

OPEN MINUTES - N.J. STATE BOARD OF MEDICAL EXAMINERS - PG. 1
DISCIPLINARY MATTERS PENDING CONCLUSION - MAY 12, 2010

A meeting of the New Jersey State Board of Medical Examiners was held on Wednesday, May 12, 2010 at the Richard J. Hughes Justice Complex, 25 Market Street, 4th Floor Conference Center, Trenton, New Jersey for Disciplinary Matters Pending Conclusion, open to the public. The meeting was called to order by Dr. Jordan, Chairperson for Open Disciplinary Matters.

PRESENT

Board Members Berkowitz, Baker, DeGregorio, Cheema, Ciechanowski, Criss, Howard Iannuzzi, Jordan, Paul, Scott, Stanley, Tedeschi, Rajput, Lomazow, Mendelowitz and Walsh.

EXCUSED

Board Members Lambert, Weiss

ALSO PRESENT

Acting Director of the Division of Consumer Affairs, Sharon Joyce, Senior Deputy Attorneys General Dick, Flanzman, and Gelber, Deputy Attorneys General Ehrenkrantz, Levine, Silva, Warhaftig, and Executive Director Roeder.

RATIFICATION OF MINUTES

**THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO
APPROVE THE MINUTES FROM THE APRIL 14, 2010 BOARD MEETING.**

HEARINGS, PLEAS, AND APPEARANCES

10:00 PM DAVID CORWIN, M.D. 25MA04336100
Michael Keating, Esquire (for Respondent)
Carla Silva, DAG (for Prosecution)
Steven N. Flanzman, DAG (Counseling)

An Order was filed by the Board on March 15, 2010 suspending Dr. Corwin's license to practice medicine for one year. The entirety of such suspension was stayed, subject to Dr. Corwin's compliance with all conditions and terms therein. The Attorney General has since filed a Notice of Motion to Enforce Litigant's Rights and a letter brief in support of the Motion on April 28, 2010. The Motion seeks the immediate suspension of Dr. Corwin's license to practice medicine based on allegations of Dr. Corwin's failure to abide by the terms of the Board's Order.

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Dr. Mendelowitz recused from discussion and vote in the matter and left the table.

DAG Silva began by reminding the Board that in March 2010, the Board entered an Order which included a requirement that Dr. Corwin have a Board approved chaperone in place whenever he examined female patients. This term was subject to possible revision depending on the results of a psychosexual evaluation. Based on statements made by Dr. Corwin to Board administrative staff, he admitted to seeing female patients absent the chaperone. DAG Silva offered into evidence P-1 through P-6. Mr. Keating, counsel for Respondent, did not object. The Board entered the exhibits into evidence.

DAG Silva continued by arguing that Dr. Corwin's actions were in direct violation of the Order and while he attempted to minimize his behavior, nonetheless, utilizing the chaperone when seeing female patients was an express term of the Order. She acknowledged that a family member may have been present, however, it did not satisfy the Board's requirement. Dr. Corwin acknowledged the terms of the Order and further acknowledged that he understood the terms at the time the Order was entered. He was informed on April 16th by a member of the Administrative Office that he could not continue to see female patients absent the Board's approval of a chaperone. She requested that his license be suspended for failing to abide by the terms of the Board's Order.

Mr. Keating asked the Board to concentrate on the "real issue", and according to him, that is, whether Dr. Corwin intentionally violated the Board's order or was it simply that Dr. Corwin was unclear whether the family member sufficed as a chaperone. He further acknowledged that Dr. Corwin did complete the evaluation and paid the civil penalty according to the Order. He also has signed up for the boundary course as required. He posited that if the Board looked at Dr. Corwin's composite behavior, it could conclude that Dr. Corwin was attempting to comply not only with the terms of the Order, but with the spirit as well. After the March Board meeting, he continued, Dr. Corwin tried to comply with the terms of the Order and this is evidenced by his compliance with the other terms.

He also reminded the Board that prior to the actual hearing on the merits, Dr. Corwin explored settlement of the matter and various options were presented to Dr. Corwin. Ultimately, he agreed to see female patients only in the presence of a Board approved chaperone. Unfortunately, no one addressed the scenario where he was seeing female patients where family members are present. One might argue that it would have been Dr. Corwin's responsibility to clarify this. Indeed, he attempted following the meeting to get some assistance from Mr. Keating's office seeking clarification on whether the family member would be appropriate. Without a response from the law firm, he began to see female patients in a group setting with family members present. He assured the Board that Dr. Corwin did not follow this path as a sign of disrespect or disregard for the Board's Order. He asked the Board to keep the current Order in place and Dr. Corwin was willing to honor all the terms. Mr. Keating also suggested that Dr. Corwin would agree to forgo seeing any female patients until the Board has had the opportunity

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to review the results of the evaluation.

