



Janice K. Brewer  
Governor

State Of Arizona Board of Podiatry Examiners  
"Protecting the Public's Health"

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Barry Kaplan, DPM; Joseph Leonetti, DPM; Barbara Campbell, DPM;  
M. Elizabeth Miles, Public Member; John Rhodes, Public Member; Sarah Penttinen, Executive Director

**BOARD MEETING MINUTES**

October 12, 2011; 8:30 a.m.  
1400 West Washington St., B1  
Phoenix, AZ 85007

Board Members: Barry Kaplan, D.P.M., President  
Joseph Leonetti, D.P.M., Member  
Barbara Campbell, D.P.M., Member  
M. Elizabeth Miles, Secretary-Treasurer  
John Rhodes, Public Member

Staff: Sarah Penttinen, Executive Director

Assistant Attorney General: Marc Harris

The Agenda for the meeting is as follows:

**I. Call to Order**

Dr. Kaplan called the meeting to order at 8:33 a.m.

**II. Roll Call**

Dr. Kaplan noted that Ms. Miles was absent. All other Board members were present as was Ms. Penttinen. Marc Harris was present from the Attorney General's Office.

**III. Approval of Minutes**

a. September 14, 2011 Regular Session Minutes.

MOTION: Dr. Leonetti moved to approve the minutes as drafted. Mr. Rhodes seconded the motion.

DISCUSSION: There was no discussion on the motion

VOTE: The motion passed unanimously by voice vote.

b. September 14, 2011 Executive Session Minutes.

MOTION: Dr. Leonetti moved to approve the minutes as drafted. Dr. Campbell seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

**IV. Review, Discussion and Possible Action –Review of Complaints**

a. 09-14-C: J. David Brown, DPM: Review of subpoena issued to Dr. Brown and objection filed by Dr. Brown's attorney.

Dr. Brown was present with attorney Bruce Crawford. Mr. Crawford addressed the Board and reviewed the actions in this matter to date. Following the Board's investigation a consent agreement was offered to Dr. Brown which included Order terms for Dr. Brown to reimburse the patient and make changes in his office regarding billing procedures regarding the specific code of concern in this case. He stated Dr. Brown and his staff have already attended education classes on billing and coding. His concern with the consent agreement was the Order term for probation which he and Dr. Brown did not feel was necessary. Mr. Crawford stated Dr. Brown is already on probation from a different investigation case and a second probation would cause him professional harm. He said the billing issue raised in this case has already been corrected and attempts have been made to reimburse the patient's insurance

company. The Board had issued a subpoena for additional charts and billing records to which he filed an objection. It is that subpoena and objection which is now the issue at hand.

Dr. Kaplan noted that the basis of the objection filed by Mr. Crawford was due to him speaking with Dr. Brown's nurse without going through Mr. Crawford first and receiving information from the nurse regarding the use of the billing code in question. Dr. Leonetti noted for the record that Dr. Kaplan was the investigator for this case. Mr. Crawford made a statement regarding his clients being contacted without his knowledge. Ms. Penttinen stated that this was not an ongoing issue but had only occurred in this case. Mr. Crawford disagreed and claimed it has happened "a few" times. Dr. Kaplan clarified that he was not aware of his mistake at the time. At this time Dr. Kaplan officially recused himself and Mr. Crawford stipulated that any comments made by Dr. Kaplan up to this point were made as the investigator for the case.

Dr. Leonetti sought to clarify that Mr. Crawford's objection to the subpoena was due to Dr. Kaplan contacting Dr. Brown's staff. Ms. Penttinen added that the objection also included the argument that the subpoena was overbroad, unduly burdensome and constitutes harassment. Dr. Leonetti reviewed the subpoena in question and clarified for the record that it asked Dr. Brown to produce patient charts and billing records for the DME billing code in question for the period of January through April 2009. He asked Mr. Harris how much of the case could be discussed at this time. Mr. Harris stated that due to the wording of the agenda the Board can only discuss the subpoena and how the Board wants to handle the objection. He also clarified that the Board could discuss the basis for the subpoena.

