

# VIRGINIA BOARD OF MEDICINE MINUTES

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Thursday, October 14, 2004      Department of Health Professions      Richmond, VA

**CALL TO ORDER:**                      The meeting of the Board convened at 8:13 a.m.

**MEMBERS PRESENT:**                  Thomas Leecost, DPM, President  
John Armstrong, MD  
Sandra Anderson Bell, MD  
Patrick Clougherty, MD  
Carol Comstock, RN  
Alvin Edwards, M.Div., Ph.D.  
Suzanne Everhart, DO  
Stephen Heretick, JD  
J. Thomas Hulvey, MD  
Gopinath Jadhav, MD  
Gary P. Miller, MD  
Juan Montero, MD  
Robert T. Mosby, MD  
Jane Piness, MD  
Karen Ransone, MD  
Jerry Willis, DC

**MEMBERS ABSENT:**                    Christine Ober Bridge  
Malcolm Cothran, MD, Vice President

**STAFF PRESENT:**                      William L. Harp, MD Executive Director  
Barbara Matusiak, MD, Medical Review Coordinator  
Kate Nosbisch, Deputy Exec. Director of Practitioner Information  
Ola Powers, Deputy Executive Director of Licensure  
Karen Perrine, Deputy Executive Director of Discipline  
Robert Nebiker, Director, DHP  
Elaine Yeatts, DHP Senior Policy Analyst  
Emily Wingfield, Assistant Attorney General  
Colanthia Morton Opher, Recording Secretary

**OTHERS PRESENT:**                    Donna Whitney, LPN – HPIP Program Manager  
Patricia Pade, MD – HPIP Medical Director  
Jerilyn Lundy, Virginia Times  
Michael Forbes, Virginia Times  
Joyce Hawkins, Virginia Society of Radiologic Technologists  
Michael Jurgensen, Medical Society of Virginia

## **PUBLIC COMMENT**

After having the board members introduce themselves, Dr. Leecost advised there would be a deviation from the agenda to allow for public comment at this time. Joseph Leming, MD addressed the Board with comments concerning HB1441 and the fee increase, the cash transfer to the Virginia Department of Health for FY2005 and FY2006, the delay between the receipt of information requiring mandatory suspension and the entering of the order, and on-line Board Briefs versus paper distribution.

Dr. Leming asked the Board to oppose any cash transfer and prevent the use of licensing revenue collected to pay for other obligations of the Commonwealth. Dr. Leming also advised the Board that he opposed the elimination of the "paper" Board Briefs and also any delay between the receipt of documentation and the entry of an order for mandatory suspension.

In closing his comments, Dr. Leming encouraged the Board to "embrace and advance the concept of legislation to make the Board (and possibly the Department of Health Professions) a semi-independent authority.

Dr. Reynolds-Cane responded to Dr. Leming's comment regarding the Board informing the Governor about the cash transfer. Dr. Reynolds-Cane advised that the Board did address the issue in 2003 by way of letter to the Secretary's office opposing the transfer. Dr. Reynolds-Cane also advised that this letter was sent even though the Board maintains it was more appropriate for the Medical Society of Virginia to make the strong push to the Governor for this transfer not to occur. Dr. Reynolds-Cane also addressed the current process of Board Briefs online, noting that this method provided access to more information than could be printed. Dr. Reynolds-Cane pointed out that the option to receive this newsletter by mail was available to anyone who requested it. She also asked Dr. Leming to provide the number of individuals who may benefit from secondary circulation.

## **ADOPTION OF AGENDA**

Dr. Harp suggested that the Reports of Officers, Committee and Advisory Board Reports and Other Reports be dealt with by consent with the exception of the Executive Director's Report, The Nominating Committee Report, and the Department of Health Professions' Report. Ms. Comstock moved to amend the agenda as so noted. The motion was seconded and carried unanimously.

## **APPROVAL OF THE JUNE 24, 2004 MINUTES**

Dr. Edwards moved to approve the minutes of the Board dated June 24, 2004. The motion was seconded and carried.

## **BOARD HISTORY PRESENTATION**

Dr. Harp gave a PowerPoint presentation of the Board's history covering the time period of 1998 to present. The presentation included topics such as the commencement of the Health

Practitioner's Intervention Program, Joint Legislative Audit Reviews, Continuing Education, Practitioner Profiling, Pain Management Guidelines, Additional Board Staff, Fee Increases, Laptops, Birth Injury Fund, Sanctions Reference Study, New Board Counsel, Office Based Anesthesia Regulations, HB1441, Ethics Regulations, On-line License Renewal, etc. Dr. Harp noted that items on the horizon for the Board included a Death Certificate Educational Module, delegation to subordinates, cosmetic use of lasers, verification of profile information, continuing education regulations, and controlled substances education.

