STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BORAD OF MEDICAL EXAMINERS
DOCKET NO. BDS03637-11

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE LICENSE OF MARVIN E. FRIEDLANDER LICENSE NO. 25MA05251300 TO PRACTICE MEDICNE AND SURGERY IN THE STATE OF NEW JERSEY	**FINAL DECISION AND ORDER**

This matter was opened to the New Jersey Board of Medical Examiners ("the Board") for consideration of an Initial Decision on an Amended Complaint seeking the suspension or revocation of Respondent's license to practice medicine filed by then Attorney General Paula T. Dow, by Joan D. Gelber, Sr. Deputy Attorney General. The 8 Count Amended Complaint was filed with the Board on February 17, 2011.[1] Counts 3, 4, 5, and 6 of the Amended Complaint charged Respondent with violating N.J.S.A. 45:1-21(b) misrepresentation and deception; (c) gross negligence; and/or (d) repeated acts of negligence; (e) professional or occupational misconduct; and (h) violation of a regulation administered by the Board; and violations of N.J.A.C. 13:35-2.6 and -6.5, the

[1] The original Complaint in this matter was filed with the Board of Medical Examiners on January 18, 2011.

diagnostic testing and record keeping regulations. Respondent was alleged to have misrepresented the credentials of health care personnel of Neurophysiological Monitoring, LLC ("NPM"), a wholly owned subsidiary of his medical practice The Back Institute ("BI"). The complaint additionally alleged that he misrepresented the financial relationship of a physician to NPM in order to obtain a hospital contract, motivated by a desire to generally make his business appear more attractive to prospective clients and insurance companies. It was further alleged that Respondent engaged in deception regarding his ownership of NPM, and made misrepresentations to a medical malpractice insurance carrier regarding the pendency of a Board investigation.

Counts 1, 2, 7, and 8 of the Amended Complaint, which were dismissed by the ALJ, alleged unlawful referral of patients to a self-owned health care service, failure to provide a physician for real-time observation of Intraoperative Monitoring ("IOM") performed by technicians, and inadequate reports and fraudulent billing in violation of N.J.A.C. 13:35-2.6, -6.16(b) regarding responsibility for billing or other representations, including disclosure of financial interest in health care services offered to the public and -6.5, and N.J.S.A. 45:1-21(b),(c), and/or (d), (e), (h), and (n), in regard to permitting an unlicensed person to perform an act for which a license is required by the Board, and/or aiding and abetting an unlicensed person in performing such an act.

Respondent filed an Answer to the Amended Complaint on March 15, 2011 denying the allegations. This matter was referred to the Office of Administrative Law, on March 22, 2011 for hearing and determination as a contested case. Although the matter had been consolidated with Complaints against Respondent's partners, Dr. Paul Ratzker and Dr. Douglas D. Bradley, the latter two matters were settled. On January 9, 2012, Respondent's motion for summary decision was denied, and hearings were held before the Honorable Jesse H. Strauss, ALJ, on twenty-two (22) dates beginning on March 7, 2012 and ending September 3, 2013. The time for filing of the Initial Decision was extended by successive Orders of Extension, and the Initial Decision of ALJ Strauss was issued on September 2, 2014. That decision is incorporated by reference, as if fully set forth herein.

An extension requested by both parties due to their trial and hearing schedules was granted for the filing of exceptions and for the hearing on exceptions. Exceptions were filed by both the Attorney General and the Respondent. Respondent filed a reply to the Attorney General's exceptions on October 27, 2014. On November 12, 2014, a bifurcated hearing took place before the Board. A hearing on exceptions from the OAL decision was immediately followed by a hearing regarding mitigating circumstances for determination of penalty. After due consideration of the one hundred and six (106) page Initial Decision of the Administrative

Law Judge, transcripts, exhibits, exceptions and arguments of counsel, the Board made the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As to Count 1: We hereby modify the ALJ proposed findings and find that IOM entities are health care service entities. We also reject the finding that the IOM process is so integral to a brain and spine surgeon's provision of care and overall practice that it warrants an exception to the referral exclusion law. ID at 27. Our reasoning and an analysis of the relevant law governing impermissible self-referrals follows.

