



# STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Dennis P. Whalen  
*Executive Deputy Commissioner*

May 26, 1999

## **CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Rafael M. Cappiello, M.D.  
2704 Brienza Way  
Las Vegas, Nevada 89117-3687

Mark T. Fantauzzi, Esq.  
NYS Department of Health  
Corning Tower – Room 2509  
Empire State Plaza  
Albany, New York 12237

### **RE: In the Matter of Rafael M. Cappiello, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No.99-113) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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.

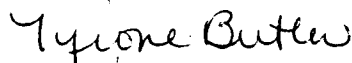
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, 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,



Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:mla  
Enclosure

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

**COPY**

**IN THE MATTER  
OF  
RAFAEL M. CAPPIELLO, M.D.**

**DETERMINATION  
AND  
ORDER  
BPMC- 99-113**

**TERESA S. BRIGGS, M.D.**, Chairperson, **LYON M. GREENBERG, M.D.**, and **IRVING S. CAPLAN**, duly designated members of the State Board for 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. **SUSAN S. PATTENAUDE, ESQ.**, Administrative Law Judge, served as Administrative Officer for the Hearing Committee.

The Department of Health appeared by **HENRY M. GREENBERG, GENERAL COUNSEL**, by **MARK T. FANTAUZZI**, Assistant Counsel.

Respondent, **RAFAEL M. CAPPIELLO, M.D.**, did not appear personally or by counsel.

A Hearing was held on March 11, 1999. Evidence was received and examined. A transcript of the proceeding was made. After consideration of the record, the Hearing Committee issues this Determination and Order, pursuant to the Public Health Law and the Education Law of the State of New York.

## STATEMENT OF CASE

This case was brought pursuant to New York State Public Health Law § 230(10)(p) [“P.H.L.”]. The statute provides for an expedited hearing where a licensee is charged solely with a violation of New York State Education Law § 6530(9) [“Ed. L.”]. 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 strictly limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Commissioner of the New York State Department of Health (“**Department**”), by the Executive Deputy Commissioner, issued an Order and Notice of Hearing, which Order determined that the continued practice of medicine in the State of New York by Rafael M. Cappiello, M.D. (“**Respondent**”) constitutes an imminent danger to the health of the people of the State and summarily suspended Respondent’s license to practice medicine in the State of New York pursuant to P.H.L. § 230(12) (Ex. 1).

Respondent is also charged with two specifications of professional misconduct, pursuant to Ed. L. §§ 6530(9)(b) and 6530(9)(d). A copy of the Notice of Hearing and Statement of Charges is attached and made a part of this Determination and Order.

The first specification charges Respondent with professional misconduct within the meaning of Ed. L. § 6530(9)(b) by reason of 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 could, if committed in New York State, constitute professional misconduct under the laws of New York State (Ex. 1).

The second specification charges Respondent with professional misconduct within the meaning of Ed. L. § 6530(9)(d) by reason of his having had disciplinary action taken against him

by a duly authorized professional disciplinary agency of another state, when the conduct resulting in the disciplinary action would, if committed in New York State, constitute professional misconduct under the laws of New York State (Ex. 1).

In order to find that Respondent committed § 6530(9)(b) misconduct, the Hearing Committee must determine: (1) whether Respondent was found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state and (2) whether Respondent's conduct on which the findings were based would, if committed in New York State, constitute professional misconduct under the laws of New York State.

In order to find Respondent guilty of § 6530(9)(d) misconduct, the Hearing Committee must determine: (1) whether Respondent had disciplinary action taken against him by a duly authorized professional disciplinary agency of another state and (2) whether Respondent's conduct on which the disciplinary action was based would, if committed in New York State, constitute professional misconduct under the laws of New York State..

### **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. All Findings and Conclusions herein were unanimous. The State was required to prove its case by a preponderance of the evidence.

1. Respondent was authorized to practice medicine in New York State on September 14, 1971 by the issuance of license number 110175 by the New York State Education Department (Exs. 1, 2). He has not been registered to practice medicine since December 31, 1988. (Ex. 2).

2. On March 5, 1999, Petitioner served on Respondent a copy of the Commissioner's Order and Notice of Hearing by certified mail, regular mail and overnight delivery (Exs. 4, 5). Petitioner also served on Respondent's attorney the Order and Notice of Hearing, Statement of Charges and Summary of Health Department Hearing Rules by facsimile and overnight delivery (Exs. 6, 7).

3. On March 8, 1999, Respondent was personally served a copy of the Commissioner's Order and Notice of Hearing, Statement of Charges & Summary of Health Department Hearing Rules (Ex. 8, T. 10).

