IN THE MATTER OF	*	**BEFORE THE MARYLAND**
Barbara A. Solomon, M.D.,	*	**STATE BOARD OF**
Respondent.	*	**PHYSICIAN QUALITY ASSURANCE**
License Number: D10472	*	**Case No. 99-0479**

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FINAL ORDER

INTRODUCTION

In early 1997, the Maryland State Board of Physician Quality Assurance (the "Board") received a complaint from a patient of Barbara A. Solomon, M.D. ("Dr. Solomon") concerning Dr. Solomon's medical care and treatment for a patient's multiple food allergies with "an experimental device" called a Computron. That patient[1] alleged that Dr. Solomon did not provide her with a consent form to read and sign. Patient A also complained that Dr. Solomon did not inform her of any potential risks of undergoing testing with a Computron until Patient A asked about the risks of electric current running through her body. Patient A's complaint stated that Dr. Solomon responded that there were no risks, yet Patient A claimed having experienced two adverse effects – pain when the Computron was pressed hard against her toes, and worsening of the condition for which treatment was sought a week after Dr. Solomon performed the procedure on her. In sum, Patient A complained that Dr. Solomon's written and oral presentations about the procedure performed with the Computron were vague and evasive. Patient A also complained, among other things, that Dr. Solomon exerted pressure on her to

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1 For purposes of confidentiality, the name of this patient will not be identified by name, but will be referred to as Patient A throughout this Final Order.

remove dental amalgam fillings without conducting any tests, and of unprofessional billing practices.

The Board conducted a preliminary investigation of Patient A's complaint. The Board did not issue formal charges against Dr. Solomon based on its investigation of Patient A s complaint but did issue an advisory letter to Dr. Solomon on August 26, 1998. That letter advised her of the need to give each patient "complete disclosure including risks" about "experimental techniques" that she intended to use in treating patients and that "a patient disclosure form along with a signed and dated consent form should be made part of the patient's medical records." It then informed her:

> **Six months from the date of this letter the Board will be conducting a re-review of your practice.** Board staff will obtain patient records, initiated after the date of this letter, in which experimental techniques were implemented. Each record will be reviewed regarding issues of standard of care to include a review of documentation of signed diagnoses and treatment disclosure forms and informed consent forms for each patient.

On March 4, 1999, approximately six months after the issuance of the August 26, 1998, advisory letter, the Board issued a subpoena for Dr. Solomon's patient appointment schedule for October, November, and December 1998. Dr. Solomon did not comply with this subpoena within the ten days required by the March 4 subpoena. The Board reissued the subpoena for Dr. Solomon's patient appointment schedule for October, November, and December 1998 three times -- on July 27, 1999, on October 13, 1999, and on November 16, 1999. On November 22, 1999, approximately eight and one half months after the due date on the subpoena, Dr. Solomon complied with the March 4 subpoena. [2]

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[2] During the period from March 4 –November 22, 1999: (1) the Circuit Court for Baltimore County

On December 2, 1999, the Board issued a subpoena to Dr. Solomon for the entire medical chart of 19 specified patients, whose names were selected from the October, November, December 1998 patient appointment logs. The December 2 subpoena commanded return of the 19 medical records to the Board within 21 business days. Dr. Solomon did not comply with the December 2 subpoena within 21 business days.[3] As of the date of the issuance of this Final Order, in April of 2001, Dr. Solomon has not complied with the December 2, 1999, subpoena. On May 25, 2000, approximately six months after issuance of the December 2, 1999, subpoena, the Board issued charges against Dr.

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issued, on July 26, 1999, an Order granting the Board's Motion to Dismiss Dr. Solomon's Complaint to quash the March 4, 1999, subpoena and ruled that "[Dr. Solomon] had no right to quash the administrative investigatory subpoena that was issued in this case;" (2) on August 2, 1999, Dr. Solomon noted an appeal to the Maryland Court of Special Appeals; (3) on August 30, 1999, the Circuit Court denied Dr. Solomon's Motion for a Stay of the July 26, 1999, Order; (4) the Court of Special Appeals denied, on October 4, 1999, Dr. Solomon's Motion for a Stay of the Circuit Court Order; and (5) the Court of Special Appeals denied, on November 1, 1999, Dr. Solomon's Motion for Reconsideration of its October 4, 1999, Order denying Dr. Solomon's Motion for a Stay.

[3] On December 10, 1999, Dr. Solomon filed her brief in the Court of Special Appeals of Maryland in her appeal of the July 26, 1999, Order of the Circuit Court granting the Board's Motion to Dismiss. On January 10, 2000, the Board filed its responsive brief. On March 2, 2000, Dr. Solomon's appeal was argued before the Court of Special Appeals. On June 6, 2000, the Court of Special Appeals issued a decision affirming the Circuit Court's July 26, 1999, Order. *See Solomon v. Board of Physician Quality Assurance*, 132 Md. App. 447, 455, *cert. denied* 360 Md. 275 (2000) ("[Dr. Solomon's] position that the closing of the initial complaint against her precludes the Board from investigating any concerns that may have arisen as a result of the investigation of that complaint finds no support in law or logic"). On June 15, 2000, Dr. Solomon filed a *Petition for Writ of Certiorari* with the Court of Appeals of Maryland. On August 21 2000, the Court of Appeals of Maryland denied Dr. Solomon's *Petition for Writ of Certiorari. Solomon v. Board of Physician Quality Assurance*, 360 Md. 275 (2000).

On December 20, 1999, unidentified patients of Dr. Solomon filed an action in the United States District Court for the Northern District of Maryland. The unnamed patients filed a "Petition for Temporary Restraining Order/Preliminary Injunction" seeking to enjoin the Board from obtaining the medical records which were the subject of the December 2, 1999, subpoena, until a "full and fair hearing" could be held with respect to the patients' privacy rights. On December 22, 1999, the federal district court issued an Order and Memorandum Opinion denying the patients' Petition for a Temporary Restraining Order/Preliminary Injunction. *Patients of Dr. Barbara Solomon v. Board of Physician Quality Assurance*, 85 F. Supp.2d 545 (N.D. Md. 1999). On January 3, 2000, the patients of Dr. Solomon filed, in the same federal district court (the United States District Court for the Northern District of Maryland), a Motion for Reconsideration of that court's December 22, 1999, Order denying their Petition. On January 28, 2000, the federal district court issued an Order and Memorandum Opinion denying the patients' Motion for Reconsideration. On February 7, 2000, that court issued an Order closing the case because the patients of Dr. Solomon did not file a complaint at the time they filed the Petition for a Temporary Restraining

Solomon for violating the Maryland Medical Practice Act based on her refusal to comply with the December 2, 1999, subpoena and her failure to timely comply with the March 4, 1999, subpoena.

PROCEDURAL BACKGROUND

On May 25, 2000, the Board filed charges against Dr. Solomon for violating sections 14-404 (a) (3) and (a)(33) of the Maryland Medical Practice Act (the "Act"), Md. Code Ann., Health Occ. ("HO") 14-401 *et seq.* Specifically, the Board charged Dr. Solomon for her failure to cooperate with a lawful Board investigation and for committing unprofessional conduct in the practice of medicine. The relevant statutory provisions provide as follows:

> (a) Subject to the hearing provisions of § 14-405 of this subtitle, the Board, on the affirmative vote of a majority of its full authorized membership, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:
>
> (3) Is guilty of immoral or unprofessional conduct in the practice of medicine;
>
> (33) Fails to cooperate with a lawful investigation conducted by the Board.

An evidentiary hearing was held on November 14, 2000, at the Office of the Administrative Hearings, Hunt Valley, Maryland before Susanne S. Fox, Administrative Law Judge ("ALJ"), pursuant to HO § 14-405(a). On December 11, 2000, the ALJ issued a Proposed Decision that contained Findings of Fact, Discussion, Conclusions of Law, and a Proposed Disposition that Dr. Solomon's license to practice medicine in the State of Maryland be revoked. The ALJ recommended revocation because Dr. Solomon's "refusal to respond to the

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Order and Preliminary Injunction.

Board's subpoenas raises serious questions about her medical practice which cannot be put to rest absent the investigation she has so doggedly tried to avoid" and because Dr. Solomon "by her own admission, has not and does not intend to comply with the December 2, 1999 subpoena issued by the Board . . . ."

On December 28, 2000, Dr. Solomon filed written Exceptions to the ALJ's December 11, 2000, Proposed Decision. On January 17, 2001, the State filed a written Response to Dr. Solomon's Exceptions. On March 27, 2001, Dr. Solomon filed an Answer to Response and Supplemental Exceptions.

The Exceptions Hearing before the Board was originally scheduled for February 28, 2001 Dr. Solomon's attorney requested a postponement of the February 28 Exceptions Hearing based upon a conflict with another professional commitment. Consequently, the Exceptions Hearing was rescheduled for March 28, 2001. A few hours before the Exceptions Hearing was to commence before the Board on March 28, Dr. Solomon filed with the Board a written Motion for Counsel Fees, Costs and Expenses.

