



Janice K. Brewer  
Governor

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

1400 W. Washington, Ste. 230, Phoenix, AZ 85007; (602) 542-3095; Fax: 542-3093

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**

January 11, 2012; 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: Montgomery Lee

(NOTE: Agenda items were reviewed out of order from the sequence listed in the agenda and minutes.)

**I. Call to Order**

Dr. Kaplan called the meeting to order at 8:35 a.m.

**II. Roll Call**

All Board members were present, as were Ms. Penttinen and Mr. Lee.

**III. Approval of Minutes**

a. December 14, 2011 Regular Session Minutes.

Dr. Kaplan noted that due to time constraints and recent emergency Board actions the regular session minutes are not yet completed. The audio recording of the meeting is available in the event of a public records request.

b. December 14, 2011 Executive Session Minutes.

MOTION: Ms. Miles moved to approve the minutes as drafted. Dr. Kaplan seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

c. December 30, 2011 Teleconference Regular Session Minutes.

The Board members offered grammatical and spelling corrections.

MOTION: Dr. Campbell moved to approve the minutes with the noted corrections. Ms. Miles seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

**IV. Informal Hearing: Review, Discussion and Possible Action:** (NOTE: The subject matter listed for each agenda item represents the allegation(s) being investigated. The presence of allegations does not automatically indicate violation of Statute or Rule in connection with the practice of podiatry.)

a. 10-29-C – Kathleen Richards, DPM: Charging or collecting an excessive fee / charging for services not rendered; inaccurate record keeping.

This case was initially reviewed on November 9, 2011 for one allegation regarding improper billing. It was referred to an informal hearing with a second allegation added for inaccurate record keeping. Dr. Richards was not present but did submit a written response to the second allegation. The issue at hand

is whether Dr. Richards billed for the correct procedure performed on the patient but did not document it properly, or if the correct procedure was documented but the wrong billing code was used. Dr. Kaplan asked the Board members if they wished to rescind the referral to informal hearing and asked Mr. Lee if it is possible to do that because he thought the Board intended only to continue the investigation but somehow a motion was made to conduct an informal hearing. Mr. Lee advised that if the Board does not want to proceed with the informal hearing as it is stated on the agenda for today, it would be appropriate to do so upon a motion and vote to vacate it and return to an investigative stage.

There was discussion between Mr. Lee and Drs. Kaplan and Leonetti regarding whether the Board legally can proceed with the informal hearing in Dr. Richards' absence. Dr. Leonetti stated that given Dr. Richards' response to the second allegation he feels he has the information he wanted and that the Board can proceed with the informal hearing. Mr. Lee advised that there is a provision in the Board's statutes regarding a licensee's absence or refusal to participate in an informal hearing. If Dr. Richards' has indicated that she accepts the informal hearing and will accept the Board's disposition of the case, then the informal hearing could proceed; however, if she refuses to participate and the Board wanted to take disciplinary action then a formal hearing would be required. Ms. Penttinen advised that the only communication she has had with Dr. Richards was the written notice of the second allegation, the written invitation for Dr. Richards to participate in the informal hearing, and Dr. Richards' written response to the second allegation. Dr. Richards has not responded to or addressed the issue of the informal hearing. Mr. Lee advised that in the absence of Dr. Richards stating that she consents to going forward with the informal hearing he would recommend that the Board take a more conservative approach and determine that her absence is a refusal to participate. He further advised that if the Board feels this case is serious enough then it would go to a formal hearing, but if the Board feels disposition of a minor nature is appropriate then they can vacate the informal hearing and return the case to the investigation stage. After that the Board could take any action other than revocation or suspension.

**MOTION:** Dr. Leonetti moved to vacate the informal hearing in this case and return it to an investigational interview. Dr. Kaplan seconded the motion.

**DISCUSSION:** Ms. Miles asked Dr. Leonetti to clarify if he meant "investigation status" as the Board does not have an official term of "investigational interview." Dr. Leonetti accepted the suggested correction from Ms. Miles. Dr. Kaplan seconded the correction.

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

Dr. Leonetti stated that his concern was the use of billing code 10060. Based on Dr. Richards' response to the second allegation he feel using code 99203 is more appropriate and he feels Dr. Richards now understands the proper use of code 10060.

**MOTION:** Dr. Leonetti moved to dismiss this case with a Letter of Concern for the proper use and documentation of code 10060. Dr. Kaplan seconded the motion.

**DISCUSSION:** Ms. Miles asked if any continuing medical education would be needed in the areas of billing and coding. Dr. Leonetti said he believes Dr. Richards now knows the proper billing codes to use and if a Letter of Concern is issued it would be on Dr. Richards' record in case of any future incidents of this nature. Ms. Penttinen asked the Board to clarify if either of the allegations is considered substantiated. Dr. Leonetti stated there does not have to be a substantiated allegation to issue a non-disciplinary action. Ms. Miles stated that there can be an incorrect billing code used without being considered excessive billing. Drs. Kaplan and Leonetti agreed with Ms. Miles. Dr. Leonetti stated the letter of Concern should be for both using the wrong billing code and for not properly documenting the procedure which was performed.

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

## **V. Review, Discussion and Possible Action –Review of Complaints**

a. 09-42-C – Kevin O'Brien, DPM: Inappropriate surgery.

Dr. O'Brien was present with attorney Dominique Barrett. Dr. William Leonetti, DPM was the investigator and was present. Dr. William Leonetti summarized the case as follows: A complaint was received from patient J.A. The patient had a long history of bilateral heel pain for several years and was referred to Dr. O'Brien by his primary care doctor in June 2008. Dr. O'Brien's records show the patient had pain for at least two years which had been treated with physical therapy and injections with no improvement. Dr.

O'Brien's assessment was that the patient had plantar fasciitis and heel spur syndrome. On the first office visit, the treatment given was trigger point injections with a steroid and Lidocaine and a recommendation for custom orthotics. On the second office visit the patient said there was no improvement in his symptoms and requested surgery. Dr. O'Brien recommended conservative treatment with physical therapy and orthotics but the patient was insistent on surgery. Appropriate consent forms were provided to the patient. On August 15, 2008, Dr. O'Brien performed bilateral fasciectomy. Post-operatively, Dr. O'Brien's notes indicate the patient was non-compliant. By the second post-op visit there was mention of an abscess in the right foot. Dr. O'Brien performed an in-office incision and drainage, prescribed appropriate antibiotics, and recommended crutches and a boot. Dr. O'Brien noted again that the patient was non-compliant and on the third post-op visit the patient complained of significant pain. Dr. O'Brien noted that the pain was isolated to underneath the medial plantar condyle of the heels in the areas of the previously-diagnoses heel spurs. Treatment recommendations were provided but the patient insisted on additional surgery for heel spur removal. Appropriate consents were provided again and surgery was done approximately one month after the first procedure to excise the heel spurs.

The patient was again reported to be non-compliant post-operatively. The patient was recommended to have physical therapy and custom orthotics which the patient refused. At seven months post-op, the patient was still complaining about pain and Dr. O'Brien recommended a Medrol-Dosepak. Due to the patient's continued non-compliance Dr. O'Brien suggested the patient obtain a second opinion from another physician. At nine months after the second surgery, the patient saw Dr. James Wilson, DPM. Dr. Wilson's recommendations stated that the patient had unresolved plantar fasciitis as well as a Baxter's nerve entrapment and heel spurs. Dr. Wilson recommended an MRI and EMG and nerve conduction studies. Review of the MRI shows that the right foot presents with no abnormalities in the heel area. A heel spur was noted but there is no inflammation noted where the plantar fascia attaches. The left foot showed very trace inflammation of the plantar fascia and presence of a heel spur. When Dr. William Leonetti spoke with Dr. O'Brien about this case, Dr. O'Brien stated that although the spurs were medial and lateral, the patient's pain was only in the medial condyle area so when he did surgery he only removed that area, therefore other spurring would be noted. There are intra-operative x-rays that show that the medial condyle was rasped smooth. Dr. Kaplan asked to confirm that there still is a spur present. Dr. William Leonetti stated that upon review of the MRI a bone spur is present but it is difficult to tell whether it is medial or lateral and there are no post-spur-removal x-rays available. Comparison to the inter-operative x-rays shows that the spurs are there but smaller. The only abnormality in the EMG and nerve conduction studies were bilateral serral nerve sensory neuropathy but no mention of any tarsal tunnel condition or neurological loss. Dr. Wilson later recommended another second opinion with Dr. William Fishco, DPM. Dr. Fishco diagnosed an entrapped neuropathy of Baxter's nerve bilaterally and recommended that the patient have additional surgery for nerve decompression and repeat plantar fasciotomy. That surgery was done on August 9, 2009 by Dr. Wilson for Baxter's nerve release and fasciotomy and radical excision of plantar fascia and removal of scar tissue. The patient continued to have pain and Dr. Wilson sent the patient back to Dr. Fishco again who recommended that the patient needed additional plantar fascia release and possible release of the nerve all the way back to the tarsal tunnel. Dr. William Leonetti said it is important to note that the EMG study and MRI were perfectly normal for the tarsal tunnel so there was never any nerve entrapment in the tarsal tunnel.