Dr. Leonetti stated the reason the Board wanted additional records was the information Dr. Kaplan received from Dr. Brown's nurse which indicated that this case was not unique with regard to the billing code used which was the wrong code. The Board had been concerned about how often that code had been used because the reimbursement amount was much higher than the correct code. Dr. Leonetti reviewed Mr. Crawford's concern that the Board was using "fruit from the poison tree" and should not be able to use information provided by Dr. Brown's nurse to Dr. Kaplan.

Dr. Leonetti stated there may be another way to resolve the Board's concerns by issuing a Letter of Concern for the specific issue of the DME billing code used in this case. This option would place on record the Board's concerns and make certain Dr. Brown is on notice of such concern. Mr. Harris confirmed that the Board could do this. Dr. Leonetti asked Mr. Crawford to confirm if Dr. Brown reimbursed the patient's insurance company. Mr. Crawford stated Dr. Brown could provide specific detail but he is aware that Dr. Brown and his staff have contacted the insurance company to attempt a correction of the billing. Dr. Brown stated he had contacted the insurance company but he is not certain of the status or outcome. Dr. Leonetti briefly discussed with Mr. Harris the difference between the Board issuing an "order" which would have to be done via a consent agreement versus a Letter of Concern. Dr. Leonetti stated he feels a Letter of Concern would satisfy the concerns of all parties in this case.

Mr. Crawford stated that if the Board looked at other patient records from the same time period they may see this same billing issue. Dr. Leonetti agreed that, due to the date of the incident in this case, there could be confusion if the same issue arises in the future and asked Mr. Harris how the Board would proceed in such a situation. Mr. Harris said in such an event the Board could review that complaint in addition to the action taken in this case, and if the Board is satisfied that Dr. Brown has corrected the billing issue they could choose to take no action. However, the Board would not be precluded from taking action. He added that the only issue on the agenda for today was the objection to the subpoena and not the disposition of the case. He suggested that the Board may wish to ask Mr. Crawford to put into writing the information discussed today regarding Dr. Brown's corrective actions. Upon receipt of such documentation the case could be re-agendized and the Board could then close the matter with a Letter of Concern.

Dr. Leonetti stated that, based on the information provided by Mr. Crawford, he feels the Board's concerns have been addressed. He would like to receive one comprehensive letter from Mr. Crawford addressing all relevant issues and then the case will be re-agendized. Mr. Crawford said he thought such a letter had already been submitted. Dr. Leonetti said there was, but Dr. Brown will need to research and confirm the status of the insurance reimbursement and report that information back to the Board. Mr. Crawford agreed to send another letter with the requested information. Ms. Penttinen asked Dr. Leonetti what action would be taken on the subpoena. He stated it would not be needed and would be withdrawn upon closing the case.

b. 09-34-C: J. David Brown, DPM: Practice below the standard of care for improper surgery. Dr. Brown was present with attorney Bruce Crawford.

MOTION: Dr. Kaplan moved to go into Executive Session for the purpose of obtaining legal advice. Mr. Rhodes seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote and the Board went into Executive Session at 8:48 a.m.

The Board returned to Regular Session at 8:57 a.m. Dr. Leonetti explained that there were some concerns regarding the quality of the investigative report submitted to the Board. This case was the first case assigned to the investigator and it appears the investigator was overwhelmed and did not understand the process. That investigator is no longer working with the Board. Dr. Leonetti stated he would like to have the investigation report reviewed by another investigator who would then report their findings back to the Board.

MOTION: Dr. Leonetti moved to table this matter for further review of the investigation report by a new investigator. Dr. Campbell seconded the motion.

DISCUSSION: Mr. Harris asked Dr. Leonetti to clarify if the new investigator's review would be limited to only the investigative report or if he wants a complete review of the whole file starting from the beginning. Dr. Leonetti stated the new investigator would need to look at the report first then the entire file to make sure the report is accurate; basically reinvestigating the entire complaint. Mr. Harris asked Dr. Campbell if that was her understanding of the motion and her second and she stated yes.