The Exceptions Hearing was held before the Board on March 28, 2001. An out-of-state attorney, not licensed to practice law in Maryland or admitted *pro hac vice* pursuant to the Maryland rules, and a person identified as this attorney's legal assistant accompanied Dr. Solomon and her Maryland attorney of record, Mercedes C. Samborsky, Esquire, to the Exceptions Hearing. Dr. Solomon had not submitted any prior written or oral notice to the Board requesting that she be represented by an out-of-state attorney. At the beginning of the Exceptions Hearing, Dr. Solomon's Maryland attorney requested that the out-of-state attorney also represent Dr. Solomon at the

Exceptions Hearing. The Board denied the request because the out-of-state attorney had not complied with Maryland Rule 14 governing special admission of out-of-state attorneys.[4] Dr. Solomon's Maryland attorney, Ms. Samborsky, then requested that the Board grant a postponement for the purposes of allowing time for the out-of-state attorney to comply with Maryland Rule 14. The Board denied the postponement request and the Exceptions Hearing proceeded. Ms. Samborsky represented Dr. Solomon throughout the entire administrative process, including at the Exceptions Hearing (as well as throughout the two years of court litigation previously noted on this issue).

After consideration of the entire record in this case, including the record made before the ALJ at the Office of Administrative Hearings, the written Exceptions filed by Dr. Solomon, the State's Response to those Exceptions, Dr. Solomon's Answer to Response and Supplemental Exceptions, and the hearing held before the Board on those Exceptions, the Board issues this Final Order.

FINDINGS OF FACT

The Board adopts the Findings of Fact numbers 1-40 as set forth in the ALJ's Proposed Decision of December 11, 2000. (The ALJ's December 11, 2000, Proposed

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4 The out-of-state attorney had not filed an appropriate motion in a circuit court in Maryland and obtained an order from a circuit court allowing him to represent Dr. Solomon before the Board as Maryland Rule 14 requires. Noteworthy is the fact that, on May 25, 2000, the Board issued a letter of procedure to Dr. Solomon along with the Charging Document which expressly gave notice to Dr. Solomon that if she intended to be represented by an out-of-state attorney, that out-of-state attorney must comply with Maryland Rule 14. *See* COMAR 10.32.02.03 D(1) (requiring a respondent to be represented by an attorney admitted to the Maryland Bar or specially admitted to practice law in Maryland under Rule 14 if a matter before the Board goes to a hearing).

Decision is incorporated by reference into this Final Order and is attached as Appendix A.) The Board has found these facts by clear and convincing evidence.

The Board also adopts the ALJ's Discussion section as set forth on pages 13-30 of the December 11, 2000, Proposed Decision except for the subsection entitled, "*Failure to Cooperate with the Lawful Investigation by the Board is Unprofessional Conduct*," on pages 27-29.

CONSIDERATION OF DR. SOLOMON'S EXCEPTIONS

The Board has considered Dr. Solomon's written Exceptions to the ALJ's Proposed Decision and her Supplemental Exceptions submitted the day before before the Exceptions Hearing. A discussion of those Exceptions follows.

Exception #1. Dr. Solomon argues that the ALJ was incorrect in determining that she engaged in unprofessional or immoral conduct in the practice of medicine by failing to comply with the Board's subpoenas. The Board's sanctioning authority is unaffected by the number of sections of the law violated. Since the Board is imposing a sanction on Dr. Solomon's medical license only for her failure to cooperate with a lawful Board investigation in violation of § 14-404(a)(33) of the Act, the Board need not reach the merits of this issue.

Exception #2. Dr. Solomon contends that the ALJ was wrong as a matter of law by finding that the Board was entitled to conduct a standard of care investigation. Specifically, she argues that "there is no statutory or substantive law justification for the Board's assumption of such investigative right." The Board finds absolutely no merit in this Exception, especially because Dr. Solomon ignores the law established by the Court of Special Appeals in her own case on this issue. Dr. Solomon herself

unsuccessfully contested this Board's authority to investigate her. The Maryland Court of Special Appeals has already ruled that the Board had the authority to investigate Dr. Solomon's medical practice. *Solomon v. Board of Physician Quality Assurance*, 132 Md. App. 447, 453-55, *cert. denied*, 360 Md. 275 (2000). The Court of Special Appeals found Dr. Solomon's position on this issue finds "no support in law or logic." *Id.* at 455.

Exception # 3. Dr. Solomon contests the ALJ's finding that she failed to cooperate with the Board's March 4, 1999, arguing that she did ultimately produce her appointment books, "after she had exhausted her judicial processes [sic]." The initiation of a lawsuit, however, against the Board does not excuse a licensee from cooperating with the Board. If filing a lawsuit were considered an automatic defense, it would be a simple matter for any physician being investigated to stall the investigation for years with no legal consequence, no matter how frivolous the lawsuit. Furthermore, Dr. Solomon's various arguments in this very case demonstrate that there is almost no end to the frivolous legal arguments which can be raised. If any board were precluded from sanctioning a licensee simply because the licensee filed an unsuccessful action against that board, cooperation would become the exception rather than the rule – at least among licensees who have something to hide.

In this course of her litigation, Dr. Solomon asked the courts three times to stay the Board from investigating her. Each time, the courts refused. Her substantive case was dismissed as lacking "law or logic" by the Court of Special Appeals. *Solomon*, 132 Md. App. at 455. In addition, Dr. Solomon refused to respond to the Board's December 1999, subpoena, though she never challenged its validity in court.

Dr. Solomon's due process rights were not implicated in this investigatory stage of the Board's proceedings. *See North Dakota Comm'n on Medical Competency v. Racek*, 527 N.W. 2d 559, 566 (N.D. 1995); *Humenansky v. Minnesota Bd. of Medical Examiners*, 525 N.W.2d 559, 566 (Minn. 1994); *Smith v. Board of Medical Quality Assurance*, 202 Cal. App. 3d 316, 326, 248 Cal. Rptr. 704, 710 (1988); *Weller v. Department of Social Services*, 901 F. 2d 387, 392 (4th Cir. 1990). A professional licensing board may discipline a licensee who refuses to cooperate with a board investigation pending his or her invocation of appellate rights. Professional licensees may not dictate the manner in which a licensing board conducts its investigations. *Abbott v. Kansas Board of Examiners in Optometry*, 1 P. 3d 318, 323 (Kan. 2000); *State Medical Board of Ohio v. Miller*, 541 N.E. 2d 602, 606-07 (Ohio 1989) ("It is certainly reasonable that, in situations where the license-granting authority is investigating a license-holder, the license-holder should not be allowed to take steps to thwart the legitimate investigation."); *Anderson v. Board of Medical Examiners*, 770 P. 2d 947, 950 (Or. 1989) ([h]ad the legislature not so provided and had it created only 'substantive' grounds for revocation, the Board's ability to revoke a license would often be dependent on the outcome of an investigation that the licensee could impede or prevent").

Exception #4. Dr. Solomon contests the ALJ's finding that she received proper notice of the Board's investigation. Dr. Solomon charges that the Board failed to provide her with "adequate notice of the disciplinary action against her." The Board, of course, could not provide notice of the "disciplinary action" pending against Dr. Solomon since no disciplinary action was pending against her. The Board was only attempting to investigate Dr. Solomon's medical practices.

Even though not required to do so, the Board gave Dr. Solomon notice that it intended to investigate her, starting with its August 26, 1998, "Informational Letter with Notice of Re-Review" (which specifically instructed that it would be re-reviewing her practice in six months). State's Exhibit 5; *see also* State's Exhibit 9 (the Board subpoena, dated March 4, 1999, which sought Dr. Solomon's appointment logs); State's Exhibit 10 (Dr. Solomon's attorney's letter of March 9, 1999, which acknowledged that Dr. Solomon knew that she was under investigation by the Board); and the many subsequent subpoenas, letters issued by the Board, and court filings, all of which confirmed the existence of the Board's investigation. Moreover, as the Circuit Court for Baltimore County has ruled in this case, the Board is not required to give Dr. Solomon notice of an investigation. *See* footnote 2 *supra*.

Exception # 5. Dr. Solomon argues that the ALJ violated her patients' right to privacy by not permitting the testimony of the patients whose medical records the Board sought to obtain through its subpoenas. The Board finds that the ALJ properly excluded the testimony of Dr. Solomon's patients.

The Board is specifically empowered by law to issue subpoenas for purposes of investigating health care professionals under its jurisdiction. Md. Code Ann., Health-General I ("HG") § 4-306 (b)(2)(2000 Repl. Vol.). Under this provision, a health care provider shall disclose such records to the Board, without the requirement that the patient (or person in interest) provide authorization. HG § 4-306 (b). It is well settled in Maryland that a patient's constitutional right to privacy in his or her medical records is outweighed by the Board's compelling interest in obtaining such records for investigatory purposes. *Dr. K. v. Board of Physician Quality Assurance*, 98 Md. App.

103, *cert. denied,* 334 Md. 18 (1993), *cert. denied,* 115 S. Ct. 75 (1994). In *Dr. K.*, the court stated that "[t]o give a patient, in effect, a veto over the Board's power to regulate licensed physicians would be to eviscerate the Board's power to protect the larger public interest." *Id.* at 120.

Thus, under the law, any constitutional rights that Dr. Solomon's patients might assert are outweighed by the Board's obligation to protect the public by investigating possible misconduct of its licensed physicians. Consequently, the patients' testimony is irrelevant and was properly excluded by the ALJ.