N.J.S.A. 45:9-22.5a, a provision of the Codey Law, provides:

> A practitioner shall not refer a patient or direct an employee of the practitioner to refer a patient to a health care service in which the practitioner, or the practitioner's immediate family, or the practitioner in combination with the practitioner's immediate family has a significant beneficial interest; except that, in the case of a practitioner, a practitioner's immediate family or a practitioner in combination with a practitioner's immediate family who had the significant beneficial interest prior to the effective date [July 31,1991] of P.L. 1991, c. 187 (C. 26:2H-18.24 et seq.), the practitioner may continue to refer a patient or direct an employee to do so if the practitioner discloses the significant beneficial interest to the patient.

Using our collective medical expertise in review of this record and interpreting the statute, we conclude that NPM, an IOM entity, and its successor companies (in which Respondent and/or his family member held a significant financial interest) are clearly

health care service entities defined by N.J.S.A. 45:9-22.4 and N.J.A.C. 13:35-6.17(a)(1) as:

> "Health care service" means a business entity which provides on an in-patient or out-patient basis: testing for or diagnosis or treatment of human disease or dysfunction or dispensing of drugs or medical devices for the treatment of human disease or dysfunction. Health care service includes, but is not limited to, a bioanalytical laboratory, pharmacy, home health care agency, home infusion therapy company, rehabilitation facility, nursing home, hospital, or a facility which provides radiologic or other diagnostic imaging services, physical therapy, ambulatory surgery, or ophthalmic services.

The IOM process takes place during surgery and entails services by a technician who is distinct from the surgeon. During the surgery the technician attaches leads to muscles or skin to record and stimulate various nerves or muscles to elicit a response. A response will disclose if particular nerves are functioning as expected. The IOM process is intended to decrease the risk of neurological damage associated with the surgery. Waveforms, which are marked by cursors that measure a time frame in which a simulated response occurs, can be observed either in the operating room or by real-time monitoring by someone outside the operating room. IOM can be invasive as in some instances, electrodes may be implanted under the skin.

We find that IOM performed by NPM and its successors is designed to diagnose in real time whether a surgery is impacting negatively on a body system or nerve creating a dysfunction. That

diagnosis of a dysfunction is relayed contemporaneously to the surgeon so that the treatment-technique of the surgery and/or anesthetic levels are altered to avoid damage or dysfunction to the patient. Given our knowledge of a physician's use of IOM we find the provision of IOM services is clearly a health care service within the ambit of N.J.S.A. 45:9-22.4 et seq.

As the entities at issue owned by Respondent were acquired after the 1991 "grandfather" date permitted by the statute, even disclosure (which was not present here) does not cure the prohibition on self-referral. However, we decline to find a violation of the self-referral laws at this time on this specific record. We so rule because at the time of the conduct at issue we are not aware that clear notice had been given to the medical community that IOM was not exempted from the self-referral prohibitions given the proximate relationship of the services to the surgery.

Further, at the time of the conduct that occurred herein, there was a statutory exemption whereby

> The restrictions on referral of patients...shall not apply to: (1) medical treatment or a procedure that is provided at the practitioner's medical office and for which a bill is issued directly in the name of the practitioner or the practitioner's medical office.

N.J.S.A. 45:9-22.5(c)(1). As IOM provided by Respondent's entity NPM is clearly a health care service which is not personally performed by the surgeon in his/her medical office, nor is it

billed in the surgeon's name or that of his practice, we have determined that prospectively all the referral prohibitions of N.J.S.A. 45:22.4 et seq. and N.J.A.C. 6.17 shall apply to IOM entities such as NPM. We make this finding because the provision of IOM does not fall within any in-office exemption of the statute or Board rule. N.J.A.C. 13:35-6.17(b)4(i).