4. On March 8, 1999, Respondent and Respondent's attorney, Michael Bohn, telephoned Assistant Counsel Fantauzzi and indicated that they would not be appearing at the March 11th hearing (T. 11). By telephone and letter dated March 10, 1999, which was sent to Mr. Bohn via facsimile, Mr. Fantauzzi confirmed this fact and the fact that Respondent would not be contesting the hearing (Ex. 9; T. 12-13).

5. The Nevada State Board of Medical Examiners ("**Nevada Board**") is a state agency charged with regulating the practice of medicine pursuant to the laws of the State of Nevada (Ex. 3).

6. On February 3, 1998, a complaint was filed with the Nevada Board charging Respondent with nine counts of malpractice, repeated malpractice, and having a pattern of practice of continual failure to exercise the skill or diligence or use the methods ordinarily exercised under the same circumstances by physicians in good standing practicing in the same specialty or field, which pattern is detrimental to the public health, welfare or safety of the citizens of the State of Nevada.

7. On February 4, 1998, the Nevada Board summarily suspended Respondent from the practice of medicine pending a hearing on the complaint.

8. In total, Respondent was charged in the accusations with unprofessional conduct in the care and treatment of seven patients during the period from on or about May 20, 1996 through on or about August 26, 1997.

9. After one day of hearings in Nevada, Respondent was found to have committed unprofessional conduct in that he: failed to properly diagnose and treat several patients; failed to immediately refer a patient to a hospital emergency room, to have the child transported by ambulance, and/or to call the authorities and have the child removed from the custodian of the child after presentation at the Center, for immediate transfer to an emergency room; failed to immediately refer a patient to an emergency room/orthopedic surgeon in a proper timely manner; failed to hospitalize a nine year old patient with a diagnosis of pneumonia and treated such patient with Rocephin I.M. for pneumonia as an outpatient; and failed to properly diagnose, follow-up, and hospitalize a patient (Exs. 1, 3).

10. On June 6, 1998, a final Order was issued by the Nevada Board which revoked Respondent's license to practice medicine in Nevada.

11. On March 5, 1999, the Commissioner of the New York State Department of Health, by the Executive Deputy Commissioner, issued an Order and Notice of Hearing, which Order determined that Respondent's continued practice of medicine in the State of New York constitutes an imminent danger to the health of the people of the State and summarily suspended Respondent's license to practice medicine in the State of New York pursuant to P.H.L. § 230(12).

12. The conduct resulting in the Nevada Board's disciplinary action against Respondent would constitute misconduct under the laws of New York State, pursuant to the following sections of New York State law:

1. Ed. L. § 6530(3) [negligence on more than one occasion];
2. Ed. L. § 6530(4) [gross negligence];
3. Ed. L. § 6530(5) [incompetence on more than one occasion]; and
4. Ed. L. § 6530(6) [gross incompetence].

13. The Hearing Committee accepts the 1998 Order of the Nevada Board and adopts it, including the Findings of Fact contained therein, as part of its own Findings of Fact.

## CONCLUSIONS OF LAW

The Hearing Committee makes the following conclusions, pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee.

The Hearing Committee concludes that the Factual Allegations (A, B and C), from the March 5, 1999 Statement of Charges, are SUSTAINED.

The Hearing Committee further concludes, based on the above Factual Conclusion, that the FIRST AND SECOND SPECIFICATIONS OF CHARGES in the Statement of Charges are SUSTAINED.

The Hearing Committee concludes that the Petitioner has shown by a preponderance of the evidence that Respondent was found guilty of improper professional practice and of professional misconduct by the state of Nevada and his conduct in Nevada would constitute professional misconduct under the laws of New York State and has thus met its burden of proof.

The Nevada Board is a duly authorized professional disciplinary agency. In February 1988, the State of Nevada, through the Nevada Board, instituted disciplinary action against Respondent.

The 1998 final Order of the Nevada Board contains facts and conclusions which establish that Respondent's conduct constituted grounds for revocation of his Nevada medical license.

The final Order has findings, by the Nevada Board, of guilt of violations of Nevada Statutes. The Nevada Board found that Respondent committed unprofessional conduct in the practice of medicine by committing malpractice on at least seven separate occasions in the care and treatment he provided to seven separate patients. In addition, Respondent committed unprofessional conduct in the practice of medicine by committing repeated acts of malpractice and by having a pattern of practice of continual failure to exercise the skill or diligence or use the methods ordinarily exercised under the same circumstances by physicians in good standing practicing in the same specialty or field, which pattern is detrimental to the health, welfare or safety of the citizens of the State of Nevada. Accordingly, Respondent was found guilty of improper professional practice or



professional misconduct by the Nevada Board and his license to practice medicine in that state was revoked.