Exception # 6. Dr. Solomon contests the ALJ's admission of evidence of a 1982 disciplinary action imposed against her by the Commission on Medical Discipline. The ALJ, however, was authorized by law to consider such evidence and properly admitted it at the hearing. Md. Code Ann., State Gov't ("SG") § 10-213 (1999 Repl. Vol.); COMAR 28.02.01.18. The prior disciplinary action was relevant for purposes of consideration of any sanction the ALJ might recommend. In any case, the Board was already actually or constructively aware of the prior 1982 disciplinary action against Dr. Solomon under the Maryland Public Information Act. Md. Code Ann., SG § 10-611 *et seq.*

Exception # 7. Dr. Solomon contests the ALJ's refusal to permit the testimony of an expert witness whom Dr. Solomon intended to call for purposes of rendering a legal opinion as to whether her refusal to cooperate was legally permissible. In support of this Exception, Dr. Solomon cites as authority the Court of Special Appeals holding in *Ankney v. Franch*, 103 Md. App. 83 (1995), arguing that this decision permitted her to introduce a legal expert's testimony. This holding, however, was

reversed by the Court of Appeals in *Franch v. Ankney*, 341 Md. 350 (1996). The Board thus finds no merit in this Exception. The ALJ properly excluded such testimony, as expert witnesses may not give opinions on questions of law except for those concerning the law of another jurisdiction. *Franch v. Ankney*, 341 Md. 350, 360 (1996); *see, e.g., Callan v. State*, 144 A. 350 (1929); *Franceschina v. Hope*, 267 Md. 632 (1973). Moreover, the decision to exclude expert testimony is completely within the province of the trial judge. *Franch*, 341 Md. at 363; COMAR 28.02.01.18.

Exception # 8. Dr. Solomon argues that the ALJ abused her discretion in failing to find that the Board's December 2, 1999, subpoena for patient records was unenforceable as a matter of law because the subpoena was beyond the scope of Patient A's complaint. The Board finds no merit in this Exception. The subpoena was indeed within the scope of Patient A's complaint, which reported concerns regarding the standard of care, regarding removal of dental amalgam fillings, informed consent, the use of experimental procedures, and unprofessional billing practices.

Exception # 9. Dr. Solomon argues that Board disciplinary proceedings are invalid unless they incorporate all of the elements of a medical malpractice cause of action. The Board finds no merit in this Exception. Board disciplinary proceedings are regulatory in nature, and are specifically designed to protect the public. In contrast, medical malpractice lawsuits exist for other reasons: to adjudicate disputes between individuals and to determine the appropriateness of a monetary award for damages suffered as a result of an injury. The Board's statutory scheme set forth in the Maryland Medical Practice Act at HO § 14-101 *et seq.* exists for different purposes than the statute which regulates civil health claims actions set forth at Md. Code Ann., Cts. &

Jud. Proc. § 3-2A-01 *et seq.* (1998 & 2000 Cum., Supp.) Dr. Solomon has not cited any legal authority supporting her argument.

Moreover, the Court of Special Appeals has already addressed Dr. Solomon's argument. Again, Dr. Solomon ignores the law as set forth on this very issue in her own case. *See Solomon v. Board of Physician Quality Assurance*, 132 Md. App. 447, *cert. denied,* 360 Md. 275 (2000). The Court of Special Appeals found Dr. Solomon's argument to be premature and not ripe for review because the Board had not and may never charge Dr. Solomon with a breach of the standard of care. The Board still has not issued any such charge.

Exception # 10. Dr. Solomon argues that the ALJ improperly found that she failed to cooperate with the Board's investigation because she "purged herself of any wrong doing by delivering [her] appointment books to the Board" albeit approximately eight and one-half months later. The Board finds no merit in this Exception for the same reasons stated in its discussion of Exception # 3 *supra*.

Furthermore, Dr. Solomon's argument that her late compliance with the March 4 subpoena "mooted" the subpoena (reissued three times between July and November 1999) makes no legal or logical sense. Dr. Solomon also ignores the fact that she has yet to comply with the Board's December 2, 1999, subpoena for the medical records of 19 patients; consequently, she may not claim that she has "purged herself of any wrongdoing" because Dr. Solomon is still refusing to comply with the December 2, 1999, subpoena.

Exception # 11. Dr. Solomon contends that the ALJ abused her discretion by recommending to the Board a proposed sanction of revocation for non-delivery of the patients' medical records, claiming that she contested the "validity of the subpoena and no court had determined the subpoena valid." The Board finds no merit in this Exception. Dr. Solomon erroneously asserts that no court has determined the December 2, 1999, subpoena to be valid. But Dr. Solomon has failed to demonstrate any such invalidity. To date, Dr. Solomon has not pursued a court challenge to the December 2, 1999, subpoena for her medical records and Dr. Solomon was unsuccessful in contesting the validity of the March 4, 1999, subpoena for her patient appointment logs. Dr. Solomon also does not offer any legal authority for the proposition that the law requires the Board to seek a declaratory ruling from a court to establish the validity of its own subpoenas.

Exception #12. Dr. Solomon alleges that the ALJ deprived her of a fair trial by prohibiting all of her witnesses from testifying on her behalf. Dr. Solomon repeats this argument elsewhere in her Exceptions with respect to the ALJ's exclusion of the testimony of the 19 patients whose records were subpoenaed by the Board; a legal expert; and a dentist (*see* discussions of Exceptions #5, 7 *supra* and Exception #14 *infra*). The Board likewise finds no merit in this Exception. The ALJ is empowered to regulate the course of the hearing, COMAR 28.02.01.08B, and specifically to limit unduly repetitious testimony. COMAR 28.02.01.08B(6). In addition, under the Administrative Procedure Act, the ALJ is empowered to exclude incompetent, irrelevant or immaterial evidence. Md. Code Ann. State Gov't § 10-213(d).

Exception # 13. Dr. Solomon argues that the ALJ improperly found that the Board's December 2, 1999, subpoena was valid, despite the fact that it did not contain the certification mandated under Md. Code Ann., H-G § 4-306.[5] The Board finds no merit in this Exception. The Board is specifically exempted under H-G § 4-306(b)(2)(i) & (ii) from providing the certification to Dr. Solomon's patients because it issued an investigatory subpoena. (*See* discussion of Exception # 5 *supra*.)

Exception # 14. Dr. Solomon alleges that the ALJ improperly excluded the testimony of a dentist, Michael Baylin, DDS, claiming that "his testimony was relevant to the issue of whether the Board's subpoena of December 2, 1999, was a valid exercise of its investigatory authority or a mere fishing expedition." The Board finds no merit in this Exception.

The ALJ properly excluded Dr. Baylin's testimony, which had no relevance to Dr. Solomon's case before the Board. Dr. Baylin was offered as a fact witness. Dr. Solomon proffered that Dr. Baylin was at one time under investigation by the Maryland Board of Dental Examiners. His case, and any testimony regarding the Dental Board's investigation of him, are irrelevant to the legal issue of Dr. Solomon's failure to cooperate with the medical Board's investigation. The Board also finds no merit in this Exception for the same reasons stated in the discussion of Exceptions numbers, 5, 7, and 12 *supra*.

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5 Dr. Solomon cites *Coco v. Maryland Commission on Medical Discipline*, 39 Md. App. 170 (1978), in support of her argument that the ALJ should have found the Board's subpoena to be invalid. *Coco*, however, was overruled by *Unnamed Physician v. Commission on Medical Discipline*, 285 Md. 1

Supplemental Exceptions

In Dr. Solomon's Supplemental Exceptions, she argues that the Board's December 2 subpoena is illegal because it violates the patients' right to privacy as protected under the federal Health and Insurance Portability and Accountability Act ("HIPAA"), Public Law 104-191, 42 U.S.C. §§ 201 *et seq.* In support of this argument, Dr. Solomon advances erroneous assertions regarding HIPPA.

HIPPA establishes both civil and criminal penalties for violating the statute and its implementing regulations (45 CFR §§ 160.300 – 160.312); however, a HIPPA statutory provision is only adopted when the regulations adopting it becomes effective. 66 Fed. Reg. 38, 12434 (2001). HIPAA's implementing regulations are not in effect; therefore, Dr. Solomon is not required to comply with HIPAA. The implementing regulations are scheduled to go into effect on April 14, 2001. 66 Fed. Reg. 38, 12434 (2001) (to be codified at 45 C.F.R. 164.534). When the statute and its implementing regulations go into effect, entities covered by HIPPA have two (2) years to come into compliance. 66 Fed. Reg. 38, 12434 (2001) (to be codified at 45 C.F.R. 164.534). However, even if the regulations implementing HIPPA become effective in April 2001, health care providers, such as Dr. Solomon, are not required to come into compliance until April 2003. Furthermore, even if HIPPA were currently in effect, HIPPA provides an express exception that allows health care providers, such as Dr. Solomon, to disclose confidential medical records to a "health oversight agency" in licensure or disciplinary actions." 65 Fed. Reg. 250, 82814 (2000) (to be codified at 45 CFR § 164.502 (d)).

(1979), on the issue of compliance with a board's investigatory subpoena. The Board notes that Dr.

Federal law, therefore, does not preclude Dr. Solomon from complying with the Board's subpoena to release her patients' medical records, nor does it provide her patients a federal right to privacy, which precludes the release of their medical records to the Board.

Dr. Solomon's second argument in her Supplemental Exceptions is that the ALJ's recommended sanction of revocation is contrary to Maryland law because it is too harsh for the offense of failing to cooperate with a lawful Board investigation. The Board finds no merit to this Exception. Dr. Solomon cites no law that supports her argument. The ALJ has express statutory authority under the Administrative Procedure Act to recommend to the Board any sanction that the Board can impose under the Medical Practice Act. The Board is statutorily authorized under section 14-404 of the Medical Practice Act to impose a range of sanctions (reprimand, suspension, revocation, probation, or fine) for any one of the forty (40) disciplinary grounds set forth in HO § 14-404 (a)(1)-(40), of which failure to cooperate is included at HO § 14-404(a)(33). Moreover, Dr. Solomon cites no statute or regulation governing the Board which requires that a specific sanction be linked to a particular offense under the Act.

