

**State Board of Medical Examiners
Open Board Minutes
January 9, 2008**

A meeting of the New Jersey State Board of Medical Examiners was held on Wednesday, January 9, 2008 at the Richard J. Hughes Justice Complex, 25 Market Street, 4th Floor Conference Center, Trenton, New Jersey. The meeting was called to order by Dr. Criscito, President.

PRESENT

Board Members Cheema, Clemency-Kohler, Criscito, Criss, Haddad, Jordan, Lambert, Lomazow, Mendelowitz, Nussbaum, Reichman, Stanley, Strand and Wheeler.

EXCUSED

Board Members Ciechanowski, DeGregorio, Paul, Salas-Lopez, Scott, Walsh and Weiss.

ALSO PRESENT

Assistant Attorney General Joyce, Deputy Attorneys General Dick, Ehrenkrantz, Flanzman, Gelber, Jespersen, Levine, Puteska, and Warhaftig; Medical Education Director Mary Blanks, M.D., and Executive Director William V. Roeder

STATEMENT CONCERNING THE ANNUAL NOTICE OF PUBLIC MEETINGS

The requirements of the gOpen Public Meetings Act have been satisfied by notice of this meeting given in the annual notice adopted by the New Jersey State Board of Medical Examiners on September 26, 2007 which was transmitted to the ATLANTIC CITY PRESS, STAR LEDGER, CAMDEN COURIER POST, ASBURY PARK PRESS, BERGEN RECORD and the TRENTON TIMES, all on the 1st day of October 2007.

ANNOUNCEMENTS

REMINDER - 2008 BOARD MEETING DATES

January 9	July 9
February 13	August 13
March 19	September 10
April 9	October 15
May 21	November 12
June 11	December 3

THE BOARD ACCEPTED THIS AS INFORMATIONAL.

MINUTES THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE THE DECEMBER 12, 2007 OPEN BOARD MINUTES AS SUBMITTED.

MINUTES THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE THE DECEMBER 17, 2007 OPEN CREDENTIALS COMMITTEE MINUTES AS SUBMITTED.

NEW BUSINESS

1. GARCIA V. HEALTHNET AND WAYNE SURGICAL CENTER

At its meeting on December 12, 2007, the Board of Medical Examiners reviewed the recent decision of Judge Robert P. Contillo, J.S.C. in *Garcia v. HealthNet and Wayne Surgical Center* and entertained an application from the Medical Society of New Jersey and other physician organizations (gApplicant) seeking the issuance of a Special Advisory Opinion. The Board also heard public comments from a number of interested persons, including representatives of physician groups and two insurers (HealthNet and Allstate). Attached was a copy of the Court's opinion and the Board's statement in response to the information presented at the December meeting.

At the onset, it was noted that after the Board meeting last month, the matter was referred to a committee of the Board that met several times over the past month. The committee reviewed the relevant portion of the larger proposal, in light of recent developments, and propose a rule, by the quickest means available to implement a reform measure tailored to address this issue. It decided, and the Executive Committee approved, to move forward on a rule proposal, to be pursued as an emergency rule, and concurrently as a proposal subject to regular rulemaking processes. A proposed draft was posted at www.njmedicalboard.gov prior to the meeting and various members of the public also wished to comment on the proposal.

The Medical Society of New Jersey, among others, questioned whether or not the process of an emergency rule making was appropriate under these circumstances. It recognized that the emergency rule making process was to preserve the status quo. It was suggested that the Board's proposed emergent rule did not preserve the status quo, but proposes a vast departure from the current law. In creating such a deviation, such a rule proposal should be subject to the full rule making process in which all interested parties would have the opportunity to comment. It was further suggested that it was inappropriate for the Board to propose these emergency regulations and circumvent the rule making process.

Addressing the proposal that would require that there be full disclosure of all owners on the bills to the patients, specifically section six, representatives from Wayne Surgical Center questioned whether under the current forms if this was even possible. Even assuming that it would be, additional time may be needed in order to implement this requirement. The necessity of such a requirement was also questioned insofar as the center is required in advance of the referral to disclose any ownership interests. It was expressed that the pre-referral disclosure of ownership was a more workable approach and allowed the patient to make an informed choice prior to any service being provided.

It was noted that the ownership interest under the proposal would be limited to physicians and excludes management companies. Dr. Richard Scott informed the Board that as an investor in surgery center and based on his experience as a managing partner and partner with Meridian Health, that his center has handled over 40,000 Patients, including countless charity care patients because of a partnership with a hospital in Monmouth. Under this center, physicians have always informed the patients that they have interest in the center. He further noted that the center was built in the State, licensed and taxed by the State and all relying on the opinions of the Board that the partnership with Meridian Health was appropriate. The partnership with Meridian was crucial to making access to quality services. He also believed that such a requirement may be problematic because of a number of non service providers that could be part of the structure. He also questioned whether this new requirement may run afoul of the Stark exception of safe harbor provision. Mr. Gorrell also pointed out that the present reg specifically NJAC 13:35-16 (e) (f) authorizes such a practice. The current proposal was a radical change from the current law and the position that the Board has taken over the years. Again, he noted that such a radical change is inappropriate in an emergent rule making process.

Dan Frye questioned the necessity for such a radical change because he was not aware of any data that existed that demonstrates there is any danger to patient safety or public health for non physicians owning these facilities. To the contrary, in many instances physicians and non physician owners work to the benefit of the Patient. He asked the Board to recognize that the non physician owner has no input into the medical care that takes place at the facility. In some ways, it was suggested that the non physician ownership actually dilutes the improper self referral which the Codey Bill was designed to address. In a sense, there is less of an incentive to inappropriately refer depending on the shared ownership interests. Additionally, it was noted that during the licensure processes, every applicant to DHSS is vetted out thoroughly, including an outside management company. Moreover, it appears that the Board is comfortable with a partnership with a hospital. It was suggested that a natural extension

of this approved partnership would be an outside management company. It was also suggested that the Codey bill had been passed a number of years ago and that the industry has changed dramatically since the initial passage. The Federal law, to the contrary, has been amended as the practice within the industry has changed. Consistent with the evolution of the Federal law, the Board was asked to recognize the distinction between an extension of the office and a business ownership.