The patient then had surgery by Dr. Wilson on the left foot for extensive plantar fascia release with a complete tarsal tunnel release. The patient was referred to another physician for chronic pain and there were some concerns about reflex sympathetic dystrophy. Dr. William Leonetti made several attempts to contact the patient by phone but the patient did not respond. Based on his review of all available records, he does not agree with the allegation. Specifically, with regard to the treatment and procedure done by Dr. Wilson, Dr. William Leonetti disagrees with that procedure. Dr. Wilson claimed there was a nerve entrapment and continued plantar fascia inflammation of the right foot, both of which are directly refuted by the MRI and EMG studies. Dr. Wilson's surgeries were unnecessary and the patient should have been treated with more conservative measures of physical therapy, orthotics and injections. Dr. William Leonetti concluded that he finds no violations.

Dr. O'Brien confirmed for Dr. Kaplan that the date of the first surgery was August 15, 2008 and was for a plantar fasciectomy and heel spur resection. Dr. Kaplan asked what a "fasciectomy" was and Dr. O'Brien stated that the operative report should read "fasciotomy." Dr. Kaplan pointed out that the consent form was then inaccurate. Dr. Kaplan and Dr. O'Brien discussed the specifics of how that

procedure was done and it was confirmed that it was a fasciotomy. Dr. Kaplan then reviewed the consent form for the second procedure which was bilateral heel spur resection. He also reviewed the operative report which was extremely limited and asked Dr. O'Brien why he only removed a portion of the heel spurs instead of the complete spurs. Dr. O'Brien stated the patient was only having pain in the medial aspect; if he removed the entire spur laterally as well there was a higher chance that the patient could develop nerve entrapment or further complications. Dr. Kaplan stated that according to the MRI the spur was not really removed. Dr. O'Brien said that under the inter-operative fluoroscopy he did see a reduction of the spur. Dr. Kaplan asked Dr. William Leonetti for his opinion with regard to the spur location and if the medial condyle is considered a spur. Dr. William Leonetti stated that in his experience any spurring of the heel usually occurs in the area of the medial condyle and very little in the lateral condyle; there is a possibility of developing a lateral spur but in this case the patient's medial condyles were very large in the pre-operative films. Dr. Kaplan said that based on the operative report it is hard to tell what was done. The Board members reviewed all available diagnostic films. Dr. William Leonetti said that when he reviewed the intra-operative films it appears the foot was slightly inverted in an oblique view so it appears that most of the flattening was done on the medial condyle; comparison to the lateral view of the MRI shows a spur which indicates there was also spurring on the lateral condyle.

Dr. Joseph Leonetti said he was concerned that a second surgery was done to remove the heel spurs only one month after the first surgery for the plantar fasciotomies when the patient was noted to be non-compliant with post-operative instructions. He added that most of the time when there is heel pain it is due to the plantar fascia not the heel spurs. He asked Dr. O'Brien why he would go forward with the second surgery. Dr. O'Brien stated the patient was still having a lot of pain. He said he discussed the non-compliance issue with the patient who assured him he would be compliant following the second procedure. Dr. Joseph Leonetti asked Dr. William Leonetti how the patient did after being treated by Dr. Wilson. Dr. William Leonetti the patient still had pain which is why there was a referral to Dr. Fishco for further evaluation; he is unsure why Dr. Fishco recommended a full tarsal tunnel release which was done on the left foot and resulted in the pain management referral. Dr. William Leonetti added that he does not believe there was any need to perform any nerve release or additional plantar fascia surgery beyond what Dr. O'Brien did. Dr. Joseph Leonetti stated he agreed and that Baxter's neuritis is somewhat of a "catch all" diagnosis for heel pain which does not respond to any treatment and is very difficult to pick up on an EMG or MRI; he feels it is overused in many cases. He continued that he does not have any concerns about Dr. O'Brien's procedures, just some concern about taking the patient back to surgery when he had been non-compliant with the first surgery post-operative instructions. Dr. Campbell asked if Dr. O'Brien considered doing any type of arthritic profile to see if there was any other type of underlying problem causing the pain. Dr. O'Brien stated he knew the patient was followed for a long time by his primary care doctor who did many things, including counseling the patient on weight loss, before referring the patient to him. Dr. Kaplan advised Dr. O'Brien that this is the second case the Board has reviewed where there are problems with record keeping with the operative reports and consent forms. Dr. Kaplan made a recommendation that Dr. O'Brien improve those areas.

**MOTION:** Dr. Kaplan moved to dismiss this case finding no violations. Dr. Joseph Leonetti seconded the motion.

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

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

b. 10-05-C – Kevin O'Brien, DPM: Practice below the standard of care for poor surgical outcome on two procedures for the same patient.

Dr. O'Brien was present with attorney Dominique Barrett. Ms. Penttinen advised that there were no x-rays in this case. X-rays from Dr. O'Brien had been sent to Dr. James Wilson who recently abandoned his practice and no one has been able to access the medical records. Dr. O'Brien confirmed that the x-rays were given to Dr. Wilson. Dr. Kaplan asked if there was a signed release from the patient to release her records because it was not noted in his chart. Dr. O'Brien stated he does not send out records unless he gets an official request to do so.

Investigator Dedrie Polakof, DPM was present and reviewed the complaint as follows: A complaint was received from P.H. who was a patient of Dr. O'Brien. The patient stated Dr. O'Brien performed a bunion and second toe hammertoe surgery on her left foot on April 17, 2008. From May through October of each year the patient goes to the White Mountains and wanted surgery done before leaving town. The

patient had two post-operative office visits before leaving town. The patient is concerned about why another surgery was needed and why the first procedure did not correct everything. The patient said her foot was painful and swollen all summer. In Dr. O'Brien's notes he did surgery to decrease an IM angle of 20 degrees and increase the range of motion to the first mpj which had crepitation upon movement. At the first post-operative visit on April 21 the patient was given a cam walker to secure the foot while she was out of town. On the second post-operative visit the range of motion was noted to be 40 degrees. The patient did not see Dr. O'Brien again until September 30, 2008 at which time she complained of pain and redevelopment of a hammertoe in the second toe. On October 16 surgery was done by Dr. O'Brien to fuse the first mpj and fuse the second toe with k-wire fixation. The patient was given a cam walker. According to the patient she was walking on it quite a bit until December 2008 when she stopped using it. Dr. O'Brien stated he gave the cam walker on October 21 but told the patient to only put pressure on the heel. Dr. Polakof added that on November 17 the patient tripped and hit the k-wire and the pin was broken out of position. X-rays taken that date showed early stages of bone graft healing and the k-wire was still in place for the part that did not break off. Dr. O'Brien stated he did not recall specifically but normally if the pin breaks he removes it in his office. He then reviewed his notes and stated that the k-wire was not broken, but the patient was concerned that it had been. Dr. Polakof continued that x-rays on December 9<sup>th</sup> showed that the hardware was in place. The patient was walking a lot without the cam walker and was given another one to use on that date and was advised it needed to be used for three months following surgery.