RULING ON MOTION FOR COUNSEL FEES, COSTS AND EXPENSES

Shortly before the Exceptions Hearing on March 28, 2001, Dr. Solomon submitted a written motion to the Board which requested that the Board award Dr. Solomon costs, expenses, and counsel fees incurred in her case to date. Dr. Solomon brought this motion pursuant to Md. Code Ann., State Gov't § 10-224; however, neither the

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Solomon has again cited an overruled case. *See* discussion of Exception 7 *supra.*

procedural nor the substantive requirements for receiving a monetary award under this statutory provision have been satisfied in this case. The Board thus finds Dr. Solomon's motion to be frivolous and hereby denies her motion.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Board concludes that Dr. Solomon has failed to cooperate with a lawful investigation conducted by the Board in violation of Md. Code Ann., HO § 14-404(a)(33) of the Maryland Medical Practice Act.

SANCTION

With respect to the ALJ's proposed sanction, the Board agrees with the disposition proposed by the ALJ. Dr. Solomon's license will be revoked. The Board needs to review Dr. Solomon's medical records before it can determine whether she is practicing competently and within the standard of care. Without medical records, which document the medical care she is rendering, the Board will never know this, and will be completely unable to fulfill its mission to protect the public. As of the date of this Final Order, Dr Solomon has not turned over the nineteen (19) patient records for which the Board issued a subpoena on December 2, 1999; furthermore, she has testified that she does not intend to comply with that subpoena.

The Board has rejected imposing a lesser sanction for the following reasons. Dr. Solomon, citing legal excuses which have no merit whatsoever, has succeeded for over two years in stopping the Board from investigating the quality of her medical practice. If the Board were to now simply suspend her license until she complies with the subpoenas, or to suspend her for a time, the Board would have established a precedent

which could be used by any investigated physician. If an investigated physician is practicing medicine in a truly dangerous manner -- or is profiting from fraud, or is abusing patients either sexually or otherwise – that physician may find it profitable or otherwise advantageous to stall, as Dr. Solomon has, safe in the knowledge that it may take the Board years to defeat such diversionary tactics. For such a physician, the prospect of up to two years of continued medical practice may make stalling a viable tactic. Only the prospect that the severe sanction of revocation will be imposed (for longstanding deliberate and unjustified failure to cooperate) will deter unscrupulous physicians from adopting such stalling tactics in an attempt to completely negate the Board's ability to protect patients from the very worst abuses in the very worst cases.

Dr. Solomon, of course, has gone beyond stalling and has outright refused to cooperate. Any lesser sanction than revocation would send a message to other Maryland licensed physicians that they have veto power over a Board investigation of their medical practices and that, by refusing to comply with Board subpoenas for medical records, they can avoid any potential Board corrective or disciplinary action resulting from a Board investigation. To do this would eviscerate the Board's ability to protect the citizens of the State of Maryland.

ORDER

Based on the foregoing, it is this 4th day of April 2001, by a majority of the full authorized membership of the Board:

ORDERED that the charges filed against Barbara A. Solomon, M.D., License Number D10472, be **UPHELD** as to HO § 14-404(a)(33), and **DISMISSED** as to HO § 14-404(a)(3); and be it further

ORDERED that the medical license of Barbara A. Solomon, M.D., be **REVOKED**; and be it further;

ORDERED that this is a Final Order of the Maryland State Board of Physician Quality Assurance, and, as such, is a **PUBLIC DOCUMENT** pursuant to the Maryland State Gov't Code Ann., §§ 10-611 *et seq.*

4/4/01
Date

C. Irving Pinder, Jr., Executive Director
Maryland State Board of Physician Quality Assurance

NOTICE OF RIGHT TO APPEAL

Pursuant to Maryland Code Ann. Health Occupations (HO) § 14-408, Respondent has the right to take a direct judicial appeal. Any petition for appeal shall be filed within thirty days (30) from the receipt of this Final Order and shall be made as provided for judicial review of final decisions in the Maryland Administrative Procedure Act, Md. Code Ann. State Gov't §10-222 *et seq.* and Title 7, Chapter 200 of the Maryland Rules of Procedure.

STATE BOARD OF PHYSICIAN	*	BEFORE SUZANNE S. FOX,
QUALITY ASSURANCE	*	AN ADMINISTRATIVE LAW JUDGE
V.	*	OF THE MARYLAND OFFICE
BABARA SOLOMON, M.D.	*	OF ADMINISTRATIVE HEARINGS
License No.: D10472	*	CASE NO.: DHMH-BPQA-71-200000002

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
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STATEMENT OF THE CASE

On May 25, 2000, the Maryland State Board of Physician Quality Assurance ("Board") issued charges against Barbara Solomon, m.d. ("Respondent") for failing to cooperate with a lawful investigation conducted by the Board and unprofessional conduct in the practice of medicine in violation of the Medical Practice Act. Md. Code Ann., Health Occ. §140404(a)(33) and (3) respectively (1994 and Supp. 1999).[1]

I conducted an evidentiary hearing on November 14, 2000, at the Office of Administrative Hearings ("OAH"), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Health Occ. §14-405(a) (Supp. 1999). The Respondent was present and was represented by Mercedes Samborsky, Esquire Gilbert, Assistant Attorney General for DHMH, represented the Board.

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[1] Unless otherwis provided, all statutory citations are to the Health Occupations article.

APPENDIX A

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Board of Physician Quality Assurance, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2000); Code of Maryland Regulations ("COMAR") 10.32.02; COMAR 28.02.01.

I conducted a pre-hearing conference on October 11, 2000, at which the Respondent and counsel were present. At that pre-hearing conference, I ruled on an oral Motion in Limine disallowing the testimony of John Appel, a witness identified by the Respondent as an expert in the law of subpoena issuance in administrative cases, and 19 patients who were sought as witnesses by the Respondent to testify as to their objections to having their medical records submitted to the Board. At the pre-hearing conference, the Respondent also filed a written Motion to Dismiss. I issued a Pre-Hearing Conference Order on October 12, 2000, that confirmed my oral ruling on the Motion in Limine and advised that I would rule on any outstanding motions prior to hearing opening statements on the date of the scheduled hearing, November 14, 2000.

Subsequent to the issuance of the Pre-Hearing Conference Order, I received the Board's (1) written copy of Board's Motion in Limine and (2) Response in Opposition to Respondent's Motion to Dismiss. From the Respondent, I received a Motion for Appropriate Relief. I also received the Board's Response to Respondent's Motion for Appropriate Relief. On the date of the hearing, on the record, and prior to hearing opening statements, I ruled as follows: I denied Respondent's Motion to Dismiss and denied Respondent's Motion for Appropriate Relief.

ISSUES

The issues in this case are:

1. Whether the Respondent obeyed the investigatory subpoenas issued by the Board on March 4, 1999, July 27, 1999, October 13, 1999, November 16, 1999 and December 2, 1999; and

2. If not, whether her failure to comply with the subpoenas constitutes a violation of H.O. § 14-404(a)(33) and/or (3) of the Medical Practice Act.

SUMMARY OF THE EVIDENCE

Exhibits

The Board submitted the following exhibits that were admitted into evidence:

Board Ex. 1. September 15, 1964, Board of Medical Examiners of Maryland Endorsement Application.

Board Ex. 2. June 15, 1982, Findings of Fact, Conclusions of Law, and Order.

Board Ex. 3. June 15, 1982, Order Terminating Probation and Reinstating Medical License.

Board Ex. 4. February 14, 1997, Complaint of Patient A.

Board Ex. 5. August 26, 1998, Board Informational Letter.

Board Ex. 6. August 27, 1998, Board Referral Letter to FDA.

Board Ex. 7. February 19, 1999, Board Referral Letter to MedChi.

Board Ex. 8. March 2, 1999, MedChi letter to Peer Review Committee.

Board Ex. 9. March 4, 1999, Subpoena Duces Tecum and receipt for certified mail.

Board Ex. 10. March 9, 1999, letter from Respondent's counsel, Mercedes Samborsky, Esquire, requesting regulations and procedures.

Board Ex. 11. March 10, 1999, Respondent's Complaint for Appropriate Relief to Quash Subpoena.

Board Ex. 12. March 16, 1999, letter from Samborsky to Stephen Johnson, Esquire.

Board Ex. 13. March 23, 1999, letter from Samborsky to J.M. Compton.

Board Ex. 14. March 23, 1999, Certificate of Discovery: First Request for Production of Documents and Interrogatories.

Board Ex. 15. April 6, 1999, Board letter to Samborsky.

Board Ex. 16. April 9, 1999, Samborsky letter to Compton.

Board Ex. 17. April 22, 1999, Board's Motion to Dismiss and accompanying documents.

Board Ex. 18. May 13, 1999, Respondent's Answer to Motion to Dismiss and accompanying documents.

Board Ex. 19. May 24, 1999, Notice of Motions Hearing in Circuit Court of Baltimore County.

Board Ex. 20. June 7, 1999, Respondent's Motion for Sanctions and accompanying documents.

Board Ex. 21. June 18, 1999, Board letter requesting rescheduling of Motion to Dismiss Hearing.

Board Ex. 22. June 21, 1999, Board letter to Baltimore County Circuit Court.

Board Ex. 23. June 28, 1999, MedChi letter to Peer Review Unit.

Board Ex. 24. June 30, 1999, Respondent's Answer to Motion for Protective Order.