With respect to Counts 2, 7, and 8 of the Amended Complaint, we hereby adopt the ALJ's proposed findings of fact and conclusions of law and dismiss these counts. We find that Respondent did not commit fraud, gross and/or repeated negligence, professional misconduct and/or negligence in violation of N.J.A.C. 13:35-6.16(b) and N.J.S.A. 45:1-21(n); N.J.A.C. 13:35-2.6(a) and -2.6(p)(5) regarding billing for diagnostic tests; and N.J.A.C. 13:35-6.11 regarding excessive fees.

We hereby adopt the ALJ's proposed findings of fact and conclusions of law regarding Counts 3, 4, 5 and 6 limited to the Respondent's misrepresentations concerning NPM's business operations. Respondent filed an exception to the ALJ's findings as to the identification badge of IOM technician Nayyar Bashir, which included the designation "M.D.". Bashir graduated from medical school abroad but is not licensed in the United States. He argues that no one believed that Bashir was either a licensed physician or working as a physician and that insurance companies did not require a medical licensee to perform IOM as a condition of reimbursement.

We do not find that Medicare compensation guidelines create the standard of care requiring physician performance of IOM and we adopt the ALJ's finding on that point. However, when Respondent hired Bashir and provided him with an identification badge from NPM that identified him as "M.D.", which he routinely wore in hospital operating rooms, with Respondent present, we do find this conduct was misleading in violation of N.J.S.A. 45:1-21(b), (e), and (h). Respondent not only knew of this misleading credential but also condoned it. We find it irrelevant whether or not Respondent or his agent actually created and/or issued the badge. Although the title "M.D." can be considered an educational title, it is widely understood in the medical community that using that credential in relation to the delivery of health care without benefit of a plenary physician's license is misleading and deceptive. We find this an instance of Respondent attempting to create a more favorable impression of his business enterprise in order to optimize its success.

Respondent and his agents on behalf of NPM further represented to insurance companies through reports and/or payment forms that Bashir was an "M.D." creating the illusion that a licensed physician was involved in the IOM process. Respondent also misrepresented credentials of technicians by designating them as

CNIM Certified[2] at a time when they had not attained that status. Although CNIM certification was not required for insurance reimbursement, they were listed as so qualified on forms related to billing, and to insurance carriers and hospitals. By misrepresenting the credentials of NPM employees, Respondent and his agents were attempting to grow the NPM enterprise using puffery to make his business more attractive in order to be hired by additional entities.

We also concur with ALJ Strauss that Respondent failed to supervise NPM in order to assure that truthful information was submitted to insurance carriers when applying for coverage. Respondent knew or should have known that an investigation was ongoing regarding BI and NPM, yet when questioned by his carrier, he permitted a response that did not disclose the pendency of a Board investigation. Accordingly, he is responsible for these misrepresentations.

We further find that Respondent in correspondence to Virtua Hospital misrepresented his financial relationship with another physician. NPM's administrator responded to an inquiry from the hospital indicating no physician who provided services at Virtua Hospital had any financial interest in NPM, either directly or indirectly. In fact, Respondent had been compensating a Virtua

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[2] CNIM stands for "Certification in Neurophysiological Intraoperative Monitoring" by the American Board of Registration of Electroencephalographic and Evoked Potential Technologies (ABRET).

Hospital surgeon a monthly sum of money to audit Respondent's surgical group, the BI. NPM was wholly owned by the BI. Both health care entities were then owned by the Respondent.

Moreover, Respondent both at trial and in his exceptions attempted to shift responsibility to his business manager Michael Shortell in regard to the misrepresentations, which included malpractice applications and various letters regarding the credentials of technicians employed by NPM. In his exceptions, Respondent argues that he cannot be held legally responsible for misstatements made by his administrator of which he had "no knowledge." He claims that busy physicians must delegate administrative management and should not be held accountable for unintentional misrepresentations. He merely made a mistake in relying on his staff. However, as ALJ Strauss found,

> If one were insulated from any responsibility for misrepresentations by delegating authority to a straw man, in this instance, the notion of responsibility for the accuracy and integrity of any medical practice-related records would be a sham. Acceptance of such a broad form of insulation from responsibility runs contrary to the need to protect the public from harmful medical practices and the reputation of the medical profession.

