



## Arizona Medical Board

9545 East Doubletree Ranch Road • Scottsdale, Arizona 85258

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### **DRAFT MINUTES FOR BOARD OFFSITE PLANNING MEETING HELD AT 9:00 A.M. ON OCTOBER 8, 2009 Gainey Suites Hotel, 7300 Gainey Suites Drive, Scottsdale AZ 85258**

#### ***Board Members***

Douglas D. Lee, M.D., Chair  
Paul M. Petelin Sr., M.D., Vice Chair  
Amy J. Schneider, M.D., F.A.C.O.G., Secretary  
Patricia R. J. Griffen, Member-at-Large  
Andrea E. Ibáñez  
Ram R. Krishna, M.D.  
Todd A. Lefkowitz, M.D.  
Lorraine L. Mackstaller, M.D.  
William R. Martin III, M.D.  
Dona Pardo, Ph.D., R.N.  
Germaine Proulx

#### **CALL TO ORDER**

The meeting was called to order at 9:00 a.m.

#### **ROLL CALL**

The following Board members were present: Douglas D. Lee, M.D., Paul M. Petelin, Sr., M.D., Amy J. Schneider, M.D., Patricia R.J. Griffen, Andrea E. Ibáñez, Todd A. Lefkowitz, M.D., Lorraine L. Mackstaller, M.D., Dona Pardo, Ph.D., R.N., and Germaine Proulx. The following Board members were absent: Ram R. Krishna, M.D. and William R. Martin, III, M.D.

#### **CALL TO PUBLIC**

No one was present for Call to Public.

#### **Informed Consents for Surgeons' Level of Experience**

Dr. Lee informed the Board that this issue came before the Board previously. He referenced a robotic procedure in which a physician performing the procedure lacked the experience needed to perform the procedure. He directed the Board to the materials provided regarding other state regulations requiring disclosure of informed consent. Dr. Mackstaller stated that a physician has a responsibility to inform patients of his or her level of experience performing specific procedures. Dr. Lee stated he believed it was an ethical obligation, especially when it is a procedure involving new technology.

Ms. Boucek informed the Board that it had the option of developing a substantive policy statement (SPS) or develop an article for the newsletter that failure to provide informed consent or full disclosure constitutes a deviation from the standard of care. Board members asked how to quantify when a physician would be required to provide that disclosure. Ms. Boucek stated it is an objective standard – what a reasonable patient would expect to hear at what point. It will vary from case to case. Dr. Schneider agreed that the interpretation would be vague. She pointed out that some procedures are rarely performed, but may be needed in an emergency. Dr. Pardo stated this kind of requirement is an issue with teaching hospitals, where a large amount of care is provided by residents and the patients rarely know the level of experience of the physicians treating them.

Dr. Schneider stated that the Board can set policy on a case by case basis as it adjudicates cases. Ms. Boucek suggested that instead of the physician talking about his level of experience, he or she could explain the procedure in a way that explained the risk involved. Board members agreed that guidance would have been useful, especially when they were new in practice. Dr. Petelin also suggested that hospitals should have their own guidelines that limit or control how new surgeons perform procedures in the hospital setting. Dr. Lee suggested that this issue would be best addressed for now as an article in the Board's newsletter. Dr. Mackstaller suggested writing a series, beginning with the history and the Board's position, followed by responses to physician comment. Ms. Boucek suggested developing a hypothetical case study to publish in the newsletter.

## **Disclosure of Physicians' Communicable Diseases**

Ms. Boucek stated that there was much discussion in the 1980s about physician disclosure of communicable diseases, especially as it related to HIV-AIDS. Since then, there have been few instances of physician failure to disclose communicable diseases. In the case that came before the Board, there was no obvious break in the sterile field and therefore, it was uncertain how Hepatitis was spread to the patient. Additionally, in that case, the physician posted a notice in his office about the possibility of transmission of infection. Ms. Boucek added that the Centers for Disease Control (CDC) issued guidelines regarding disclosure to patients, but only in connection to a limited number of invasive procedures.

Dr. Lee asked how the Board should review these cases and how to balance a physician's right to privacy with public protection. Dr. Schneider stated that physicians diagnosed with communicable diseases typically reach out to bulletins published by the CDC or their specialty associations to find guidance on how to proceed with disclosing their disease to patients. Currently, the CDC is the standard for guidelines for disclosure. Dr. Mackstaller stated that the onus is on the physician to disclose his or her health history to the patient depending on the risk of the surgery. Dr. Petelin stated that a physician being successfully treated for a communicable disease could see his or her practice drop considerably if it was public knowledge that he or she was infected. Dr. Lee stated that conversely, a patient who found out that a physician was infected after the fact could live in fear of potential transmission. Ms. Boucek stated there is case law similar to this in which the court found in favor of the physician; the fear needs to be reasonable. Ms. Boucek stated there is an additional issue of a physician's privacy rights, especially as it relates to hospital employment.