Board Ex. 25. July 22, 1999, MedChi letter returning case to Board.

Board Ex. 26. July 26, 1999, Motion for Sanctions/Protective Order Ruling.

Board Ex. 27. July 27, 1999, Subpoena Notice and Subpoena.

Board Ex. 28. July 29, 1999, receipt for Certificate of Service.

Board Ex. 29. August 2, 1999, Respondent's Notice of Appeal.

Board Ex. 30. August 6, 1999, Respondent's Motion for Stay in Baltimore County Circuit Court.

Board Ex. 31. August 19, 1999, Respondent's letter regarding submission of Motion to Stay.

Board Ex. 32. August 20, 1999, Board's Opposition and Answer to Motion to Stay.

Board Ex. 33. August 30, 1999, Baltimore County Circuit Court's Ruling on Motion to Stay.

Board Ex. 34. September 22, 1999, Respondent's Motion to Stay filed in Court of Special Appeals.

Board Ex. 35. October 4, 1999, Board's Opposition to Appellant's Motion to Stay.

Board Ex. 36. October 4, 1999 Order of Court of Special Appeals denying Motion to Stay.

Board Ex. 37. October 13, 1999, Board letter to Respondent.

Board Ex. 38. October 26, 1999, Fax from Samborsky with Motion for Reconsideration.

Board Ex. 39. October 26, 1999, Respondent's Motion for Reconsideration.

Board Ex. 40. November 1, 1999, Board's Opposition to Appellant's Motion for Reconsideration.

Board Ex. 41. November 1, 1999, Order of Court of Special Appeals denying Respondent's Motion for Reconsideration.

Board Ex. 42. November 16, 1999, Board's letter to Respondent.

Board Ex. 43. November 16, 1999, Receipt for Certified Mail.

Board Ex. 44. November 19, 1999, Samborsky letter to Board.

Board Ex. 45. November 19, 19999, Board letter to Samborsky.

Board Ex. 46. November 22, 1999, Respondent's formal objection to submission of patient records.

Board Ex. 47. November 22, 1999, Faxed copies of Respondent's patient appointment logs.

Board Ex. 48. November 23, 1999, Board letter to William Klump, Esquire, co-counsel for Respondent.

Board Ex. 49. December 2, 1999, letter and Subpoena to Respondent for medical charts of specified patients and receipt for certified mail.

Board Ex. 50. December 2, 1999, Memorandum to the File on selection of records for subpoena.

Board Ex. 51. December 10, 1999, Respondent's Brief to the Court of Special Appeals.

Board Ex. 52. January 10, 2000, Board's Brief to the Court of Special Appeals.

Board Ex. 53. January 13, 2000, Board's Motion in Opposition to Respondent's Motion for Reconsideration.

Board Ex. 54. January 27, 2000, Board's Supplemental Memorandum in Opposition to the Respondent's Motion for Reconsideration.

Board Ex. 55. February 7, 2000, Order of U.S. District Court for District of Maryland closing Respondent's case.

Board Ex. 56. Respondent's patients' Motion for Reconsideration and Memorandum.

Board Ex. 57. June 6, 2000, Decision of the Court of Special Appeals, *Solomon v. Board of Physician Quality Assurance*, 132 Md. App. 447 (2000).

Board Ex. 58. June 15, 2000, Respondent's *Writ of Certiorari.*

Board Ex. 59. June 30, 2000, Board's Answer to Petition for *Writ of Certiorari.*

Board Ex. 60. August 21, 2000, Order of the Court of Appeals Denying Petition for *Writ of Certiorari.*

The Respondent provided to me a loose-leaf notebook containing 62 exhibits. However, at the hearing the exhibits were not submitted for inclusion in the hearing file. They have not been reviewed nor considered in the decision-making process, but they have been included with the record returned to the Board.

Testimony

Elizabeth Greene, Compliance Analyst for the Board testified on behalf of the Board of Physician Quality Assurance.

The Respondent testified on her own behalf. In addition, counsel for the Respondent proffered testimony from John Appel, Michael Bayline, D. D. S., and the 19 patients whose medical records were the subject of the December 2, 1999 subpoena.

FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by clear and convincing evidence:

1. At all times relevant to the issues involved in this matter, the Respondent was and is a physician licensed to practice medicine in the State of Maryland. The Respondent was originally issued a license to practice medicine in Maryland in 1964, under Maryland License Number D10472, and most recently, her license was renewed in the summer of 1999.

2. As the result of a hearing before the Commission on Medical Discipline of Maryland (the "Commission")[2], on June 15, 1982, the Respondent was found to be professionally incompetent, in violation of Article 43, § 130(h)(18) of the Annotated Code of Maryland.[3]

    a. The Respondent utilized certain tests deemed to be unreliable, to the exclusion of standard diagnostic testing;

    b. The Respondent did not routinely inform her patients that the tests she utilized were clinically unproven;

    c. The Respondent failed to order standard diagnostic testing;

    d. The Respondent emphasized unorthodox treatment modalities to the exclusion of pursing conventional and potentially efficacious medical treatment;

    e. The Respondent ordered certain tests/therapies without clear indication; and

    f. The Respondent maintained deficient medical record-keeping practices.

3. The June 15, 1982 Order issued by the Commission suspended the Respondent's medical license for a period of two (2) years. The Commission immediately stayed the imposition of the suspension of the Respondent's medical license and placed her on probation for a period

[2] The 1988 General Assembly, by Senate Bill No. 508 and House Bill No. 855, merged the functions of the former Commission on Medical Discipline and the former Board of Medical Examiners into the present Board of Physician Quality Assurance.

[3] This provision has since been recodified as Md. Code Ann., Health Occ. § 14-404(a)(4).

of two (2) years, subject to several probationary conditions:

a. Enrolling in and successfully completing a medical record-keeping course;

b. Attaining competency in medical record-keeping;

c. Being subject to periodic peer review;

d. Ordering certain tests only when medically indicated and appropriately documented;

e. Attaining informed consent for the use of such testing.

4. On September 18, 1984, the Commission terminated the Respondent's probation and reinstated her license to practice medicine without further conditions or restrictions.

5. On or about February 14, 1997, Patient A filed a complaint with the Board regarding her treatment by the Respondent, alleging, in pertinent part:

a. The Respondent treated Patient A on January 14, 1997 for multiple food sensitivities.

b. The Respondent tested her with an experimental device.

c. The Respondent read the informed consent aloud, and, when Patient A asked to read it for herself, the Respondent replied, "I don't have the time."

d. The Respondent did not mention any potential risks of the test until Patient A asked about risks of electric current running through her body. The Respondent told her there were no risks.

1) Patient A experienced pain when the Respondent pressed the device hard against her toes.

2) When Patient A protested, the Respondent told her that it was necessary to get an accurate reading.

3) The Respondent did not offer to stop the test.

4) For a period of about a week after the procedure, Patient A experienced a worsening of the condition for which she sought treatment by the Respondent.

e. Patient A asked for a copy of her test results and her consent form, and the Respondent told her that she did not know how to operate the new copying machine.

1) The Respondent told Patient A that her secretary would make a copy of the test results for her.

2) By the time Patient A filed her complaint with the Board (a period of about 1 month), Patient A had not received a copy of the test results.

f. The consent form did not explain how the Computron (the device used by the Respondent on Patient A) was tested.

g. The Respondent's written and oral presentations about the procedure utilizing the Computron device were vague and evasive.

6. On August 26, 1998, the Board closed the investigation of Patient A's complaint with the issuance of an Informational Letter with Notice of "re-review," Case Number 97-0583, advising the Respondent:

a. The Board conducted a full investigation of the issues and allegations raised in Patient A's complaint;

b. On June 24, 1998, a subcommittee of the Board closed the case with the Informational Letter;

c. When a patient comes to the Respondent's office for diagnosis and treatment by her, and she employs experimental techniques, either in terms of the manner in which she diagnoses an ailment or in terms of the manner in which she chooses to treat an ailment, each patient should be given a complete disclosure including risks;

d. Six months from the date of the letter, the Board would be conducting a re-review of her practice;

e. Board staff would obtain patient records, initiated after the date of this letter, in which experimental techniques were implemented;

f. The requested records would be reviewed regarding issues of standard of care including a review of documentation of signed diagnoses and treatment disclosure forms and informed consent forms for each patient;

g. The Informational Letter is not considered an action pending against her;

h. The Board does not consider the case to be an action pending against her;

i. The Informational Letter is not considered disciplinary action.

j. The Informational Letter is considered a confidential document and cannot be obtained under the Public Information Act unless she signs a release to permit the Board to disclose the information.

k. The Board can share the resolution of this case with the Peer Review Management Committee as the Board's statutory agent for peer review.

l. The Peer Review Management Committee is governed by the same confidentiality provisions as the Board.

m. In filling out questions included on her license renewal regarding whether she has had past complaints or investigations, the correct answer is "yes" with a written response.

7. On August 27, 1998, the Board sent a letter to the Food and Drug Administration, Center for Devices and Radiological Health, advising them that the Respondent was using a Computonix [4] system (Electro Acupuncture According to Voll) to diagnose patient's conditions.