ID at 85.

We concur with ALJ Strauss and find that Respondent as a licensee of this Board and as the owner of the BI and NPM is culpable for the pattern of material misrepresentations made by his agent on behalf of the entities he owned. The record supports that

Respondent had close, even daily contact with his administrator Shortell, and knew or clearly should have known about the false information his agent provided to the hospitals, insurance carriers and the medical community and patients at large. This position was recently upheld by the Appellate Division in several cases. See In re Application of Y.L., 437 N.J. Super. 409 (App. Div. 2014)[3]; Township Pharmacy v. Division of Medical Assistance and Health Services, 432 N.J. Super. 273 (App. Div. 2013)[4].

PENALTY DISCUSSION

At the hearing on mitigation of penalties, five (5) mitigation witnesses were presented on Respondent's behalf, four (4) doctors and one hospital CEO[5]. The witnesses testified to the high caliber

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[3] The Court affirmed the Board of Massage and Bodywork Therapy's denial of an applicant's license application because she misinformed the Board in her sworn application that she had never been arrested, although she had been arrested for prostitution in a massage establishment. The Court rejected the applicant's argument that the Board must find that she had an intent to deceive, stating that a finding of misrepresentation does not generally require an intent to deceive. In re Application of Y.L., 437 N.J. Super. 409 (App. Div. 2014).

[4] In Township Pharmacy v. Division of Medical Assistance and Health Services, the plaintiff failed to perform basic due diligence before answering a question intended to disclose information material to a proper determination of an applicant's eligibility to participate in the State's Medicaid Program. Although the plaintiff did not intend to deceive or conceal information, the Court found that public policy supports the Director's determination that failure to provide accurate, truthful, and complete information constituted good faith to deny the application. 432 N.J. Super. 273 (App. Div. 2013).

[5] The following are the mitigation witnesses who presented before the Board: Gary Berand, President and CEO of Trinitas Regional Medical Center (by audio means); Dr. Richard Williams,

of Respondent's surgical work, his willingness to be on call, and to his reputation for honesty and integrity. They further testified that neurosurgeons are scarce in New Jersey and losing the services of the Respondent would be detrimental to the medical community. However, on cross examination, one doctor testified that a patient can receive the same neurosurgical services at a hospital five minutes away. Respondent testified as well and acknowledged that misstatements were made but not intentionally and physicians routinely delegate responsibilities to administrators and should not be held accountable for misstatements of staff.

Upon consideration of the arguments of the parties, the five (5) mitigation witnesses presented, Respondent's testimony, and upon our own independent review of the record, we conclude that cause exists to modify the recommendation made by ALJ Strauss on penalty. Specifically, we conclude that Respondent engaged in, or condoned his agent to engage in on his behalf, a pattern of misrepresentation in order to optimize a revenue source from a succession of IOM health care service entities in which he or his then wife owned a significant beneficial interest. We considered that Respondent is a sophisticated, highly educated practice and business owner who perpetrated this misrepresentation and

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Chief of Surgery at Bayonne Medical Center; Dr. George Safran, Emergency Medicine at Hoboken Medical Center; Dr. Barry Levinson, Medical Director of the Cancer Center at Trinitas Hospital; Dr. Pirack, Chief of Anesthesia at Trinitas Hospital.

unprofessional conduct when he was a seasoned licensee. This is not a case of a young, naïve, newly graduated physician eager to please employers. We find this conduct warrants a more significant sanction than the ALJ assessed.

