

**State Board of Medical Examiners  
Open Board Minutes  
December 12, 2007**

A meeting of the New Jersey State Board of Medical Examiners was held on Wednesday, December 12, 2007 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, Ciechanowski, Criscito, Criss, Haddad, Jordan, Lambert, Lomazow, Mendelowitz, Nussbaum, Reichman, Paul, Scott, Stanley, Strand Walsh and Wheeler.

**EXCUSED**

Board Members Clemency-Kohler, DeGregorio, Salas-Lopez, 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 October 11, 2006 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 November 2006.

**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

Dr. Stanley was not present for the discussion and vote on the minutes.

MINUTES THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE THE NOVEMBER 14, 2007 OPEN BOARD MINUTES.

MINUTES THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO APPROVE THE OCTOBER 15, 2007 OPEN MIDWIFERY LIAISON COMMITTEE MINUTES.

**NEW BUSINESS**

1. Assembly Bill No. 4455

Seeks to provide licensure of massage and bodywork therapists and registration of employers.

The Bill was introduced on or about November 8, 2007 and referred to the Assembly Regulated Professions and Independent Authorities Committee, which reported it out of committee with amendments and second reading on or about November 19, 2007.

Dr. Stanley was not present for the discussion and vote in this matter.

THE BOARD, UPON MOTION MADE AND SECONDED VOTED TO OPPOSE THE PROPOSAL BECAUSE IT SEEKS TO EXPAND THE SCOPE OF PRACTICE TO PERMIT A MASSAGE AND BODYWORK THERAPISTS TO TREAT ILLNESSES AND/OR DISEASES, IMPAIRMENTS OR DISABILITY AND THIS BEGINS TO ENCROACH INTO THE PRACTICE OF MEDICINE. EVEN WITH A PHYSICIAN DIAGNOSIS, BEGINS TO BLUR THE LINE OF THE PRACTICE OF MEDICINE. ADDITIONALLY, THE BOARD DID NOT BELIEVE THAT SUFFICIENT QUALIFICATIONS OR EDUCATION HAVE BEEN ATTAINED IN ORDER TO JUSTIFY SUCH AN EXPANSION IN THE PRACTICE.

## 2. Senate Bill No. 2946

Seeks 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.

Dr. Stanley was not present for discussion or vote in this matter.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO REFER THIS BILL TO THE EXECUTIVE COMMITTEE FOR FURTHER REVIEW AND COMMENT, IF ANY.

## OLD BUSINESS

### 3. CULTURAL COMPETENCY REGULATIONS

The proposed Cultural Competency Regulations were published in the New Jersey Register for notice and comment on June 4, 2007. The comment period ended on August 3, 2007. Attached for the Board's consideration were the comments received and the proposed responses.

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO PUBLISH THE RESPONSES TO THE COMMENTS AND AS A FINAL ADOPTION IN THE NEW JERSEY REGISTER WITH THE TYPOGRAPHICAL ERRORS CORRECTED.

It was suggested that upon publication in The Register that it be posted on the Board's website.

## INFORMATIONAL

None.

## PUBLIC COMMENT

**Mr. Simmons of the Wayne Surgical Center (gWayneh), a group of physician surgeons who have formed as a group to provide better service to its patients, thanked the Board for the opportunity to address it on the important issue of Ambulatory Surgical Centers (gASCh). He explained that as physicians became frustrated with the delays and limited availability or equipment at the local hospitals, they began to form ASCs because it was difficult, if not impossible to adapt their own office practice location to accommodate their clients. Wayne began as a group of nine physicians and he reported that since the inception it has grown to a practice of more than 50 physicians. He reminded the Board that over the past several years, there has been on going litigation alleging, among other things, fraud and violations of self referral under certain of the Codey provisions. He also noted that the group relied on the Board's opinion that it was allowable because the service was integral to the physician's office practice and not a referral to a separate facility. He also reminded the Board that recently, the court advised the community that the**

**structure was impermissible and in his view, it was a clear violation of the prohibition of Self Referrals. The judge, however, also found that physicians who had ownership interest in Wayne and referred their patients to the surgical center at which they performed the surgery had not committed healthcare fraud.**