8. On February 19, 1999, the Board sent a letter to the Director of the Department of Peer Review for the Medical and Chirurgical Faculty of Maryland (" Med Chi"), the State Medical Society, advising them, in pertinent part:

a. The Respondent was issued an Informational Letter on August 26, 1998, regarding the concerns expressed by Patient A;

b. The Respondent used a Computonix system for the diagnosing of a patient's ailments, and on the basis of this diagnosis, she developed the treatment plan for the patient;

c. The Computonix system is an experimental device requiring specific documentation which is reported to the Food and Drug Administration;

d. The Board notified the Chief of Neurological Devices for the Food and Drug Administration of the Respondent's use of the Computonix system;

e. The Board is required by law to forward allegations such as the one received from Patient A to Med Chi for further investigation and peer review within the involved medical specialty;

f. The Informational Letter sent to the Respondent advised her that, six months from the date of the letter, the Board would be conducting a re-review of her practice;

g. The Board requested that Med Chi conduct a practice review of the Respondent's practice;

[4] The Computonix system is ostensibly the same as the Computron referenced in Findings of Fact number 5, above.

h. When records are subpoenaed, staff should request any and all medical records of the patients including but not limited to consent forms and patient disclosure forms.

i. Unless the Board would grant an extension, Med Chi should report to the Board on its investigation within 90 days after the February 19, 1999 referral.

j. The review was to be conducted in conjunction with the guidelines set forth in the *Peer Review Agreement*.

9. On March 4, 1999, the Board issued a subpoena to the Respondent to deliver immediately upon service of process a copy of her complete appointment schedule for October, November and December 1998 along with a list of all hospitalized patients during this period, reason for and date of hospitalization, and the name of the hospital, which materials were in the custody, possession or control of the Respondent. The Respondent was directed to provide the requested information within ten (10) days to an agent of the Peer Review Management Committee of Med Chi.

10. On March 5, 1999, J. Leach signed the mail receipt accepting delivery of the March 4, 1999 subpoena on behalf of the Respondent.

11. By letter dated March 9, 1999, counsel for the Respondent notified the Board that she represented the Respondent in all matters pending before the Board and requested certain information:

a. To supply "all regulations and procedures which relate to the investigation of [the Respondent] now pending before the Board";

b. All documents on which the Board relies to justify its investigation of her medical practice and the Board's issuance of the subpoena duces tecum requesting her medical records

c. Each rule or other writing promulgated by the Board or any other Agency explaining the physician's rights when investigations are instituted or any other proceedings brought against the physician under the Medical Practice Act.

12. On or about March 10, 1999, the Respondent filed a Complaint for Appropriate Relief in the Circuit Court for Baltimore County, requesting that the March 4, 1999 subpoena duces tecum issued by the Board be quashed.

13. By letter from the Board to the Respondent dated April 6, 1999, the Board modified the subpoena by deleting that portion of the March 4, 1999 subpoena requesting records of the hospitalization of patients and demanded production of the complete appointment schedule for October, November and December 1998.

14. By letter dated April 9, 1999, the Respondent notified the Board that she would not produce any documents until she received formal charges against her and copies of all documents

upon which the Board and the Peer Review Committee relied to support the charges.

15. By letter dated June 28, 1999, the Med Chi Peer Review Management Committee asked for an extension until July 2, 1999, for the purpose of completing the investigation of the complaint against the Respondent.

16. By letter dated July 22, 1999, because of the pending litigation between the Respondent and the Board in the Baltimore County Circuit Court, the Med Chi Peer Review Management Committee returned the Respondent's file to the Board without having done the re-review of her practice.

17. On July 26, 1999, the Honorable Dana M. Levitz, Judge of the Circuit Court for Baltimore County, granted the Board's Motion to Dismiss and thereby denied Respondent's Complaint for Appropriate Relief to quash the administrative investigatory subpoena issued on March 4, 1999.

18. On July 27, 1999, the Board issued a subpoena to the Respondent demanding return, within ten (10) business days, of her office appointment log for patients seen by her in January, February and March, 1999, which materials were in her custody, possession or control. J. Leach accepted delivery of the subpoena on behalf of the Respondent and signed the mail receipt for it on July 29, 1999.

19. On or about August 2, 1999, the Respondent noted an appeal of the Baltimore County Circuit Court's Order granting the Board's Motion to Dismiss.

20. On or about August 6, 1999, the Respondent filed, in the Baltimore County Circuit Court, a Motion to Stay the court's Order granting the Board's Motion to Dismiss.

21. By letter dated August 19, 1999, the Respondent notified the Board that she had filed a Motion to Stay in the Circuit Court for Baltimore County and that, on the advice of her counsel, would not respond to the subpoena duces tecum issued by the Board on July 27, 1999.

22. On August 30, 1999, the Honorable Judge Turnbull of the Circuit Court for Baltimore County denied the Respondent's Motion to Stay.

23. On or About September 22, 1999, the Respondent filed a Motion to Stay with the Court of Special Appeals.

24. On October 4, 1999, the Court of Special Appeals denied the Respondent's Motion to Stay.

25. On October 13, 1999, the Board reissued to the Respondent the July 27, 1999 subpoena and demanded return of the requested patient logs within ten (10) business days.

26. On October 15, 1999, J. Leach accepted delivery of the Board's October 13, 1999 letter on behalf of the Respondent and signed the mail receipt for it.

27. On October 26, 1999, the Respondent filed a Motion for Reconsideration in the Court of Special Appeals.

28. On November 1, 1999, the Court of Special Appeals denied the Respondent's Motion for Reconsideration.

29. On November 16, 1999, the Board reissued to the Respondent the July 27, 1999 subpoena and demanded return of the requested patient logs within forty-eight (48) hours.

30. On November 16, 1999, the Respondent accepted delivery of the Board's November 16, 1999 re-issuance of the July 27, 1999 subpoena, and she signed the mail receipt for it.

31. By letter dated November 19, 1999, counsel for the Respondent requested an extension of time to comply with the July 27, 1999 subpoena on the basis that she had non-refundable airline tickets to Los Angeles, California and would be away for one month.

32. On November 19, 1999, the Board advised the Respondent by letter that they had denied her counsel's request for an extension of time to comply with the July 27, 1999 subpoena.

33. At 4:40 p.m. on November 22, 1999, the Respondent delivered to the Board by Fax the subpoenaed patient logs for January, February and March 1999.

34. On December 2, 1999, the Board issued a subpoena duces tecum for the entire medical chart, including, but not limited to, the billing records for 19 specified patients and demanded their return within twenty-one (21) business days.

35. The patient records selected for inclusion in the December 2, 1999 subpoena were determined by selecting the third patient's name from every third page of the Respondent's appointment logs of January, February and March 1999.

36. On December 6, 1999, the Respondent accepted service of the Board's December 2, 1999 subpoena duces tecum.

37. On or about December 10, 1999, the Respondent filed an appeal in the Court of Special Appeals seeking review of the Circuit Court for Baltimore County's dismissal of her Complaint that sought to quash the Board's subpoena duces tecum for her appointment logs.

38. On June 6, 2000, the Court of Special Appeals of Maryland affirmed the decision of the Circuit Court for Baltimore County to grant the Board's Motion to Dismiss.

39. On June 15, 2000, the Respondent filed a *Petition for Writ of Certiorari* with the Court of Appeals of Maryland.

40. On August 21, 2000, the Court of Appeals for Maryland denied the Respondent's *Petition for Writ of Certiorari*.

DISCUSSION

Section 14-404(a) of the Act authorizes the Board to reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee commits certain conduct. In this case, the Board charges the Respondent with the following violations of the Medical Practice Act:

- Is guilty of immoral or unprofessional conduct in the practice of medicine (Section 14-404(a)(3); and
- Fails to cooperate with a lawful investigation conducted by the Board (Section 14-404(a)(33).

The Board alleges that the Respondent, since March 4, 1999[5], has persistently failed to cooperate with its lawful investigation of her medical practice and engaged in unprofessional conduct when she failed to respond, in a timely manner to, or alternatively, failed to respond altogether to subpoenas issued by the Board as part of its investigation of her practice.

The Respondent counters that the Board may not discipline her with regard to the March 4, 1999, July 27, 1999, October 13, 1999, or November 16, 1999 subpoenas as she did comply with them after she had exhausted her legal right to contest them in the courts. With regard to the December 2, 1999 subpoena, she argues that the subpoena is illegal and, therefore, unenforceable.

Statutory Framework for Regulation of Physicians

The Board is the State regulatory agency charged with licensing and disciplining Maryland physicians pursuant to the Maryland Medical Practice Act (the "Act"), Title 14 of the

[5] The March 4, 1999 subpoena demanded return to the Board of the Respondent's patient logs for October, November and December 1998. The July 27, 1999 subpoena demanded return of the patient logs for January, February and March 1999. This subpoena was reissued on October 13, 1999 and again on November 16, 1999. The patient logs were submitted by Fax transmission on November 22, 1999 at 4:40 p.m. Another subpoena was issued on December 2, 1999 demanding the return to the Board of patient records for 19 patient charts and billing records, chosen at random from the patient logs submitted on November 22, 1999. By the date of the hearing in this matter, the December 2, 1999 subpoena has not been complied with by the Respondent.