Trustworthiness and honesty are crucial traits for physicians to possess as they are responsible for billing and are privy to patients' private information. The public relies on the Board to assure those characteristics are found in licensees. The dishonesty of any licensee reflects on the reputational standing of the entire profession. Thus, we find it appropriate to modify the recommended sanction from a one (1) year to a three (3) year stayed suspension, due to the seriousness of the misconduct and to send a deterrent message to the regulated community. We also require that Respondent must demonstrate satisfactory completion of an ethics course pre-approved by the Board. As the public relies on the Board to require honesty and integrity of its licensees, we order Respondent to complete an ethics course to sensitize him to important issues and help provide insight and guidance so that there will not be a reoccurrence of the professional misconduct found herein.

We recognize that serious allegations against Respondent were dismissed. Respondent did not commit any violations that put patients in harm's way. Additionally, the ALJ found there is no showing that Respondent is anything other than a skilled surgeon,

and we concur. The record supports that finding. Therefore, we did not order an active suspension or more serious sanctions against his license impacting his ability to practice.

We also order that Respondent employ a business monitor if he acquires an interest in a health care service entity.[6] Further, in light of the sums Respondent earned from the misrepresentations which made his IOM entities more attractive to employ, we are increasing the civil penalty from the recommended $10,000 to a total of $70,000, pursuant to N.J.S.A. 45:1-25. The heightened amount represents $10,000 for the first offense found (Count 3 of 4 Counts) in which we found that the State sustained its burden, and $20,000 penalty second offenses for each of the remaining 3 Counts in which the State prevailed (Counts 4, 5, and 6).[7] We affirm the ALJ's recommendation as to costs of $44,928.13 and attorney's fees of $102,707.50. We note that the ALJ significantly reduced the attorney's fees by 50 percent to reflect that the state prevailed on four Counts of an eight (8) Count Complaint. He also did not

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[6] Respondent reported to the Board that neither he nor any of his family members now have a financial interest in any health care service entity. We are not imposing a requirement for a business monitor for Respondent's private medical practice office.

[7] On oral announcement on the record on November 12, 2014, the motion on sanction inaccurately assessed $10,000 civil penalty for a portion of Count 1 which resulted in a total of $80,000. Although we found IOM entities are health care service entities, we did not on these facts find a violation of the self-referral prohibitions. The amount has been modified in this Order to reflect the accurate penalty amount of $70,000.

recommend assessment of expert fees as the State did not meet its burden on the Counts alleging quality of care issues and we concur.

Respondent has not objected to the amount or calculations utilized as to the investigative costs, attorney's fees[8], expert witness fees, transcript and other costs. Respondent also did not document (via statement of assets and tax returns) any inability to pay, as required by notification provided to him well before the hearing date if he wished to raise that issue. We have reviewed the costs sought in this matter and find the application sufficiently detailed and the amount reasonable (with the reductions indicated) given the complexity of the investigation and prosecution of this matter. Our analysis follows.

In its submission seeking investigative costs, the State has submitted certifications of the supervising investigator, as well as Daily Activity Reports which identify the precise activities performed, the amount of time spent in each activity, and the hourly rate charged for each investigative assignment. We find the portion of the application for investigative costs, supported by

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[8] We again note the attorney's fees were reduced by 50% to reflect that the State prevailed on four and a portion Counts out of an 8 Count Complaint and no expert fees are assessed as the State did not prevail on those Counts. Respondent did suggest that costs be assessed based on the number of days at the hearing, 36% in which the State prevailed. We decline to adopt that approach because we feel that the number of days at hearing does not accurately serve as a basis for assessing costs. We feel that the assessment is more fairly based proportionally on the Counts in which the State prevailed.

signed and detailed contemporaneous time records, to be sufficient. We note that investigative time records are kept in the ordinary course of business by the Enforcement Bureau, and contain a detailed recitation of the investigative activities performed. We have also considered and find that the rates charged, (from $101.98 to $116.80 per hour) to be reasonable, and take notice that investigative costs, approved many times in the past, are based on salaries, overhead and costs of state employees. Considering the important state interest to be vindicated, protection of the public, the investigative costs imposed of $40,683.59 are certainly reasonable.

