



JON S. CORZINE  
Governor

## New Jersey Office of the Attorney General

Division of Consumer Affairs  
State Board of Medical Examiners  
P.O. Box 183, Trenton, NJ 08625-0183



ANNE MILGRAM  
Attorney General

DAVID SZUCHMAN  
Director

June 15, 2009

**VIA FACSIMILE**

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**FILED**

JUNE 15, 2009

**NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS**

Re: In the Matter of Jacques G. Losman, M.D.

Dear Counsel:

This letter is to advise you that, acting in my executive capacity as President of the State Board of Medical Examiners, I have granted Dr. Losman's request that the commencement of the suspension of his license begin at 12:01 a.m. on Tuesday, June 16, 2009.

As you are both aware, the Board's initial Order had provided that the suspension was to commence on June 12, 2009. On June 11, 2009, the Appellate Division entered an Order granting an "emergent stay of the [Board's] Order ... to remain in effect until the Court acts upon the application. That stay remained in place until this morning (June 15, 2009), when the Appellate Division entered a second Order denying Dr. Losman's "emergent application for relief from Order of License Suspension pending appeal." Dr. Losman is now requesting that the starting date for the suspension of his license be deferred until the end of the day, and the Attorney General has consented to Dr. Losman's request.

Given the timing of the Appellate Division's actions, and the absence of any objection on the part of the Attorney General to Dr. Losman's request, I will grant Dr. Losman's request to defer the starting date of the suspension ordered by the Board until 12:01 a.m. on Tuesday, June 16, 2009. The active period of suspension shall continue through and including September 15, 2009.

Joseph M. Gorrell, Esq.  
Brach Eichler L.L.C.

-2-

June 15, 2009

Kevin R. Jespersen, D.A.G.

Re: In the Matter of Jacques G. Losman, M.D.

All other terms of the Board's "Order Adopting Findings of Fact and Conclusions of Law within Initial Decision and Modifying Penalty," filed May 28, 2009, effective nunc pro tunc May 13, 2009, remain unchanged and in full force and effect.

Very truly yours,

NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS

By:

  
Paul G. Mendelowitz, M.D.  
Board President

PCM/SF/ccf/pah

cc: William Roeder, Executive Director, State Board  
Bindi Merchant, D.A.G.  
Steven Flanzman, S.D.A.G.

ORDER ON EMERGENT APPLICATION

IN THE MATTER OF THE  
SUSPENSION OF THE LICENSE  
OF JACQUES LOSMAN, M.D. TO  
PRACTICE MEDICINE AND  
SURGERY IN THE STATE OF NEW  
JERSEY

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-  
MOTION NO. M-  
BEFORE PART: I  
JUDGE(S): CARCHMAN  
PARRILLO

EMERGENT APPLICATION  
FILED: June 11, 2009

BY: Brach Eichler, LLC,  
attorneys for appellant (Eric  
W. Gross, of counsel and on  
the brief).

ANSWER(S) FILED: June 12, 2009

BY: Anne Milgram, Attorney  
General, attorney for  
respondent (Bindi Merchant,  
Deputy Attorney General, on  
the brief).

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON  
THIS 15 DAY OF JUNE, 2009, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR RELIEF  
FROM ORDER OF LICENSE SUSPENSION  
PENDING APPEAL

GRANTED DENIED OTHER  
(  ) (  ) (  )

SUPPLEMENTAL:

FOR THE COURT:

  
Anthony J. Parrillo, J.A.D.

ORDER ON EMERGENT APPLICATION  
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IN THE MATTER OF THE  
SUSPENSION OF THE LICENSE  
OF JACQUES LOSMAN, M.D. TO  
PRACTICE MEDICINE AND  
SURGERY IN THE STATE OF NEW  
JERSEY

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-  
MOTION NO. M-  
BEFORE PART: I  
JUDGE(S): PARRILLO

EMERGENT APPLICATION  
FILED: June 11, 2009

BY: Brach Eichler, LLC,  
attorneys for appellant (Eric  
W. Gross, of counsel and on  
the brief).

ANSWER(S) FILED:

BY:

APPEARANCE ONLY:

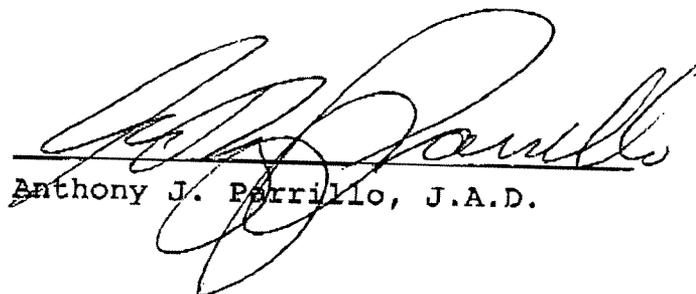
ORDER  
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THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON  
THIS 11 DAY OF JUNE, 2009, HEREBY ORDERED AS FOLLOWS:

AN EMERGENT STAY OF THE ORDER BELOW, PURSUANT TO R. 2:9-8, TO REMAIN IN EFFECT UNTIL THE COURT ACTS UPON THE APPLICATION.	GRANTED ( <input checked="" type="checkbox"/> )	DENIED ( <input type="checkbox"/> )	OTHER ( <input type="checkbox"/> )
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SUPPLEMENTAL: THE STATE'S BRIEF TO BE FILED BY NOON ON JUNE 12,  
2009. APPELLANT'S BRIEF TO BE FILED BY 4:30PM ON JUNE 11, 2009.  
BRIEFS ARE TO BE FILED DIRECTLY IN THE CHAMBERS OF JUDGES  
CARCHMAN AND PARRILLO.

FOR THE COURT:

  
\_\_\_\_\_  
Anthony J. Parrillo, J.A.D.

**FILED**

June 11, 2009

**NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
STATE BOARD OF MEDICAL EXAMINERS

In the Matter of the Suspension  
or Revocation of the License of:

JACQUES LOSMAN, M.D.

to Practice Medicine and Surgery  
in the State of New Jersey

ORDER DENYING MOTIONS FOR  
RECONSIDERATION AND STAY

This matter was reopened before the New Jersey State Board of Medical Examiners (the "Board") on June 4, 2009, upon respondent's filing of a notice of motion seeking Board reconsideration of our determination to impose a three month period of active suspension of the license of respondent Jacques Losman, M.D., and for a stay of the imposition of the suspension pending our making a determination upon the motion for reconsideration. In support of his application, respondent filed a letter brief dated June 4, 2009, wherein he argued that the Board should reconsider its determination to suspend the license of Dr. Losman because the Board failed to "take into consideration the effect upon the public that would result from an active suspension upon Dr. Losman."