Md. Health Occ. Code Ann. (HO") (1994 & Supp. 1999). The Board has the authority to investigate a physician who allegedly "[f]ails to meet appropriate standards as determined by appropriate peer review for the delivery of quality medical and surgical care." *Id.*, HO § 14-404(2)(22)

In order to conduct its investigations, the Board is empowered to issue subpoenas. HO §§ 14-206(a) and 14-401(g). After its preliminary investigation, the Board must refer any investigation regarding the standard of medical care for a further investigation by the Med Chi, HO § 14-401(c)(2)(i), which in turn reports back to the Board with its recommendations. HO § 14-401(e)(1)(i)

Upon receipt of the report and consideration of its recommendations, the Board is authorized to "take the action, including further investigation, that it finds appropriate under this title." *Id.* HO § 14-4-1(e)(3). After receiving the completed investigatory information and reports, the Board may vote to charge the physician with a violation of the Act. COMAR 10.32.02.03C(1)(e). Before taking any disciplinary action against a physician, however, the Board must give the physician notice and an opportunity for a hearing before an administrative law judge. *Id.* HO § 14-405(a). At the hearing, the charges must be proven by clear and convincing evidence. *Id.* HO § 14-405(b). After conducting the hearing, the administrative law judge "shall refer proposed factual findings to the Board for the Board's disposition." *Id.* § 14-405(e). If a physician disagrees with the proposed decision, he or she has a right to an exceptions hearing before the Board. COMAR 10.32.02.03F. If a majority of the Board's full authorized membership finds grounds for disciplinary action, the Board is authorized to impose any of the sanctions provided in HO § 14-404, including license revocation.

Background

On or about February 13, 1997, the Board received a complaint from Patient A, a patient of the Respondent, concerning medical care provided to her by the Respondent. The complaint stated, in pertinent part:

> I saw [Respondent] on 1/14/97 for treatment of multiple food sensitivities. The incidents below destroyed my confidence in [Respondent] and her staff. I did not return for the remaining skin tests. I also filed a Fair Credit Billing dispute of [Respondent's] $275 charge for the office visit and skin testing.
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> [Respondent] tested me with an experimental device. She read the informed consent aloud. When I asked to read it myself, [Respondent] amazed me by replying, "I don't have the time."... [Respondent] did not obtain my signature on the consent form.
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> * * *
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> [Respondent] did not mention any potential risks of the test, until I asked about risks of electric current running through my body. [Respondent] replied there were no risks. Yet I had two adverse effects (1) I experienced pain when [Respondent] pressed the device hard against my toes. When I protested, she replied that it was necessary to get an accurate reading. She did not offer to stop. (2) A condition for which I sought treatment became worse for a week after the procedure.
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> I asked for a copy of my test results. [Respondent] claimed she did not know how to operate the new copying machine. She said her secretary would make a copy for me. To date, a month later, I have not received it. I also asked for a copy of the consent form. [Respondent] promised, but never gave me one. At my request, Joann, who administers skin tests, found one for me.
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> * * *
>
> The consent form does not explain who the principal investigator is/was, how the COMPUTRON was tested, or what has happened in the six years since COMPUTORONIX "obtained a non-significant risk determination" in 1991. In conclusion, [Respondent's] written and oral presentations about this procedure were all vague and evasive.

Board Ex. 4.

The Board conducted an investigation of the complaint and determined that the complaint itself did not merit disciplinary action, but that it raised concerns about the medical care being provided by the Respondent. Patient A's complaint, coupled with the fact that the Respondent had been disciplined by the Commission in 1982 (*See* Board Ex. 2) for concerns similar to those raised by Patient A in her February 13, 1997 complaint, caused the Board to pursue an investigation of the Respondent's medical practice.

On August 26, 1998, the Board sent a letter to the Respondent advising her that: (1) no disciplinary action would result from the patient's complaint and that the case would be closed, and (2) that the Board would re-review her practice in six months, focusing on her medical care and particularly on whether she was providing informed consent to her patients. *See* Board Ex. 5. The Board's letter to the Respondent explained that its future review of her practice would concern only those patients whom the Respondent treated in the six months after the date of the Informational Letter. In accordance with the August 26, 1998 letter, on February 19, 1999 the Board sent a letter to Med Chi requesting Med Chi to conduct a practice review of the Respondent's practice. *See* Board Ex. 7. In order to obtain records for Med Chi to review, on March 4, 1999, the Board issued a subpoena duces tecum to the Respondent for copies of her recent appointment schedule for the months of October, November and December 1998.[6]

The Respondent then began a legal contest of the right of the Board to initiate an investigation of her medical practice. Throughout the legal proceedings in the Circuit Court for Baltimore County, the Maryland Court of Special Appeals, the Maryland Court of Appeals, and the United States District Court for Maryland, the Respondent consistently refused to comply with the subpoenas issued by the Board notwithstanding the fact that, at each stage of the proceedings, the Board's subpoenas were upheld and her motions to stay enforcement of the subpoenas were dismissed. *See* Board Exhibits 11, 16, 20, 26, 29, 30, 33, 34, 36, 39, 41, 44, 46, 51, 55, 56, 57 58 and 60. On July 27, 1999, the Circuit Court for Baltimore County dismissed the Respondent's Motion for Appropriate Relief, and the Board reissued the March 4, 1999 subpoena duces tecum with a modification that requested the office patient logs for January,

[6] The March 4, 1999 subpoena duces tecum demanded that the Respondent submit her "[c]omplete appointment schedule for October, November and December 1998 along with a list of all hospitalized patients during this period, reason for, and date of hospitalization, and the name of the hospital, which materials are in your custody, possession or control." By letter dated April 6, 1999, the Board modified the subpoena duces tecum to require the submission

February and March 1999. *See* Board Ex. 27. During the appeals process, subpoenas for the January, February and March 1999 office patient logs were again reissued by the Board on October 13, 1999. On November 1, 1999, the Maryland Court of Special Appeals denied the Respondent's Motion for Reconsideration of its October 4, 1999 Denial of the Respondent's Motion for Stay, and on November 16, 1999, the Board again reissued its subpoena duces tecum for the office patient logs for January, February and March 1999 with a return date of 48 hours from the date of its request. *See* Board Ex. 42. On November 19, 1999, the Respondent asked for an extension to comply with the subpoena on the basis that counsel would be out of the State for a month. The Board denied the Respondent's request. *See* Board Exs. 44 and 45. On November 22, 1999, at 4:40 p.m., by fax transmission, the Respondent provided the subpoenaed office patient logs to the Board.

After reviewing the office patient logs for January, February, and March 1999, the Board selected 19 individual patient charts and records[7] and, on December 2, 1999, it issued to the Respondent a subpoena duces tecum for those records. *See* Board Ex. 49. As of the hearing conducted in this matter on November 14, 2000, those patient records have not been submitted to the Board.

The Right of the Board to Investigate the Medical Practice of its Licensed Physicians

The investigation of the Respondent's medical practice was instigated by a complaint from Patient A, received on or about February 14, 1998, raising standard of care concerns similar to those involved in a disciplinary action taken against the Respondent by the Commission in 1982.

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of only the complete appointment schedule for October, November and December 1998. "That part of the Subpoena regarding records of the hospitalization of patients may be disregarded at this time."

[7] The selection of the 19 patient records by the Board was accomplished by selecting the third patient's name on every third page from the appointment logs for January, February and March 1999. *See* Board Ex. 50.

The Maryland Court of Special Appeals has addressed this issue in its June 6, 2000 decision in *Barbara Solomon, M.D. v. Board of Physician Quality Assurance*, 132 Md. App. 447 (2000), which chronicles the Respondent's attempts to quash the subpoenas through the legal process. The Court summarized the Board's investigative process as follows:

> "When an allegation that may constitute grounds for disciplinary action against a physician comes to the Board's attention, the Board is required to conduct a preliminary investigation." *Board of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 190-91, 725 A.2d 1027, 1028 (1999) (citing HO § 14-401(a)). Upon completing that preliminary investigation, the Board may, among other things, issue an advisory letter that "informs, educates, or admonishes a health care provider in regard to the practice of medicine under the Medical Practice Act." *See* COMAR 10.32.02.02B(4) (defining advisory letter); 10.32.02.03C(1)(b). It may also refer the allegation to Med Chi for further investigation. HO § 14-401(c)(1)(i). Med Chi then must "report to the Board on its investigation within 90 days after the referral." HO § 14-401(e)(1)(i). Med Chi's report "shall contain the information and recommendations necessary for appropriate action by the Board." HO § 14-401 (e)(2). The Board is then authorized to "take the action, **including further investigation**, that it finds appropriate under this title." HO §14-401 (e)(3) (emphasis added). If warranted, the Board may charge the physician with a violation of the Act. *See* COMAR 10.32.02.03C(1)(e). Before taking any disciplinary action, however, the Board must give the physician an opportunity for a hearing before an administrative law judge. HO § 14-405(a) – (b). The physician is entitled to be represented by counsel, and all factual findings must be supported by clear and convincing evidence. HO § 14-405(b) – (c). At the conclusion of the hearing, the administrative law judge "shall refer proposed factual findings to the Board for the Board's disposition." HO § 14-405(e). If a physician disagrees with the proposed decision, he or she has a right to an exceptions hearing before the Board. *See* COMAR 10.32.02.03F. If a majority of the Board's "full authorized membership" finds grounds for disciplinary action, the Board is authorized to impose any of the sanctions set forth in HO § 14-404(a).

Solomon at p. 452.

In *Solomon*, the Court of Special Appeals dealt specifically with the issue of "whether the Board has the right to investigate the quality of medical care appellant is providing her patients as a result of concerns that arose in the course of investigating a patient complaint that the Board had formally closed." *Id.* at p. 453. During her pursuit of a judicial decision to quash the Board's subpoenas, the Appellant argued that once the Board had closed the complaint of Patient A, it lacked the authority to "re-review"[8] her practice or to investigate any concerns arising out of the initial case, or to issue subpoenas pursuant to that investigation. The Court of Special Appeals discussed this issue thoroughly:

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[8] *See* Bd. Ex. 5. The language in the August 26, 1998 Informational Letter issued to the Respondent, in the fourth paragraph it is stated that: "Six months from the date of this letter the Board will be conducting a re-review of your practice."

