

**STATE BOARD OF MEDICAL EXAMINERS
DISCIPLINARY MATTERS PENDING CONCLUSION -
OPEN MINUTES -February 23, 2006**

A meeting of a Committee of the New Jersey State Board of Medical Examiners was held on Thursday, February 23, 2006 at the Administrative Office, 2nd Floor, large Conference Room, 140 East Front Street, Trenton, New Jersey to continue the hearing in the Dr. Zahl matter. The meeting was called to order by Ms. Karen Criss, Chairperson for Open Disciplinary Matters.

PRESENT

Board Members Criss, DeGregorio, Lomazow, Mendelowitz, Paul, Salas-Lopez, and Walsh

EXCUSED

Cheema, Ciechanowski, Clemency Kohler, Criscito, Haddad, Jordan, Lambert, Nussbaum, Reichman, Scott, Strand, Stanley, Weiss and Wheeler.

ABSENT

ALSO PRESENT

Senior Deputy Attorney General Dick, Deputy Attorney Generals Ehrenkrantz, Flanzman, Kenny, and Warhaftig and Executive Director Roeder.

HEARINGS, PLEAS, RETURN DATES, APPEARANCES

9:00 a.m. - ZAHL, Kenneth M.D. (License #MA 56413)

(Counseling Deputy: Flanzman, Steven N.,)

JACKSON, John Zen Esq., for Respondent

KENNY, Paul R., D.A.G. for Complainant

Dr. Cheema and Ms. Clemency Kohler were recused in this matter and did not attend the hearing.

It should be noted that Dr. Salas Lopez was present for this part of the hearing, although, she did not participate in the discussion or vote in this matter.

Dr. Zahl was again called as a witness and he resumed his testimony from the previous day.

He testified that in reviewing the billing record for patient R.B., he noted that it was a bill for Medicare for services for a Q6 modifier which indicates that a provider in the practice is not yet credentialed with his own Medicare PIN number. It also, he continued, is used with a locum tens physician. Dr. Zahl then testified to other documents which were filled out for reimbursement in the same manner. He also noted that the subpoena for the documents was sent via e-mail and that he requested his staff to comply with the demand. Some of the documents, according to the witness, printed out differently because of a computer program and noted that in those documents, the Q6 also included his PIN number. This would alert Medicare, according to the witness, that another provider would have been working under his PIN number. He stressed that it was not meant to indicate that he provided the service or that he supervised the service. A number of this type of document was brought to the attention of the Board, as well as other ways in which the bills were done because of his Medi-Soft computer program. For example, Dr. Zahl noted that rather than put the CPT code under that category, it was placed under the services provided. Dr. Zahl reviewed a series of documents to illustrate that the use of the Q6 modifier was consistent throughout the documents sought by the subpoena. This included testimony about a series of documents that did not include the Q6 modifier as well.

Dr. Zahl as part of the interview process, observed Dr. Yulo perform an EMG and some nerve conductions. He hit every nerve the first time. Dr. Zahl also observed Dr. Yulo perform the EMG component, followed the insertion of the needle, and Dr. Yulo had to put the needle into the peripheral muscles. One of the items that needed to be observed was the depth at which the needle was inserted so as not to enter into the spinal canal. After observing Dr. Yulo, Dr. Zahl testified that he had a level of confidence in him. Thereafter, he permitted him to perform three interventional procedures while Dr. Zahl was in the room according to Dr. Zahl. For example, Patient MG received a left lumbar block, at three levels. Similarly, Patient MA received a bilateral injection at three different locations. Another Patient RB, he noted, received bilateral lumbar blocks. Testifying as to all three, Dr. Zahl testified that he observed Dr. Yulo perform these procedures. The witness recalled that he knew the anatomy and where he was going, although Dr. Zahl characterized his performance as being somewhat "slow." Dr. Zahl also was convinced that Dr. Yulo needed some pointers in how to anesthetize the skin. Dr. Zahl questioned his speed, but overall his skill level was sufficient. As result, Dr. Zahl testified that he was willing to work with him and teach him how to improve his techniques. One of the reasons that he asked him to come in on a Saturday was because the day had fewer patients and there was more time to teach him. After some teaching, he trusted him to do more. Another example was Patient WN who was treated with a radio frequency in the lumbar spine. Earlier in that day, Dr. Yulo observed Dr. Zahl do the procedure. When Dr. Yulo did the procedure solo, the monitor was not in place because he did not believe that he had to be monitored and that it may put the patient at risk/danger because it would increase his stress level with the monitor looking over his shoulder. Dr. Zahl, however, noted that he was in the room and did help him through the procedure. Similarly, Dr. Zahl testified that when Dr. Yulo was performing the procedures, he did not have the monitor observe him. Dr. Zahl continued by explaining that he also watched Dr. Yulo in other procedures and for example, made sure that he was able to hit the "eye of the Scottie dog." He also made sure that there was some anatomical confirmation by reviewing the x-ray image and the physiology component with Dr. Yulo's technique.