## **NOMINATING COMMITTEE REPORT**

Dr. Bell reported the suggested slate of officers as follows: Thomas Leecost, DPM, President and Malcolm Cothran, MD as Vice-President.

Dr. Edwards moved to accept the slate of officers. The motion was seconded and carried unanimously. Dr. Leecost graciously accepted his election to the office of President.

## **REPORT OF THE DEPARTMENT OF HEALTH PROFESSIONS**

Mr. Nebiker reported on the Prescription Monitoring Program (PMP) Conference held October 7 & 8, 2004 in Richmond noting that a number of people from the Board attended. Elinore McCance-Katz, MD, William Massello, MD and Steve Long, MD were some of the keynote speakers who addressed the conference participants on issues such as opioid usage and pain management. Mr. Nebiker distributed a copy of the operating policy currently used in Southwest Virginia stating that the policy will expire next year unless legislation is sought to continue the program. Mr. Nebiker stated to the Board that Virginia has been operating for a year with limited access. He stated that 85% of the queries to the PMP database come from practicing physicians relative to their patients. Mr. Nebiker advised that the PMP Advisory Committee, chaired by Dr. Kenneth Walker, had recommended that the program be continued, be expanded statewide, include Schedules III, IV and V and that a limited amount of analysis be done with the database.

Mr. Nebiker discussed the timeframes, fiscal information and the action taken by the Board in regards to opposing the cash transfer of funds to the Department of Health. Mr. Nebiker stated that Delegate Hamilton submitted an amendment to the budget bill deleting the cash transfer request, but it was not incorporated into the final version.

Mr. Nebiker advised that if the transfer did not take place, the licensing fees would be lowered by the appropriate amount. He also stated that the transfer had not affected the Board's ability to hire staff, but it is an additional burden on revenue. Mr. Nebiker addressed another member's concern indicating that this transfer was an extraordinary step to attract practitioners to underserved areas.

## **AD HOC ON DEATH CERTIFICATES REPORT**

In the absence of Malcolm Cothran, MD, Chair, Dr. Harp reported that the Ad Hoc on Death Certificates was commissioned by the Legislative Committee to address the issue of

physicians not completing death certificates in a timely and accurate manner. Dr. Harp summarized the meetings of July 16<sup>th</sup> and September 24<sup>th</sup>, 2004 and stated that the committee recommends an educational approach over a disciplinary one and suggests an on-line educational module. Dr. Harp asked the Board to consider if the module should be a high-tech interactive module versus read-only module, Category Type I versus Category Type II CE, mandatory versus voluntary and if the Board should take responsibility of hosting the module on Board of Medicine's website. Dr. Harp noted that the effort to complete these certificates electronically was not currently available, but the option was being considered along with an educational module on how to complete the form. Dr. Harp advised that this research and implementation would be the primary responsibility of the Department of Health.

Dr. Harp asked the Board for guidance on the extent of the Board's involvement on development, implementation, and hosting of an educational module.

Dr. Mosby pointed out that licensees would still need to be notified if a read-only module was used and maybe that could be done by dissemination of a mini-brief.

Dr. Jadhav stated that it is the duty of the Board to advise the licensees of their duty in terms of signing a certificate in a timely fashion even if it cost the Board some additional dollars.

Dr. Armstrong agreed there was a need for an instructional tool but doesn't think that a voluntary program would be very effective.

Dr. Leecost instructed Dr. Harp to relay to the Ad Hoc Committee the Board's support of an on-line read-only, Category II continuing education, voluntary module hosted on the Board's website and publicized via the Board Briefs. Should Dr. Fierro be able to secure funding for a high-tech approach, the Board would support that as well. The Board also supports an effort by VDH to have the death certificate completed online with an accompanying module to assist with the completion of the form.

## **PROPOSED REGULATIONS**

Ms. Yeatts advised that the proposed regulations on professional standards are in the Governor's office. They have been reviewed by the policy analysts and are currently awaiting the Governor's signature. After the regulations have been signed, they will be presented to the Board along with any public comment for the Board's review before final adoption.

## **18 VAC 85-40 REGULATIONS GOVERNING RESPIRATORY CARE**

Ms. Yeatts advised that the Board received a recommendation from the Advisory Board of Respiratory Care in response to a petition for rulemaking allowing an amendment to their regulations for AMA Category I continuing education credits to be accepted.