Dr. Corwin, after being sworn in, testified that he recalled that during negotiations, he was presented with two options. He agreed that he would not see any female patients alone. When he left the meeting, he realized he had a small office and that from time to time, some of his female patients are seen with family members present. He tried to contact his attorney and clarify the issue. He was under the assumption that the Board would get back to him on his question about whether he could do this. Finally, he apologized and acknowledged that he should have waited for prior approval before seeing females without the Board approved chaperone.

On cross examination, DAG Silva questioned the doctor about his understanding of the Order. He acknowledged that he understood the terms, which included the requirement that a Board approved chaperone be present whenever he saw female patients. Dr. Corwin acknowledged that he did see female patients but only in the presence of family members or significant others. He did recall speaking with the Board representatives and further acknowledged that he did see female patients after learning the Board expected him to cease. He stressed that at all times that he saw female patients, it was only with the presence of another person in the office during his session. Mr. Keating also clarified that Dr. Corwin would be able to produce his progress notes which would demonstrate another person was present during his session. Dr. Corwin explained that he had not selected a chaperone because he was waiting to hear back from the Board.

DAG Silva noted for the record that prior to the entry of the Order, the terms were read into the record and that Dr. Corwin acknowledged on the record that he understood the terms. She also stressed that Dr. Corwin also continued to see patients after he was informed by the Board office that he could not see female patients without a presence of a Board approved chaperone.

Mr. Keating acknowledged that there was a violation of the Order, however, he wanted the Board to take into consideration that it was not intentional. Dr. Corwin was attempting to at least to comply with the spirit of the terms by only seeing female patients in the presence of a family member. In retrospect, Dr. Corwin did not interpret the term appropriately. He concluded by asking the Board to recognize that the Board's Order was the appropriate way to handle this case and that Order should not be disturbed. He urged the Board to consider that Dr. Corwin has complied with all the other terms and that his "non compliance" was at best inadvertent and the result of poor judgement in his interpretation of the Order.

**THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE
INTO CLOSED SESSION FOR ADVICE OF COUNSEL AND DELIBERATIONS.**

All parties, except administrative and counseling staff left the room.

The Board returned to Open Session and announced its decision.

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THE BOARD, UPON MOTION MADE AND SECONDED, VOTED THAT THE ATTORNEY GENERAL MET HER BURDEN AND FOUND THAT DR. CORWIN VIOLATED THE TERMS OF THE ORDER INsofar AS HE SAW FEMALE PATIENTS WITHOUT A BOARD APPROVED CHAPERONE AND ACTIVATED THE PERIOD OF ACTIVE SUSPENSION PENDING FURTHER ORDER OF THE BOARD WHICH WILL BE ENTERED AFTER REVIEW OF THE EVALUATION FROM PETER'S INSTITUTE. THE REPORT WILL BE PRESENTED AT THE FOLLOWING BOARD MEETING AFTER RECEIPT (CONDITIONED THAT IT IS RECEIVED FOURTEEN DAYS PRIOR TO THE SCHEDULED MEETING).

1:00 PM **KEVIN M. FLEMING, M.D., 25MA04672000**
Carl D. Poplar, Esquire (for Respondent)
Jeri Warhaftig, DAG/David Puteska, DAG (for Prosecution)
Debra Levine, DAG (Counseling)

The Initial Decision of Administrative Law Judge Jeff S. Masin in this matter was served on the parties on or about February 9, 2010. Respondent's objections to the Initial Decision were filed on or about February 22, 2010. The Attorney General's reply to Respondent's exceptions, and Certifications of costs were filed on March 16, 2010.

The attorneys put their appearances on the record with DAG Warhaftig in for DAG Puteska.

The parties stipulated to the proposed findings of fact and conclusions of law, except that they do not stipulate to the penalty or to the judge's findings that the doctor acted in good faith. The Attorney General maintained that the issue of good faith was relevant only to the assessment of penalty or in the mitigation of the penalty. Mr. Poplar agreed with the stipulations. The parties waived oral argument on the liability phase.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE INTO CLOSED SESSION FOR DELIBERATIONS AND ADVICE OF COUNSEL.

All parties, except administrative and counseling staff, left the room.

Returning to open session, the Board announced its decision.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO ADOPT IN ITS ENTIRETY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE INITIAL DECISION ON LIABILITY. THE BOARD CONSIDERED THE ALJ'S FINDING OF GOOD FAITH IN DETERMINING THE APPROPRIATE PENALTY.