Turning his attention to the cervical spine injections, Dr. Zahl testified that he worked with Dr. Yulo in the same way: See One, Do one together, and Do one solo under observation. After this three-prong approach, Dr. Zahl was assured that Dr. Yulo would be able to perform them on his own.

In his certification, he stated that Dr. Yulo was the primary attending physician, he clarified his statement as he meant to say that he was the primary person doing procedures. Although, Dr. Yulo often worked on "original" Dr. Zahl's patients, which might establish an Attending relationship, he always considered that Dr. Yulo was the primary physician whenever he was doing the procedure.

In Stellate-Ganglion procedures, according to Dr.Zahl, one must identify the C6 and C7 and with the x ray imaging, once it is there, Xray dye is inserted in order to verify the location. Again, as he testified earlier, he employed the three prong teaching approach and again, achieved a level of confidence in his ability to perform the procedures, although, the witness noted that Dr. Yulo only performed two of them during his tenure in his office.

Dr. Zahl also testified about the priority of teaching his patients. He described this as one of his highest priorities. He has maintained a web site with a various set of information for a number of years, which also is available in Spanish if needed. In his office, he makes available literature, brochures, and video tapes. The witness also explained that he uses the Consent Form as an opportunity to educate his patients.

Turning his attention to the Consent Form, and as indicated in prior testimony, he noted that a number of people in his office may assist him with obtaining the Consent Form. During this time, the patients are also educated and given an opportunity to think about the procedure. He also noted that in some instances, the Consent Form is obtained in order to obtain the pre-certification that is necessary for a number of the insurance or third party payers. The Consent Forms for which Dr. Yulo was involved do not include his name because there is no place to write it in. He may have explained the procedure to the patient, but because they were originally patients of Dr. Zahl, he also talked to the patient. The witness, however, noted that the patient was always informed that Dr. Yulo would be performing the procedure.

He also explained that those forms that did not indicate that Dr. Yulo performed the services, yet he billed for it

was because the non electronic forms had an attachment to them which would have indicated that Dr. Yulo performed the service. More than likely, the witness opined, that this was the anesthesia record. Dr. Zahl admitted that as a general rule, he does not have any involvement with the anesthesia record. He has not instructed the nurse anesthetist what to put down on the form. The nurse anesthetist, according to the witness, fills out the form on her own.

In contrast, Dr. Zahl does have full responsibility for the Operative Report. He has developed a number of forms, estimating about eighty to one hundred different versions, to streamline the process. He described the form as a template which corresponds to each type of procedure that might be performed. Dr. Zahl informed the Board that he uses the templates because it makes his record keeping easier and allows him to make contemporaneous records. Dr. Zahl also stated that he filled out all the forms because Dr. Yulo had a tendency to be too slow in the preparation of the reports. He admitted that there was a signature of Dr. Yulo on some of the documents, however, he noted that it was a scanned signature. The witness further explained that he informed Dr. Yulo that he would be scanning the signature and Dr. Yulo did not object. Also, Dr. Zahl realized that as he was becoming more and more overwhelmed with the Board 's investigation, he realized that he could not longer do it all himself. He changed his procedure and now the documents are personally signed by the provider.

In reviewing the documents, Dr. Zahl identified those documents that he prepared, indicating which information was input by him. For example, on one operative report, he noted that Dr. Yulo was listed as the physician and the signatures were both the scanned versions of Dr. Yulo and Dr. Zahl. The operative report, for another procedure, had Dr. Yulo as both the signatory and the physician. Another report, was like the first one reviewed, namely, the physician was Dr. Yulo, however, both Dr. Yulo and Dr. Zahl were signatories on the document. Yet another report, had Dr. Zahl as the physician, however, both signatures were placed on the document. In using these as examples, Dr. Zahl clarified that because the documents were part of the templates some "inaccurate" information may be contained on them, that is, carried over from one template to another. Dr. Zahl admitted that this was his error because he was the one that created the documents.

Dr. Zahl testified that Dr. Yulo's name may be found on the images because Ms. Graham would have inserted his name. He never told Ms. Graham to put in his name, nor did he ever ask her to change any of the images.