Respondent's Letter Brief dated June 4, 2009, p. 2.

In support of his motion, respondent submitted a letter dated June 1, 2009, from William McHugh, M.D., Chief Medical

Officer of Trinitas Regional Medical Center. Therein, Dr. McHugh stated that Dr. Losman's "loss, even for three months, would be a major setback in our ability to care for these people [patients requiring use of hyperbaric oxygen in advanced wound care]." Respondent submitted a second letter from Robert A Wanniner, III, M.D., Chief Medical Officer of Diversified Clinical Services, wherein Dr. Wanniner stated that he was "concern[ed] that any action ... that prevents Dr. Losman from continuing to provide medical care to patients currently being treated at the Wound Care Center could have adverse and unanticipated consequences for their outcomes." Finally, Dr. Losman submitted copies of a petition that was signed by over sixty members of the Medical Staff of Trinitas Hospital - the petition included statements, among other items, that Dr. Losman "provides an invaluable service in treating patients with serious wounds at the Wound Healing Center at Trinitas Hospital" and that "we strongly believe that it will be impossible to adequately replace Dr. Losman at the Center on June 12, 2009."<sup>1</sup>

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By way of a supplemental letter dated June 8, 2009, respondent submitted a third letter from Bruce W. Haines, M.D. (Dr. Haines in fact testified as a mitigation witness at the hearing held before the Board on May 13, 2009), Medical Director of the Wound Center at Trinitas Hospital. Dr. Haines states that he was "disturbed" by the Board's decision to suspend Dr. Losman's license for three months "because of the damage it will cause the Wound Center," and states that "we cannot get adequate coverage for the center for that time as he provides unique services for the center."

Within his letter brief, respondent suggested that the Board consider other punitive actions that might be taken in lieu of a active suspension. Specifically, he suggested that the Board consider requiring that he perform community service, either in a medical or non-medical capacity.

Respondent did not seek reconsideration of any other portion of the Board's Order. He thus is not challenging the Board's imposition of a civil penalty of \$20,000 and costs in the aggregate amount of \$42,730.46, nor the Board's determination that his practice is to be restricted during the stayed period of suspension to the provision of "wound care" to patients and to thirteen specifically identified procedures attendant to the provision of wound care.

Upon receipt of Dr. Losman's motion, this matter was scheduled to be considered on the papers at the Board meeting on June 10, 2009. The Attorney General submitted a letter brief dated June 8, 2009 opposing respondent's motions. The Attorney General argued that the motion should be denied because respondent had not made a showing that the Board's decision was "palpably incorrect" or "irrational," nor any showing that the Board failed to "consider or ... appreciate the significance of probative, competent evidence." The Attorney General additionally pointed out that respondent could have made the very same arguments that he now asks the Board to consider when this matter was heard on May 13, 2009,

and suggested that he should not now be afforded an opportunity to reopen the case simply because he failed to present certain evidence to the Board on May 13, 2009.

*Analysis and Basis for Determination to Deny Motions*

The sole basis for respondent's motion for a stay and for reconsideration is the asserted impact that the Board's action would have on the patient population that Dr. Losman currently treats at the Wound Care Center at Trinitas Hospital. Based on that claimed effect on patients, respondent asks that we craft some form of penalty other than an active license suspension, so that Dr. Losman can continue to provide care to patients at the Wound Care Center.

It is axiomatic that any license suspension, of any physician, has adverse consequences on the patient population that the physician is treating. In all cases, the patients of a suspended licensee need to find another physician(s) to provide care during the period of the licensee's suspension. Dr. Losman's case is not fundamentally different from that of any other physician suspended by the Board.

We perceive no reason to reconsider or to alter any of the determinations we made when this matter was first considered. In our written Order, we set forth with great specificity the reasons why we concluded, on balance, that an active period of suspension should be imposed in this case, and we expressly readopt

that reasoning. We are not persuaded that Dr. Losman's case is so unique, and so different from that of any other physician whose license may be suspended by this Board, to warrant the extraordinary relief that he seeks.

We also point out that both Dr. Losman and the Wound Care Center had more than adequate notice of our intended action, as we announced our decision on May 13, 2009, and then purposefully determined that the active period of suspension would not start for thirty days. When holding the starting date of the suspension in abeyance, we fully expected and anticipated that both Dr. Losman, and the Wound Care Center where he is practicing, would make appropriate arrangements to ensure that patients would continue to receive appropriate care during the ninety day period of active suspension. We are unmoved by any suggestion within respondent's present submission that either Dr. Losman or the Wound Care Center has not had sufficient time to plan for and make appropriate arrangements for patient care during the ninety day period of suspension.

Finally, we are constrained to point out that, notwithstanding the claims made in the letters submitted on Dr. Losman's behalf, we do not perceive the provision of wound care generally, nor the specific services that Dr. Losman provides, to be particularly unique or specialized. We instead are confident that the Wound Care Center should be able to swiftly and readily

identify other care providers who could adequately cover Dr. Losman's practice and provide wound care services to patients during the period of time that Dr. Losman is suspended. We therefore expressly reaffirm and ratify all determinations made in our written Order filed May 28, 2009, and reject respondent's motions for a stay and for reconsideration of our prior determination.

WHEREFORE, it is on this 11<sup>th</sup> day of June, 2009

ORDERED:

Respondent's motion for a stay of the Board's Order "Adopting Findings of Fact and Conclusions of Law and Modifying Penalty" in the Matter of Jacques Losman, M.D., filed on May 28, 2009, *nunc pro tunc* May 13, 2009, is hereby denied.

Respondent's motion for reconsideration of the Board's Order "Adopting Findings of Fact and Conclusions of Law and Modifying Penalty" in the Matter of Jacques Losman, M.D., filed on May 28, 2009, *nunc pro tunc* May 13, 2009, is hereby denied.

NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS



By:

Paul C. Mendelowitz, M.D.  
Board President

**FILED**

MAY 28, 2009

**NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS**

EFFECTIVE NUNC PRO TUNC May 13, 2009

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
STATE BOARD OF MEDICAL EXAMINERS

In the Matter of the Suspension  
or Revocation of the License of:

JACQUES LOSMAN, M.D.

to Practice Medicine and Surgery  
in the State of New Jersey

ORDER ADOPTING FINDINGS OF  
FACT AND CONCLUSIONS OF  
LAW WITHIN INITIAL DECISION  
AND MODIFYING PENALTY

This matter was returned to the New Jersey State Board of Medical Examiners (the "Board") following the entry of an Initial Decision by A.L.J. McGill on March 16, 2009. Within his decision, A.L.J. McGill concluded that respondent Jacques Losman, M.D., engaged in gross malpractice when performing surgical procedures on two patients, B.L. and L.N. In B.L.'s case, A.L.J. McGill found that Dr. Losman engaged in gross malpractice when he stapled B.L.'s main artery shut during the course of a pneumonectomy, causing the blood flow to B.L.'s heart and lungs to be interrupted and resulting in her nearly immediate death. In L.N.'s case, A.L.J. McGill concluded that Dr. Losman engaged in gross malpractice when he performed wrong-sided surgery, by inserting a chest tube (to drain fluid from a pleural effusion) on L.N.'s right side when the tube should have been inserted on L.N.'s left side.

Based on said findings, A.L.J. McGill recommended that the Board enter an Order restricting Dr. Losman's practice for a

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period of three years, by precluding Dr. Losman from performing any surgery during that period "other than the type that he is presently doing at the Wound Healing Center at Trinitas Hospital." A.L.J. McGill also recommended that the Board impose a civil penalty in the amount of \$20,000 and assess costs of \$39,071.96 against Dr. Losman.

Following the entry of A.L.J. McGill's decision, the parties were advised within a letter dated April 3, 2009 that written exceptions to the Initial Decision were to be filed and served not later than April 15, 2009. The Attorney General submitted a written letter brief on April 13, 2009, urging that the Board adopt all findings of fact and conclusions of law within the Initial Decision, but reject A.L.J. McGill's penalty recommendation and instead order the suspension of respondent's license. Respondent did not timely file any exceptions to the Initial Decision, but did submit a reply letter brief dated April 27, 2009. Therein, respondent's counsel, Joseph Gorrell, Esq., suggested that A.L.J. McGill erred when he concluded that Dr. Losman engaged in gross malpractice. Mr. Gorrell urged the Board to affirm the A.L.J.'s recommendations that respondent's license not be suspended and that respondent be allowed to continue to practice medicine, but reject the A.L.J.'s recommendation that respondent be assessed

costs.<sup>1</sup>

The matter was scheduled for consideration by the Board on May 13, 2009.<sup>2</sup> Respondent then appeared before the Board, represented by Joseph Gorrell, Esq., and Deputy Attorney General Bindi Merchant appeared on behalf of Attorney General Milgram. Respondent initially waived oral argument on his exception to the proposed conclusion of law that respondent had engaged in gross malpractice, and we therefore considered the argument on the papers alone. After deciding to adopt the proposed findings of fact and conclusions of law of the A.L.J., we then proceeded to conduct a hearing on the issue of penalty to be assessed, at which hearing respondent was afforded an opportunity to present evidence in mitigation of penalty.

Upon consideration of the arguments of the parties, the mitigation evidence presented, and upon our own independent review of the record, we conclude that cause exists to modify the recommendation made by A.L.J. McGill on penalty. Specifically, we conclude that respondent's conduct - particularly, his having

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Although respondent's submission of "exceptions" to A.L.J. McGill's Initial Decision was not timely filed, we have nonetheless considered his arguments and address the reasons why we reject those arguments herein.

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An Order extending for forty-five days (through June 16, 2009) the time for the Board to issue a final decision adopting, modifying or rejecting A.L.J. McGill's Initial Decision, was entered on April 13, 2009.

engaged in two egregious acts of gross malpractice, one of which directly caused the death of his patient - warrants the imposition of a three year suspension of license, to include a three month active component, to be followed by a thirty-three month period of stayed suspension. We concur with A.L.J. McGill's suggestion that respondent's license should be limited during the period of stayed suspension to performing the types of surgery that he is presently performing at the Wound Healing Center,<sup>3</sup> and adopt A.L.J. McGill's recommendation that respondent be assessed a \$20,000 civil penalty and costs. We set forth in detail below the basis for our conclusions and actions.

Exceptions to Findings of Fact and Conclusions of Law

Neither the Attorney General nor Dr. Losman has taken any exception to the proposed findings of fact made by A.L.J. McGill. We therefore adopt, in their entirety, the findings of fact that

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A.L.J. McGill recommended that respondent's practice be restricted to preclude him from practicing surgery for a period of three years, other than "the type[s] that he is presently doing at the Wound Healing Center at Trinitas Hospital." Because we perceive that the A.L.J.'s recommendation lacks precision, and could be interpreted to allow Dr. Losman to presently continue to perform certain procedures - in particular, the insertion of pacemakers and tracheotomies - which are procedures he presently performs, but not at the Wound Healing Center, we have listed thirteen procedures that respondent may continue to perform, as an adjunct to his general provision of wound care to patients at the Wound Healing Center.

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are set forth in the Initial Decision.<sup>4</sup>

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While neither party has objected to any proposed finding of fact set forth in the Initial Decision, we nonetheless note our concern with the breadth with which the proposed findings in paragraph 41 and 43 were stated, and with A.L.J. McGill's characterization of certain procedures, to include the insertion of pacemakers and the performance of tracheotomies, as "minor surgeries" in paragraph 40.

Paragraphs 41 and 43 of A.L.J. McGill's proposed findings include the following broad statements regarding the quality of Dr. Losman's work and regarding his history of providing charitable care:

41. The quality of respondent's work at the Wound Healing Center is excellent, and he is very careful with patients.

43. Respondent never turned a patient away, because he could not pay for services.

With regard to the quality of Dr. Losman's work, we point out that we as a Board, and A.L.J. McGill as a fact-finder, cannot know on the limited record below whether or not Dr. Losman's work at the Wound Healing Center is or is not "excellent," nor can we know how careful he is with patients. The only testimony in the record below that would support the proposed "finding" is that of Dr. Bruce Haimes, who offered his individual opinion regarding the quality of Dr. Losman's work and his care with patients. Accordingly, we point out that paragraph 41, to the extent it is included as a "finding of fact," should be qualified to make clear that the "finding" is based solely on Dr. Haimes' testimony.

