves New York to reside or practice outside the State, Respondent shall notify the Director of the OPMC in writing at the address indicated above, by registered or certified mail, return receipt requested, of the dates of his departure and return. Periods of residency or practice outside New York State shall toll the probationary period, which shall be extended by the length of residency or practice outside New York State.
5. During the period of probation, the Director of the Office of Professional Medical Conduct or designee, may review the professional performance of the Respondent. This review may include but not be limited to a random selection of the office records, patient records or hospital charts, interviews with or periodic visits with the Respondent

patient records or hospital charts, interviews with or periodic visits with the Respondent and his/her staff at the practice location(s) or one of the offices of the Office of Professional Medical Conduct.

6. The Respondent will make available for review by the Office of Professional Medical Conduct, or a physician selected by the Respondent and approved by the Office of Professional Medical Conduct, complete copies of any and all medical and office records selected by the Office of Professional Medical Conduct.

7. Any deviation from accepted medical practice identified during any of the reviews will be discussed with the Respondent. Any pattern of substandard care identified during the probation period may result in an independent medical review and could lead to a probation violation and/or additional investigation or charges.

8. Respondent will maintain legible and complete medical records which accurately reflect evaluation and treatment of patients. Records will contain a comprehensive history, physical examination findings, chief complaint, present illness, diagnosis and treatment. In cases of prescribing, dispensing, or administering of controlled substances, the medical record will contain all information required by state rules and regulations regarding controlled substances. Any pattern of substandard care identified during the probation period may result in an independent medical review and could lead to a probation violation and/or additional investigation or charges.

9. Respondent shall submit written proof to the Director of the OPMC at the address indicated above that he has paid all registration fees due and is currently registered to practice medicine as a physician with the New York State Education Department. If Respondent elects not to practice medicine as a physician in New York State, then he shall submit written proof that he has notified the New York State Education Department of that fact.

10. If there is full compliance with every term and condition set forth herein, Respondent may practice as a physician in New York State in accordance with these terms of probation the Determination and Order of the Board for professional Medical Conduct; provided, however, that on receipt of evidence of non-compliance or any other violation of the term(s) and condition(s) of probation, a violation of probation proceeding and/or such other proceeding as may be warranted, may be initiated against Respondent pursuant to New York Public Health Law §230 or §230(19) or any other applicable laws.