The witness acknowledged that he had problems with URS over the course of the monitoring. In some cases, it was being billed for block times that they were not needed. Additionally, when patients were not in the office, the monitors would read magazines, talk on the cell phone, or go to the mall across a street. The practice monitors, according to Dr. Zahl, never reviewed any of the bills even when there was down time in the office. In spite of his asking, the monitors refused to have anything to do with the billing issues. He did, however, recall that there were a few occasions that the practice monitor did look at the bills. He had hoped they would because this would have saved him from having to send the bills. On site review was a rare occasion. To the best of his knowledge, he did not believe that he was required under the Order to send the bills, but that it was within his right to have on site monitoring of the bills. Additionally, Ms. Caruso noted that when he did the IMEs, the auditor would come on site and perform a live audit. She suggested, and the witness agreed, that the monitors should come on site and not have to be sent copies in order to perform the proper review. As he testified, he stressed that he was willing to have the billing monitors come on site to review the charts. He also recalled that he had requested the Board to permit this procedure. In the interim, Dr. Zahl stated that he never instructed his staff not to furnish records to URS.

While there was some question about his billing method, according to the witness, his billing method for listing each fluoroscopic level that was localized separately is consistent with the Medicare policy. The billing monitor confirmed this with Medicare.

The Attorney General objected to having Dr. Zahl testify as to any policy or procedures concerning social security disabilities. The chair sustained the objection and noted that the issue was peripheral, as the primary focus of the hearing was whether cause existed to temporarily suspend or otherwise limit the license of Dr. Zahl pending a plenary hearing in this matter. The chair further noted that this line of questioning, if deemed relevant, can be fully explored at any plenary hearing that might occur at a later date.

Ms. De Gregorio left the hearing and did not participate further in this portion of the hearing.

DAG Kenny began his cross by focusing his attention on a document in which Dr. Zahl verified his signature on the response to Demand for Statement Under Oath certification. The witness also stated that he understood the certification when he signed it. He also certified that he stated that Dr. Yulo signed all the reports. When pressed, Dr. Zahl admitted that the statement was not true as he pointed out during his direct testimony. He recognized there were other ways to express the veracity of who signed the document and how it was signed. Dr. Zahl, however, did explain that the certification was prepared by his attorney and he admitted that he may have signed it hastily without completely reviewing it line by line. He acknowledged that he read it before he signed it. He also noted that he attempted to get the documents to him as soon as possible and assured the committee that he was attempting to comply as best as he could. He did, however, admit that he did not review the documents prior to them being sent out.

Addressing the Consent Forms, he again noted that the forms did not mention Dr. Yulo because as he explained, there was not room on the form.

In 2005, around Christmas time, Dr. Zahl denied that he telephoned Dr. Yulo in order to obtain his signature on the insurance forms to be submitted to be reimbursed. He clarified, however, that he did mention that for billing purposes, Dr. Zahl needed the original signatures. Although the procedures had already been billed, Dr. Zahl denied that he wanted to conform the documents in light of the Attorney General's demand for records. He maintained that it was for billing purposes only. According to Dr. Zahl, he also asked Dr. Yulo to contact him because he thought they could meet and at that time, he would obtain the original signature. Dr. Zahl continued by stating that he did not think to go through his attorney to obtain the information. The witness also admitted that he placed two or three more telephone calls subsequent to the first requesting the signature. Although he initially tried to explain there were many reasons for the telephone call, he finally admitted that all related to Dr. Zahl's attempt to obtain Dr. Yulo's signature.

Dr. Zahl also confirmed that he did not in his initial response to the Demand for Statement Under Oath submit any of the records relating to fluoroscopies. This did not occur, as admitted by Dr. Zahl, until after the filing of the Attorney General's filing of the Temporary Suspension and Order to Show Cause.

In reviewing a typical operative report, Dr. Zahl testified that the purpose of the signature is to confirm that the service that was described above was done. He also admitted that it should be signed by the person that performed the procedure and that the content of the report is being attested to as accurate to the best of the physician's ability. He noted that on the record being reviewed, Dr. Yulo performed the services, yet his signature (i.e., Dr. Zahl's) was on the operative report. He admitted that Dr. Yulo's signature would have been on the operative report and further admitted that Dr. Yulo should have been offered the opportunity to read the report prior to signature. DAG Kenny then focused Dr. Zahl's attention to the section under indications on the operative report. He again stressed that the form comes off of a template and this might account for some of the items that are not as accurate as perhaps they should be. The same would apply, Dr. Zahl continued, as to the boiler plate language about anesthesia and the potential adverse reactions that may occur.