In a similar ilk, we note that the only support in the record for the "finding" in paragraph 43 that Dr. Losman has never turned a patient away was Dr. Losman's own say so in his testimony. It is thus again the case that neither A.L.J. McGill nor this Board have any way to know whether or not that statement is in fact true, and thus the "finding" in paragraph 43 should similarly be qualified to make clear that it is based on Dr. Losman's testimony alone.

Finally, we take issue with A.L.J. McGill's statement in paragraph 40 that procedures such as tracheotomies and the insertion of pacemakers constitute "minor surgery." While these

Within his reply brief, respondent argues that the Board should reject A.L.J. McGill's conclusion of law that respondent engaged in gross malpractice with respect to patients B.L. and L.N. Specifically, Mr. Gorrell argues that the A.L.J. should not have found that Dr. Losman was grossly negligent, because the expert opinion offered by the State's lone witness, Jack Sabo, M.D., should have been rejected as a "net opinion."

We conclude that A.L.J. McGill's determination that Dr. Losman engaged in gross malpractice should be adopted for either of two complementary reasons. First, we reject respondent's contention that Dr. Sabo's expert opinion be rejected as a "net opinion." Dr. Sabo's opinions were amply supported by the factual evidence. See Creaqna v. Jardal, 185 N.J. 345, 360-361 (2005). Dr. Sabo adequately explained both how the factual evidence supported his conclusion and how Dr. Losman's acts deviated from accepted standards of care. In doing so, he gave the "why and wherefore of his opinion." Id. at 360. Dr. Sabo's opinion thus was not an opinion "based on bare conclusions untethered to facts." Id. At 349. Just as significantly, there is no reason to reject Dr. Sabo's opinion as a net opinion given that there was a self-evident causal connection between the acts Dr. Losman engaged in

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procedures certainly may involve considerably less risk to patients than the procedures that were performed on patients B.L. and L.N., the procedures do have attendant risks, and should not be trivialized as "minor" procedures.

(i.e., stapling the main artery; inserting a chest tube on the wrong-side) and the injury and damage that resulted in both cases. See generally, Buckelew v. Grossbard, 87 N.J. 512, 524 (1981).

Furthermore, on our independent review of the record, we are satisfied that a sufficient factual predicate exists to find that Dr. Losman engaged in gross malpractice in both cases. See In re Suspension or Revocation of the License of Kerlin, 151 N.J. Super. 179 (App. Div. 1977) (standard of care for determining gross malpractice or negligence may be supplied by members of the Board, where Board includes licensed and practicing professionals). In the case of L.N., there is nothing more elementary nor fundamental than for a surgeon to determine, in advance of commencing a procedure, the site of the intended surgery. Dr. Losman unquestionably was grossly negligent when he inserted a chest tube on the wrong side. Dr. Losman's error was entirely preventable, and would not have occurred, had he engaged in the most basic and simple of preparation. Indeed, the error would presumably have been avoided had Dr. Losman reviewed L.N.'s medical record, reviewed her x-ray or the x-ray report, and/or reviewed the Cat scan or Cat scan report. Even having failed to review available information, the error still would not have occurred had Dr. Losman conducted a cursory physical examination of L.N.'s chest before proceeding to insert a chest tube. To have failed to do so, and to have therefore performed wrong-sided surgery, is inexcusable, and

clearly crosses the threshold between conduct that can be deemed to constitute simple negligence and that which constitutes gross negligence.

Similarly, and with catastrophic consequences, Dr. Losman's stapling of B.L.'s main artery during the course of a left pneumonectomy is patently an act of gross negligence. Dr. Losman closed B.L.'s main pulmonary artery from the heart, thereby eliminating blood flow to both her lungs and causing her death within minutes. The accepted standard of care dictates that a surgeon needs to take appropriate measures to assure that he or she does not staple shut an artery needed to sustain life. The catastrophe was again entirely preventable, as Dr. Losman could have simply applied a clamp to the site he intended to staple before actually stapling - had he done so, he would have unquestionably recognized that he had not identified the appropriate site for stapling, and the unnecessary death of patient B.L. would have been averted.

For the reasons set forth above, we unanimously conclude that respondent engaged in acts of gross malpractice and negligence in both cases. We therefore adopt in their entirety (subject to the limited modifications noted in footnote 4 infra) the proposed findings of fact and conclusions of law within A.L.J. McGill's Initial Decision.

## Penalty

### A. Hearing before the Board and Arguments of Counsel

Upon deciding to adopt the findings of fact and conclusions of law of A.L.J. McGill, we proceeded to hold a hearing on the question of penalty to be assessed. We then considered both the oral and written arguments of counsel on the recommended penalty, and mitigation evidence presented on Dr. Losman's behalf.

Dr. Bruce Haimes was presented as a mitigation witness for Dr. Losman. Dr. Haimes, the Medical Director of the Wound Healing Center, testified that he knows Dr. Losman well, having worked together with him on many cases. Dr. Haimes offered his opinion that Dr. Losman was a competent, kind and thorough physician. Dr. Haimes testified that Dr. Losman performs wound care at the Wound Healing Center, opined that Dr. Losman is "very good at it," and asserted that it would be a hardship if Dr. Losman were to have to leave the Wound Healing Center. Dr. Haimes conceded that neither tracheotomies nor pacemaker insertions were procedures that Dr. Losman performs at the Wound Healing Center.

Dr. Losman then testified in mitigation on his own behalf. Dr. Losman stated that he was greatly impacted by B.L.'s death and that he limited the scope of his practice because of the shock of what occurred. Specifically, Dr. Losman testified that after B.L.'s death, he ceased performing thoracic surgery, and has since limited his practice to providing wound care at the Wound

Healing Center and to the performance of occasional pacemaker insertions, tracheotomies and chest tube insertions at Trinitas Hospital. Dr. Losman further testified that a suspension of his privileges would cause great hardship to his family, which family includes a five year old boy who Dr. Losman brought to the United States from the Dominican Republic (after the child had suffered a traumatic injury) for medical care and who Dr. Losman subsequently adopted.

