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**BEFORE THE BOARD OF MEDICAL EXAMINERS
IN THE STATE OF ARIZONA**

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IN THE MATTER OF:

MITCHELL L. KAPHAN, M.D.,
Holder of License No. 18517
For the Practice of Medicine
In the State of Arizona

No. 00F-12573-MDX
FINDINGS OF FACT,
CONCLUSION OF LAW,
AND ORDER

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Formal hearing was held in this matter on December 13, 2000. On December 21, 2000, Brian Brenden Tully, Administrative Law Judge for the Office of Administrative Hearings, entered his recommended decision in this matter.

On January 19, 2001, the Arizona Board of Medical Examiners ("the Board") considered the proposed findings of fact, conclusions of law and recommended order of the Administrative Law Judge.

Based upon the entire record, the Board accepted the proposed Findings of Fact and Conclusions of Law of the Administrative Law Judge, and the proposed order.

FINDINGS OF FACT

1. The Arizona State Board of Medical Examiners ("BOMEX") is the duly constituted authority for licensing and regulating the practice of medicine in the State of Arizona.
2. The Respondent, Mitchell L. Kaphan, M.D., is the holder of License Number 18517 for the practice of allopathic medicine in the State of Arizona
3. Dr. Kaphan was also authorized to practice medicine in the State of New York. He had been issued License Number 139985 by the New York State Education Department. That medical license has been revoked.

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4. This matter came to formal hearing concerning the matters set forth in the Complaint and Notice of Hearing issued by BOMEX dated October 24, 2000. BOMEX alleges that Dr. Kaphan has committed acts constituting unprofessional conduct.
 5. On or about July 17, 1998, a Hearing Committee of the New York State Board of Professional Medical Conduct ("New York Board") issued a Determination and Order that sustained charges against Dr. Kaphan for negligence on more than one occasion, gross negligence, incompetence on more than one occasion, and unwarranted treatment. Dr. Kaphan was represented by legal counsel in those administrative proceedings.
 6. The New York Board's Hearing Committee issued findings that on three separate occasions Dr. Kaphan performed orthopedic surgery on the wrong site.
 7. The Hearing Committee determined that Dr. Kaphan committed professional misconduct in his treatment of Patient A, who was assigned to him to perform an open reduction and internal fixation. During the period of treatment regarding Patient A.:
 - a) Dr. Kaphan failed to perform an adequate pre-operative work-up, including but not limited to failing to perform an adequate physical examination; failure to adequately review Patient A's x-rays prior to surgery; failure to obtain adequate confirmation of which hip required surgery; and failure to adequately review Patient A's hospital chart prior to surgery.
 - b) On or about December 19, 1995, Dr. Kaphan incorrectly performed surgery on Patient A's left hip, instead of the fractured right hip.
 8. The Hearing Committee determined that Dr. Kaphan committed professional misconduct in his treatment of Patient B, who he diagnosed with having "tear medial meniscus left knee" and admitted her to Westchester Square Medical Center in order to perform athroscopic surgery on her left knee. Dr. Kaphan's professional misconduct involved:

1 a) Dr. Kaphan's failure to perform an adequate pre-operative
2 work-up, including but not limited to failing to adequately
3 review his office records prior to surgery and failing to
4 adequately review Patient B's hospital records.

5 b) On or about February 19, 1992, Dr. Kaphan incorrectly
6 performed arthroscopic surgery on Patient B's right knee,
7 instead of the injured left knee.

8 9. The Hearing Committee determined that Dr. Kaphan committed professional
9 misconduct in his treatment of Patient C. On or about April 1, 1987, Patient C had
10 been admitted to St. Barnabas Hospital, Bronx, New York. Patient C was diagnosed
11 with a fracture of the right femoral neck. Dr. Kaphan scheduled Patient C's surgery for
12 the following day to perform a cemented bipolar hip athroplasty. During the period of
13 treatment:

14 a) Dr. Kaphan failed to perform an adequate pre-operative
15 work-up, including but not limited to reviewing and/or
16 obtaining adequate radiographic confirmation of which hip
17 required surgery.