Dr. Zahl informed the Committee that he considers himself a solo practitioner in a solo setting and for this reason he does have the CRNA on site in order to assist with the administration of anesthesia. But, as pointed out by D.A.G. Kenny, Dr. Yulo was on site that day and Dr. Zahl confirmed that this was accurate. He also admitted that the form stated 'solo' practitioner, he admitted at least on the document he was reviewing, there was another practitioner on site. Dr. Zahl, however, again asked the Board to realize that he was using a template.

The anesthesia record, which has the name of Victoria Bran, CRNA, was reviewed by Dr. Zahl. This would have included the block for the name surgeon. There is no information as to differentiate between what part of the procedures were performed by Zahl or Yulo. Comparing these to the billing record, he noted that Dr. Yulo's name was not on the billing records and in the event that he was billing Medicare, he used the Q6 modifier. Another explanation offered by Dr. Zahl as to why Dr. Yulo's name was not on the billing records was because there was not any space available to include it. He also believed that with the electronic filling, it does not matter who signs

the billing record because it is already on file with the application as well as the W-9 forms. Although he could not categorically agree that it was the standard within the industry, he did believe that the fact that a reimbursement form does not get returned to him for a signature issue was telling. He also admitted that it would be important for all the patient records to accurately reflect who provided what services.

When Ms. Bran was called into an investigatory hearing, Dr. Zahl admitted that he offered and paid for her attorney, as well as paid her for her day away from work. The witness stated that she is hired on a per diem basis and gets paid the same whether she does one procedure or ten procedures.

Generally speaking, Dr. Zahl believed that she was familiar with the application to be credentialed with Medicare. The form that was previously marked as S-12 is the one that is generally used for a locum tens. But in any event, he testified that it would inform Medicare that there would be another licensee in the office providing services. He believed that this document was found in his office in a folder entitled "Physician Credentialing" and he was not sure if the form had been sent in. He confirmed that Dr. Yulo did his first procedures as early as October 23, 2004. The witness believed that the form had been sent in and filed in April 2005 and it is possible that Dr. Yulo did about ten procedures prior to submission of this form. January 10, 2005, according to the witness is not a special date or anything memorable. He did note however that Ms. Caruso Long claimed that she signed it then, but the witness stated that it was impossible because Ms. Caruso Long did not work for him at that time. The witness did express concern that the form was never filed especially as it related to the Medicare billings that have been submitted, although to date, he has not pulled any of those bills because he just learned about it late yesterday. In any event, according to the witness' own testimony, there were a number of instances that the Q6 modifier was used prior to the attempted filling of the form to be reimbursed. While he did not have a complete understanding as to how long a Q6 modifier could be used, Dr. Zahl was certain that it could not be used for an indefinite period of time.

Dr. Zahl acknowledged that Dr. Liebowitz worked for him. He further acknowledged that treatment for those patients treated by Dr. Liebowitz were not reviewed by the billing monitor. The witness explained that he did not believe that the Board Order contemplated having procedures and/or the bills for those services monitored. Dr. Liebowitz had some interests in taking over Dr. Zahl's practice and was interested in learning some additional techniques from Dr. Zahl. Acknowledging that he took a course just days before he started working for Dr. Zahl, the witness explained that he performed interventional procedures as soon as he arrived to work with Dr. Zahl present in the room. He also admitted that Dr. Liebowitz performed a discogram as the primary attending physician.

Reviewing an e-mail sent to Elaine Long in November 2005 and Dr. Zahl recalled that it was at a time when she was raising questions about the manner of billing for Dr. Liebowitz, Dr. Zahl stated that he was instructing her how to bill for him. One of the explanations he offered to Ms. Long was that Dr. Liebowitz only did one Discogram alone, yet the documents illustrated that there were at least three Discograms performed by Dr. Liebowitz by himself. According to the email, it was clear that Dr. Zahl's intent was to have Ms. Long bill for one Discogram performed by Dr. Liebowitz as the sole provider, and that the others were to be billed as if performed by Dr. Zahl as the sole provider. During the hearing, however, Dr. Zahl attempted to clarify that in the email he meant that he could not bill for the other two and that he would only be billing for the one discogram performed by Dr. Liebowitz by himself. He further explained that he did some limited credentialing on Dr. Liebowitz and when he came in October 2004, he was ready to procedures, albeit with some supervision.

It was difficult for Dr. Zahl to explain when he felt the need to observe or walk a physician through a procedure. Sometimes he would be gloved in the event he would have to intercede in a procedure.