On December 30, 2008 the patient was reported to be doing well. On January 26, 2009 the patient reported she still was doing well. X-rays on that date showed an incomplete fusion and Dr. O'Brien recommended use of a bone stimulator with follow-up in one month. On March 2, 2009 there was still incomplete fusion but the bone stimulator was still awaiting insurance approval. The patient then sought treatment with Dr. Wilson. Dr. Polakof stated that she did not see any x-rays but finds that the patient was non-compliant with post-operative instructions. Dr. O'Brien provided appropriate post-operative instructions and tried to accommodate the patient's travel plans. Dr. Polakof concluded that she did not find any violations in this case and the allegation is not substantiated.

Dr. Leonetti asked Dr. Polakof about how much time she restricts her patients from bearing weight following mpj fusions. Dr. Polakof stated it would be 4-6 weeks after surgery. Dr. Kaplan asked what Dr. Wilson did for the patient. Dr. Polakof stated she attempted to contact Dr. Wilson but his office phone was disconnected. She said the patient was not very cooperative when she called her to get more information. Dr. Leonetti asked about the second toe and Dr. Polakof advised that the patient said it was rolling to the side (following Dr. O'Brien's second procedure). Dr. Polakof asked the patient if she had changed shoe sizes following surgery which the patient stated she did not; Dr. Polakof stated old or improper shoe gear can affect the post-operative results. Dr. Kaplan stated he agreed with that.

Dr. Kaplan asked Dr. O'Brien about his notes from the first surgery which do not indicate there was a hammertoe deformity which Dr. O'Brien confirmed, and Dr. Kaplan asked what may have happened following that procedure to cause the hammertoe such as an injury. Dr. O'Brien stated that the patient only told him about the hammertoe pain in September 2008 and said she had exhausted conservative measures. Dr. Kaplan also asked Dr. O'Brien why he did not wait to do the first surgery, knowing that the patient was going to be leaving town so quickly. Dr. O'Brien said he did discuss that with the patient and that there were podiatrists available in the White Mountains area. Dr. O'Brien said he told the patient to see a doctor there if she had any problems. Dr. O'Brien said he would not normally do that but it's a case-by-case issue and he thought the patient would be fine. He added that he would not have had any problem waiting to do the surgery but the patient wanted to have it done before she left town.

Dr. Kaplan asked about the status of the joint. Dr. O'Brien stated there was 20 degrees of motion and pain with motion. Dr. Kaplan reviewed the first operative report and asked Dr. O'Brien to explain the procedure. Dr. O'Brien did not bring the patient's chart with him but was provided the copy he sent to the Board for him to review for the discussion. Dr. O'Brien stated that with the type of implant he used in this patient what he typically does is first remove the bone spur from the top of the first mpj. Then he resects the base of the proximal phalanx with the correct sizer within the joint. He then applies the correct implant to the joint after drilling subchondral bone on the head of the first metatarsal. Dr. O'Brien stated that the patient was under general anesthesia. Dr. Kaplan noted that the operative report does not indicate general anesthesia, only an injection of local anesthetic. Being questioned by Dr. Kaplan, Dr.

O'Brien described the process by which the implant was placed; the specific details were not noted in the report. Dr. Kaplan asked why the implant later had to be removed and the mpj fused. Dr. O'Brien stated the patient was having continued pain and the implant was not providing adequate relief. Dr. Kaplan asked if perhaps the implant was not positioned properly, if it was the wrong size or maybe it had sustained trauma while the patient was out of town. (The implant was an Arthrex hemi implant.) Dr. Leonetti asked Dr. Polakof to confirm the notes regarding the pre-operative IM angle and she stated it was 20 degrees. Dr. O'Brien clarified that it was actually the range of motion which was 20 degrees; he did not note the IM angle. Dr. Polakof stated that the most common cause for second toe hammertoe development following full implant or hemi implant is having a very short first metatarsal so the second toe is overworking. Dr. Kaplan agreed but stated that without the x-rays they cannot tell for certain. Upon questioning by Dr. Kaplan, Dr. O'Brien stated he did not note any damage to the implant when he removed it, but there was some jamming in the first metatarsal. There was brief discussion between Dr. Campbell and Dr. O'Brien regarding the patient's history and physical reports in the chart.

Dr. Leonetti asked Dr. O'Brien about the process of resecting the base of the proximal phalanx and if a guide hole is drilled in the shaft of that bone. Dr. O'Brien stated he does and that the Arthrex implant has a stem which is inserted into the proximal phalanx. Dr. Leonetti reviewed that when the implant was removed a reamer was used to remove cartilage from the first metatarsal and the base of the proximal phalanx. However, the base of that bone is not really there; it is the shaft of the bone. He asked if Dr. O'Brien filled that hole (from the previous implant) with anything. Dr. O'Brien stated he uses bone grafting material to do that. Dr. Kaplan noted that that information was not in the operative report and asked Dr. O'Brien if he considers it a correct operative report. Dr. O'Brien agreed that it could be more detailed. Dr. Leonetti asked if Dr. O'Brien knew for sure that he used bone grafting material in this case. Dr. O'Brien stated that in 99 percent of the time he uses bone grafting material in fusions and reviewed the report which stated it was used. Dr. Leonetti asked where the graft material was taken from. Dr. O'Brien stated he used a pre-mixed brand provided by the surgery center. Dr. Leonetti advised Dr. O'Brien that his operative documentation needs to be improved. There was discussion regarding the intra-operative fluoroscopy film and Dr. O'Brien stated the hospital likely did not forward it to him.

Dr. Leonetti asked Dr. O'Brien at what point he felt he did not have a good fusion in this case. Dr. O'Brien stated that on March 2 he saw that the plate was in good position but there was not enough bridging across the fusion site. He said that on previous films there was some cross-bridging noted but as early as January 26 he saw signs of incomplete fusion. Dr. Leonetti asked Dr. O'Brien at what point he would expect to see fusion that is strong enough to let the patient walk without a boot. Dr. O'Brien said he usually does not allow patients to walk without a boot for four to six weeks with radiographic signs of good healing. At eight weeks there were signs of non-fusion and the bone stimulator was ordered on January 26, 2009. Dr. O'Brien is uncertain if the patient ever received the stimulator due to insurance approval. Dr. Leonetti asked Dr. O'Brien why he thought this fusion did not work. Dr. O'Brien stated it could be early ambulation or complications from surgery. Dr. Leonetti asked if he normally allows patients to bear weight after one week. Dr. O'Brien stated he allowed the patient to use the cam walker using her heel only to go to the bathroom but otherwise no weight-bearing for four to six weeks. Dr. Leonetti stated using the heel is partial weight-bearing.

Dr. Leonetti reviewed the concerns in this case as follows: whether the procedure was done correctly, was the patient properly informed of the potential risks of the surgeries with both the implant and the fusion, and whether there was proper diagnosis of the post-operative complications. He added that without the x-rays they cannot assess the placement of the implant and reminded Dr. O'Brien of the importance of maintaining his original films. Dr. Kaplan discussed the use of the reamer to remove cartilage from the fusion site. He asked Dr. O'Brien if it was possible that some cartilage was not removed and that is what prevented the bones from fusing adequately. Dr. O'Brien stated it was possible but he did not think so due to the type of reamer used in this case.

(It is noted that the patient reported to Dr. Polakof that following her treatment with Dr. O'Brien, the patient then saw Dr. Wilson who did a third surgery in January 2010. The patient reported that everything is good now.)

Dr. Leonetti stated there were some bad outcomes with this patient's surgeries. It is unknown if that was due to the patient being too active too soon post-operatively. Dr. Leonetti added that if the patient is

provided proper informed consent, they can agree to go forward with the surgery knowing the possible complications and it is unfortunate that it happened twice with this patient.

MOTION: Dr. Leonetti moved to dismiss this case finding no violations. Dr. Kaplan seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

c. 10-06-C – M.A. Rosales, DPM: Previously reviewed at 11/09/11 Board meeting for allegation of failure to properly diagnose and treat a soft tissue foot condition. Second allegation added at that time for lack of informed consent for a matrixectomy.

