

RELATIONSHIP BETWEEN BOARD OF MEDICAL EXAMINERS AND ORGANIZED MEDICINE AT ALL TIME LOW

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For over twenty years, since the days when the late Edwin H. Albano, M.D., took over the reins of the New Jersey Board of Medical Examiners, tensions between the Board and the medical community of New Jersey have been less than perfect, especially as the Board sought increasingly greater regulatory control over physicians' conduct and the practice and policies of medicine.

Recent actions by the Board have now produced outright hostility between the Board, which operates in the Division of Consumer Affairs under the direction of the Attorney General, and the medical community, as represented by the Medical Society of New Jersey. Four separate areas of concern have left "Organized Medicine" wondering how and why a Board, which has fourteen physician members, out of twenty-one total members, could be so far removed from the reality of medical practice and the concerns of their colleagues.

Last year ended with the Board ruling that physicians had no right to expect their offices and records to be secure from unannounced, warrantless searches. Liquor dealers, coal mine owners, race horse trainers and auto junkyard operators are subject to rare and limited exceptions to the Fourth Amendment guarantees against warrantless searches. These exceptions are based upon well-founded regulatory concerns and pervasive regulatory activity necessitated by the nature of their enterprises – enterprises associated with criminal activity, gambling, and inhumane and unsafe working conditions. The Attorney General's office has convinced the Board that physicians should be subject to even more intense regulatory oversight than these enterprises, with fewer constitutional protections than those afforded to these endeavors. The Board has accepted the Attorney General's position that physicians' offices and records are to be subject to complete, random, unannounced, warrantless searches, without any demonstration of good cause or judicial review. The Board has, thus, authorized the Attorney General to exercise greater power in regulating physicians than Congress has granted to regulators of liquor dealers, mine owners, race horse trainers and auto junkyard dealers.

On the heels of this remarkable position, the Board began the New Year by arousing the enmity of not only the medical community but the legal profession, journalists (including the editorial writers of the New York Times), the Hospital Association, the Department of Health, the Bar Association, and virtually every other public health policy group in the nation, with a singularly bizarre determination that patients are presumed to be incompetent and that three physicians must attest to a patient's competence before a Do Not Resuscitate Order can be implemented. At a n unprecedented public hearing in May, twenty-four speakers, including legal counsel for the American Medical Association, representatives of the Medical Society of New Jersey, the New Jersey Bar Association, Commissioner of Health Len Fishman, and the nation's leading bioethicist in the field of death and dying, Paul Armstrong, all testified against the Board's ill-conceived policy.

While wreaking havoc upon physicians' and patients' privacy rights the Attorney General and the

Board have also decided to overturn legal and judicial processes developed over two-hundred years of American jurisprudence. In April, the Board reversed a not-guilty finding of an Administrative Law Judge in favor of a primary care physician and found the physician guilty of professional misconduct for engaging in consensual sexual relations with two female patients during the late eighties. The sexual relations, with each individual, preceded any physician-patient relationship and there was no evidence of any use of the physician-patient relationship to gain sexual advantage. The Administrative Law Judge's decision was based upon the testimony of Medical Society of New Jersey Executive Director and Legal Counsel, Vincent A. Maressa; bioethicist Paul W. Armstrong; and forensic psychiatrist Stanley Kern, M.D., that standards of sexual conduct for physicians were first beginning to be debated in the late Eighties and ethical standards regarding such conduct did not evolve until sometime in the 1990s. The Board passed its own regulation prohibiting sexual relations between physician and patient in 1996 and the Judge found that the Board's regulation could not, constitutionally, be applied retroactively. In reversing the Judge's decision, it was obvious that the Board did not even read the nine days of testimony which led to the decision finding the physician innocent, including the testimony of these three experts. When asked to state whether they read the transcripts, or even the Judge's well-reasoned decision, the Board members refused to respond.

In a decision lacking in logic, the Board held that it is never possible for a physician to have consensual sexual relations with a person who later becomes a patient since the physician is always in a position, as a physician, to intimidate and exploit the patient. The fallacy of this position was perhaps best described by Mr. Maressa. At a hearing on sentencing, Maressa told Board members that it was illogical to believe, for example, that a female Army General would necessarily be so intimidated by a Captain primary care practitioner, that she would be unable to make a reasoned decision, free from exploitation, as to whether to engage in consensual sexual relations with that physician. Medical Society President, Gregory Sachs, M.D., also testified before the Board, at sentencing, and reminded them that, during the Eighties, physicians routinely selected spouses from their patient populations.

In overturning the Administrative Law Judge's decision, the Board relied upon its own "experience, expertise and training" though the law clearly prohibits Boards from doing so and, in effect, acting as silent witnesses against an accused. When the Board became aware of the legally defective basis of its decision to overturn the Judge's decision, it disingenuously changed the basis of its ruling and determined that its decision was based upon the testimony of a philosopher, Edmund Erde, Ph.D., who, ironically, admitted that he was not aware of any legal or medical standards proscribing consensual relations between physician and patient, during the time frame at issue.

Clearly recognizing the weakness of its own position, the Board ultimately imposed a \$2500 fine and a reprimand upon the physician, though it claimed the conduct was egregious. If the conduct was egregious, why was the penalty only a reprimand? Apparently, the Board realized that its decision was legally unsustainable by the time it decided upon penalty. Rather than admitting that it had made a mistake, the Board imposed a minimal penalty.

Though the penalty is minimum, its effects on the physicians career can be substantial. Many managed care companies will refuse to accept physicians into their panels, where there is any

disciplinary action in that physician's past.

While the Board was imposing penalties on consensual sexual relations it was, in another case, severely restricting a physician's ability to conduct pretrial discovery which could prove his innocence. This second case involves a psychiatrist accused of having a twelve year sexual relationship with his patient. The patient has been diagnosed by the State's own expert as suffering from a borderline personality disorder and the physician's discovery sought to demonstrate the patient's propensity to fabricate, imagine, and exaggerate.

The Administrative Law Judge permitted defense counsel to issue eighteen subpoenas for records and deposition, as part of the usual pretrial discovery in the case. At the urging of the Attorney General's office, the Board overturned sixteen of the eighteen subpoenas and severely restricted the scope of the remaining two. In so doing, the Board accepted the unprecedented argument that depositions are an extraordinary remedy which should only be employed in emergent situations and when the defendant cannot otherwise obtain discovery through the prosecuting Deputy Attorney General. The Board also held that, with rare exception, it would never permit a complaining patient to be deposed in a case where the patient accuses the physician of sexual misconduct.

A third case, known popularly as the warrantless search case, is now before the Appellate Division, as is the Board's decision to preclude most discovery where physicians have been accused of wrongdoing. The decision retroactively applying the Board's 1996 prohibition on consensual sexual relations is expected to be appealed once the Board issues its final written decision, and the Medical Society of New Jersey is expected to file a friend of the Court brief.

The Board has promised to revisit its Do Not Resuscitate Policy but, if it does not do so quickly, the American Medical Association has agreed to help fund litigation against the Board on this issue. In the meantime, key legislators have expressed interest in conducting an investigation of the Board of Medical Examiners and its all too close relationship with the Attorney General's office, which acts as both counsel to the Board and prosecutor before the Board.