

**OPEN MINUTES - NJ STATE BOARD OF MEDICAL EXAMINERS
DISCIPLINARY MATTERS PENDING CONCLUSION - January 13, 2016**

A meeting of the New Jersey State Board of Medical Examiners was held on Wednesday, January 13, 2016 at the Richard J. Hughes Justice Complex, 25 Market Street, 4th Floor Conference Center, Trenton, New Jersey for Disciplinary Matters Pending Conclusion, open to the public. The meeting was called to order by Karen Criss, R.N., C.N.M. Board Vice President.

PRESENT

Board Members Angrist, Carniol, DeLuca, Haidri, Kubiel, Lopez, Maffei, McGrath, Metzger, Miller, Rao, Rock, Scott and Shah.

EXCUSED

Board Members Stephen Berkowitz, Stewart Berkowitz and Parikh.

ABSENT

ALSO PRESENT

Assistant Attorney General Joyce; Senior Deputy Attorney General Flanzman, Dick and Gelber; Deputy Attorneys General Hafner, Goulding, Salloum and Merchant; William V. Roeder, Executive Director of the Medical Board, Sindy Paul, M.D., Medical Director and Harry Lessig, M.D., Consultant Medical Director.

II. RATIFICATION OF MINUTES

THE BOARD, UPON MOTION MADE AND SECONDED,
VOTED TO APPROVE THE MINUTES FROM THE
DECEMBER 9, 2015 BOARD MEETING.

The Motion was made by Dr. Carniol and seconded by Ms. Lopez.
It carried unanimously.

III. HEARINGS, PLEAS AND APPEARANCE

10:00 AM **KAJI, Vikram H., M.D., 25MA02397600**
Complaint #89764
Joseph M. Gorrell, Esq.
Bindi Merchant, DAG, Prosecuting
Steve Flanzman, DAG, Counseling

On or about November 4, 2015, the Attorney General filed a Motion for Summary Decision on Count I of the Verified Complaint filed on or about June 16, 2015 in this matter. Dr. Kaji has opposed the motion and has submitted responsive papers in opposition. The matter was scheduled for oral argument.

The Board opened the public discipline portion of the meeting; DAG Bindi Merchant represented the Attorney General, Mr. Gorrell represented Dr. Kaji and SDAG Flanzman counseled the Board, with assistance from Meaghan Goulding.

Mr. Gorrell opened his argument by positing that the motion should be dismissed based on procedural grounds because the Attorney General failed to include a list of the undisputed facts. Mr. Gorrell explained to the Board that while there is nothing in the Administrative Procedure Act, there are court rules. Under the court rules, he continued, the Attorney General must specify a statement of undisputed facts and that the law indicates that unless there is no genuine issue of material fact, the Attorney General would be entitled to summary decision. He argued the Attorney General has failed to provide a full record and has deprived the Respondent of his due process rights in knowing what facts are not disputed. The purpose of the requirement, the

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attorney explained, is to put the Respondent on notice, as well as clarify exactly what the Attorney General is relying on as undisputed fact. The Respondent cannot adequately defend himself as he has not been made aware as to what those undisputed facts are.

DAG Merchant took to the podium and told the Board that they should look to Administrative Court Rule 12.5 which does not require such a list. DAG Merchant further explained that unless the Administrative Procedure Act is silent, only then does one need to look to the Court rules for guidance. The Office of Administrative Law rules do not include the requirement of such a list. The Board only needs to look to the Court rules when the APA is silent on the issue. This is supported by case law.

The Board, after a motion made and seconded, went into closed session for advice of counsel. All parties, except counseling and administrative staff, left the room.

**IN RETURNING TO OPEN SESSION, THE BOARD
ANNOUNCED THAT UPON A MOTION BY MS.
LOPEZ AND SECONDED BY DR. SHAH, THE
BOARD UNANIMOUSLY VOTED TO DENY THE
RESPONDENT'S MOTION INASMUCH AS THE OAL
RULE DOES NOT REQUIRE SUCH A LIST.**

The Board then continued with the hearing.

DAG Bindi Merchant then went on to discuss the Verified Complaint which alleged a sham transfer of business ownership from Dr. Brigham to Dr. Kaji.