Dr. Rosales was not present. Patient S.M. was present. Investigator Dedrie Polakof, DPM was present and summarized the complaint information for both allegations as follows: The case was reviewed on November 9, 2011 for failure to diagnose and treat a soft tissue condition with concerns of Dr. Rosales not taking cultures and the practice of polypharmacy for prescribing an antifungal medication and steroid medication at the same time. The second allegation was added for lack of informed consent for a matrixectomy. Dr. Polakof stated there was not an informed consent form for a matrixectomy performed on the patient.

Dr. Leonetti reviewed Dr. Rosales' response to the second allegation which stated it is his policy to have consent forms done for all procedures. However, he did not have a copy of the consent form due to it being lost while he was transitioning to electronic medical records. Dr. Polakof stated she had nothing further to add regarding this allegation other than what was stated in Dr. Rosales' written response. Dr. Kaplan asked how the Board received paper copies of the patient's records which were originally submitted. Ms. Penttinen stated she did not know if the chart was printed from the electronic copy. Dr. Kaplan stated there would be now way to know if what was originally submitted was the paper chart and questioned how it could be confirmed if this was the complete chart. Dr. Polakof added that, according to Dr. Rosales, as of December 12, 2011 all hard copies were shredded after being scanned. Ms. Penttinen stated that based on looking at the quality of the copies of the records submitted it appears that they are not "first-generation" copies and were likely copied and or scanned a number of times. Dr. Kaplan commented that loss of documents is danger of scanning documents and then destroying the originals and asked if anyone (on the Board) has experience with electronic records. Dr. Polakof offered that her office (at a Cigna facility) is completely electronic and there are no paper charts; once a document is scanned by administrative clerks and double-checked, then the original is shredded. Dr. Leonetti stated that for a physician in private practice, the process of converting to electronic medical records can be extremely difficult and labor-intensive, and it is very possible that something can be left out by the staff scanning the records. Dr. Leonetti said he would be comfortable giving Dr. Rosales the benefit of the doubt on this issue, and Dr. Kaplan agreed. Dr. Kaplan asked Dr. Polakof if, in light of Dr. Rosales' response, she felt the second allegation is unsubstantiated. Dr. Polakof agreed with that.

Dr. Kaplan then moved to the first allegation which was lack of proper diagnosis and treatment of a soft tissue condition. Dr. Polakof reviewed the information on that allegation as follows: Dr. Polakof stated that he patient presented with a draining rash consistent with what a fungal infection would look like. Dr. Rosales did not take any cultures at that time assuming it was a fungus. Dr. Rosales prescribed an anti-fungal medication and prepared the patient for use of Lamisil by conducting a liver function test. The patient returned with the same condition after vacationing in Mexico at which time Dr. Rosales prescribed additional oral antifungal medication as well as oral steroid medication. Dr. Leonetti asked if the antifungal medication was for a nail condition or skin condition. Dr. Polakof stated it could have been for both but it was prescribed for a nail condition, and according to Dr. Rosales records he believed it had cleared up but there were no tests done to diagnose that. Dr. Polakof confirmed that it was a 90-day antifungal treatment after which another 90-day antifungal treatment was prescribed along with a second steroid prescription. Dr. Polakof stated that when the patient went to a dermatologist the first evaluation, according to the dermatologist, was skewed due to previous treatments but he eventually determined by a series of KOH tests that the patient's infection was not fungal in nature. Dr. Leonetti asked if any of the dermatologist's KOH test were positive and what his diagnosis was. Dr. Polakof stated none of the tests were positive and the diagnosis was vasculature eczema which can appear very similar to what a fungal infection would look like so they are very easy to confuse; but if the same condition is seen more than

once the doctor has a responsibility to conduct the appropriate tests to make sure the diagnosis is correct. Dr. Leonetti agreed. He asked if the Lamisil was for a skin condition and the condition returned he did not think another 90-day treatment with Lamisil would be appropriate without knowing what the exact issue was. Dr. Polakof agreed and added that Lamisil remains in the body for six months. Dr. Leonetti stated that even if the Lamisil treatment was for a nail condition it is uncertain if 180 days of that medication would be appropriate, but here was no culture of the nails either, which Dr. Polakof confirmed. The only diagnostic test in the chart was for liver function.

Dr. Leonetti stated that when dealing with dermatologic conditions, many of them can look very similar so an original misdiagnosis would be understandable. However he is concerned at the level of Lamisil prescribes without additional testing. Dr. Polakof offered a correction in that the first 90 days of treatment was Lamisil and the next prescription was for Gris Peg. Dr. Leonetti stated there would still be concern with that. Dr. Polakof stated she was concerned with the use of any type of antifungal at the same time as a steroid treatment. Dr. Leonetti asked if any topical treatment was prescribed and Dr. Polakof stated that all prescribed medications were oral, but the main concern was the January 26, 2010 office visit when the patient was advised to continue with the Lamisil and start the Medrol Dose-Pak.

Dr. Leonetti and Dr. Kaplan discussed the appropriate use of the medication prescribed and whether it was for a skin condition or nail condition. Dr. Kaplan asked the patient, who was present, how her skin condition is at this time. The patient started it took a year for it to clear up but now her skin condition is good. The patient added that she has occasional flare-ups but over the last year it is not as bad as it was previously. Dr. Kaplan asked the patient what medication helped clear up the skin condition and the patient said it was a topical steroid cream. Dr. Leonetti asked if the oral antifungal medications prescribed by Dr. Rosales were for a skin condition or nail condition. The patient stated that as far as she knew she never had a nail infection; Dr. Rosales thought that because she had vacationed in Mexico she may have contracted a fungal infection even though she had been treated by Dr. Rosales previously for eczema. However, Dr. Rosales told her she did not have eczema. Dr. Kaplan asked the patient what her final diagnosis was from her dermatologist and she stated it was eczema which was exacerbated due to the level of oral steroid medication.

The patient then addressed the Board directly. The patient stated that one of her main concerns was that she had developed a severe rash and thought it might be a side-effect of the Gris Peg, but Dr. Rosales told her she must have changed her laundry soap or something else. Dr. Rosales also asked her if she was allergic to steroids which she was not. The patient said Dr. Rosales referred her to a dermatologist but prescribed more oral steroids and Gris Peg, at double the original dose, and said it would take 2 weeks to a month to get to see a dermatologist. The patient was able to get in to see a dermatologist the next day. The patient stated that she did not have any skin issues until the Gris Peg dose was doubled, and she felt Dr. Rosales should have done a culture prior to prescribing any medication. She said the dermatologist told her that if she had continued with that dose of medication there could have been serious damage to her feet.

Dr. Leonetti stated her has a concern in that if a patient is on a systemic medication and develops a rash, the doctor should make sure they are not having an allergic reaction. Dr. Kaplan discussed with Dr. Polakof and the patient the doses of the medications prescribed to her including Lamisil, Gris Peg, and steroids. Dr. Leonetti stated he does not have any issue with the consent form as that could have been a clerical error; but he does have concern with prescribing what he considers to be a very high strong systemic antifungal medication without properly identifying the source of the skin condition. Dr. Leonetti said he was uncertain if a Letter of Concern would be appropriate or further action. Dr. Kaplan stated he felt a Letter of Concern was appropriate for the proper diagnosis of skin conditions, and he agreed that the allegations regarding the consent form was not substantiated.

**MOTION:** Dr. Leonetti moved to issue a Letter of Concern for failure to use proper diagnostic procedures for dermatologic problems prior to prescribing any medication. Dr. Campbell seconded the motion.

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

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

d. 10-27-C – Jason Harrill, DPM: Practice below the standard of care.