Taking the findings of the Nevada Board as true, the Hearing Committee finds that the record establishes that Respondent's acts constituted negligence on more than one occasion, gross negligence, incompetence on more than one occasion and gross incompetence in that he: failed to properly diagnose and treat several patients; failed to immediately refer a patient to a hospital emergency room, to have the child transported by ambulance, and/or to call the authorities and have the child removed from the custodian of the child after presentation at the Center, for immediate transfer to an emergency room; failed to immediately refer a patient to an emergency room/orthopedic surgeon in a proper timely manner; failed to hospitalize a nine year old patient with a diagnosis of pneumonia and treated the patient with Rocephin I.M. for pneumonia as an outpatient; and failed to properly diagnose, follow-up and hospitalize a patient.

Since the Hearing Committee has determined that Respondent's conduct for which he was found guilty and subject to disciplinary action by the Nevada Board, if committed in New York State, would constitute professional misconduct under §§ 6530(3), 6530(4), 6530(5) and 6530(6) of the Education Law, Respondent has therefore committed professional misconduct pursuant to §§ 6530(9)(b) and 6530(9)(d) of the Education Law.

### **DETERMINATION**

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determines that Respondent's license to practice medicine in New York State should be REVOKED. The determination was reached upon due consideration of the full spectrum of penalties available pursuant to P.H.L. Sec 230-a, including revocation; suspension and/or probation; limitations; a course of education or training; performance of public service; censure and reprimand, and the imposition of monetary penalties.

In arriving at the severity of the penalty to be imposed, the Hearing Committee reviewed all of the evidence presented by the Petitioner, including the Nevada Order, issued after a full hearing was held, and the evidence indicating that Respondent chose not to appear or to contest the New York charges. The record clearly establishes that Respondent committed significant misconduct in Nevada. Based on all the evidence, the Hearing Committee thus determines that the same actions taken in the State of Nevada are necessary in New York to adequately protect the People of the State of New York. Accordingly, Respondent's license to practice medicine in the State of New York should be revoked.

The Hearing Committee concludes that if this case had been held in New York, on the facts presented relative to respondent's acts of gross negligence, repeated acts of negligence, gross incompetence and repeated acts of incompetence, the Hearing Committee would have voted unanimously for revocation of Respondent's license.

The Hearing Committee considers Respondent's misconduct to be very serious. With a concern for the health and welfare of patients in New York State, the Hearing Committee determines that revocation of respondent's license is the appropriate sanction to impose under the totality of the circumstances presented.

### **ORDER**

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

1. The First and Second Specifications of professional misconduct contained in the Statement of Charges are **SUSTAINED**; and
2. Respondent's license to practice medicine in the State of New York is hereby **REVOKED**.

**DATED:** Albany, New York  
May 24, 1999



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**TERESA S. BRIGGS, M.D.**  
Chairperson

**LYON M. GREENBERG, M.D.**  
**IRVING S. CAPLAN**

## **Appendix 1**

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

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IN THE MATTER : COMMISSIONER'S  
OF : ORDER AND  
RAFAEL M. CAPPIELLO, M.D. : NOTICE OF HEARING

-----X

TO: RAFAEL M. CAPPIELLO, M.D.  
2704 BRIENZA WAY  
LAS VEGAS, NEVADA 89117-3687

The undersigned, Dennis P. Whalen, Executive Deputy Commissioner of the New York State Department of Health, after an investigation, upon the recommendation of a committee on professional medical conduct of the State Board for Professional Medical Conduct, and upon the Statement of Charges attached hereto and made a part hereof, has determined that the continued practice of medicine in the State of New York by Rafael M. Cappiello, M.D., the Respondent, constitutes an imminent danger to the health of the people of this state.

It is therefore:

ORDERED, pursuant to N.Y. Pub. Health Law Section 230(12), that effective immediately Rafael M. Cappiello, M.D., Respondent, shall not practice medicine in the State of New York. This Order shall remain in effect unless modified or vacated by the Commissioner of Health pursuant to N.Y. Pub. Health Law Section 230(12).

PLEASE TAKE NOTICE that a hearing will be held pursuant to the provisions of N.Y. Pub. Health Law Section 230, and N.Y. State Admin. Proc. Act Sections 301-307 and 401. The hearing

will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on the 11th day of March, 1999 at 10:00 a.m. in the forenoon at the Hedley Park Place, 5th Floor, 433 River Street, Troy, New York 12180, and at such other adjourned dates, times and places as the committee may direct. The Respondent may file an answer to the Statement of Charges with the below-named attorney for the Department of Health.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. The Respondent shall appear in person at the hearing and may be represented by counsel. The Respondent has the right to produce witnesses and evidence on his behalf, to issue or have subpoenas issued on his behalf for the production of witnesses and documents and to cross-examine witnesses and examine evidence produced against him. A summary of the Department of Health Hearing Rules is enclosed. 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.