VOTE: The motion passed unanimously by voice vote.

c. 10-16-C: J. David Brown, DPM: Providing unnecessary treatment to a patient.

Dr. Brown was present without legal representation. Dr. Dedrie Polakof was the investigator for this case and was present. Dr. Polakof summarized the case as follows: Complainant T.B. filed the complaint on behalf of her mother, the patient, J.M. The patient has type II diabetes which is well-controlled. She saw Dr. Brown for right foot pain. The complainant said Dr. Brown took x-rays, told the patient surgery would be necessary, provided an air boot and ordered an MRI of the foot. On the second office visit the complainant was uneasy with Dr. Brown's demeanor and scheduled a visit with Dr. Kerry Zang for a second opinion. According to the complaint Dr. Zang diagnosed only arthritis. The complainant feels that all treatment by Dr. Brown was unnecessary including his recommendation for surgery.

Dr. Polakof then reviewed the patient's medical records. The patient is an elderly female. The first office visit with Dr. Brown was on 03/06/10. X-rays were taken at that time and the patient was prescribed a diabetic shoe and Medrol Dosepak. The patient later received orthotics but the foot pain persisted. An MRI of the right foot showed bone marrow edema, subcortical sclerosis, ganglion cyst, and osteophyte growth on the dorsal side of the foot. The complainant then took the patient to Dr. Zang on 04/01/10. Dr. Zang noted decreased pulses in the feet, left greater than right. Dr. Zang formed a diagnosis of degenerative arthritic changes and prescribed a topical oil treatment. On 04/15/10 the patient was seen by vascular specialist Dr. Edward Dietrich who later performed a revascularization of the left lower extremity. And on 05/04/10 the patient had a second office visit with Dr. Zang whose notes indicate the patient was doing well.

Dr. Polakof stated that when she reviewed the complaint with the complainant T.B., T.B. was concerned about why all of the patient's issues could not be concerned in one office visit because she works full time and has limited availability to take the patient to doctor visits. Dr. Polakof stated she felt the air boot, MRI and prescriptions from Dr. Brown were appropriate. However, she has one concern regarding the vascular component of the patient's care. She stated she vacillated as to whether or not a vascular consult should have been done sooner. Dr. Kaplan clarified with Dr. Polakof that the revascularization done by Dr. Deitrich was on the left foot, which Dr. Polakof confirmed. Dr. Polakof stated that according to Dr. Deitrich the patient's circulation on the right foot was not the greatest but there was a palpable pulse. Also according to Dr. Zang's records, the patient only needed revascularization on the left foot due to the patient's ABI (ankle brachial index).

Dr. Kaplan noted that Dr. Brown's chart notes indicate the patient did have palpable pulses on her right foot, so he is not sure if a vascular issue was really a problem on that side. Dr. Polakof stated she considered that. She added that when she sees a patient she does not limit the focus of her exam to the extremity having problems; she does "due diligence" on both sides. Dr. Kaplan agreed with this approach and added that if he found a strong pulse in the extremity to be possibly operated on he would still consider the surgery. Dr. Polakof added that, considering the MRI results and conservative care plan, she would not see a need to rush to surgery until the patient's vascular status was "up to par." Dr. Leonetti asked what the recommended procedure was. Dr. Polakof states it was a removal of osteophytes on the dorsal side of the foot. She added that the complainant seemed upset that the pre-operative discussion included the possible complication of death. Dr. Polakof and the physician Board members were in agreement that discussing that possible complication was appropriate.

Drs. Leonetti and Polakof discussed the records from Dr. Brown and Dr. Zang regarding their evaluations of the patient's vascular status. Dr. Leonetti stated he thinks Dr. Brown's treatment was in order. Conservative treatment was attempted along with an MRI. He added that if there were any concerns regarding surgery then a vascular consult would be obtained prior to the procedure being done.