Dr. Harrill was not present. The patient R.V. was present. Dr. William Leonetti, DPM was the investigator and summarized the case as follows: Review of the records shows the patient was originally seen in May 2009 by Dr. Harrill's associate Dr. Garald Campbell with a complaint of painful bumps on the bottom of her left foot which had been present for several months. Dr. Campbell's records show that he diagnosed the patient as having a verruca wart formation underneath the 5<sup>th</sup> mpj. Dr. Campbell performed with two cryotherapy treatments. Based on continued pain and inflammation Dr. Campbell determined there must be some type of bursitis and mass underneath the wart so he injected it with a steroid. There was no improvement so Dr. Campbell suggested excising the lesion, but because he no longer does surgery he referred the patient to Dr. Harrill. Dr. Harrill agreed with Dr. Campbell's assessment that the patient had a plantar verruca and bursal formation underneath the 5<sup>th</sup> metatarsal head and most likely a hypertrophy condyle or exostosis which was causing the problem. Treatment options were discussed and appropriate patient consent was given. On June 29, 2009 Dr. Harrill performed the following procedures: excision of soft tissue neoplasm, excision of bursa, and decreased of the condyle on the 5<sup>th</sup> metatarsal head. This was done in a plantar incision and Dr. Harrill stated that while the incision was opened he used a rasp to smooth the condyle to assure there was no bony irritation. The tissue was sent to pathology which confirmed plantar wart and mild fibrosis of the bursa. Post-operatively the patient continued to complain of pain and inconvenience of a scar or callus on the bottom of her foot. The patient later sought treatment with Dr. Bradley Newswander because he was closer to her home. The patient told Dr. William Leonetti that she did not like Dr. Newswander and then went back to Dr. Harrill. There was still no major relief and the patient eventually went under the care of Dr. Jessica Cerda. According to the patient, Dr. Cerda told her she probably never had a wart and did not need the surgery. In review of the pathology report Dr. Harrill's assessment of the patient was completely correct in that she did have a verruca and bursal formation.

Dr. William Leonetti continued and explained that when he spoke with the patient he asked if she had any other lower extremity problems, and the patient told him that she was seeing a chiropractor for a limb length discrepancy. The patient has a short left leg which means that the left leg supinates (turns in) and the right leg turns out while walking which would justify why she would continue to develop callus under one leg (foot). Dr. Harrill's notes indicate that patient is a "scar-former" and has callus under both feet at the 5<sup>th</sup> mpj. He added that this supination would play a role in her condition. He noted that Dr. Cerda ordered a diagnostic MRI which showed only plantar capsular scar tissue with no bone deformity which would be consistent with surgery in that area. In review of all the records, he was not able to find any violations in Dr. Harrill's care of the patient.

Dr. Joseph Leonetti asked if the patient had any orthotics made. Dr. William Leonetti stated the patient has had several orthotics made and additional palliative care including regular debridement of the calluses. Dr. Kaplan stated that it is known by the pathology report that the patient had a verruca and that there was a problem with the bursa, so he does not know why the other doctor would say the patient did not have a verruca. Dr. William Leonetti stated that the patient's condition at this point is essentially some scar tissue and callus development. He added that Dr. Harrill used a plantar incision which was directly under the weight-bearing surface of the foot. The patient also told him that she saw an orthopedic surgeon who said the 5<sup>th</sup> toe could be amputated. Upon questioning Dr. William Leonetti stated he did not know why an amputation would be done and thought there may have been some miscommunication between that doctor and the patient. Dr. Harrill also offered the option of removing the metatarsal head so there would be no pressure on the scar when the patient walks. Dr. Kaplan asked if the patient's continued pain was likely to keloid scar tissue formation which Dr. William Leonetti agreed with. Dr. Harrill stated he could excise that scar tissue but it would likely only cause more scar tissue. Dr. Joseph Leonetti stated he agrees with the care provided by Dr. Harrill, that the pathology report confirmed the initial diagnosis, unfortunately the patient developed scar tissue which can happen. Dr. Joseph Leonetti added that the patient's condition could be treated with custom orthotics and possible resection of the metatarsal head to relieve the pressure on the scar tissue. Dr. William Leonetti added that all physicians know that plantar incisions can lead to scarring which is painful for the rest of the patient's life but in this case, due to the location of the verruca which was directly under the mpj, there was no way to remove it from a dorsal or lateral approach. Dr. Joseph Leonetti reviewed the allegation and Dr. William Leonetti's opinion which is that there was no violation. Dr. William Leonetti confirmed this.

The patient addressed the Board. Dr. Kaplan asked the patient if she had orthotics in her shoes right now and she said no. The patient reviewed that when she saw Dr. Harrill after the surgery and she was still having pain she told him it was becoming a nuisance because he told her that after surgery everything would be OK. She said he told her that he did her surgery wrong and should have gone in through the top of the foot. He gave her two options: continuing seeing him, or allow him to do another surgery to correct her foot which would put his reputation on the line. After that she sought treatment with Dr. Cerda who told her she did not have a wart and should never have had surgery. In her treatment with Dr. Cerda, her foot was numbed and the callus scraped off or cut out and then freezing with acid. However, AHCCCS cut coverage for podiatry so she is now seeing an orthopedic doctor. Dr. Cruthers told her that the surgery was done wrong and that she never had a wart, only a callus. Dr. Cruthers told her he would have to amputate her small toe and shape the foot.

The patient continued and stated there was information left out because she was told by two different doctors that she did not have a wart and only had a callus. She was told she should not have had surgery and Dr. Harrill told her he did the surgery done wrong. She felt uncomfortable with Dr. Harrill and went to see other doctors including a Dr. Nelson who told her he would not treat her because the surgery was done wrong. She went back to her primary care doctor who sent her to another orthopedic doctor who told her the same thing. She stated that she did receive one pair of custom orthotics following Dr. Harrill's surgery but they wore out and AHCCCS will no longer cover them.

Dr. Joseph Leonetti stated that it is almost impossible to diagnose a wart by just looking at it. The proper way to diagnose it is to take a biopsy and send it to a lab which was done in this case and the result was positive for a wart. He advised the patient that the other doctors who told her she did not have a wart must not have seen the pathology report otherwise they would not have said that. Her foot condition now and lack of present wart may be what those other doctors are referring to. What was present before the surgery was definitely a wart because it was confirmed by the pathology report. Dr. Joseph Leonetti continued and stated he does not know how a wart on the bottom of the foot by going in through the top of the foot because the only way to do that is to remove the bone; the only way to remove the wart was to make the incision on the bottom of the foot. The problem comes if it causes a scar then the scar will callus and feel like a large mass. He does not believe Dr. Harrill did the wrong procedure and he would have done the same thing.

The patient stated she does not know about the pathology report but Dr. Cerda told her she had all the records including the x-rays and that nothing was adding up. She asserted that Dr. Harrill told her that he did the surgery wrong. After Dr. Cerda told her what happened she went back to Dr. Harrill and wanted him to contact Dr. Cerda to come up with a care plan but Dr. Harrill became upset and stated he would not speak with Dr. Cerda. Dr. Joseph Leonetti stated he could not speak to the politics of the relationships of her doctors. He added that if the patient has a copy of her records there should be a copy of the pathology report which clearly shows a verruca. He told that patient that given her history and presentation, Dr. Harrill did the correct procedure but unfortunately it did not work out the way the patient wanted it to. He added that at this point the patient's options would be to remove the metatarsal head or create an orthotic to take the pressure off the area; however, AHCCCS no longer covers podiatry care.

The patient said that when she spoke with Dr. William Leonetti about her chiropractor, she told him she saw the chiropractor due to the problems walking from this surgery. Dr. Kaplan advised the patient that chiropractors do make shoe inserts which may be more cost-effective than custom orthotics and she may want to look into that. He added that based on the information available in this case, there was no improper surgery done. The patient asked how she would appeal the Board's decision and bring in her own expert witness. She was advised by Mr. Lee that there is no appeal of a dismissal of a complaint by the Board and that she could seek the advice of an attorney for other legal remedies if she felt it necessary.

**MOTION:** Dr. Joseph Leonetti moved to dismiss the case finding no violations. Mr. Rhodes seconded the motion.  
**DISCUSSION:** There was no discussion on the motion.  
**VOTE:** The motion passed unanimously by voice vote.

e. 11-01-C – Kevin O'Brien, DPM: Practice below the standard of care for improper surgery. Dr. O'Brien was present with attorney Dominique Barrett. Investigator Dedrie Polakof, DPM was present and summarized the complaint as follows: Patient S.E. had surgery by Dr. O'Brien to fuse her left ankle. Following the procedure the angle of the ankle joint forced her to have to use lifts in her shoe which created other problems for the patient with her knee and back. The patient went to another physician and had to have her ankle re-fused and also sought treatment for the knee and back problems.