18 b) On or about April 2, 1987, Dr. Kaphan incorrectly made a
19 surgical approach and incision to Patient C's left hip,
20 instead of the injured right hip.

21 10. The Hearing Committee dismissed the Third, Fourth, Sixth, Seventh, Eighth, Ninth
22 and Eleventh Specifications of the Statement of Charges.

23 11. The Hearing Committee ordered that Respondent's license to practice medicine as a
24 physician in New York State be suspended for one year commencing on the effective
25 date of the Determination and Order, and it stayed that suspension.

26 12. The Hearing Committee placed Respondent on probation for five years and ordered
27 that a practice monitor be assigned to preoperatively review all Respondent's surgical
28 cases during such probation period.

29 13. On or about October 19, 1998, the New York State Administrative Review Board
30 ("Review Board") issued a Determination and Order that sustained the Hearing

1 Committee's findings of fact and conclusions of law. Dr. Kaphan was represented by
2 legal counsel in those administrative proceedings.

3 14. The Review Board considered the record and considered the parties' briefs, then
4 made the following determinations:

5 a) The Review Board voted 5-0 to sustain the Hearing
6 Committee's determination that Dr. Kaphan practiced with
7 negligence on more than one occasion in treating Patients
8 A, B and C.

9 b) The Review Board voted 5-0 to sustain all of the Hearing
10 Committee's other determinations sustaining or dismissing
11 charges, except for the charge that Dr. Kaphan performed
12 unwarranted surgery on Patient B. The Review Board
13 voted 4-1 to sustain that charge

14 c) The Review Board voted 5-0 to overturn as inappropriate
15 the sanction the Hearing Committee imposed; and

16 d) The Review Board voted 4-1 to revoke Dr. Kaphan's
17 license to practice medicine in New York State.

18 15. In voting 5-0 to reject the Hearing Committee's penalty, the Review
19 Board concluded that

20 "...the Respondent's negligent actions in these cases
21 implicates his ability to practice medicine in general, rather
22 than merely his practice as a surgeon. The Respondent failed
23 to perform adequate examinations on patients, ignored
24 medical records and x-rays and ignored opinions by other
25 physicians. Those deficiencies in practice would pose a
26 danger to patients no matter what area the Respondent chose
27 to practice, even if we did ban him from performing surgery."

28 16. In voting 4-1 to revoke Dr. Kaphan's New York State medical license, the Review
29 Board opined that

1 "...Respondent has failed to learn from his mistakes or take
2 sufficient steps to avoid reoccurrences. We see no hope that
3 the Respondent will correct his negligent practice or that any
4 measures less severe than revocation will correct the
5 Respondent's deficiencies sufficiently so that he would no
6 longer present a danger to patients, either as a surgeon or as
7 a physician practicing in another medical specialty. The ARB
8 concludes that our responsibility to protect the public health
9 requires that we remove the Respondent from medical
10 practice in New York."

11 17. On or about November 14, 1998, while submitting an application for the renewal of
12 his Arizona medical license, Dr. Kaphan advised BOMEX that the New York Board
13 had revoked his license to practice medicine in that state. Dr. Kaphan also advised
14 BOMEX that he would appeal the revocation of his New York medical license.

15 18. On or about January 27, 2000, the Appellate Division of the New York State
16 Supreme Court issued a Memorandum and Judgment in an appeal of the
17 Administrative Review Board's Determination and Order 98-142. Dr. Kaphan was
18 represented by legal counsel in those judicial proceedings. The Court concluded,
19 among other things, that

20 "...the appropriate penalty was to revoke the petitioner's
21 license in its entirety because his deficiencies impaired his
22 ability to practice medicine in general."

23 19. Dr. Kaphan currently resides in the State of New York.

24 20. Dr. Kaphan is not practicing, nor planning to practice, allopathic medicine in the State
25 of Arizona.

26 21. Dr. Kaphan is maintaining his Arizona medical license so that he may continue to be
27 a deployable asset to the United States Army in the capacity of Orthopedic Surgeon at
28 the rank of Lieutenant Colonel.
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1 22. Dr. Kaphan does admit to the allegations of the professional misconduct concerning
2 his medical care and treatment of Patients A, B and C which were the subject of the
3 medical disciplinary action in New York.