Dr. Edwards moved to adopt the proposed amendment to 18 VAC 85-40, Regulations Governing the Practice of Respiratory Care to accept Category I, AMA approved continuing

education directly related to the practice of respiratory care. The motion was seconded and carried unanimously.

## **18 VAC 85-80 REGULATIONS GOVERNING OCCUPATIONAL THERAPY**

Ms. Yeatts presented the proposed regulations required by HB309 governing the practice of Occupational Therapy. HB309 amended the law that previously deemed it a violation for anyone to claim to be an OT without holding a license to making it unlawful to practice OT without holding a license. It also required the Board of Medicine to designate a credentialing organization through which a person could obtain additional certification in order to call himself an Occupational Therapy Assistant (OTA).

Mr. Heretick moved to adopt the proposed regulations to establish certification by NBCOT as the credential necessary for use of the protected title of OTA. The motion was seconded and carried unanimously.

## **18 VAC 90-30 REGULATIONS GOVERNING THE LICENSURE OF NURSE PRACTITIONERS**

Ms. Yeatts advised that the presented draft proposed regulations were identical to the emergency regulations currently in effect. Ms. Yeatts noted that the regulations allowed a nurse practitioner to sign documents in lieu of the supervising physician under certain guidelines.

Mr. Heretick moved to adopt the proposed regulations for Nurse Practitioners to implement provisions of HB855 of the 2004 General Assembly and to replace the emergency rules currently in effect. The motion was seconded and carried 16 to 1.

## **18 VAC 90-30- Regulations Governing the Licensure of Nurse Practitioners**

Ms. Yeatts advised that the 2003 General Assembly passed into law provisions for a nurse licensure compact with a delay in implementation to be effective January 2005. In the 2004 Session, the Department requested additional amendments that would give the Board of Nursing authority to adopt regulations to implement the law. Ms. Yeatts explained that the 17 states that belong to the nurse licensure compact will jointly issue a multi-state privilege to every nurse that resides in their state which will enable a nurse that resides in one compact state to work in another compact state without obtaining licensure in that state. A central pocket of states include MD, TN, MD and KY.

Ms. Comstock asked about the disciplinary process for someone who holds a multi-jurisdictional license. Ms. Yeatts advised that all disciplinary information will be entered on a central verification system called NURSES and the Board would be automatically informed when an action has been taken against a nurse in another compact state. If a nurse is practicing in VA on a NC license, DHP will investigate the complaint, issue a cease and desist order, if appropriate, and report any findings back to the licensing state, which holds the responsibility of taking any action.

In response to Dr. Leecost's inquiry on what the impact on education would be nationally, Ms. Yeatts explained that joining the national nurse compact does not affect the requirement for the Board of Nursing to approve nursing programs in Virginia.

Dr. Willis moved to adopt the proposed regulations for Chapter 30 to implement provisions of HB633 of the 2004 General Assembly and to replace the emergency regulations currently in effect. The motion was seconded and carried.

### **RECOMMENDATION TO ADD ATHLETIC TRAINERS TO LIST OF THOSE PROFESSIONS REQUIRED TO REPORT EMERGENCY CONTACT INFORMATION**

Ms. Yeatts advised that the Advisory Board on Athletic Training voted to request inclusion on the list of professions required to provide contact information to provide assistance in the event of a public health emergency/disaster.

Dr. Edwards moved to recommend that DHP amend the regulations to add Athletic Trainers to those professions required to report Emergency Contact Information. The motion was seconded, discussed and carried.

### **ADOPTION OF GUIDANCE DOCUMENT DELEGATION OF INFORMAL FACT-FINDING TO AN AGENCY SUBORDINATE**

Dr. Miller moved that the flowchart and narrative explanation be adopted as a Board of Medicine guidance document explaining the process to be followed in a proceeding conducted by an agency subordinate. The motion was seconded, discussed and carried.

### **ELIGIBILITY FOR STAYS OF DISCIPLINE**

Dr. Harp advised that the Health Practitioner Intervention Program (HPIP) was set up in 1998 as an alternative to the disciplinary system. Stay of discipline criteria are established in the law. One criterion is that there be no evidence that the use of controlled substances constitutes a danger to patients. Dr. Harp advised that the interpretation of this element has been if the individual used, or was under the influence of, by intoxication or withdrawal, a substance while responsible for patient care. Dr. Harp asked the board to determine if the public and the licensees are best served by this interpretation. One of the concerns is that if the standard is too stringent for those who get a stay, then those individuals who would self-refer may be deterred from doing so, and others may also be deterred from referring family members or colleagues. An early referral better protects the public and increases the chances of a successful recovery, thereby preserving a community resource and helping the practitioner.