Dr. Polakof reviewed Dr. O'Brien's records for patient S.E. as follows: Dr. O'Brien initially saw the patient on July 18, 2008 and diagnosed significant arthritic pain in the left ankle. Surgery to fuse the joint was performed on August 15, 2008. On January 14, 2009 the patient saw Dr. Brien for left mid-foot pain and contracting. Dr. O'Brien dispensed night splints and prescribed physical therapy to stop the contracture. On February 4, 2009 Dr. O'Brien discussed with the patient having another procedure done if the physical therapy did not work. On March 4, 2009 the patient's mid-foot seemed to be collapsing more and was more painful. The patient then sought a second opinion with Dr. Daniel Heiner who eventually performed surgery to correct the fusion and lengthen the Achilles tendon on June 3, 2009. The operative report for that procedure notes that the subtalar joint was grossly loose with motion present and it was evident that none of the cartilage had been removed from the subtalar joint in the previous fusion attempt.

Dr. Polakof concluded that the allegation is substantiated. Dr. Leonetti asked if Dr. Polakof had reviewed any x-rays or MRI's to which she replied no. Ms. Penttinen clarified that there were x-ray films. Dr. Polakof corrected that she did review x-rays. The pre-operative x-rays (from Dr. O'Brien) show arthritic changes. Inter-operative x-rays look as though the hardware was in the proper place. Screws were used and Dr. O'Brien confirmed that he used an IM rod. Dr. Polakof said the inter-operative fluoroscopy did appear to show that the procedure was done properly with regard to presence of cartilage and bone contact. Dr. Polakof confirmed for Dr. Leonetti that there were no post-operative x-rays to review to determine the progression of the joint status. There were no x-rays from Dr. Heiner, only the operative report. Being asked, Dr. O'Brien stated the patient took her x-rays from his office to Dr. Heiner.

Dr. Leonetti asked Dr. Polakof if Dr. Heiner saw any infection in the patient's foot. Dr. Polakof stated there was an infection in the bone at the tibial-talar joint and soft tissue which had to be cleared up prior to the surgery he performed. Dr. Polakof reviewed that the inter-operative fluoroscopy for Dr. O'Brien's procedure showed a good position of the fusion site but did not show the cartilage. Dr. Leonetti asked if a bone stimulator had been used which Dr. Polakof confirmed. Dr. Heiner's operative report indicated that there was still cartilage present in the fusion areas. Dr. Leonetti reviewed that the patient's main complaint was that her foot was flexed in a position where she could not put her heel all the way down and it seems that, according to Dr. Heiner, the foot was not fused in the correct position. Dr. Polakof said that she spoke with Dr. Heiner, his suggestion was that there was not proper pre-operative planning to evaluate the rear-foot and mid-foot and that lengthening of the Achilles tendon should have been done with the original procedure (done by Dr. O'Brien). Dr. Campbell asked about a pre-operative MRI and Dr. Polakof confirmed that was not done.

Dr. Kaplan noted that Dr. Heiner's pre-operative notes on June 30, 2009 indicate a left ankle failed fusion. Also noted was cartilage in the subtalar joint and it appeared there had been no cartilage removed in the first fusion procedure. Following Dr. Heiner's surgery the ankle was in a 90 degree angle. Dr. Kaplan and Dr. Polakof agreed that due to the presence of cartilage the fusion done by Dr. O'Brien could not be accomplished.

Dr. O'Brien then addressed the Board. He stated with regard to the infection he has not seen the patient since March 2009 and asked when the infection was discovered. Dr. Leonetti explained that the first time Dr. Heiner operated to debride the joint he found the infection in the bones and soft tissue which had to be treated before he could attempt a re-fusion. Dr. O'Brien stated he has not seen any records on the patient since she left his care upon him referring her to Dr. Heiner. After brief discussion between Drs. Leonetti, Kaplan and O'Brien it was agreed that the patient's infection began at or near the time of Dr. O'Brien's surgery.

Dr. Leonetti said it appeared that Dr. O'Brien did a pan-talar fusion on the patient, which Dr. O'Brien confirmed. Dr. Leonetti asked Dr. O'Brien if he denuded the cartilage in the posterior facet. Dr. O'Brien said it is his practice to denude all the cartilage from the subtalar joint and ankle joint. Dr. Leonetti asked him to explain how Dr. Heiner found all the cartilage intact. Dr. O'Brien stated he could not explain that. Dr. Leonetti stated there was a large discrepancy between Dr. O'Brien's post-operative notes and what the patient stated which was that immediately following the surgery her foot began to plantar-flex. He asked Dr. O'Brien if he was happy with the position of the patient's foot following the fusion he did. Dr. O'Brien stated that from what he recalls he was happy with the position but he has not seen any x-rays for this patient in years.. Dr. O'Brien was provided copies of pictures showing the patient's foot from Dr. Heiner's records which show a plantar-flexed position in June 2009.

Dr. Kaplan asked if Dr. O'Brien had put a heel lift in the patient's shoe which he said he may have but did not recall. Dr. Kaplan asked why he would put a heel lift in the shoe if the positioning problem was not present and asked about the size of the lift. Dr. O'Brien did not respond. Dr. Kaplan asked if, during the patient's post-operative visits, Dr. O'Brien tried to manipulate the ankle joint. Dr. O'Brien stated he did and the joint could not be moved. Dr. Kaplan asked why then the patient needed another surgery to re-fuse the joint. Dr. O'Brien said that apparently the foot was in a plantar-flexed. Dr. Leonetti stated the records show the talus was anterior and the joint was plantar-flexed and fixed with the IM rod. Dr. Polakof noted that Dr. O'Brien's surgery was in August 2008 and his office notes from January 2009 indicate the mid-foot was contracting and he dispensed night splints and physical therapy. So there was problem with contracture of the foot before the patient saw Dr. Heiner in March 2009.

Dr. Kaplan asked Dr. O'Brien how many fusions he does per year or how many he had done prior to this patient. Dr. O'Brien stated he had done 10-15 before this patient and that he does not do fusions anymore. The last one was done in 2009. Dr. Leonetti asked if he did the same procedure in those cases as in this one with using the IM rod to fuse the subtalar joint as well as the ankle joint which Dr. O'Brien confirmed. Dr. O'Brien stated the other fusions were fine. Dr. Campbell asked Dr. O'Brien if he routinely does MRI's before this type of procedure. He stated he normally does but this patient had previously been seen at the Mayo Clinic and they had recommended ankle fusion. Dr. Leonetti stated that evaluating this case it would be important to review all x-rays and MRI's. There was an MRI report in Dr. Heiner but no films. Dr. O'Brien stated that the radiologist who reviewed the patient's intra-operative films from his procedure said the joint was in a good position. Dr. Kaplan said that report shows that the hardware was in a good position but that does not mean the foot was in a good position, and does not necessarily mean the fusion was good. Dr. Campbell asked about the pre-operative evaluation of the patient, specifically the blood work which showed abnormal BUN and creatinine, and asked if there were any recommendations or concerns that that may cause problems post-operatively. Dr. O'Brien stated he did not recall but said if there are any abnormal labs the primary care physician is contacted and if there are any concerns then the surgery is postponed. Dr. O'Brien stated the patient's primary care doctor did not have any concerns.