Dr. Zahl reviewed a number of procedures that took place in October 2004 and according to his testimony, although he stated that Dr. Yulo was the one that performed the procedure, the physician listed was Dr. Zahl. He further admitted that in looking at the document, one would not be able to tell who the physician really was, but would be left with the impression that Dr. Zahl had been the provider. He did state that the information in the operative report was written by him, even though he may not have been the one that provided the services. He also confirmed that the same was true regardless of what type of procedure was performed.

Dr. Zahl noted that if he were observing a procedure and had to intervene, in the event that the monitors were not present in the room, he would not be able to bill for the procedure. He also noted that sometime he would be pre-gloved to be ready in the event that was necessary, but that generally, it would have depended on the nature of the procedure as to whether he thought it was necessary. He again confirmed that he believed that Drs. Yulo and Liebowitz were prepared early on to perform certain procedures as the primary attending physician, although he stressed that he was in the room ready to stop, direct, or step in to assist with the procedure. In particular at the early stage of placing the needle to make sure that the appropriate levels were obtained with the needles was the time that was crucial to being observed according to Dr. Zahl.

Since about 1979 or 1980, Dr. Zahl stated that he has been a member of ISIS and that there are guidelines issued by the Society that deal with the injections of steroids. The witness was generally familiar with the guidelines, although he did not know whether he had ever seen the guidelines shown to him by DAG Kenny. After reading the guidelines into the record, Dr. Zahl agreed that for the most part he was familiar with them.

There was some confusion as to how Dr. Zahl considered Dr. Yulo in relationship to Dr. Zahl's office practice. In one sense, Dr. Zahl considered him an employee and on the other hand he considered him to be an independent contractor. The witness also stated that he did not believe that the monitoring requirement extended to Dr. Yulo. He admitted, however, that the CRNA was monitored. From October 2004 through November 2005, Dr. Zahl did not seek clarification from the Attorney General's office whether Dr. Yulo needed to be monitored. The first time that the witness could recall that he sought clarification was the motion that was filed in November 2005, which the Board tabled in light of the filing of the Attorney General's temporary suspension application.

Ms. Long left his employment in December 2005 and denied that she informed him that part of the reason that she was leaving because he was in violation of the Board's Order.

Dr. Zahl again addressed his hiring of Dr. Yulo and depending on what happened to his license in the Board proceedings, he may be the one that would keep his practice going in the event Dr. Zahl lost his license. He again noted that Dr. Yulo was a temporary employee that would be working one day a week in his office. For the Medicare patients, he billed Dr. Yulo's services with the Q6 modifier. Even though he is not board certified by AAEM, he believed that he could observe and oversee Dr. Yulo initially to determine whether he was qualified to perform the procedures solo. In part, Dr. Zahl held this belief because of his vast experience. He did not believe that the monitor was necessary under the Board Order because he was an employee. He also reminded the Board that he thought that the presence of the monitor would also add additional stress to Dr. Yulo. He also assured the Board that he was doing his best to comply with the terms of the Order. Dr. Zahl also clarified that with the cervical cases, he felt comfortable with Dr. Yulo performing the procedure because there was a lot of time. He believes that Dr. Yulo no longer works with him because when Dr. Zahl received the appellate decision remanding the case, he believed that the revocation may not happen. At that time, he even believed he told Dr. Yulo that he may not need his services any longer. At the same time, Dr. Zahl testified that he learned that Dr. Yulo was not a member of the group as he had led him to believe he was. Dr. Zahl has attempted to learn and believes that Dr. Yulo has continued to do procedures, however, he did not know where.

In the 5700 procedures he performed, if Dr. Yulo was the primary treating physician and if some untoward experience occurred, he would be faced with three possibilities. If no bill is submitted, no monitor is needed. Secondly, he could abort the procedure and finally, he could perform the procedure or guide the licensee through it. Of course, as an afterthought, he could call the USR monitor to return.

Dr. Zahl does not believe that he has a template for EMGs, however, he did note that there is a computer program that could generate a report. By the fourth or fifth one, Dr. Yulo was doing the reports himself. Although, he did recall that throughout, Dr. Yulo had a problem printing the reports. Of the 42 EMGs performed, the vast majority of reports were written by Dr. Yulo with some help particularly with the printing component. Dr. Zahl also believes that he scheduled an in service for him to learn the computer program.

According to Dr. Zahl, the Board Order of May 2003 mandated a billing monitor. It took some time to get things in place and more than likely, according to Dr. Zahl, it was in place by June 2003. He was reminded that Ms.