A representative of Wolf Block, on behalf of various clients of concerned physicians, which included the Medical Society of New Jersey, the New Jersey Association of Osteopathic Physicians and Surgeons, the Orthopaedic Surgeons of New Jersey, the New Jersey Academy of Ophthalmologists, the New Jersey Association of Ambulatory Surgery Centers, the Alliance for Quality Care and the Orthopaedic Surgery Center of Northwest Jersey, LLC, who were also part of the litigation, maintained that this was a critical moment for the Board. As they Board was reminded, the group had requested that the Board become more actively involved in the litigation. It was recognized that the Board had provided the judge with a copy of the Board's draft corporate practice regulations which represented the Board's current view of the parameters of the medical office exemption under Codey. The Board was further reminded that the ASC represented seventeen years of an important and vital delivery of healthcare that was cost effective. Additionally, the ASC represents a delivery system that provides a quality, more efficient, ambulatory care -- either as a single room or multiple room center. In the course of the litigation, Wayne argued that the ASC was developed as an exception in Codey and that the ASC relied on the advice offered by the Board over the last seventeen years. In spite of those factors, the Superior Court judge found it to be a violation of Codey. This in turn has created a dilemma for all physicians in this practice. Physicians are now faced with an opinion of the Court that the continued referral would constitute fraud and if the physicians continue, they would be knowingly violate the law. He urged the Board to look at the issue carefully and approve the advisory opinion previously submitted to the Board as it is well within the jurisdiction of the Board who has been given charge to administer the Codey Act

Mr. Robert Bowen, representing the Osteopathic physicians echoed the thoughts previously addressed to the Board. He concurred that it was in the best interest of the patient, in particularly in light of the falling hospital system, to permit the continued operation of ASCs. He urged the Board to adopt the statement in support of the ASCs.

Mr. Belizio, on behalf of All State, opposed to any involvement of the Board at this juncture. The judge in court, based on the facts that were before him, decided that these arrangements were prohibited under current law. Because this issue is being addressed in the Court, he opined that it would be improper and inappropriate for the Board to become involved at this time. He pointed out that in his view there was such a pervasive practice of self referral that was resulting in a high level of abuse. He informed the Board that in the basic scenario, the physician owned the ASC and performed the procedure and therefore, receives a share of fees for the center and the professional fee component. It is possible that the medical judgment could be impaired because of the financial interest. This type of self referral with its potential abuse is why the Codey prohibition of self referral was put in place. In another scenario, the physician is a co-owner in the ASC and receives a professional fee as the one that performs the service and a fee as part owner for the facility. Another scenario includes the physician co-owner in the ASC, refers the patient and then assists in the procedure. Under this hypothetical, the physician receives a professional fee, a facility fee and a fee for assisting in the procedure. He continued by stating that physicians have learned how to manipulate the centers and the regulations, as well as the Board's opinion, to abuse the system. He believed that one facility charged \$45,000 for a facility fee for a 50 minute TMJ procedure. He reminded the Board of the cases that it has first hand where not all the procedures being billed at the facilities were necessary. He further opined that if the Board were to adopt this advisory opinion, then it will be creating even more confusion in the regulated community and potentially give a basis to further violate the law. He concluded by stating that any broad statement would only lead to even more creative ways to abuse the system further. This in turn will lead to even higher insurance rates. All of which is not in the best interest of the patients.

Mr. Dan Orr, an attorney at Morgan Lewis, representing Health Net, addressed the Board by reminding it that the Codey act says what it says. Put simply, according to Mr. Orr, a physician cannot self refer. Moreover, he continued, that the regulation incorporates the same language as the Board's proposed regulations which also prohibit self referral under most circumstances. This issue, according to Mr. Orr, is one for the legislature. In essence, in asking the Board to adopt this advisory opinion is asking the Board to take a position contrary to its statute and its own regulations, both those in existence and those proposed. Mr. Orr stated that before the Board

makes this statement, it needs to take a closer look at the ASC because he opined that the Board would discover that the ASC's don't even comply with the limited expansion of the Board's prior opinions. Prior to making a broad statement to exempt a widespread industry, it needs additional information and further scrutiny of the widespread practice of kickbacks and self-referral incentives that exist under the current schemes.

Mr. Mark Mannigan informed the Board that he believes that the Codey Statute does provide an exemption that deals with referrals and the Board was being asked to restate its prior position. He reminded the Board that the community has relied on that opinion for the last seventeen years and that an industry has been built on the Board's opinion. He also expressed the belief that without such a statement, carriers will stop paying for the services which are a necessary part of good, efficient, quality of care for patients. Mr. Mannigan also opined that without such a statement, the ASC would begin to close and therefore would create an access to care issue for patients. Finally, he posited that without these centers, there would be a tremendous impact to charity care and charity dollars. He did not believe it was fair to indict an entire industry and believed that the public was better served by dealing with abusers on a case by case basis within the Board's disciplinary context.