In addition to the witness testimony, both Deputy Attorney General Merchant and Mr. Gorrell made arguments upon the appropriate quantum of penalty to assess. The Attorney General urged that the Board find A.L.J. McGill's recommendation - in particular his recommendation that Dr. Losman's license not be presently suspended - to be inadequate given the gravity of the findings made.

Mr. Gorrell argued that the Board should adopt the recommendation of A.L.J. McGill that Dr. Losman be permitted to continue his present medical practice without interruption and without any suspension of license, but should reject his determination to assess the costs of this matter upon Dr. Losman. Mr. Gorrell suggested that the imposition of a suspension would be "disproportionate to the alleged wrongful conduct by Dr. Losman, as evidenced by a series of cases where orders were imposed by the Board." Respondent's Letter Brief, p. 5. Specifically, respondent

asked that the Board consider penalties which were imposed in five cases that he suggested had "circumstances similar to this case," Id. (copies of the orders entered in each of the five cases were appended to the letter brief).

On the issue of costs, respondent points out that N.J.S.A. 45:1-25(d) affords the Board discretion to determine whether to impose costs, as it states that a Board "may" (as opposed to "shall) assess costs. Respondent argues that any assessment of costs in this case would be inappropriate under the "unique circumstances of this case." Id. at p. 6.<sup>5</sup>

B. Determination on Issue of Suspension of License

We have considered the arguments made by counsel and the

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Respondent's argument that costs should not be assessed in this case is based primarily on his contention that:

The plain fact is that a hearing was unnecessary in this case. The result determined by Judge McGill is virtually the same as that agreed to by Respondent in 2006. Moreover, Respondent was not offered the opportunity, which he would have taken, to limit his practice to wound care, without the right to insert pacemakers and perform tracheotomies. Instead, the Attorney General simply broke off negotiations without even extending the normal professional courtesy to counsel of a simple telephone call.

In sum, it was the Attorney General, not Respondent, who caused the necessity of a hearing in this case. Thus, it would be unreasonable and unfair to require Respondent to be responsible for the Attorney General's costs in this case.

Respondent's Letter Brief, p. 8.

mitigation testimony offered, and conclude on balance that cause exists to reject A.L.J. McGill's recommendation that a period of suspension not be imposed in this case. Simply put, we are of the unanimous opinion that respondent's extreme recklessness and carelessness in both cases fully supports entry of an Order suspending his license. While this Board recognizes that surgery is never risk-free, and that a pneumonectomy is an operation with considerable risk, it is simply the case that B.L. should not, and would not have died, absent respondent's gross negligence. And, while the complications that occurred in L.N.'s case may have been minimal, it is irrefutable that L.N. was exposed to substantial risks to her health solely because of respondent's gross dereliction of his fundamental responsibilities as a surgeon. In both cases, the gross malpractice which occurred could have and indeed would have been avoided had respondent taken even the most basic of precautions.

We conclude that the imposition of a period of suspension, to include an active component, is necessary in order to further our paramount obligation to protect the public health, safety and welfare. In this instance, the suspension of respondent's license will serve both a punitive element - that is, to punish respondent for his behavior - and a deterrent effect, as it is intended to send a message to the community of licensees at large that wanton and reckless disregard for patient safety will

expose a licensee to significant penalty.

In deciding to impose an active period of suspension, we expressly reject respondent's contention that "the imposition of a suspension would be disproportionate to the alleged wrongful conduct by Dr. Losman, as evidenced by a series of cases where orders were imposed by the Board."<sup>6</sup> Indeed, we point out that, although A.L.J. McGill did not recommend that the Board suspend respondent's license, he nonetheless expressly rejected respondent's "proportionality" argument, as he distinguished each of the five cases relied on by respondent and found that none of the cases had substantial resemblance to the cases of B.L. and L.N.<sup>7</sup>

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The five cases relied on by respondent are: In the Matter of Herbert Rosengarten, M.D., Consent Order filed May 22, 2008; In the Matter of Rodolfo R. Perocho, M.D., Consent Order filed May 22, 2008; In the Matter of Derek O. Chapman, M.D., Consent Order filed November 7, 2007; In the Matter of Mildred B. Sabo, M.D., Consent Order filed October 23, 2007 and In the Matter of Radu Codol, M.D., Consent Order filed July 30, 2007. In four of the five cited cases, the Orders were based on findings that the licensees provided grossly negligent care (the Codol Order was based on a finding of repeated acts of negligence in Dr. Codol's provision of care to a single patient). In each case, the licensee was penalized by the entry of a formal reprimand and the assessment of a civil penalty; additionally, in certain cases, licensees were ordered to complete course work, submit to monitoring, and/or were assessed certain costs of investigation.

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A.L.J. McGill expressly rejected respondent's argument by concluding that each of the five cases attached to respondent's brief was distinguishable:

To support his contention that suspensions were not imposed in similar cases, respondent attached Consent

We find several additional reasons to reject counsel's argument that we be guided in meting out penalty in Dr. Losman's case by the fact that suspensions were not imposed against the licensees who were the subjects of the Consent Orders appended to respondent's letter brief. Initially, it is axiomatic that each case must be judged individually, on its own unique facts and circumstances. There is no cookie-cutter penalty imposed for all physicians who are found to have engaged in gross negligence, as not all cases involve the same degree of recklessness, and not all cases deserve equal sanction. For the reasons cited above, we find Dr. Losman's conduct in the cases of B.L. and L.N. to have been strikingly egregious, and thus find his case to be one that fully supports the suspension we order herein.

In addition, we point out that each of the five cases relied on by respondent is distinguishable because, in each case, the subject licensee was found to have engaged in one act of gross negligence (or in repeated acts of negligence, but limited to the

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Orders from five settlements to his brief. Due to the fact that these cases are settlements, the facts are sketchy but it is clear that in three instances the doctors failed to diagnose conditions with the result that they were allowed to run their course. In contrast, B.L. was not critically ill, and she would not have died in the immediate term from her disease. Her death was solely the result of respondent's monumental error. The other two cases involved a medication error and the faulty insertion of a pacemaker. They have no resemblance to the cases of B.L. or L.N.

Initial Decision, p. 12.

provision of care to one patient), not multiple acts of gross negligence involving more than one patient.