Caruso Long estimated that about 20% of his bills were being returned. Dr. Zahl attempted to explain this by informing the Board that he has hired someone to follow up, especially with the Medicare reimbursements. He is not quite sure why they were being returned, but again stressed that the ones returned were those submitted to Medicare. He also noted that the billing monitor was not to assist him with his billing, but to oversee the billing and make sure that it corresponded for the services provided. According to Dr. Zahl, he received no feedback from the billing monitor as it related to how to bill.

The CRNA, he continued in his testimony, may not be able to see the patient while the procedure is taking place and is behind a lead shield. As he explained, her role is to monitor the patient and if need be, assist if something untoward were to occur as it relates to the provision of anesthesia. He further clarified that the lead shield is a rolling shield, but that the fluoroscopy procedures might be seen through the image. Once the procedure is going, i.e., guiding the needle, she is in a better vantage point to observe what is going on. He did not that the X ray technician was in a better position to observe the patient.

Turning his attention to his medical records, he testified that he does note progress of patients and follow ups of office visits. This issue was worked out between the attorneys prior to Dr. Zahl 's response to the Demand for Statement Under Oath and it was determined that those records did not need to be produced.

Again looking at the operative records and specifically, focusing on the signature of Dr. Yulo's signature that was scanned in, Dr. Zahl noted that during the interview, he obtained a copy of his license. From the license, Dr. Zahl then cut and paste the signature. According to Dr. Zahl he informed Dr. Yulo that he was going to do this. Information for the operative report was obtained by either Dr. Yulo telling him or through Dr. Zahl's personal observations of the patient.

The witness acknowledged that he had his attorney write into the Board concerning the use of a CRNA. He also recalled that he did write again in November 14, 2005 requesting clarification about the need to have a physician, other than Dr. Zahl, monitored according to the terms of the Consent Order.

Dr. Zahl explained that the last time that records that were forwarded to the billing monitor was sometime around October 2005. This was after there was some disagreement for which he sought clarification, over what is to be required. He acknowledged that USR faxed a list of patient records that it was looking for and that Ms. Caruso Long and Dr. Zahl had a confrontation over it. The witness noted that he did not understand Ms. Caruso's "flip flop" of position. He maintained that the order required unfettered access to the records and he was and is prepared to let them review the records on site. He also stated that as long as he performs and intends to bill for an interventional procedure a monitor is present to observe him.

The parties also marked the letter from Dr. Paul denying Respondent's request to issue a subpoena to compel the testimony of Dr. Brody.

MR. JACKSON'S CLOSING ARGUMENTS

Mr. Jackson in closing arguments reminded the Board that the burden of proof was on the Attorney General. He posited that this case was very focused and that it was whether the State had met its burden of proof to palpably demonstrate that there was a clear and imminent danger to the public health, safety and welfare. Counsel reminded the Board that it heard from patients that they all confirmed that Dr. Zahl was a safe practitioner whose continued practice did not present a clear and imminent danger to the public.

Counsel for Respondent acknowledged that there were indeed problems with Dr. Zahl's record keeping. Mr. Jackson went so far as to characterize them as an "embarrassment." But even with the quality, or lack thereof, it certainly did not demonstrate a risk of harm to anyone. Perhaps, Mr. Jackson suggested, that the issue should be settled on another day at the plenary hearing but stressed that to remove him from practice, would cripple his practice and harm the patients that depended on him for the quality of care that they have testified that they are in dire need of. But even with the records, he directed the Board to the volume of records that document all the procedures that Dr. Zahl did perform.

Mr. Jackson suggested that there were credibility issues of Dr. Yulo and Ms. Caruso-Long that there had not been sufficient time to explore. He added that Dr. Zahl had also, in spite of their testimony, attempted to comply with the terms of the Board Orders. So much so that he even wrote to the Board for clarification and ultimately, submitted the Motion to the Board.

While the allegations of fraud, deceit, and misrepresentation issues were out there, he maintained that these issues had not been proven by the Attorney General and so, therefore, urged the Board to deem it appropriate to have the Office of Administrative Law decide these issues. He concluded by urging the Board to find that the Attorney General had not met its burden of proof and therefore, the application for a temporary suspension should be denied.