The Board returned to closed session for advice of counsel after a motion by Ms. Lopez was seconded by Dr. Rao. All parties, except

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counseling and administrative staff, left the room.

Upon returning to open session, SDAG Flanzman reiterated that the Board was going to consider the certifications submitted as the “evidence.” He noted that the Attorney General was moving beyond the allegations in the Complaint and what was filed in his oral argument; under the standards of a summary decision the Board can only look at the record. SDAG Flanzman further cautioned counsel that she needs to confine her argument to what is in the record and that the Board members will not consider any additional information.

DAG Merchant continued her oral argument and noted that sometime in April 2015, an inspection was performed and Dr. Kaji was present. When asked if he was the owner, Dr. Kaji said No, he wasn't and further stated that he was Medical Director, not the owner. DAG Merchant told the Board that such an admission was consistent with his statement under oath on May 6, 2015 when he appeared before PEC. During the PEC, he said multiple times that he was not the owner. DAG Merchant went on to cite various portions of the PEC's transcript where Dr. Kaji consistently and repeatedly denied being the owner, and, moreover, he attributed ownership to Dr.Brigham.

Dr. Maffei excused himself from the meeting

Even when questioned about the ownership and his obligations, Dr. Kaji denied that he had any obligations at all. He continually attributed any obligations within the corporation to Dr. Brigham. He characterized himself as the Independent Contractor and/or Medical Director. On two separate instances, he admitted that he

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was not aware of any management company although he signed a contract four to six months prior.

At the time of “transfer,” Dr. Kaji did not believe that anything was being transferred. Dr. Kaji later characterized it as a technical paper transaction so the business could go on. In essence, he admitted to just lending his name so that the business could go on under the complete control of Dr. Brigham. At best, Dr. Kaji just continued in practice as the Medical Director and as an Independent Contractor as he always had.

DAG Merchant concluded by arguing that there were not genuine issues of material fact in the allegations in Count I and nothing has changed since the signing of the stock certificate for the transfer of ownership, which was nothing more than a sham. She urged the Board to grant summary decision in the Attorney General’s favor.

Mr. Gorrell, in response, reiterated the standards for summary decision at the onset. He took issue that the Attorney General has sustained his burden of proof. There are disputed material facts and even if you were to agree that there are not, when the inferences are applied to Dr. Kaji, the motion fails because he is entitled to present his version of the facts. Additionally, the Attorney General has failed to establish that the law is his favor.

He continued by noting that the Certification of the investigator was based on information of a facility that is not part of American Women’s Services. There is a denial of ownership, however, it is not specific to a Brigham owned facility. Dr. Kaji did not specify anything about American Women’s Services, but rather makes a general denial. In the transcript, various names are provided to

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Dr. Kaji, and he denied many of them because some of the statements were true, although it has not been fleshed out why he is not the owner of some of the entities. Turning to Dr. Kaji's certification, he acknowledged appearing before the Board and that he was questioned by three deputies, and that he was confused. Mr. Gorrell said that this confusion was acknowledged by the deputy as well. Inasmuch as there was confusion about the entities upon which he was questioned, it naturally follows that there is confusion in the answers he provided. This creates disputed facts – what he said, what he thought he was being asked, and what he meant in his answers.

Dr. Kaji's certification provides an unqualified statement that he is the owner and ultimately responsible for the corporation. In part, at issue is the credibility of Dr. Kaji and this cannot be tested on a motion for summary decision.

Finally, Mr. Gorrell argued that DAG Merchant had not provided the law on what constitutes an owner of a medical practice. If you look to the record, there are a number of indicia which demonstrate he is the owner of the stock, that he is responsible for the policies and procedures, and other aspects. The fact that he may not own the building or the furniture doesn't definitively define ownership. If this were the case, a number of practices would need to be closed. The Attorney General provided no law as to what constitutes a true owner. The lack of the law provided also causes the motion to fail. If the Board were to find that Dr. Kaji is not the owner, then there would be far implications to other, established practices.

In order to establish fraud, he continued, one must establish that someone made a statement or committed an act with an intent to

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deceive and upon which someone has relied. In order to determine the intent, one must call the witness, explore the motivation, flesh out the circumstances, all of which do not lend itself to a summary decision.