Finally, even were the five cases relied on by respondent to be considered to involve misconduct that could be equated to Dr. Losman's misconduct, the penalty assessments in the five cases would not properly be benchmarks for any penalty assessment in Dr. Losman's case because each was the product of a voluntary settlement. It is thus the case that all of the matters relied on by respondent to support his "proportionality" argument were settled upon entry of Consent Orders. In each case, the entry of the Consent Order obviated the need for formal administrative hearings to be held.

As in criminal and civil cases, settlements in administrative proceedings require both parties to make compromises. A licensee who accepts a settlement offer extended by the Board limits his or her potential exposure to Board discipline, by accepting a fixed and finite sanction. The Board benefits because it is able to preserve otherwise limited resources, and free up those resources to be used to further the investigation and/or prosecution of other significant matters.

Most significantly, penalties that are imposed in matters settled by consent simply cannot and should not be equated to penalties that might be imposed, in the very same matters, after a full contested hearing process. We structure settlement proposals

to include penalties that are less severe than penalties we would consider to be appropriate to mete out at the conclusion of administrative proceedings, so as to provide the licensee with an incentive to accept a settlement proposal.<sup>8</sup> While we will not speculate herein on what penalties might have been assessed in any of the five cases relied on by respondent had we been unable to reach negotiated settlements and had those same licensees instead been found to have engaged in gross negligence following a hearing process, we would fully anticipate that any penalties imposed would have been far more substantial than those that were imposed within the Consent Orders. We thus categorically reject respondent's argument that we should be guided in meting out penalty to Dr. Losman by the penalties imposed in the five cases he relies upon in his brief.

Although we conclude that an active suspension is warranted in this case, we are convinced on consideration of the mitigation evidence presented that the period of active suspension need not be lengthy. In reaching that determination, we expressly consider that there is no evidence that respondent's actions were

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Indeed, were the possibility of harsher sanctions not to exist, there would be little incentive for a licensee to ever settle a case with the Board, as a licensee who elected to reject a proffered settlement proposal would then know in advance the ceiling of his or her potential exposure to penalty, and the decision to reject a settlement proposal would then in essence be "risk-free."

the product of intentional misconduct, that respondent was forthright and open about the mistakes he made, and that respondent acted responsibly when he made a non-compelled election to restrict his practice following the two cases. The above facts, along with other evidence in mitigation, militate against the imposition of a lengthy active period of license suspension.

On balance, we conclude that respondent's license should be suspended for a period of three years, but that only the first three months of the period of suspension need be required to be served as a period of active suspension. The remainder of the suspension may be stayed and served as a period of probation, subject to the restriction that respondent's practice be limited in a manner similar to that which was in fact recommended by A.L.J. McGill. Specifically, we herein Order that during the period of probation, respondent should be limited to the type of practice which he is presently engaging in at the Wound Care Center - namely, the provision of "wound care" to patients, which practice shall be limited to the thirteen procedures that are listed below (see footnote 3, *infra*).

C. Determination as to Monetary Penalties and Costs

In addition to the period of suspension, we find the remainder of penalty recommendations made by A.L.J. McGill to be appropriate and balanced. Neither party has raised any objection to A.L.J. McGill's recommendation that respondent be assessed a

civil penalty in the amount of \$20,000, and we expressly adopt that recommendation.

On the issue of costs, we adopt A.L.J. McGill's recommendation that respondent be assessed the costs of the investigation and prosecution of this matter.<sup>9</sup> In doing so, we

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Within the Initial Decision, A.L.J. McGill recommended that respondent be assessed costs in this matter of \$39,071.96, and that respondent be required to repay those costs within thirty days of the date on which the decision in this matter becomes final. A.L.J. McGill pointed out that the Attorney General had submitted a certification providing details with respect to the costs incurred, and that respondent was then given the opportunity to challenge the cost application and did not do so (while respondent did not object to the amount of costs sought by respondent, we nonetheless point out that we find the costs sought to be reasonable, both with regard to the number of hours of attorney time that was sought and the rates of compensation for that time).

When this matter was presented to the Board, we received a supplemental certification of costs from Deputy Attorney General Merchant, detailing that an additional \$3,658.50 in attorney's fees had been incurred after October 28, 2008, which represents 27.1 hours of attorney time billed at a rate of \$135 an hour. We find it entirely appropriate to assess these additional attorney fees, which appear to be reasonable and necessary expenses which were incurred to finalize this matter, upon respondent. We thus increase the amount of costs that are herein assessed upon respondent by \$3,658.50, resulting in a total cost assessment of \$42,730.46.

In light of respondent's testimony that the assessment of substantial fines and costs will cause him financial hardship, we will modify A.L.J. McGill's suggestion that costs be paid within thirty days of the date of entry of the Order. We instead afford respondent the opportunity to satisfy his aggregate financial obligation to the Board by making twelve quarterly payments, over the span of the three year period of suspension, of the total sum of \$62,730.46 which has been assessed. Further, provided that respondent makes timely payment of the quarterly installments, we will waive the assessment of any interest upon the amount owing.

reject respondent's claim that costs should not be imposed because settlement negotiations were unilaterally ended by the Attorney General. Rather, we point out that it appears, based on review of the documents that respondent attached to his April 27, 2009 letter brief, that the final break-down in settlement negotiations (prior to the filing of a complaint) occurred as a result of respondent's unilateral act of amending the proposed terms of a Consent Order which had been presented to him for consideration by the Attorney General. The statement in respondent's brief that he was prepared to accept a settlement that would have limited his practice to wound care without the right to insert pacemakers and perform tracheotomies is belied by the record - clearly, respondent was offered that very opportunity in the final settlement agreement that was forwarded to his counsel (see letter of Attorney General Jespersen to Mr. Gorrell dated May 10, 2006, and proposed form of Consent Order enclosed therewith, appended to respondent's letter brief).<sup>10</sup>

Finally, for the reasons discussed at length above, we categorically reject the suggestion in respondent's papers that costs should not be assessed in this case because the penalty that

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There is no suggestion in the papers that were attached to respondent's brief that respondent obtained, or even sought, the consent of the Attorney General prior to adding tracheotomies and pacemaker insertions to the list of authorized procedures that were contemplated within the posited settlement agreement.

was recommended by A.L.J. McGill was similar to that which had been proposed as a settlement in 2006. When rejecting the Board's settlement proposal, respondent exposed himself to the additional risk that he might be assessed the costs incurred in the administrative action that was thereafter necessitated. We point out that, were we not to assess costs against Dr. Losman, those costs would instead need to be borne by the entire licensee population (as it is the licensee population which ultimately pays all Board expenses within licensure fees), and we do not perceive that to be an equitable result in this case.