Similarly, the Attorney General's certification in this matter extensively documented the time of the attorney expended in these proceedings. The Attorney General documented a total of $205,415.00 in counsel fees (which did not include any fees for time expended on the exceptions). The Attorney General's certification was supported by the timesheets of SDAG Gelber and included information derived from a memorandum by a past Director of the Department of Law and Public Safety detailing the uniform rate of compensation for the purpose of recovery of attorney's fees established in 1999 and amended in 2005, setting the hourly rate of a DAG with more than ten years of legal experience at $175.00 per hour. We are satisfied that the record adequately details the tasks performed and the amount of time spent on each by the Deputy

Attorney General (to include investigation, research, drafting, discovery, negotiations, motions, affidavits and briefs, preparation of experts and exhibits for trial, trial presentation, and post-hearing brief with appendix). After accepting the reduction of $102,705.50 by ALJ, we are satisfied that the tasks performed, while time-consuming, and needed to be performed and that in each instance the time spent (considering the reduction for Counts in which the State did not prevail) was reasonable.

The rate charged by the Division of Law of $175.00 for a DAG with ten (10) or more years of experience has been approved in prior litigated matters and appear to be well below the community standard. Moreover, we find the certification attached to the billings to be sufficient. We note that no fees have been sought for legal work performed regarding exceptions, oral argument on exceptions or additional transcript cost incurred for the hearing before the Board..

We find the application to be sufficiently detailed to permit our conclusion that the amount of time spent on each activity, and the overall fees sought are objectively reasonable as well. (See, Portiz v. Stang, 288 N.J. Super. 217 (App. Div. 1996)). We find the Attorney General has adequately documented the legal work necessary to advance the prosecution of this case. We are thus satisfied that the Attorney General's claims are reasonable

especially when viewed in context of the seriousness and scope of the action maintained against respondent.

Medical Board and OAL transcripts	$3,836.40
Travel costs of Fact Witness Bashir	$408.14
Investigative costs	$40,683.59
Attorney's fees	$102,707.50
Total costs:	$147,635.63

As orally ordered by the Board on the record on November 12, 2014,

THEREFORE, IT IS ON THIS 24 DAY OF NOVEMBER 2014

ORDERED THAT:

1. Respondent's license shall be suspended, for a period of three (3) years, the entirety to be stayed and served as a period of probation, effective thirty (30) days after the November 12, 2014 oral announcement of this order on the record, that is, on December 11, 2014.

2. Respondent shall demonstrate full attendance at and satisfactory completion of an ethics course pre-approved by the Board within six (6) months from the November 12, 2014 oral announcement of this order on the record, that is, no later than May 11, 2015. He shall submit documentation to the Board office.

3. Respondent shall be required to employ a Board approved business monitor to oversee the business operations of any health care service entity he acquires a financial interest in until further order of the Board.

4. Respondent shall pay a civil penalty in the amount of $80,000 within 30 days of the date of service of this order or in such installments as shall be permitted by the Board upon application by Respondent prior to that time. Payment shall be made by bank check, money order, wire transfer or credit card made payable to the New Jersey Board of Medical Examiners and mailed to the New Jersey State Board of Medical Examiners, ATTN: William Roeder, Executive Director, 25 Market Street, Trenton, New Jersey 08625. Any other form of payment will be rejected and will be returned to the party making the payment. In the event that respondent fails to make timely payment, interest shall begin to accrue at the annual court rule rate, a Certification of Debt shall be issued, and the Board may institute such other proceedings as are authorized by law.

5. Respondent shall, within 30 days of the date of the service of within Order, pay costs in the amount of $147,635.63 by bank check, money order, wire transfer or credit card made payable to the State of New Jersey and submitted to the Board at the address above. In the event such payment is not timely made, a certificate of debt may be filed as well as proceedings instituted for collection.

6. Respondent shall abide by the Directive for Disciplined Licensees attached hereto and made apart hereof.

NEW JERSEY STATE BOARD OF
MEDICAL EXAMINERS

By: Karen Criss
Karen Criss, R.N., C.N.M.
Board Vice President