Dr. Brown addressed the Board. He stated that he was in the very early stages of working the patient up for possible surgery and was first trying conservative care measures. The patient's MRI showed a large dorsal osteophytes and significant arthritic degeneration of the second tarsal / metatarsal joint. Dr. Brown stated he had discussed possible surgery with the patient but had not conducted a pre-operative consultation. He stated an ABI would have been done in a pre-operative consult but he was not yet at that point in his care of the patient. Dr. Kaplan agreed that Dr. Brown's chart shows he had not proceeded very far in his treatment of the patient. Dr. Campbell said it seems as though the complainant wanted everything done very rapidly in one office visit but doctors cannot always do that.

**MOTION:** Dr. Kaplan moved to dismiss the complaint finding no violations of statute. Dr. Campbell seconded the motion.

**DISCUSSION:** There was no discussion on the motion.

**VOTE:** The motion passed unanimously by voice vote.

## **V. Review, Discussion and Possible Action – Probation / Disciplinary Matters**

a. 07-28-C – Kent Peterson, DPM: Monthly update.

Dr. Leonetti explained that he had reviewed the HCFA forms submitted by Dr. Peterson for the patient charts already submitted during his probation. Dr. Leonetti stated he could not tell enough information from them and needs to have the EOB's for those charts. Ms. Penttinen explained that she had misunderstood the previous discussion and thought either the EOB's or HCFA forms would be sufficient. She will contact Dr. Peterson and request to have the EOB's sent. Dr. Leonetti stated that one month of EOB's should be sufficient. Ms. Penttinen also confirmed that Dr. Paterson has agreed to appear at the November 9 Board meeting for a comprehensive probation review.

Following review of this matter there was a general discussion regarding the submission of records from licensees for both probation reviews and initial investigations. The current wording on the Board's subpoenas includes "all records... including billing records." The Board members would like that language modified to specifically state that EOB's must be included with the billing records. Ms. Penttinen will make the necessary changes.

b. 08-03-C – Elaine Shapiro, DPM: Monthly update.

Ms. Penttinen advised that the next probation report from Dr. Sucher is due in November. She has not received any reports of non-compliance.

c. 08-44-C – Alex Bui, DPM: Monthly update.

Ms. Penttinen advised that Dr. Bui was notified of the Board's approval of the ACFAS education program he wanted to attend. Dr. Bui is still working on submitting information about "E/M University" and "Dr. Jensen." Ms. Penttinen also advised that Dr. Bui's monthly report for October had not yet been received.

d. 09-17-B – J. David Brown, DPM: Monthly update.

Ms. Penttinen advised that the next probation report from Dr. Sucher is due in November. She has not received any reports of non-compliance.

**VI. Review, Discussion and Possible Action on Administrative Matters**

a. Request from Bruce Crawford to amend minutes of the July 13, 2011 Board meeting. The Board reviewed a letter received from attorney Bruce Crawford regarding the July 13, 2011 Board meeting minutes. During that meeting the Board had reviewed a malpractice claim report received from PICA regarding Dr. Gary Friedlander. The minutes state that a malpractice lawsuit was filed and Mr. Crawford would like that changed to indicate that a claim was made with PICA but a lawsuit was never filed. The Board reviewed the minutes and the report which had been received from PICA.

MOTION: Dr. Kaplan moved to amend the minutes for July 13, 2011 as requested by Mr. Crawford. Dr. Campbell seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

b. Correspondence from Dr. Martin Rosenthal to "close" his license status.

Dr. Kaplan reviewed correspondence received from Carondelet Health Network in Tucson, Arizona which indicates that Dr. Rosenthal had retired from practice and his privileges with their facilities were dissolved. This action was based on a medical evaluation Carondelet asked Dr. Rosenthal to undergo which indicated a suggested diagnosis of moderate dementia. Dr. Kaplan had asked Ms. Penttinen to contact Dr. Rosenthal by phone to discuss the letter from Carondelet which she did. The Board has received a letter from Dr. Rosenthal dated October 3, 2011 asking that his license be closed.