WHEREFORE, it is on this 28TH day of May, 2009

ORDERED nunc pro tunc May 13, 2009:

1. The license of respondent Jacques Losman, M.D., to practice medicine and surgery in the State of New Jersey is hereby suspended for a period of three years. The first three months of the suspension are to be served as a period of active suspension, and the remainder shall be stayed and served as a period of probation. During the period of probation, respondent shall limit his practice to the provision of "wound care" to patients. Respondent shall further limit any surgical practice to the following thirteen specified procedures:

1. Incisions and drainage of abscess.
2. Debridement of wounds.
3. Debridement of nails.

4. Paring of skin lesions.
5. Biopsy of skin.
6. Excision of skin lesions.
7. Repairs of superficial wounds.
8. Skin and skin substitute grafts.
9. Burns dressing.
10. Applications of various types of casts.
11. Amputation of toes.
12. Placement of central venous catheter.
13. Implantable venous access device.

2. Respondent is hereby assessed a civil penalty in the amount of \$20,000.

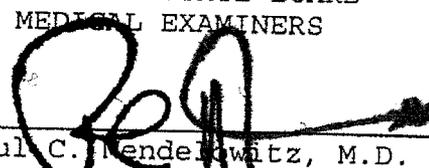
3. Respondent is assessed costs of this action, in an aggregate amount of \$42,730.46.

4. The period of suspension shall commence on June 12, 2009. The active period of suspension shall be served from June 12, 2009 through and including September 11, 2009, and the period of probation shall thereafter commence on September 12, 2009 and continue through and including June 11, 2012. During the thirty days from the date on which the Board order was announced on the record (that is, on May 13, 2009) through the commencement of the period of active suspension, respondent shall restrict his practice in a manner consistent with the limitations set forth within paragraph 1 above.

5. Respondent shall pay the aggregate penalties and costs assessed herein of \$62,730.46 in full on or before July 1, 2009, or in equal quarterly installments of \$5,227.54 over the three year period of suspension. Should respondent elect to pay in quarterly installments, the first payment shall be due on or before July 1, 2009, and the remaining payments shall thereafter be due on or before the first day of each ensuing quarter (i.e., October 1, 2009, January 1, 2010, April 1, 2010, etc.). Provided respondent makes timely payment of each installment, the Board shall waive the imposition of any interest that might otherwise be added to the assessments ordered herein.

NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS

By: \_\_\_\_\_

  
Paul C. Mendelkowitz, M.D.  
Board President

Jacques G. Losman, M.D.  
NJ License # MA44962

### ADDENDUM

Any licensee who is the subject of an order of the Board suspending, revoking or otherwise conditioning the license, shall provide the following information at the time that the order is signed, if it is entered by consent, or immediately after service of a fully executed order entered after a hearing. The information required here is necessary for the Board to fulfill its reporting obligations:

Social Security Number<sup>1</sup>: \_\_\_\_\_

List the Name and Address of any and all Health Care Facilities with which you are affiliated:

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List the Names and Address of any and all Health Maintenance Organizations with which you are affiliated:

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Provide the names and addresses of every person with whom you are associated in your professional practice: (You may attach a blank sheet of stationery bearing this information).

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<sup>1</sup> Pursuant to 45 CFR Subtitle A Section 61.7 and 45 CFR Subtitle A Section 60.8, the Board is required to obtain your Social Security Number and/or federal taxpayer identification number in order to discharge its responsibility to report adverse actions to the National Practitioner Data Bank and the HIP Data Bank.

**DIRECTIVES APPLICABLE TO ANY MEDICAL BOARD LICENSEE  
WHO IS DISCIPLINED OR WHOSE SURRENDER OF LICENSURE  
HAS BEEN ACCEPTED**

**APPROVED BY THE BOARD ON MAY 10, 2000**

All licensees who are the subject of a disciplinary order of the Board are required to provide the information required on the addendum to these directives. The information provided will be maintained separately and will not be part of the public document filed with the Board. Failure to provide the information required may result in further disciplinary action for failing to cooperate with the Board, as required by N.J.A.C. 13:45C-1 et seq. Paragraphs 1 through 4 below shall apply when a license is suspended or revoked or permanently surrendered, with or without prejudice. Paragraph 5 applies to licensees who are the subject of an order which, while permitting continued practice, contains a probation or monitoring requirement.

**1. Document Return and Agency Notification**

The licensee shall promptly forward to the Board office at Post Office Box 183, 140 East Front Street, 2nd floor, Trenton, New Jersey 08625-0183, the original license, current biennial registration and, if applicable, the original CDS registration. In addition, if the licensee holds a Drug Enforcement Agency (DEA) registration, he or she shall promptly advise the DEA of the licensure action. (With respect to suspensions of a finite term, at the conclusion of the term, the licensee may contact the Board office for the return of the documents previously surrendered to the Board. In addition, at the conclusion of the term, the licensee should contact the DEA to advise of the resumption of practice and to ascertain the impact of that change upon his/her DEA registration.)

**2. Practice Cessation**

The licensee shall cease and desist from engaging in the practice of medicine in this State. This prohibition not only bars a licensee from rendering professional services, but also from providing an opinion as to professional practice or its application, or representing him/herself as being eligible to practice. (Although the licensee need not affirmatively advise patients or others of the revocation, suspension or surrender, the licensee must truthfully disclose his/her licensure status in response to inquiry.) The disciplined licensee is also prohibited from occupying, sharing or using office space in which another licensee provides health care services. The disciplined licensee may contract for, accept payment from another licensee for or rent at fair market value office premises and/or equipment. In no case may the disciplined licensee authorize, allow or condone the use of his/her provider number by any health care practice or any other licensee or health care provider. (In situations where the licensee has been suspended for less than one year, the licensee may accept payment from another professional who is using his/her office during the period that the licensee is suspended, for the payment of salaries for office staff employed at the time of the Board action.)