The Board agreed to defer to the CDC guidelines and take no further action on this issue.

## **Physicians' Utilization of Physician Assistants**

Ms. Ibáñez stated that an issue came before the Board regarding the supervision of a physician assistant. She noted that there are guidelines in place for PA supervision; however the scale of PA practice continues to change. She asked if Board members considered the guidelines to be current, especially as it relates to modern practice in geographically separate locations. Dr. Petelin stated that the guidelines were good, especially as it relates to telemedicine. The establishment of electronic medical records makes geographically separate practice supervision even more conducive. Ms. Ibáñez stated that her concern was with physicians who practice in urban areas and have multiple practice locations. The problems the Board has seen involve physicians who have not adequately supervised their PAs. Dr. Petelin stated that it was his opinion that PAs are functioning fairly autonomously and successfully with little physician supervision. The guidelines may need to be tightened to address a small percentage of PAs who require added supervision.

Dr. Lee suggested developing a mechanism for reminding supervising physicians of their supervisory obligations. Dr. Schneider suggested sending an email to supervising physicians reminding them of the guidelines. Ms. Wynn informed the Board that staff does not review the log books that PAs and their supervising physicians are required to keep unless the PA or supervising physician is the subject of a Board investigation or is being monitored under a probationary order. Suzann Grabe, Licensing Office Manager informed the Board that the log book is not statutorily required, but rather a suggestion for best practice. Ms. Boucek informed the Board that it has the authority to hold a physician liable for the care rendered by the physician's PA. Patricia McSorley, Investigations Manager stated that in the future, she would direct investigative staff to obtain the log books in cases involving PA supervision. In the interim, Ms. Wynn stated that Board staff will continue to notify PAs of supervising physician requirements and share information through the Board's newsletter.

## **Advisory Letters**

### ***Posting Advisory Letters on Physician Profiles***

Ms. Wynn explained that Staff has recently heard concern from physicians and physician groups that non-disciplinary advisory letters are having an adverse affect on physician practices because they are often perceived by the public as being disciplinary. She explained that in the past, physician groups were successful in removing dismissals and the number of open investigations from the website, although they are still a public record. She also noted that Arizona is one of only a few medical boards across the country to post these types of actions on the website. However, there is a concern about removing something that was previously provided to the public. Additionally, unlike dismissals and open investigations, there is a finding of unprofessional conduct. Dr. Mackstaller stated that she has heard similar concern among her colleagues. She suggested a step between a dismissal and an advisory letter where the Board has the ability to track a physician without making it public.

Ms. Boucek stated that if another level was created, she is concerned that it will tip the balance of making advisory letters appealable. Dr. Petelin stated that the public has the right to know that the Board took an action so they can

make an informed decision. Ms. Ibáñez stated that this is a discussion about what is public information. She stated that just because an action is not posted on the website does not mean that it is not public. Dr. Schneider opined that advisory letters should be removed from the website. She also suggested adding a disciplinary action below a Letter of Reprimand. Ms. Boucek stated that the issue is that advisory letters are issued without a physician being present and having due process rights. Dr. Pardo stated that from a public protection issue, the public would want to know if a physician had multiple advisory letters. Dr. Petelin agreed and stated that if the public goes to the Board's website to find information on a physician, that person should not be expected to dig further to find more information. Dr. Lefkowitz agreed with Drs. Pardo and Petelin.

Dr. Lee suggested that as part of the Executive Director's report, the Board receive a report of the current number of disciplinary and non-disciplinary actions. Dr. Petelin also suggested that the Board rank advisory letters in terms of seriousness. Ms. Wynn stated that would require a statutory change. Ms. Boucek informed the Board that the Arizona Dental Board posts on its website the number of advisory letters against a physician and the public is required to call the Board to follow up on the reason for the action.

Dr. Lee addressed the issue of health insurance companies looking at advisory letters when physicians apply for and renew their memberships. Ms. Wynn stated that this has not been the Arizona Medical Association's issue. Dr. Lee then questioned whether this issue would make a better argument for why advisory letters should be appealable. Ms. Boucek stated that if a physician could show in court that an advisory letter directly resulted in increased medical malpractice premiums, there would be a better argument for making advisory letters appealable. To date, that has not happened.

Dr. Petelin suggested that if the Board believed its current policy of posting advisory letters on the website was fair and added public protection, the Board should take no affirmative action on the issue. Dr. Mackstaller stated that sustained acts of unprofessional conduct should be on the Board's website. Dr. Lee suggested that the Board remain neutral on the issue.