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Ms. DeGregorio put on the record that she thought Dr. Fleming's name was familiar to her and it was clarified with the doctor that her firm had represented him in the past and that in any event, she did not believe that representation would influence her decision and that she was able to remain objective in her decision making. Neither attorney objected to her continued participation.

The Board then moved to the mitigation aspect of the case.

Dr. Fleming was sworn and testified before the Board. Since the complaint in 2007, his practice has changed dramatically. His record keeping and charting has changed dramatically, based on the recommendations from a record review course performed by a nurse practitioner, who is a document and coding expert and has reviewed his records on two occasions. He has accepted all her recommendations and she has returned to review his record keeping, and has approved his current methodology. This current methodology, according to the witness, is more aligned with the appropriate CPT codes. He has also changed the physical plant of his office, which has been renovated, to include better filing for the medical records. The patients that he accepts for treatment, he continued, have not included any that need pain management. He does continue to treat those who need out-patient detoxification for opioid addiction and/or hospice care. These patients are also managed by a team. Dr. Fleming sees about 2,400 patients totally. These include patients in low income high rise apartments/assisted living, although this approval is still pending. He also takes care of the reservists for the Army for those men coming back from Iraq. When the complaint was filed, he had privileges at Cooper and Lourdes hospitals, and still holds them at these locations. He has also obtained privileges at the Kennedy Hospital system. As far as home care, he has two home visit practices one of which is his own practice and then as a detox hospice physician; he sees some of those individuals at their homes. Financially, he does not have any pension funds and has depleted a good deal of his savings on his children's education. His only source of income is from his practice and although it has been improving, since the filing of the Complaint, there has been a significant drop in income. He also mentioned that he suffers from diabetes.

Into evidence, his attorney offered the transcripts of his fifteen character witnesses, previously marked as R-1 from the OAL; twenty five letters from doctors attesting to his character (R-2); tax returns of 2007, 2008, and 2009 (R-3-4) and a financial statement (R-5). Hearing no objection from the Attorney General on R-1, it was entered into evidence. The Attorney General recognized that R-2 is generally considered by the Board, and asked that the Board give them their appropriate weight as unsworn statements. R-3 and 4 have not been certified and the Attorney General requested that the Board ask the Respondent to certify that they are his tax returns on the record. Finally, she objected to R-5 because it was not a certified financial statement. In response, Mr. Poplar verified that R-3 and 4 were true copies of Dr. Fleming's actual tax returns on file with the U.S. Government.

The Attorney General presented two items in aggravation. AG-1 was submitted. It was a

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Consent Order of 1992, signed by Dr. Fleming. Hearing no objection, it was admitted. The certification of costs authored by DAG Puteska, AG-2, was offered and entered into evidence as there was no objection made by Respondent to its admission.

Mr. Poplar, in closing, thanked the Board for the opportunity to present evidence in mitigation. According to Mr. Poplar, he asked the Board to recognize that Dr. Fleming is a fine, family practitioner. He came under the scrutiny of the Board and ten charts were submitted for review by the State's expert, who recommended that four of the charts met the standards of medical care and further recommended that the state proceed on only six cases. These six cases were selected out of thousands of patient charts of his practice. He opined that the charts selected were not representative of Dr. Fleming's overall practice of medicine. There has not been any patient harm and no patient has ever complained. Noteworthy, N.S. still remains a patient of the practice. Of the six cases at issue in the complaint, one was dismissed at the trial. Again, the Board was asked to keep this in perspective to his overall practice. Dr. Fleming conceded that he should not have treated N.S. He now refers this type of patient out. Mr. Poplar argued that based on his long standing relationship with N.S. and the family, he thought he was helping a very stubborn patient. In retrospect, he now realizes that he should have referred him out.

The Attorney, turning his attention to the record keeping issue, again conceded that in the past the record keeping was less than adequate. Since the last chart reviewed by the Board, Dr. Fleming has taken a record keeping course and sought out advice from an expert in the field. His record keeping has been revised and subsequently, it has been reviewed and the consultant/expert has applauded him on the efforts that he has made. Mr. Poplar also noted that a number of physicians respect the doctor and he is well respected within the community. He described Dr. Fleming as a doctor who cares about his patients and goes out of his way to be a caring and sensitive physician.

Finally, Mr. Poplar requested that Dr. Fleming not be given any active period of suspension. He is a doctor who serves a patient population in need of medical care. To deprive him of practicing would also deprive patients from receiving health care.

DAG Warhaftig, in her closing, acknowledged that Dr. Fleming may be a caring physician and even noted the number of letters in support. She reminded the Board that the writers, however, did not address his prescribing practice and questioned the neutrality of the opinions. She asked the Board to view them as a self serving series of documents.