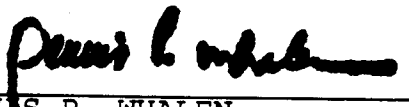
The hearing will proceed whether or not the Respondent appears at the hearing. Scheduled hearing dates are considered dates certain and, therefore, adjournment requests are not routinely granted. Requests for adjournments must be made in writing to the Administrative Law Judge's Office, Hedley Park

Place, 433 River Street, 5th Floor, Troy, New York 12180  
(518-402-0751), upon notice to the attorney for the Department of  
Health whose name appears below, and at least five days prior to  
the scheduled hearing date. Claims of court engagement will  
require detailed affidavits of actual engagement. Claims of  
illness will require medical documentation.

At the conclusion of the hearing, the committee shall make  
findings of fact, conclusions concerning the charges sustained or  
dismissed, and, in the event any of the charges are sustained, a  
determination of the penalty or sanction to be imposed or  
appropriate action to be taken. Such determination may be  
reviewed by the administrative review board for professional  
medical conduct.

THESE PROCEEDINGS MAY RESULT IN A  
DETERMINATION THAT YOUR LICENSE TO PRACTICE  
MEDICINE IN NEW YORK STATE BE REVOKED OR  
SUSPENDED, AND/OR THAT YOU BE FINED OR  
SUBJECT TO OTHER SANCTIONS SET FORTH IN NEW  
YORK PUBLIC HEALTH LAW SECTION 230-a. YOU  
ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT  
YOU IN THIS MATTER.

DATED: Albany, New York  
March 5, 1999

  
DENNIS P. WHALEN  
Executive Deputy Commissioner

Inquiries should be directed to:

Mark T. Fantauzzi  
Assistant Counsel  
NYS Department Of Health  
Division Of Legal Affairs  
Bureau Of Professional Medical Conduct  
Corning Tower Building  
Room 2509  
Empire State Plaza  
Albany, New York 12237-0032  
(518) 473-4282



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

-----X

IN THE MATTER : STATEMENT  
OF : OF  
RAFAEL M. CAPPIELLO, M.D. : CHARGES

-----X

Rafael M. Cappiello, M.D., the Respondent, was authorized to practice medicine in New York State on September 14, 1971 by the issuance of license number 110175 by the New York State Education Department.

**FACTUAL ALLEGATIONS**

A. On or about June 6, 1998 the Board of Medical Examiners of The State of Nevada (hereinafter "Nevada Board") issued a Findings of Fact, Conclusions of Law, And Order (hereinafter "Nevada Order"). That Nevada Order found, among other things, that the Respondent's: failure to properly diagnose and treat a patient, constituted malpractice; failure to immediately refer a patient to a hospital emergency room, to have the child transported by ambulance, and/or to call the authorities and have the child removed from the custodian of the child after presentation at the Center, for immediate transfer to an emergency room, constituted malpractice; failure to immediately refer a patient to an emergency room/orthopedic surgeon in a proper timely manner, constituted malpractice; failure to

properly diagnose and treat a patient, constituted malpractice; treatment of a patient coupled with his failure to hospitalize a nine year old patient with a diagnosis of pneumonia and treating with Rocephin I.M., for pneumonia as an out patient, constituted malpractice; failure to properly diagnose and treat a patient constituted malpractice; and failure to properly diagnose, follow-up, and hospitalize a patient on or before May 23, 1996, constituted malpractice. The Nevada Order ordered that the Respondent's license to practice medicine in the State of Nevada is Revoked.

B. The Nevada Order referred to in Paragraph A above was predicated upon a complaint filed on February 3, 1998, and a follow-up to an Order of Summary Suspension of License to Practice Medicine In The State of Nevada filed February 4, 1998 which summarily suspended the Respondent's license to practice medicine in the State of Nevada.

C. The conduct resulting in the Nevada Board's disciplinary action against Respondent would constitute misconduct under the laws of New York State, pursuant to the following sections of New York State law:

1. N.Y. Education Law Section 6530 (3) [negligence on more than one occasion];
2. N.Y. Education Law Section 6530 (4) [gross negligence];
3. N.Y. Education Law Section 6530 (5) [incompetence on more than one occasion];
4. N.Y. Education Law Section 6530 (6) [gross negligence].

## **SPECIFICATIONS**

### **FIRST SPECIFICATION**

Respondent is guilty of violating N.Y. Education Law § 6530 (9) (b) by reason of 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 could, if committed in New York State, constitute professional misconduct under the laws of New York State, in that the Petitioner charges the following:

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

### **SECOND SPECIFICATION**

Respondent is guilty of professional misconduct under N.Y. Education Law § 6530 (9) (d) by reason of his having had disciplinary action taken against her by a duly authorized professional disciplinary agency of another state, when the conduct resulting in the disciplinary action would, if committed in New York State, constitute professional misconduct under the laws of New York State, in that the Petitioner charges:

2. The facts in paragraphs A, B, and/or C.

DATED: *February 16*, 1999  
Albany, New York

*Peter D. Van Buren*

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