4 23. Dr. Kaphan does admit to negligence on more than one occasion; gross negligence
5 on one occasion; incompetence on more than one occasion; and unwarranted
6 treatment on one occasion.

7 24. As a physician, Dr. Kaphan is found to pose a threat to the public health not only to
8 the citizens of the State of New York, but also to the citizens of the State of Arizona
9 and the members of the United States Armed Forces.

10 **CONCLUSIONS OF LAW**

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- 12 1. BOMEX possesses jurisdiction over the subject matter herein and over Dr. Kaphan.
- 13 2. The conduct and circumstances described in the above Findings of Facts constitute
- 14 unprofessional conduct pursuant to A.R.S. § 32-1401(25)(o) (action taken against a
- 15 doctor of medicine by another licensing or regulatory jurisdiction due to that doctor's
- 16 mental or physical inability to engage safely in the practice of medicine, his medical
- 17 incompetence or for unprofessional conduct as defined by that jurisdiction and
- 18 which corresponds directly or indirectly to an act of unprofessional conduct
- 19 proscribed by Arizona law).
- 20 3. The New York State Board of Professional Medical Conduct revoked Dr. Kaphan's
- 21 license to practice medicine in the State of New York on the basis of certain findings
- 22 of unprofessional conduct. Those findings of unprofessional conduct correspond
- 23 directly or indirectly to the following acts of unprofessional conduct proscribed by
- 24 Arizona law:

- 25 a) A.R.S. § 32-1401(25)(l) (conduct that the Board
- 26 determines is gross malpractice, repeated malpractice or
- 27 any malpractice resulting in the death of a patient);
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1 b) A.R.S. § 32-1401(25)(q) (any conduct or practice which
2 is or might be harmful or dangerous to the health of the
3 patient or the public); and

4 c) A.R.S. § 32-1401(25)(II) (conduct that the Board
5 determines is gross negligence, repeated negligence or
6 negligence resulting in harm to or the death of a patient).

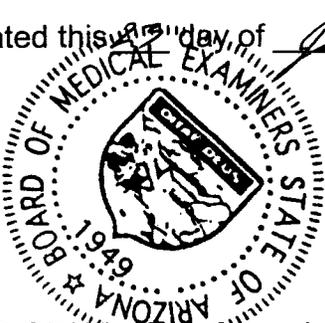
7 4. The evidence of record is more than adequate to support the revocation of Dr.
8 Kaphan's license to practice medicine in the State of Arizona. Despite a
9 determination by the New York Board for Professional Medical Conduct that Dr.
10 Kaphan was a threat to the public health and would continue to be so in any practice
11 of medicine, a determination upheld by the Appellate Division of the New York
12 Supreme Court, Dr. Kaphan continues to practice medicine using his Arizona
13 medical license.

14 5. The evidence of record supports the revocation of Dr. Kaphan's Arizona medical
15 license in order to protect the public health.

16 **ORDER**

17 In view of the foregoing, License Number 18517 issued to Mitchell Kaphan, M.D.,
18 for the practice of medicine in the State of Arizona is revoked.

19 Dated this 23rd day of January, 2001.



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21
22 *Tom Adams*
23 *for* CLAUDIA FOUTZ
24 Executive Director

25 ORIGINAL of the foregoing filed
26 this 23 day of January, 2001, with:

27 Arizona Board of Medical Examiners
28 9545 E. Doubletree Ranch Road
29 Scottsdale, AZ 85258

1 Executed copy transmitted via certified mail
2 this 23 day of January, 2001, to:

3 Mitchell L. Kaphan, M.D.
4 3612 East Tremont Av.
5 Bronx, NY 10465

6 Copy of the foregoing mailed this
7 23 day of January, 2001, to:

8 Steven A. Wolf, AAG
9 Arizona Attorney General Office
10 1275 West Washington
11 Phoenix, AZ 85007

12 R. L. Higgins - Genth
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