Because the Attorney General's facts are disputed and in accordance with summary decision rules, all inferences must be granted to Dr. Kaji, and because the Attorney General cannot establish that fraud has been committed, no legal basis has been provided to establish that the case was ripe for summary decision.

DAG Merchant responded by arguing that Mr. Gorrell raised a number of facts, but she directed the Board to the documents provided and that what was presented doesn't change the fact that Dr. Kaji was acting as Medical Director, which he was doing for as far back as 2010, but certainly since 2013, and not as the legitimate owner. No one is disputing that he is the Medical Director. Mr. Gorrell's argument that Dr. Kaji was confused at the PEC is not supported by the transcript. The PEC questioning was well organized and done in such a way that clearly demonstrates, at least 79 times, that he denied he was or is the owner of the practice.

The certification, she continued, made by Dr. Kaji is a self-serving document to which the Board should afford the appropriate weight and in of itself, it does not create a genuine issue of material facts. Given all the inferences to the Respondent, it is undisputed that he is not the owner or that a transfer existed. If one did, it was purely a sham on paper. While stock may have been transferred, it was not worth anything and in effect the ownership did not change, nor did the landscape of the practice.

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Mr. Gorrell took issue with the suggestion that DAG Merchant asks that a determination of credibility be made on the Certification of Dr. Kaji. If the Board needs to do that, then there are disputed facts because you need to go beyond that facts as certified and assess credibility, and therefore, a genuine issue of fact is created.

The Board questioned DAG Merchant about the legal requirements of what constitutes an owner; she explained that the admission that it was not a real transfer is sufficient to demonstrate that he was not the owner.

The Board, upon motion made and seconded, voted to move into closed session for advice of counsel and deliberations. The motion, which carried unanimously, was made by Ms. Lopez, and seconded by Ms. Kubiel. All parties, except counseling and administrative staff, left the room.

Upon returning to open session the Board announced the following:

THE BOARD, UPON MOTION MADE AND SECONDED, VOTED TO DENY THE APPLICATION FOR SUMMARY DECISION. WHILE IT FINDS THAT MANY OF THE FACTS ARE NOT SUBJECT TO DISPUTE AND SUPPORT THE ALLEGATIONS, IT CANNOT CONCLUDE IN LIGHT OF INFERENCES TO DR. KAJI THAT THERE ARE NO ISSUES OF MATERIAL FACT. BECAUSE ALL INFERENCES MUST BE GRANTED TO THE MOVING PARTY AND MUST DEMONSTRATE AS A MATTER OF LAW THAT THIS MOVING PARTY IS ENTITLED TO JUDGMENT, THE BOARD FINDS THAT FURTHER

DEVELOPMENT IS NEEDED OF THE SPECIFIC OBLIGATIONS OF ONE BECOMING A SOLE SHAREHOLDER OF A PROFESSIONAL SERVICE CORPORATION. THE BOARD VOTED TO TRANSFER THE MATTER TO OAL WITH AN EXPRESS REQUEST TO SCHEDULE THE HEARING ON AN EXPEDITED BASIS, AS THE BOARD IS CONCERNED WITH DR. KAJI AND WHETHER OR NOT DR. KAJI CONTINUES TO BE THE OWNER AT THIS TIME.

The Motion, made by Dr. Shah and seconded by Ms. Lopez, carried unanimously.

DAG Merchant asked that the Board retain jurisdiction and hold a hearing within two months as there is a limited witness list.

The Board found that there was no basis to retain jurisdiction at this time and it was not aware of the extent of the witnesses or testimony. Inasmuch as it may take a number of days, the Board believed that the ALJ may be better suited to make credibility determinations.

President Scott announced, however, that the Board did discuss retaining jurisdiction and elected to transfer the matter with the caveat that if it isn't heard on an expedited basis that it be returned to the Board and the Board would hear the mater.

The hearing concluded.

IV. OLD BUSINESS

No old business.

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V. NEW BUSINESS

No new business.

Respectfully submitted,

George J. Scott, D.P.M. M.D.,
Chairperson
For Disciplinary Matters
Pending Conclusion

WVR/br