Donna Whitney, LPN, CSAC and Patti Pade, MD addressed the Board and discussed the steps taken once a person has come under investigation for an allegation of impairment. Ms. Whitney continued by saying that normally by the time the Board gets an investigative report, the person has entered HPIP. That licensee has been pulled from practice, had an opportunity to get into some kind of treatment program, has been evaluated, and may already be back practicing. She stated that an important matter to consider is the

ramifications at that point if a notice is drafted and the licensee is required to come before an IFC and the only finding of the IFC is that the person is impaired and he/she is ordered to participate in HPIP. Ms. Whitney stated that in the seven years of operation, 397 stays of discipline have been granted. Sixty-one are from the Board of Medicine including 1 chiropractor, 1 radiologic technologist, 4 respiratory care practitioners, and 55 physicians. Out of this number, 12 have been vacated over the last 7 years and 2 within the last year because of contract violations.

Dr. Pade stated that her concern is that the participants entering the program seem to be sicker than in the past. In her discussions with hospital personnel, the program is becoming more associated with the Board, and there are concerns that individuals entering the program are immediately disciplined. Dr. Pade presented an outline of the intensive evaluation the participants may be subjected to, including a 3 month residential program, referral to an aftercare program, monitoring, screenings, etc. Dr. Pade assured the Board that they do not hesitate to vacate a stay for those who are in non-compliance or to ask participants to refrain from practice if there are suspicions of impairment. Dr. Pade advised that a contract is generally in effect for 5 years for chemically dependent licensees; however, currently several are on indefinite contracts with the diagnosis of a mental disorder.

Dr. Harp stated that danger and harm do not equate, and he thinks this is the issue in determining who should get a stay.

Dr. Willis moved that we maintain the same guidelines. The motion was seconded but not carried. Dr. Everhart opposed by stating that the stays should be determined based on an individual basis. The vote, by show of hands, was 15 to 2.

Dr. Bell moved that for the purposes of interpreting danger and potential for harm in §54.1-2916 (C) the fact of the use of a controlled substance when practitioner has or may have patient care responsibilities, on its face, does not constitute a danger to patients or the public absent other factors indicating that patients were endangered. Further, these matters should be handled on a case by case basis with respect to granting stays of discipline. The motion seconded and carried.

## **Clinical Reports by Out-of-State Physicians**

Dr. Harp advised the Board that this matter involved inquiries concerning a practitioner in another state reading an x-ray, creating a pathology report and sending the results back to Virginia. Is the doctor practicing medicine without a Virginia license? Dr. Harp stated that the Board staff has been responding to inquiries in the negative since the law has an exemption in §54.1-2901 item 15, which allows any legally qualified out-of-state or foreign practitioner to meet in consultation with legally licensed practitioners in this Commonwealth. Dr. Harp advised that if a report is sent back to a Virginia practitioner who has responsibility for a Virginia patient, then it would appear to comply with this Code section. However, if the report is being sent back directly to a patient, it would not appear to meet the test of this law.

Dr. Clougherty noted that given the Internet and technology and the advances in telemedicine, he suggests that the Board solicit comments from Medical Society of Virginia

and FSMB before accepting a broad interpretation of the exemption clause. Mr. Nebiker advised that DHP did a study on telemedicine and the legal issues surrounding it in 1990. Basically this issue remains unsettled. He stated that this is classic interstate commerce, and the federal government has declined for the last decade to step in. He thinks this is the only way that it will be settled and that it would be extraordinarily difficult for one state board to resolve this question by itself.

Dr. Armstrong noted a concern about physician liability for incorrect reports especially when the physician may not have taken part in contract negotiations between out-of-state or out-of-country physicians and Virginia hospitals.

Dr. Harp recommended that Board staff research what FSMB has developed to date and present it to the Executive Committee on November 19, 2004, and then perhaps the Executive Committee could develop a resolution for FSMB's 2005 meeting.

### **Continuing Education Audit**

Dr. Harp provided a PowerPoint presentation of the continuing education audit advising that MDs, DOs, DCs, and DPMs were required to attest to 60 hours of CE between 2002 and 2004 in order to renew their licenses in 2004 in a current active status. A 1% audit was conducted of those licensees who were eligible to renew, equating to 295 practitioners. Of that total, 5 licensees were exempt from the requirements, and 261 were apparently compliant. The remaining 19 are currently non-compliant and board staff is seeking guidance on how to resolve this matter. Dr. Harp provided three alternatives for the Board's consideration: 1) since this is the first audit, take no action, 2) offer a CCA to all the licensees since non-compliance qualifies as minor misconduct with no patient harm and not likely to happen again, or 3) if the Board could determine that there was intent to deceive, send to an IFC.