A licensee whose license has been revoked, suspended for one (1) year or more or permanently surrendered must remove signs and take affirmative action to stop advertisements by which his/her eligibility to practice is represented. The licensee must also take steps to remove his/her name from professional listings, telephone directories, professional stationery, or billings. If the licensee's name is utilized in a group practice title, it shall be deleted. Prescription pads bearing the licensee's name shall be destroyed. A destruction report form obtained from the Office of Drug Control (973-504-6558) must be filed. If no other licensee is providing services at the location, all medications must be removed and returned to the manufacturer, if possible, destroyed or safeguarded. (In situations where a license has been suspended for less than one year, prescription pads and medications need not be destroyed but must be secured in a locked place for safekeeping.)

### **3. Practice Income Prohibitions/Divestiture of Equity Interest in Professional Service Corporations and Limited Liability Companies**

A licensee shall not charge, receive or share in any fee for professional services rendered by him/herself or others while barred from engaging in the professional practice. The licensee may be compensated for the reasonable value of services lawfully rendered and disbursements incurred on a patient's behalf prior to the effective date of the Board action.

A licensee who is a shareholder in a professional service corporation organized to engage in the professional practice, whose license is revoked, surrendered or suspended for a term of one (1) year or more shall be deemed to be disqualified from the practice within the meaning of the Professional Service Corporation Act. (N.J.S.A. 14A:17-11). A disqualified licensee shall divest him/herself of all financial interest in the professional service corporation pursuant to N.J.S.A. 14A:17-13(c). A licensee who is a member of a limited liability company organized pursuant to N.J.S.A. 42:1-44, shall divest him/herself of all financial interest. Such divestiture shall occur within 90 days following the the entry of the Order rendering the licensee disqualified to participate in the applicable form of ownership. Upon divestiture, a licensee shall forward to the Board a copy of documentation forwarded to the Secretary of State, Commercial Reporting Division, demonstrating that the interest has been terminated. If the licensee is the sole shareholder in a professional service corporation, the corporation must be dissolved within 90 days of the licensee's disqualification.

### **4. Medical Records**

If, as a result of the Board's action, a practice is closed or transferred to another location, the licensee shall ensure that during the three (3) month period following the effective date of the disciplinary order, a message will be delivered to patients calling the former office premises, advising where records may be obtained. The message should inform patients of the names and telephone numbers of the licensee (or his/her attorney) assuming custody of the records. The same information shall also be disseminated by means of a notice to be published at least once per month for three (3) months in a newspaper of

general circulation in the geographic vicinity in which the practice was conducted. At the end of the three month period, the licensee shall file with the Board the name and telephone number of the contact person who will have access to medical records of former patients. Any change in that individual or his/her telephone number shall be promptly reported to the Board. When a patient or his/her representative requests a copy of his/her medical record or asks that record be forwarded to another health care provider, the licensee shall promptly provide the record without charge to the patient.

## **5. Probation/Monitoring Conditions**

With respect to any licensee who is the subject of any Order imposing a probation or monitoring requirement or a stay of an active suspension, in whole or in part, which is conditioned upon compliance with a probation or monitoring requirement, the licensee shall fully cooperate with the Board and its designated representatives, including the Enforcement Bureau of the Division of Consumer Affairs, in ongoing monitoring of the licensee's status and practice. Such monitoring shall be at the expense of the disciplined practitioner.

(a) Monitoring of practice conditions may include, but is not limited to, inspection of the professional premises and equipment, and inspection and copying of patient records (confidentiality of patient identity shall be protected by the Board) to verify compliance with the Board Order and accepted standards of practice.

(b) Monitoring of status conditions for an impaired practitioner may include, but is not limited to, practitioner cooperation in providing releases permitting unrestricted access to records and other information to the extent permitted by law from any treatment facility, other treating practitioner, support group or other individual/facility involved in the education, treatment, monitoring or oversight of the practitioner, or maintained by a rehabilitation program for impaired practitioners. If bodily substance monitoring has been ordered, the practitioner shall fully cooperate by responding to a demand for breath, blood, urine or other sample in a timely manner and providing the designated sample.

**NOTICE OF REPORTING PRACTICES OF BOARD  
REGARDING DISCIPLINARY ACTIONS**

Pursuant to N.J.S.A. 52:14B-3(3), all orders of the New Jersey State Board of Medical Examiners are available for public inspection. Should any inquiry be made concerning the status of a licensee, the inquirer will be informed of the existence of the order and a copy will be provided if requested. All evidentiary hearings, proceedings on motions or other applications which are conducted as public hearings and the record, including the transcript and documents marked in evidence, are available for public inspection, upon request.

Pursuant to 45 CFR Subtitle A 60.8, the Board is obligated to report to the National Practitioners Data Bank any action relating to a physician which is based on reasons relating to professional competence or professional conduct:

- (1) Which revokes or suspends (or otherwise restricts) a license,
- (2) Which censures, reprimands or places on probation,
- (3) Under which a license is surrendered.

Pursuant to 45 CFR Section 61.7, the Board is obligated to report to the Healthcare Integrity and Protection (HIP) Data Bank, any formal or official actions, such as revocation or suspension of a license (and the length of any such suspension), reprimand, censure or probation or any other loss of license or the right to apply for, or renew, a license of the provider, supplier, or practitioner, whether by operation of law, voluntary surrender, non-renewability, or otherwise, or any other negative action or finding by such Federal or State agency that is publicly available information.

Pursuant to N.J.S.A. 45:9-19.13, if the Board refuses to issue, suspends, revokes or otherwise places conditions on a license or permit, it is obligated to notify each licensed health care facility and health maintenance organization with which a licensee is affiliated and every other board licensee in this state with whom he or she is directly associated in private medical practice.

In accordance with an agreement with the Federation of State Medical Boards of the United States, a list of all disciplinary orders are provided to that organization on a monthly basis.

Within the month following entry of an order, a summary of the order will appear on the public agenda for the next monthly Board meeting and is forwarded to those members of the public requesting a copy. In addition, the same summary will appear in the minutes of that Board meeting, which are also made available to those requesting a copy.

Within the month following entry of an order, a summary of the order will appear in a Monthly Disciplinary Action Listing which is made available to those members of the public requesting a copy.

On a periodic basis the Board disseminates to its licensees a newsletter which includes a brief description of all of the orders entered by the Board.

From time to time, the Press Office of the Division of Consumer Affairs may issue releases including the summaries of the content of public orders.

Nothing herein is intended in any way to limit the Board, the Division or the Attorney General from disclosing any public document.