She argued that substantial discipline was warranted and this required a suspension from active practice, along with significant penalties and costs. While Respondent argued that his intentions were well meaning, DAG Warhaftig noted that even well intentioned actions can be determined as negligent. She was reminded of the expression that the road to hell is paved with good intentions. She posited that the practice of medicine assumes that the licensee would act in good faith and that the actions would be well intentioned. The Board's role is to review whether or not the medical care provided was within the appropriate standard of care.

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Concerning the medical records issue, DAG Warhaftig noted that not only were the records insufficient, in some cases, the records were non-existent. The records did not document the care that was provided. Again, she asked the Board to take this into consideration in meting out the penalty.

DAG Warhaftig also asked the Board to focus on Dr. Fleming's expert who through her own testimony demonstrated that his prescribing of some of the medications far exceeded the highest amount that the expert has ever seen prescribed for one patient. She acknowledged that some of the patients were difficult to deal with and although well meaning, his care for these difficult patients was not within the appropriate standard of care. DAG Warhaftig argued that while this may not be a big portion of his practice, the fact that any patient might be harmed is sufficient to take disciplinary action.

Financially, she clarified, he should be held liable for significant penalties. The two billing violations were assessed by the judge as \$10,000 each, as he erroneously believed there was a minimum amount. She noted that there is not such a minimum, although the Attorney General supported the suggested penalty of \$20,000. She asked the Board to impose the total penalties suggested by the ALJ in the initial decision. The Attorney General also sought costs in the amount of \$78,388.41.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO MOVE INTO CLOSED SESSION FOR DELIBERATIONS AND ADVICE OF COUNSEL.

All parties, except administrative and counseling staff, left the room.

Returning to open session, the Board announced its decision.

THE BOARD, UPON MOTION MADE AND SECONDED, HAS DETERMINED TO MODIFY THE ALJ'S RECOMMENDED PENALTY AS FOLLOWS: THE BOARD AFFIRMED THE SUSPENSION OF DR. FLEMING'S LICENSE FOR A PERIOD OF FIVE YEARS, TWO OF WHICH WILL BE ACTIVE AND THE REMAINING TO BE SERVED AS A PERIOD OF PROBATION. PRIOR TO RESUMING PRACTICE, IN ADDITION TO DR. FLEMING'S DEMONSTRATION OF HIS FITNESS TO PRACTICE, HE MUST SUCCESSFULLY COMPLETE BOARD APPROVED COURSES IN RECORD KEEPING AND CDS PRESCRIBING. AT THAT TIME, THE BOARD MAY ALSO LIMIT HIS PRACTICE OF ONGOING MANAGEMENT OF CHRONIC PAIN SUFFERING PATIENTS. IT AMENDED THE RECOMMENDED CIVIL PENALTY AND IMPOSED A MONETARY SANCTION TOTALING \$105,000, REPRESENTING \$20,000 PER PATIENT AND \$5,000 FOR THE BILLING VIOLATIONS. IT FURTHER IMPOSED THE FULL COSTS TO THE STATE

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AS DOCUMENTED IN THE ATTORNEY GENERAL'S CERTIFICATION IN THE AMOUNT OF \$78,388.41. IN ORDER TO PERMIT THE LICENSEE THE ABILITY TO TRANSITION HIS PATIENTS TO APPROPRIATE CARE, THE ORDER WILL BE EFFECTIVE JUNE 2ND. HE IS PROHIBITED FROM TAKING ON ANY NEW PATIENTS OR TO ENGAGE IN THE TWO NEW BUSINESS ENDEAVORS HE MENTIONED DURING HIS TESTIMONY, WHICH IS EFFECTIVE IMMEDIATELY.

Motion made by Stanley and seconded by Dr. Ciechanowski. The motion carried with Dr. Paul and Ms. Criss voting in opposition.

OLD BUSINESS

I/M/O LIONETTI, Anthony, M.D.
DAG Carla Silva

A Motion for Summary Judgment was filed on December 21, 2007. Rather than proceed with the hearing on January 9, 2008, the Respondent entered an Interim Consent Order where he agreed to cease and desist from the practice of medicine pending disposition of his criminal conviction at issue. The convictions and sentence have since been affirmed. The Attorney General renewed the application for Summary Decision in this matter. This matter was scheduled to be heard by the Board, however, the parties reached a settlement.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO ACCEPT THE CONSENT ORDER OF REVOCATION.

Respectfully submitted,

Paul Jordan, MD Chairperson
For Open Disciplinary Minutes

WVR/dt/br