**MOTION: Dr. Pardo moved to remain neutral on any proposed legislation to remove advisory letters from the website.**

**SECONDED: Dr. Petelin**

**VOTE: 9-yay, 0-nay, 0-abstain, 0-recuse, 0-absent.**

**MOTION PASSED.**

#### ***Advisory Letter Issues***

**MOTION: Dr. Pardo moved to go into executive session.**

**SECONDED: Dr. Schneider**

**VOTE: 9-yay, 0-nay, 0-abstain, 0-recuse, 0-absent.**

**MOTION PASSED.**

The Board went into executive session at 11:38 a.m.

The Board returned to open session at 12:07 p.m.

#### **PHP Subcommittee Update**

Dr. Petelin informed the Board of the changes made to the Board's contract with Drs. Sucher and Greenberg for the Monitored Aftercare Program (MAP). Of note, the monthly participation fee has been lowered by \$100 per month; the contractors may now charge \$1,000 for initial assessments; and of the 17 physicians released from the Program early, Board staff has detected two instances of relapse. Ms. Wynn also explained that there is a current contract amendment to include a more comprehensive monitoring program with physicians who have behavioral health issues.

Board members agreed that there is no current need for the Subcommittee to meet. Staff may call the Subcommittee together again when the contract is up for renewal in 2011.

#### **Malpractice Reporting Subcommittee Update**

Dr. Schneider explained that the Board previously expressed concern about an apparent loophole in malpractice reporting. Board staff developed a SPS for the reporting of malpractice issues in which the physician was not named. Since the development of the draft SPS, Board staff has received opposition to the policy statement. Ms. Wynn stated that discussions with several healthcare organizations have resulted in considerable feedback. Specifically, the organizations have noted that the current statute requires hospitals to report physicians who may be guilty of unprofessional conduct (A.R.S. §32-1451(A) states there is a duty to report to the Board any information that appears to show that a doctor of

medicine is or may be medically incompetent, is or may be guilty of unprofessional conduct, or is or may be mentally or physically unable to safely engage in the practice of medicine), and therefore, an SPS is not needed.

Board members noted that there was a recent case before them in which there was a malpractice case settled on behalf of the physician. The physician was not named and therefore, he was not reported to the Board. The Board became aware of the physician's involvement in the case through a newspaper article. Board members expressed concern that even though hospitals have a requirement to report physicians not named in a settlement or judgment if the hospital suspects the physician may be guilty of unprofessional conduct, some hospitals are not doing so. Ms. Boucek advised the Board that hospitals that are not reporting physicians who are or may be guilty of unprofessional conduct are not likely to remedy their ways because of a Board policy statement. Dr. Schneider stated that the Subcommittee was charged with developing a remedy to a loophole and the extent to which that loophole exists is unknown. Ms. Wynn added that many malpractice settlements are made without notifying a physician or without the physician's consent and that can add another problem with reporting.

Ms. Boucek opined that the solution is not a legal change. She also noted that the problem is likely wide spread among many hospitals. Dr. Petelin reiterated his concern that some hospitals have taken on the role of the Board and choose to self regulate instead of reporting their physicians to the Board. Board members agreed while they still believe this is an ongoing issue there is no further action to take at this time.

## **Delegation of Executive Director Authority for Consent Agreements**

### ***Format for Consent Agreements***

Ms. Wynn informed the Board that the format of consent agreements have been changed to placed some of the more substantive items in the consent at the front. This is for ease of use by the public. Additionally, in the consent, the physician must affirmatively state that the agreement was signed without coercion.

### ***Negotiation and Compliance***

Ms. Wynn informed the Board that there is a conflict in the Board's statutes between a licensee's right to a settlement conference in lieu of a formal hearing and the Executive Director's authority to negotiate an agreement without the matter going forward to the Board. One option is for the Board to give the Executive Director delegated rule authority to negotiate a settlement agreement. Dr. Lee asked if an agreement needed to go to the full Board for approval or if approval could be obtained through a Board designee. Ms. Boucek stated that the law does not allow for one person on the Board to make that determination. She suggested a rule change would be the best method to delegate authority to the Executive Director. Until that time, she suggested that the Board grant the authority at each Board meeting.

## **Future Direction and Discussion Items**

Dr. Pardo noted that in the past, the Board had a list of suggested fines for certain statutory violations in which the licensee received financial remuneration for his or her acts of unprofessional conduct. Ms. Wynn stated that there have been studies that have shown that fines actually have the reverse effect for which they were intended. For example, some physicians may determine that it is easier to pay a fine than change their practices. Additionally, in these economic times, there may be fallout if licensees believe the Board is using civil fines to bolster State coffers. Dr. Pardo stated that the Board also has the opportunity to issue an order for restitution.

Ms. Wynn informed the Board that we are anticipating new Board member appointments by the December Board meeting.

The meeting adjourned at 2:13 p.m.



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Lisa S. Wynn, Executive Director