Turning the attention to Subsection 9 which deals with proposed facility's billing being handled in the same manner as the physician's office. That is, if one is network then both should be in network and conversely, if one is out of network, then both should be out of network, Dr. Simensky, an owner of a one room center addressed the Board. (It is also noted that Dr. Simenski submitted a written copy of his comments.) He estimated that he performs approximately thirty colonoscopy and endoscopy procedures a week and that about seventy percent of his income is derived from the services provided at the surgery center. He posited that it was not as simple as the Board is proposing. He explained that in some instances he participates in the same carrier at both, while in other instances, he may be in network in his office and out of network at the surgery center with the same carrier. His decision of whether to participate or not was simply based on what he was able to negotiate with that particular carrier. He argued that forcing the doctors to choose such a distinction was not in the best interest of the patients. He suggested that more than likely, if forced to choose, he would be out of network and would have to terminate many of his long standing patients. Because this would reduce the volume of patients, in turn, his charges would have to be increased since his overhead costs are fixed. Within a short period of time, this would not be profitable and he would be compelled to close it.

Dr. Scott echoed similar thoughts and explained that he is in a solo practice, and to require him to participate in the same networks as other owners at the surgery center was illogical. He also questioned the implications of such a requirement relating to federal antitrust laws. Such a requirement would clearly interfere with the physician's contracting right and such collusion would be a blatant violation of the law and in essence give the insurance industry an unfair advantage in the negotiating process. He posited that if the Board were to maintain this requirement, most, if not all physicians with a surgery center interest would opt to be out of network. In the long run, this would not be in the best interest of patient care or patient access. Additionally, he believed this would just open the door to insurance companies negotiating even lower reimbursement rates. He recognized that neither was the intended consequence of the Board's proposal, however, he was convinced that it would be the result if the Board were to continue with this aspect of its proposal. Other public members concurred with these thoughts citing other examples.

The new subsection 3 would require that the physician personally perform the procedure for which the patient was referred. The consensus among those attending the meeting was that the physician always refers the patient to the individual that is best to perform the procedure. The opinion that the Board should not interfere with the medical judgment of a physician to determine who is the best one to perform the procedure was expressed by a number of individuals. One representative of the insurance company believed that it has seen numerous examples where the referring doctor does not perform the procedure and further opined that the primary reason for these types of referrals was to generate fees for the facility. He also explained that the other problem especially in the PIP cases was the unbundling of fees. The Board recognized that the PIP issues were more within the purview of DOBI and believed it was aware of ongoing litigation to address some of those issues.

One Surgery Center noted for the record that absent from the discussion at the meeting was any input from the patients. It posited that there is a high rate of satisfaction among those patients that undergo procedures at surgery centers and that the patient community more than likely would want the industry to continue to evolve as it has.

Mr. Gorrell handed out to the Board members a copy of a proposal he believed would maintain the status quo. His proposal was an amendment to NJAC 13:35-(b)(4)(I) and would define a medical office to include a site owned in whole or in part by either the practitioner or by an entity which is owned in whole or part by the practitioner in accordance with N.J.A.C. 13:35-6.16(f).

The Board thanked the members for the comments.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO REFER THE MATTER TO THE ADVISORY COMMITTEE FOR FURTHER REVIEW AND REPORT BACK LATER IN OPEN SESSION.

Returning to open session later in the day, the Committee suggested that the Board delete the requirement that the bill include the full names of all practitioners with an ownership interest in the practice and in its place require that at the time of the referral a list of the full names of all the practitioners with an ownership interest be provided to the patient. The committee also suggested that the requirement that fees for the component parts of a procedure billed to third party payors for reimbursement shall be billed on the same basis (i.e., in-network or out-of-network). It also suggested that the time frame within which practitioners commence to bring the practice site into compliance with these requirements be extended to one hundred twenty days in order to be deemed to have met the new requirements.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO ACCEPT THE RECOMMENDATIONS OF THE COMMITTEE AND APPROVED THE SUGGESTED CHANGES.

OLD BUSINESS

2. RULE PROPOSAL

An amendment to the Board's regulation on Postgraduate Training; Registration and Permit Requirements for Graduate Medical Education Programs in Medicine or Podiatry; Standards for Licensure of Physicians Graduated from Medical Schools Not Approved by American National Accrediting Agencies; Standards for Licensure of Physicians Graduated from Medical Schools Approved by American National Accrediting Agencies was published in the New Jersey Register for notice and comment on September 17, 2007. The comment period ended on November 16, 2007. Only one comment was received from the Medical Society. Attached was a copy of the draft response and approval was sought to publish this in the New Jersey Register as a final adoption.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE THE COMMENT AND TO PUBLISH THE REGULATION AS AN ADOPTION IN THE NEW JERSEY REGISTER.

3. Senate Bill No. 2946

Seek to permit physicians to refer patients to certain physician owned hospitals.

The Bill was introduced on or about November 18, 2007 and referred to the Senate Health Human Services and Senior Citizens Committee.

The Board reviewed the proposal at its December meeting and referred it to the Executive Committee for further review. The Executive Committee does not recommend making any comments on this bill.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO NOT COMMENT ON THIS PROPOSAL.

INFORMATIONAL

PUBLIC COMMENT

Respectfully submitted,

Mario A. Criscito, M.D., President

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