DAG KENNY'S CLOSING ARGUMENTS

The Attorney General in her closing argument handed out to the Board a February 22, 2006 written submission as a supplement to any oral argument permitted by the Board at the conclusion of the hearings on the Attorney General's Application for Temporary Suspension of Dr. Zahl's license. Also handed out was the Appendix of Exhibit A through D comprising DAG Kenny's calculations of the review of all the records and categorizing them into certain categories with certain references so that the committee could check with regard to the Attorney General's Summation to the Committee of the Board. Also, included in the appendix were cases that DAG Kenny relied upon as far as Dr. Zahl's continued practice presenting a clear and imminent danger to the public's health, safety, and welfare. Mr. Jackson did not object to the submission and it was received by the Board as informational.

D.A.G. Kenny continued by stressing that the Attorney General considered this matter to be very serious and thanked the Board for its attention and the efforts involved in the case. Counsel noted that this matter was not about the Board though, and not about Mr. Jackson, but instead it was about Dr. Zahl. The Attorney General submitted that a physician who's judgement was so clouded by greed, anger and a desire to deceive that he would risk his entire professional career on these desperate attempts to avoid compliance with the Board's Orders was a dangerous physician. The Attorney General believed that it had palpably proven that Dr. Zahl had perceived a reckless and devious path in trying to avoid compliance with the Board's Orders.

The Attorney General asked the Board one more time to go through those records and to read these records in their deliberations. D.A.G. Kenny believed that Dr. Zahl did not want the Board to look very closely at things. Because if you don't look very closely, you just take things at a superficial level. The Attorney General argued that it has been proven that Dr. Zahl has engaged in scores of unmonitored procedures and billings since at least October of 2004. He reminded that Committee that Dr. Zahl had stated that the justification for this is that Dr. Yulo and Dr. Liebowitz were the primary attending physicians for each and every one of these 130 procedures. He referred the members to Exhibit A which was a simple attempt to break each one of the procedures. He requested that the members concentrate the review on the infrequency of the occurrence that only lists Dr. Yulo, or for that matter, Dr. Liebowitz as the only physician. He also reminded the members that all of the operative reports, as well as the bills, were created solely by Dr. Zahl. He also argued that considering the totality of the evidence that Dr. Zahl's testimony was not credible on any of the issues. He further suggested that Dr. Zahl's testimony was contrived to purposefully attempt to confuse and explain away his deceit and misrepresentations. He reminded the Committee that Dr. Zahl admitted that if one were to read most if not all of the operative records, one could not determine who was doing what on the patients. Although Dr. Zahl attempted to explain the errors away by blaming it on the templates, DAG Kenny argued that the errors were all part of a deliberate scheme to create records that would obfuscate review by the billing monitor. He further argued that it was an attempt to circumvent the parameters of the Board's Orders.

He continued by referencing a book about a comical look at the mob by Jimmy Breslin, called The Gang that Couldn't Shoot Straight. DAG Kenny suggested that when one reviews the testimony of Dr. Zahl, Ms. Genard, Victoria Brant and Shontell Graham together, you have the gang that couldn't keep their records straight and it's all to the same issue – the identity of the surgeon.

Turning his attention to the issue of the Attorney's fees, DAG Kenny noted that Dr. Zahl owed that money at least as of December 8, 2005 when his appeal on that issue was exhausted to the Supreme Court. He now argues that since he has a motion pending which he does, he is not responsible for its payment. To the contrary, the facts demonstrate that he has not paid one dollar in good faith, has not rendered a single scrap of evidence to the Board that he is unable to pay or for that matter requested a payment schedule.

As far as the consistent and deliberate obstruction of the submission of patient records to URS monitors, unfettered access, DAG Kenny argued that it was nothing more than a cat and mouse game. Now, again when it fits Dr. Zahl's purposes, the deputy continued, he wants to read the Orders very closely and say unfettered access means come to my office. What he doesn't tell you that at least since last April of 2004, he's been sending those records to URS, and then he declares in October of 2005 he's not sending them anymore. Basically, according to DAG Kenny, Dr. Zahl took the position, if you don't come here, you're not getting them. Such an attitude or position, he commented, is contrary to both the letter, as well as the spirit of the Board's Order.

DAG Kenny also referred to the testimony of Elaine Caruso-Long. He acknowledged that there were attacks made against her by the handwriting expert. He further acknowledged that the expert may be well intentioned but noted that it was almost unfathomable how she could uncover to a reasonable degree of scientific certainty, that the date underneath (1/06/05) was for 2000 especially since at the bottom of the questioned document it indicates that it was a document issued in November 2001.