MOTION: Dr. Kaplan moved to accept the request from Dr. Rosenthal and deem his license closed. Dr. Leonetti seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

Following the vote Ms. Penttinen asked what the effective date of the license closure would be. All Board members were in agreement that it would be effective retro-active to the date of Dr. Rosenthal's letter which is October 3, 2011. Mr. Harris advised the Board that a letter should be sent to Dr. Rosenthal advising him of the Board's decision and confirming that his license is now expired.

c. Request from Dr. Chris Werner, potential new license applicant, for permission to sit for the oral licensing exam in December 2011. (Dr. Werner has not submitted the application form, fee or any required supplemental documents.)

The Board reviewed the letter received by Dr. Werner. There was general discussion regarding Dr. Werner's desire to practice at a federal facility in Texas, but he apparently is having a difficult time obtaining a license there because of their requirements. Dr. Werner would like the Board to allow him to sit for the oral exam for new license applicants in December. The Board discussed the relevant time frames and concluded that Dr. Werner could sit for the June 2012 exam but would not be permitted to sit for the December 2011 exam because he missed the application deadline.

MOTION: Dr. Leonetti moved to deny Dr. Werner's request. Dr. Campbell seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

d. Review of new license applications and possible approval to sit for oral exam on December 14, 2011:

i. Carmen Partridge, DPM

ii. Michelle Zhubrak, DPM

MOTION: Dr. Leonetti moved to approve the applications of Drs. Partridge and Zhubrak and allow them to sit for the oral exam in December 2011. Dr. Campbell seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

**VII. Executive Director's Report – Review, Discussion and Possible Action**

a. Open complaint status report.

Ms. Penttinen advised that due an emergency she was not able to complete the report. However, one new complaint was received from the public in addition to the cases opened by the Board based upon the license renewal applications reviewed in September. She also updated that 14 cases have been

sent to investigators and she expects several to be ready to review at the November 2011 Board meeting.

b. Malpractice case report.

- i. David Lee, DPM. Claim filed by patient D.R.; date of occurrence 07/25/11; no disposition yet.
- ii. Scott Price, DPM. Claim filed by patient C.B.; no disposition yet.
- iii. Frank Maben, DPM. Claim filed by patient L.M.; date of occurrence 04/22/09; no disposition yet.
- iv. Teisha Chiarelli, DPM. Claim filed by patient L.G., date of occurrence 04/01/11; no disposition yet.

(None of the above-noted cases has been previously addressed by the Board.)

The Board reviewed the reports received from PICA for each of these four matters and took the following actions:

MOTION: Dr. Kaplan moved not to open a complaint investigation file at this time for Dr. Lee's matter which involved accidental spilling of phenol onto a patient's lap during a toenail procedure. The Board will await the outcome of the PICA action when or if a settlement or judgment is filed against Dr. Lee. Mr. Rhodes seconded the motion:

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

The case for Dr. Price involves patient C.B. who alleges Dr. Price incorrectly cut her toenails and caused an infection. The case for Dr. Maben involves patient L.M. who alleges Dr. Maben failed to appropriately diagnose problems caused by surgery done by a previous physician. And the case for Dr. Chiarelli involves patient L.G. who alleges Dr. Chiarelli incorrectly performed surgery on her foot which required additional surgery. The Board discussed and agreed to open complaint investigation files for these three cases. Mr. Harris advised that the cases should be opened via a motion and vote by the Board.

MOTION: Dr. Kaplan moved to open complaint investigation cases of each of these three cases. Mr. Rhodes seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

**VIII. Call To The Public**

There were no requests to speak during the call to the public.

**IX. Next Board Meeting Date:**

- a. November 9, 2011 at 8:30 a.m.

**X. Adjournment**

MOTION: Dr. Kaplan moved to adjourn the meeting. Dr. Leonetti seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote and the meeting was adjourned at 9:44 a.m.