Dr. Leonetti stated he has concerns with this case. The first is whether the procedure was done correctly and Dr. O'Brien's records show that he thought it was done correctly and the placement of the IM rod appears to have been correct. However, Dr. Heiner's evaluation of the surgical site later on disputes that and the outcome was not as planned. His second concern is why, once a problem was discovered, why the patient was sent to Dr. Heiner. Dr. O'Brien stated that Dr. Heiner had done a foot and ankle fellowship so he wanted his opinion on what was going wrong with the patient. Dr. Leonetti asked Dr. O'Brien what he thought was going wrong and Dr. O'Brien stated he thought the patient's foot was contracting and did not know if she would need any additional surgery done but he did not want to do another fusion. Dr. Leonetti asked why a re-fusion would be needed if it had been done correctly and also how would the patient develop an equinus deformity if the rod had been placed correctly. Dr. O'Brien stated that patient only had mid-foot contracting at that time. Dr. Leonetti stated he was also concerned that Dr. O'Brien failed to recognize what was going on with the patient's foot post-operatively, whether there was a bone infection that was preventing the fusion, contracting of the Achilles tendon, or breakdown of the mid-foot. His concern in summary are 1) whether the procedure was done correctly and was the correct procedure for this patients, and 2) if Dr. O'Brien recognize the post-operative complications and deal with them appropriately. It appears that the consent form was appropriate to inform the patient. Dr. Leonetti stated doing an ankle fusion with an IM rod requires a high level of skill and a doctor must be able to address the possible complications such as this patient had. This patient

developed a severe equinus deformity. She also had numerous other surgeries following this to correct the indirect effects of this procedure on her knee and back and having to walk with a large lift under her heel. Dr. Leonetti advised Dr. O'Brien he should never give out his original x-rays because now in this case the x-rays cannot be reviewed and the Board must rely on Dr. Heiner's opinion. Dr. O'Brien confirmed that the patient was given her pre- and post-operative films to take to Dr. Heiner and he never got them back. Dr. Polakof stated the only films she reviewed were the inter-operative copies and then pictures from Dr. Heiner. Dr. O'Brien confirmed that he uses actual films (not digital). Dr. Kaplan stated the Board should obtain the films either from the patient or Dr. Heiner. Ms. Penttinen clarified that her administrative notes only indicate that hard copy films were received but not who submitted them, but she did subpoena "all" records. Dr. Kaplan said he was also concerned that there was no CT scan done following the fusion by Dr. O'Brien. Dr. Polakof confirmed that Dr. Heiner did do a CT scan but there were no films submitted, only a copy of the report dated March 18, 2009. There was also a report from March 9, 2009 for x-rays done by Dr. Heiner which indicates the talus bone was anteriorly displaced and in an equinus position, the fusion was not complete, and the bones of the mid-foot and rear-foot were not properly aligned.

Dr. Leonetti confirmed that the IM rod and screws were intact and the talus was fixed in a plantar-flexed position. Dr. Leonetti asked Dr. Polakof if she thought the talus could have been rectus in the surgery and then later became plantar-flexed. Dr. Polakof stated that a good surgical attempt was tried but the rod was not placed correctly and the inter-operative x-ray could have been taken at such an angle that it appears the rod actually had been placed properly; only one view was seen, but additional views could have identified the rod placement better. Dr. Polakof also stated that in Dr. Heiner's first evaluation of the patient he noted there was movement in the joint. Dr. Leonetti stated that if any fixation device is placed in a plantar-flexed position and then allow the patient to bear weight, there is going to be a breakdown of the joint. Dr. Polakof stated that even though Mayo Clinic had stated that patient needed a fusion, just as Dr. O'Brien believed, there was not adequate planning to evaluate other related biomechanical issues such as lengthening the Achilles tendon to achieve the proper positioning of the foot.

Dr. Kaplan asked if Dr. Heiner removed the previous IM rod. Dr. Polakof stated all hardware was removed. The joint was scraped of all cartilage and a low-level soft tissue infection was noted. Dr. Heiner then lengthened the Achilles tendon to see how much room he had to work with before re-fusing the joint. Dr. Polakof stated the tendon lengthening was the key to the procedure. Dr. O'Brien asked if Dr. Heiner did a culture for the infection he noted. Dr. Polakof confirmed that he did for both bone and soft tissue and the pathology report dated June 3, 2009 states mild chronic inflammation as the only concern.

MOTION: Dr. Leonetti moved to go into Executive Session for the purposes of obtaining legal advice. Dr. Kaplan 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 9:32 a.m.

The Board returned to Regular Session at 9:36 a.m.

MOTION: Dr. Leonetti moved to table this case until the Board has the opportunity to review the other cases on today's agenda for Dr. O'Brien. Ms. Miles seconded the motion.  
DISCUSSION: There was no discussion on the motion.  
VOTE: The motion passed unanimously by voice vote.

Following review the other two cases on today's agenda for Dr. O'Brien, the Board re-opened review of this case. Dr. O'Brien and his attorney were still present. Dr. Leonetti stated that his concern in this case that there is some evidence that the procedure was not done correctly based on the description of the position of the talus post-operatively, the condition of the subtalar joint, the fact that the joints did not fuse well, and the failure to recognize that in a proper time frame. Dr. Leonetti would like to offer Dr. O'Brien a consent agreement for six months probation and review of surgical cases dealing with fusion procedures. Dr. Kaplan asked if Dr. Leonetti meant "all" fusion procedures because Dr. O'Brien stated he is no longer doing ankle fusions. Dr. Leonetti stated there are several other types of fusions that can

be done and they all require a certain degree of pre-operative planning, inter-operative care, and post-operative follow-up care. Dr. Kaplan asked if Dr. O'Brien does any Lapidus procedures. Dr. O'Brien stated he does not do any fusion procedures at all anymore. Dr. Kaplan asked if there was a way to have Dr. O'Brien sign something stating he is no longer performing any fusions. Ms. Miles suggested that the Board could propose a practice restriction by a consent agreement, or another option would be requiring significant continuing education. Dr. Leonetti state that the benefit of CME is that the courses are not exclusive to the surgical procedures but also include information on things like pre-operative evaluations and post-operative care. That may help Dr. O'Brien in this regard, but there is also the option of non-disciplinary CME. Ms. Miles stated she would be uncomfortable with a non-disciplinary order if there is a finding of a violation.

**MOTION:** Dr. Kaplan moved to go into Executive Session for the purpose of obtaining legal advice. Ms. Miles 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 12:38 p.m.

The Board returned to regular Session at 12:42 p.m.

**MOTION:** Ms. Miles offered a motion for the following: offer a consent agreement with a practice restriction to prohibit him from performing any surgical fusion procedures. The restriction would remain in place until Dr. O'Brien received written permission from the Board to have it lifted. In order to have the restriction lifted, Dr. O'Brien would have to submit a written request and demonstrate that he has obtained at least 20 hours of CME in the area of surgical treatment specific to fusions. If the Board elects to lift the restriction then his license would be placed on probation for a minimum of 18 months during which time he must submit records to the Board for review for all fusion procedures. Dr. O'Brien could requested early termination of the probation after 12 months but lifting of the probation would be at the Board's sole discretion. He also would be required to affirmatively request termination of the probation whether it is at 12 or 18 months. Mr. Lee asked if the 20 hours of CME in fusion would be in addition to the minimum CME requirements for licensure. Ms. Miles confirmed that it would be. Dr. Kaplan seconded the motion.

**DISCUSSION:** Ms. Penttinen asked to clarify the terms of the motion so ensure accuracy. At that time Ms. Miles added that the 20 hours of additional CME would have to have been completed within six months of the request to lift the practice restriction. Dr. Leonetti said he is concerned because the CME requirement only applies to the fusion procedures; but he believes there are some questions regarding Dr. O'Brien's pre- and post-operative care which could be addressed through some surgical CME regardless of whether or not he ever does any fusions again. Upon discussion with Drs. Leonetti and Kaplan, Ms. Miles offered two additional amendments to the motion as follows: 1) that there be a six month period of probation on the "front end" during which time Dr. O'Brien must complete 10 hours of CME in record-keeping and surgical evaluation and management in addition to the normal annual CME requirements, and 2) that if Dr. O'Brien does not accept the consent then the mater would be referred to an informal hearing. Dr. Kaplan seconded all amendments. There was brief discussion regarding whether or not there should be a requirement for the minimum number of fusion cases to review before the probation would be lifted, but it was decided that a minimum number would not be required. There was no further discussion.