DAG Kenny also argued that the Attorney General takes the position that a deliberate falsification of patient records, particularly when the reason therefore is to protect one's own interest at the expense of the patient's must be regarded as gross malpractice endangering the health or life of his patient. In the instant case, he continued, Dr. Zahl has obscured the identity of the surgeon that performed the procedure. In and of itself, he argued, this constitutes gross negligence. However, in this case, it not only violates the Board's laws, but is contrary to the Orders and parameters of practice imposed on Dr. Zahl by the Board. According to DAG Kenny, is nothing more than pure fraud being committed for Dr. Zahl's own gain.

In closing, he reminded the committee that back in 2003 the Attorney General came before it with the assertion that Dr. Zahl was, and as determined by the Board at that time, a fundamentally corrupt and dishonest licensee who utterly failed to recognize the moral repugnancy of his acts of dishonesty and deception. Currently, in a wholly separate record, he argued that the facts had not changed. The Attorney General respectfully requested that the committee suspend Dr. Zahl's license temporarily as his continued practice represents a clear and imminent danger to the public health, safety and welfare.

The Committee, upon motion made and seconded, voted to move into Executive Session for deliberations and advice of counsel. All parties, except for the counseling and administrative staff, left the room.

Upon returning to open session, the committee announced the following motion made by Dr. Paul and seconded by Mr. Walsh.

THE COMMITTEE OF THE BOARD, UPON MOTION MADE AND SECONDED, FOUND THAT THE ATTORNEY GENERAL HAS MET HER BURDEN OF PALPABLY DEMONSTRATING A CLEAR AND IMMINENT DANGER TO THE PUBLIC'S HEALTH, SAFETY AND WELFARE. THE COMMITTEE ADDITIONALLY CONCLUDED, BASED ON THE FINDINGS THAT DR. ZAHL HAS REPEATEDLY AND FUNDAMENTALLY VIOLATED THE TERMS OF THE PRESENT MONITORING ORDER THAT NO ACTION SHORT OF THE TEMPORARY SUSPENSION OF THE LICENSE OF DR. ZAHL COULD ADEQUATELY PROTECT THE PUBLIC. THE COMMITTEE, THEREFORE, ORDERED THAT THE LICENSE OF DR. ZAHL IS TO BE TEMPORARILY SUSPENDED PENDING THE COMPLETION OF PLENARY PROCEEDINGS IN THIS MATTER. BASED SOLELY ON CONCERNS FOR THE WELFARE OF THE CHRONIC PAIN PATIENTS THAT DR. ZAHL MAY BE PRESENTLY TREATING, THE TEMPORARY SUSPENSION SHALL BE EFFECTIVE ON MARCH 9, 2006. PRIOR TO MARCH 9, 2006, DR. ZAHL MAY TREAT PATIENTS WHO ARE CURRENTLY SCHEDULED FOR APPOINTMENTS FOR PROCEDURES. ANY

PROCEDURES PERFORMED SHALL CONTINUE TO BE DONE IN THE PRESENCE OF THE URS PRACTICE MONITOR. DR. ZAHL SHALL FORWARD BY FAX, A COPY OF HIS SCHEDULE FOR THE NEXT TWO WEEK PERIOD TO THE BOARD OFFICE ATTN: WILLIAM V. ROEDER, EXECUTIVE DIRECTOR, NOT LATER THAN 5:00 P.M. ON FRIDAY FEBRUARY 24, 2006. DR. ZAHL SHALL NOT SCHEDULE ANY NEW PROCEDURES DURING THE TWO WEEK WIND DOWN PERIOD NOR SHALL HE SEE OR TREAT ANY NEW PATIENTS DURING THAT TIME. DR. ZAHL SHALL ADDITIONALLY MAKE APPROPRIATE ARRANGEMENTS FOR THE TRANSFER OF THE CARE OF HIS PATIENTS PRIOR TO MARCH 9, 2006. A WRITTEN ORDER SETTING FORTH IN GREATER DETAIL THE FINDINGS MADE BY THE COMMITTEE AND THE BASIS FOR THE ACTION THAT HAS BEEN ORDERED BY THE COMMITTEE SHALL BE PREPARED AND SHALL MADE AVAILABLE TO THE FULL BOARD ON MARCH 8, 2006 AT WHICH TIME THE COMMITTEE'S FINDINGS AND ACTIONS MAY BE ADOPTED, REJECTED OR MODIFIED BY THE FULL BOARD.

Mr. Jackson respectively made an application for a stay of the order. The Attorney General opposed that application.

THE COMMITTEE, UPON MOTION MADE AND SECONDED, VOTED TO DENY THE STAY APPLICATION.

Karen Criss R.N., C.N.M.
Vice-President
Chairperson for Open
Disciplinary Matters
RCS/wr February '06

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