Dr. Hulvey, who was included in the 1% audit, asked that a letter of completion be sent to those who were in compliance. Dr. Harp advised that he would follow up with Ms. Powers and that it was a work in progress.

Dr. Willis stated that physicians should be held accountable for conforming to the Code of Virginia. Dr. Willis thinks that after the second letter of the audit requesting information, if the appropriate documentation has not been received the licensee should be sent to an IFC.

Dr. Edwards moved that licensees in non-compliance by their own admission be found in violation, with appropriate findings of fact, the requirement that the hours be obtained within 3 months, and automatic inclusion in the next audit. The motion was seconded and carried.

Dr. Willis moved that the 8 licensees who have contacted the Board but have not submitted the appropriate documentation and the 11 licensees who have not contacted the Board after three or more attempts on the Board's part be sent to an informal conference. The motion was seconded and carried.

## **2005 Calendar**

Dr. Bell moved to accept the proposed 2005 calendar of meeting dates. Dr. Harp pointed out that the Credentials Committee was not included on the calendar with the intent to go to an on-demand for both business and the hearing of applicants. The members acknowledged their agreement with this proposal. The motion was seconded and carried.

## **Discipline Report**

Ms. Perrine reviewed the breakdown of the 554 CCAs offered on profile cases to date and the Board's current open case status. Ms. Perrine advised that use of the Sanctions Reference Study has proven to be a useful tool, and so far the Board has not received any recommendations for modification although some clarification of the priority system may be necessary. Ms. Perrine advised that until recently, the Board had been able to schedule cases that are ready for administrative proceedings in a timely fashion. However, more recently, with the profile cases that were not resolved by CCA and the increase in the volume of the other cases from the administrative proceedings division, should the scheduling of cases continue at the same rate, it would be May 2005 before all the cases that are currently ready could be heard.

Dr. Leecost asked that Board members consider working an additional one or two days a month on informal conferences between November and March which should reduce the case load and shorten the time for cases to be heard and get back on schedule with disciplinary cases. This also includes a day that could be scheduled to review cases recommended for closure at the Board office.

Ms. Perrine also requested a motion to implement the Executive Director's authority under the agency subordinate emergency regulations. Dr. Montero moved to implement the regulations that say the Board may authorize Dr. Harp to appoint the agency subordinate. The motion was seconded and carried.

## **Practitioner Information Section Update**

Kate Nosbisch reviewed the information from the random audit. Ms. Nosbisch advised that there is nothing in the laws or regulations that say that this information has to be audited. The Board voted in 2003 to do a 1% random audit (265 profiles) and only 25% (67 profiles) of them were accurate and needed no additional follow up. Ms. Nosbisch suggested that, due to poor audit results, the Board conduct a 2% audit in 2005.

Dr. Willis moved that the Board to conduct a 2005 audit verifying 2% of the Board's licensees' profile to assess profile accuracy. The motion was seconded and carried.

## Conflicts of Interest Training

Emily Wingfield, AAG conducted training on conflicts of interest for the Board members and other agency staff. Ms. Wingfield provided handouts of §§2.2-3200 through 2.2-3131 effective August 1, 2004 and Ethics in Public Contracting §§2.2-4367 through 2.2-4377.

## Announcements

Dr. Harp reminded Board members of the responsibility to keep confidential matters confidential and to keep public matter public.

Dr. Clougherty asked for a brief discussion of Dr. Leming's suggestion that the Board and/or Department become an independent authority. Mr. Nebiker advised that the idea has been around for a number of years. The applicable authority under Virginia law is the creation of a political subdivision even though it may not be one that relates to geography. Mr. Nebiker stated that the issues cited by Dr. Leming of manpower authorization and transfer of funds may still garner the same results since both fall under the jurisdiction of the General Assembly and the Appropriations Act. Mr. Nebiker also pointed out that the Board of Medicine is an independent authority in that the Board of Medicine is the only state Board that can propose and adopt regulations that set standards for their licensees. Also, for the purpose of making case decisions, whether for an applicant or someone who is going to be disciplined, the Board of Medicine is the only Board in state government that can do so and the decisions can only be appealed through the court system. Mr. Nebiker also stated there has never been a serious attempt to pursue independent authority status for the Board.

With no other business to conduct, the meeting adjourned at 1:43 p.m.

The next meeting is scheduled for February 11, 2005.

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Thomas Leecost, DPM  
President

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William L. Harp, M.D.  
Executive Director

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Colanthia Morton Opher  
Recording Secretary