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

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

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

Dr. Leonetti reported that he had reviewed the most recent records submitted by Dr. Peterson requested by the Board and it appears Dr. Peterson has made the billing changes and procedure changes requested by the Board. The Board also reviewed a letter submitted by Dr. Peterson's attorney requesting termination of his probation. Upon discussion with the Board, Mr. Lee advised that the Board

could consider terminating the probation under the agenda heading of “review, discussion and possible action.”

MOTION: Dr. Leonetti moved to terminate Dr. Peterson’s probation. Ms. Miles seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

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

Ms. Penttinen advised that Dr. Shapiro’s license is currently suspended due to action taken in another Board matter on December 30, 2011. For her probation in this matter, the last progress report from Dr. Sucher was received in November 2011 so the next report would be due in February. Dr. Leonetti asked if Dr. Shapiro is still required to complete the requirements of her probation even though her license is suspended. Ms. Penttinen confirmed that the probation requirements remain in effect while Dr. Shapiro’s license is suspended. Mr. Lee inquired as to whether or not Dr. Shapiro’s consent agreement in this case included a stipulation to toll the probation if she was suspended. Ms. Penttinen advised that it did not. Mr. Lee confirmed then that the current probation requirements remain in place at this time.

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

Dr. Kaplan reviewed the monthly report received from Dr. Bui which states he has had no charges for durable medical equipment for the month of December 2011.

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

Ms. Penttinen advised that the most recent progress report was received from Dr. Sucher in November 2011 so the next update is due in February. She added that she has requested additional information from Dr. Sucher with regard to quantitative values for any positive urine drugs screens Dr. Brown may have had as well as a query report from the Arizona Pharmacy Board’s controlled substances prescription database.

## **VII. Review, Discussion and Possible Action on Administrative Matters**

a. Election of Board officers.

MOTION: Dr. Leonetti moved to nominate Dr. Kaplan to continue as the Board’s President. Dr. Campbell seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

MOTION: Dr. Kaplan moved to nominate Ms. Miles to continue as the Board’s Secretary-Treasurer. Dr. Leonetti seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

b. CME approval request from the Southern Arizona V.A. Medical Center.

The Board members reviewed a CME approval request submitted by James Dancho, DPM on behalf of the Southern Arizona VA Medical Center. The proposed CME includes weekly educational activities called “Journal Club” which involves in-depth discussion of various medical topics and patient case reviews. The total number of hours requested is 42.

MOTION: Dr. Kaplan moved to approve the CME request for a maximum of 25 hours. Dr. Leonetti seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

c. Discussion regarding drug testing for impaired or allegedly impaired podiatrists.

Ms. Penttinen offered general discussion with regard to licensees who may have a substance abuse issue and are on probation. Those licensees are still permitted to take medications for a bona fide illness or injury which can cause concern. Ms. Penttinen stated there could be some improvements in the

method of monitoring those licensees with regard to quantitative testing (on their urine drug screens) to make sure that they are only using such medications within acceptable therapeutic doses. Ms. Penttinen asked the Board if they would like to consider this and if they had any feelings with regard to frequency of such testing because there is potential for a problem to become out of control very quickly without the Board being aware of it.

Dr. Leonetti asked if all drug tests could be checked for quantitative levels and if there is an additional cost for that. Ms. Penttinen stated that testing can be done on all drug tests and there is an additional cost to the licensee of approximately \$50 per test. There was discussion regarding the frequency of normal drug testing. The least number of times a licensee will be tested is twice per month on a random basis and they are given less than 24 hours notice of the need to test. When a monitoring program begins, they are tested much more frequently; as they progress through their recovery and show a pattern of negative tests the frequency is gradually reduced. There was also brief discussion as to the method used for the randomizing of the tests which involves a "color system" under Dr. Michel Sucher's monitoring program. The licensee is assigned a color which has a specific frequency for testing so as the frequency of testing is changed they are assigned a new color.

Dr. Kaplan asked if the Board can make sure that Dr. Sucher pursues the quantitative testing. Ms. Penttinen stated that was the basis of the need for discussion. A written directive from the Board could be submitted to Dr. Sucher for the licensees he monitors to make sure quantitative values are tested. Also, it is something that could be added to these types of probation agreements in the future. Dr. Kaplan stated that based on previous history with cases the Board has reviewed he feel Dr. Sucher would be in favor of quantitative testing. Ms. Penttinen added that Dr. Sucher can provide the Board his knowledge and expertise to determine if a licensee is using a prescribed medication within the therapeutic range or exceeding normal dosing.

Ms. Miles asked if the frequency of drug testing is defined in the probation agreement or if Dr. Sucher is determining what frequency is needed. In her previous experience the testing frequency would be changed in consultation with the regulating board; however, it seems that currently Dr. Sucher makes the determination alone and she would have concerns with that. Ms. Penttinen stated that in Dr. Elaine Shapiro's probation agreement it was specifically stated that she would be monitored through Dr. Sucher's program. A subsequent agreement offered to Dr. J. David Brown did not specify that he had to go through Dr. Sucher but it included the same terms and conditions. Ms. Miles stated she would like the Board to inquire with Dr. Sucher regarding exactly what his monitoring program provides and how he makes those decisions. Before control is given over regarding the drug testing the Board needs to understand how the testing is occurring. Ms. Penttinen stated that because the Board has had so few licensees with these types of monitoring requirements the question has never been raised before. Ms. Miles added that the Board could incorporate all of Dr. Sucher's requirement by reference into the agreements that are offered to our licensees if it is appropriate. Dr. Leonetti agreed with the need to gather that information. Ms. Miles suggested the Board obtain copies of the most recent consent agreements for these types of cases which are being offered by the Arizona Medical Board and the Arizona Board of Nursing.

There was agreement among the Board members that more information is needed regarding Dr. Sucher's program. Ms. Miles feels that the Board should decide what the minimum monitoring standards should be for every agreement, and then additional requirements can be placed if needed for an individual case. The Board members agreed. There was also discussion among the Board members and Ms. Penttinen regarding whether the Board would want to conduct all monitoring, which would be burdensome, or continue to allow licensees to use Dr. Sucher's program but make certain that the Board is more specific with the monitoring requirements. Ms. Penttinen stated that in recent years she has been working on modifying the language in the standard substance abuse consent agreement terms to eliminate problems and loopholes as they come up. She feels this is a good time to review all of the terms and conditions and will present it to the Board in the near future along with copies of the agreements utilized by the Medical Board and Nursing Board.

- d. Review of new license application for Adam Isaac, DPM.  
The Board members reviewed the license application file for Dr. Isaac and found it to be complete.

MOTION: Dr. Kaplan moved to approve Dr. Isaac's application and allow him to sit for the next scheduled oral examination. Dr. Leonetti seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

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

a. Open complaint status report.

Ms. Penttinen reviewed the report which indicates that there are currently 69 open complaints which is down 5 from last month. The open cases include those that are on today's agenda. There was brief discussion regarding the length of time that some cases have been open. Part of the delays come from the length of time it takes to obtain records, and part is due to the volume of complaints received and limited resources to conduct the investigations.

b. Request for approval for Executive Director to expend Board funds to attend a seminar sponsored by the Arizona State Bar.

The Board members reviewed information for an upcoming seminar sponsored by the Arizona State Bar Association. The seminar is titled, "Representing Healthcare Professionals in Front of Their Licensing Boards." The cost for Ms. Penttinen to attend would be \$149.00.

MOTION: Ms. Miles moved to approve the expenditure of Board funds to allow Ms. Penttinen to attend the seminar. Dr. Kaplan seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

c. Malpractice case report.

- i. Robert Fridrich, DPM: Claim filed by parents on behalf of patient A.P. Board investigation case already opened. (Dr. Fridrich reported this claim on his 2011 license renewal application.)

The Board reviewed the report submitted by Ace Insurance of a settlement made on Dr. Fridrich's behalf. Due to the fact that a Board investigation case has already been opened and is in progress, no further action will be taken at this time.

**IX. Call To The Public**

There were no requests to speak during the Call to the Public.

**X. Next Board Meeting Date:**

- a. February 8, 2012 at 8:30 a.m.

**XI. Adjournment**

MOTION: Dr. Kaplan moved to adjourn the meeting. Ms. Miles 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 12:56 p.m.