Neil Prupis, Esquire informed the Board that he has reviewed what all other states have done and it is common practice that surgery centers have been established by the physician community. He looked at the federal law which contains certain safe harbor provisions. He further reminded the Board that when the Codey law was created surgery centers were not common. Mr. Prupis suggested that the Board offer guidance to the medical community on this issue and while he recognized that the Board has provided copies of its proposed regulations, he still maintained that these proposals did not address the questions in this gray area. He urged the Board to adopt the advisory opinion and at least maintain the status quo within the industry until the Board has had sufficient time to study the issue and enact the much needed regulations.

Thomas Gentile noted for the record that in the judge's opinion he recognized that the physicians at Wayne Surgical Center made sound medical decision and that surgeries were not being performed unnecessarily. He further acknowledged the value of the surgery centers and did not condemn the entire industry. He asked the Board to take the appropriate steps to allow the industry to legally provide services that are necessary for the citizens of New Jersey.

**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 read the following statement.

At its regularly scheduled 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 (applicant) 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). The Board notes that earlier this week Judge Contillo denied the applicant's request to intervene in the case, on the grounds that the application was not timely, the applicant's interests were ably represented in the litigation and, in any event, his earlier ruling was intended to affect only the rights of the parties before him. It is clear from Judge Contillo's decisions of November 20 and December 10 that based on the record before him he did not view Wayne Surgical Center as a medical office within the meaning of the term as it appears in N.J.S.A. 45:9-22.4 (the Codey Act), more specifically at N.J.S.A. 45:9-22.5(c). He has noted that the facility was at a different location from the other medical offices maintained by the doctors, the doctors did not control the personnel, and different bills were generated for the professional services rendered and for the facility fees. He distinguished the case before him from a situation addressed in a 1997 letter of the Board (addressed to a different party), suggesting that were an ambulatory surgical center (ASCh) in a joint venture with a hospital, there might be a different outcome.

The Board recognizes that the health care arena has changed substantially since the enactment of Codey Act in 1989. At the outset, the Board was asked to review business structures in which several physicians pooled their

capital to establish an additional practice site at which they could perform services integral to their area of practice. The model then presented appeared to easily resemble a gmedical office.h In the absence of any statutory provision barring physicians from maintaining multiple offices, the Board has always focused on the facts of a particular entity, making certain that it is the doctor himself or herself who is performing the service and a bill is being generated in the name of the practice. The 1997 letter expressly reflected the Boardfs expectation that the facility fees involved would be gnominalh. From time to time the Board has issued other letters to individual inquirers pertaining to specific factual situations. (Representative letters were attached to the application.) Despite the admonitions that the advice provided was grounded upon the generally limited facts presented and not intended to guide others, the business model, as Judge Contillo has noted, has become widespread. Moreover, based on the statements before the Board today, there may be ASCs in current operation where a physician investor refers a patient for the performance of surgery by another doctor who may or may not be an investor. To date, the Board has not viewed the gmedical officeh exception applicable to such situations. Further, based on the statements provided to the Board today and Judge Contillofs observations, the facility fees that may be involved are not nominal.

In light of these developments, it is time for a clarification of the indicia that an entity should have in order to view it as a gmedical officeh, and thus excepted from the self-referral ban of the Codey Act. While Judge Contillo found it compelling that the center at issue was in a different location, that the doctors did not employ the personnel directly, and that separate bills were generated, we do not see these criteria as dispositive in all cases. Consistent with N.J.S.A. 45:9-22.9, the Board has the authority to promulgate rules to better define the attributes that would support the recognition of a practice site as a gmedical office.h It is through developing regulatory standards - not through the adoption of a Special Advisory Opinion, - that the Board hopes to bring greater clarity to the issue and clear guidance that can be applied, and enforced, across the spectrum of offices and facilities, rather than as to isolated parties. Accordingly, we are declining to adopt the Special Advisory Opinion that had been sought.

We are however, very concerned that the uncertainty that the applicant has described - as more fully documented in the certifications presented in support of its motion to intervene before Judge Contillo - has a significant potential to affect patient access to health care services. Judge Contillo has acknowledged the positive benefits of such centers and the important role they play in the delivery of health care in New Jersey. Were ASCs to close or cut back on the services provided, it is not clear that alternative providers - hospitals or offices- could immediately absorb additional cases, providing timely services. Any effort on the part of insurers to deny claims submitted by physicians-owners will likely have a significant impact on the availability of services, representing a potential imminent peril to the public health. As such, the Board will undertake an effort to pursue an emergency rule defining a gmedical officeh for purposes of Codey Act. We have reviewed the section of a more expansive rule proposal that has been under consideration relating to this issue. A committee of the Board will review the relevant portion of the larger proposal, in light of recent developments, and will propose a rule, by the quickest means available to implement a reform measure tailored to address this issue.

Respectfully submitted,

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