There is no dispute that the Board has a right to investigate an alleged violation of the Act upon the receipt of a written complaint, as it did in the instant case. HO § 14-205(a)(2). Nor is there any dispute that the Board has the authority to issue subpoenas in furtherance of an investigation. HO § 14-401(g).

Although the Board closed the individual complaint that had been filed against appellant, that complaint apparently gave rise to the Board's concern that appellant might have also failed to obtain other patients' informed consent to her methods of diagnosis and treatment. It therefore issued an advisory letter to appellant, informing her, among other things, that her practice would be "re-reviewed" in six months on the issue of informed consent and that her patient records would then be examined to determine her compliance with the standard of care. Unquestionably, the issuance of an advisory letter lies within the discretion of the Board. *See* COMAR 10.32.02.03C(1)(b).

Indeed, the Board's decision to close the complaint, rather than leave it open until Med Chi's investigation was completed, appears to have been made principally, and perhaps solely, for the benefit of appellant. It is the Board's policy to close such complaints, even if follow-up action is necessary, so that a physician does not have to continue practicing medicine under a cloud when no disciplinary action is anticipated. The Board, in its brief, described the reasoning underlying this policy as follows:

> If an original case were kept open while the Board investigated newly-discovered possible practice deficiencies, cases would be pending against Maryland licensed physicians for a longer period of time. Meanwhile, those physicians would have to disclose to employers and other licensing Boards that a case was pending against them. Under the Board's interpretation and current practice, however, physicians can truthfully answer that no disciplinary complaint is pending against them, even though the Board may have identified possible deficiencies in their medical practices.

Appellant's position that the closing of the initial complaint against her precludes the Board from investigating any concerns that may have arisen as a result of the investigation of that complaint finds no support in law or logic. Nowhere does the Act suggest, either expressly or impliedly, that the closing of a specific complaint terminates the Board's authority to perform a follow-up investigation or to take remedial action.

Moreover, as the Court of Appeals held in *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 69, 729 A.2d 376, 381 (1999), "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Furthermore, the expertise of the agency in its own field should be respected." (Citations omitted.) Therefore, we must accord the Board's interpretation of the Maryland Medical Practice Act considerable weight and deference.

Finally, appellant's interpretation of the Board's authority, if accepted, would strip the Board of its ability to monitor deficiencies in medical practice that have not yet arisen to the level of a violation of the standard of care and leave the Board with no means for determining whether corrective action requested by the Board has been taken by a physician. Such a narrow reading would thwart the Legislature's intent to provide the Board with sufficient authority to assure a high standard of medical care from physicians licensed in this State.

Id. at pages 454 and 455.

Thus, as established in the decision issued pursuant to Respondent's own appeal to the Maryland Court of Special Appeals on the issue of the right of the Board to pursue

an investigation of her medical practice subsequent to the closure of Patient A's complaint letter, the Board was entitled, and, indeed, required to continue its investigation of Respondent's practice of medicine.

The Respondent's Ultimate Compliance with the July 27, 1999 Subpoena

The Board maintains that the Respondent's ultimate submission of the records requested in the July 27, 1999 subpoena does not obviate the fact that she failed to comply by their demanded due dates with any of the earlier issued subpoenas. Thus, it argues, she failed to cooperate with a lawful investigation by the Board, and, by her failure to do so, she has been unprofessional in the practice of medicine.

The Respondent argues that she cannot be penalized by the Board for exercising her due process rights to protest the subpoena. She maintains that the Board is attempting to deny her due process by penalizing her for exercising her legal rights before delivering the subpoenaed records, and she maintains that the Board lacks authority to deny a physician constitutional due process.

At first blush, it might appear that the Respondent should not be found to have violated HO § 14-404 (a)(33) because she did provide the subpoenaed records to the Board on November 22, 1999. However, a closer look at the progression of her legal battle to quash the subpoenas tells a different story.

Accepting the Respondent's right to challenge the March 4, 1999 subpoena, the facts establish the following sequence of events: on July 26, 1999, the Circuit Court for Baltimore County dismissed Respondent's Motion for Sanctions and Protective Order; on July 27, 1999, the Board reissued the subpoena modifying it to request the office patient logs for January, February and March 1999, and the Respondent did not comply with the subpoena. On August 6,

1999, the Respondent filed a Motion to Stay in the Circuit Court; and on August 30, 1999 the Circuit Court denied the Motion to Stay. Still, the Respondent did not comply with the subpoena. On September 22, 1999, the Respondent filed a Motion to Stay in the Maryland Court of Special Appeals, on October 4, 1999 the Court of Special Appeals denied the Motion to Stay and the Board reissued the July 27, 1999 subpoena, and still the Respondent did not comply with the subpoena. On October 26, 1999, the Respondent filed a Motion for Reconsideration in the Maryland Court of Special Appeals, on November 1, 1999, the Maryland Court of Special Appeals denied the Motion for Reconsideration, and still the Respondent did not comply with the subpoena. Again on November 16, 1999, the Board reissued the July 27, 1999 subpoena, this time demanding compliance within 48 hours. Even in face of consistent denials of stays by the Circuit Court for Baltimore County and the Maryland Court of Special Appeals, the Respondent did not comply within the time specified on the subpoena. In further defiance of the judicially endorsed subpoenas, on November 19, 1999, the Respondent wrote to the Board requesting:

> Please extend the time within which to respond to the subpoena issued to my client [Respondent], to after I return from California on December 15, 1999. I have non-refundable airline tickets to Los Angeles, CA for a month visit with my grandchildren. These non-refundable airline reservations were made on October 5, 1999.

See Board Ex. 44.

When the Board, by letter dated November 19, 1999, denied the Respondent's request to extend the time for her to respond to the subpoena and reiterated that the documents were due by the close of the business day on Monday, November 22, 1999, counsel for Respondent faxed a letter to the Board stating, in pertinent part:

> [Respondent] objects to producing these confidential medical records. However, they will be produced. I am arranging with William Klump, Esq., co-counsel in the pending appeal, to accompany [Respondent] when she delivers these records to you...
>
> The subpoena for [Respondent's] patient confidential medical records is illegal and issued against statutory authority which limits the Board's right to issue subpoenas without authority from the patient to situations where a complaint or disciplinary action is pending against the physician.

> [Respondent's] objections to disclosure of her patient confidential medical records will remain in effect throughout these proceedings. The admission of any information whatsoever gleaned from the subpoenaed confidential medical records or which is discovered as a result of information in the records, will be subject to admissibility objections on the grounds that the information was obtained illegally, by duress, and as a result of an illegal search of [Respondent's] patient confidential medical records. All such information is tainted with the illegality of the original subpoena and inadmissible against [Respondent] in any proceedings or investigation before the Board or any other agency, group or tribunal.

See Board Ex. 45.

Even if the Respondent could argue that she had a right to pursue her legal remedies before complying with the subpoena, she certainly became obliged to comply when her Motion for Appropriate Relief was denied on July 26, 1999, when her Motion to Stay in the Circuit Court for Baltimore County was denied on August 30, 1999, when her Motion to Stay in the Maryland Court of Appeals was denied on October 4, 1999, and, finally, when her Motion for Reconsideration was denied on November 1, 1999. Although she finally provided the Board with the information it sought, on the same day, her counsel's letter to the Board still decrying the illegality of the subpoena provides additional evidence of the Respondent's unwillingness to cooperate with the Board's investigation of her medical practice.

In accordance with the Medical Practice Act, the Respondent is required to respond to investigatory subpoenas issued by the Board. All licensed physicians are subject to the regulatory authority of the Board. In *Commission of Medical Discipline v. Stillman* 291 Md. 390, 405 (1981), the Court of Appeals held that a physician's right to his or her licensure was subject to the paramount police power of the state. Citing *Aitchison v. State*, 204 Md. 538, 544 (1954), the Court stated that:

> [N]o person has an absolute vested right to practice medicine, but only a conditional right which is subordinate to the police power of the State to protect and preserve the public health. *Reetz v. People of the State of Michigan*, 188 U.S. 505, 23 S. Ct. 390, 47 L. Ed. 563. The State, in the performance of its duty to protect and preserve the public health, has the power, within constitutional limitations, to regulate the practice of medicine by those engaged therein. This regulatory power is justified by the fact that the practice of medicine requires special knowledge, training, skill and care, that health and life are committed to the physician's care, and that patients ordinarily lack the knowledge and ability to judge his qualifications.

Thus, as a licensed physician, the Respondent is subject to the Board's regulatory authority, and she is not permitted to delay or to refuse to respond to Board investigatory subpoenas pending her appellate challenge of such subpoenas. As stated in the Board's Response to the Motion to Dismiss:

> [I]t is the law of this case that the Board was authorized to conduct an investigation of [Respondent's] practice. *Solomon*, 132 Md. App. at 452-55. The *Solomon* opinion at pp. 452-53 sets forth in detail the relevant statutory and regulatory authority and caselaw which permits the Board to conduct an investigation of [Respondent's] practice.

See Board Ex. 17.

The language used by the Maryland Court of Special Appeals in *Solomon* captures the essence of the Respondent's reliance on pursuit of legal process as an excuse for non-compliance with the subpoena:

> Finally, appellant's interpretation of the Board's authority, if accepted, would strip the Board of its ability to monitor deficiencies in medical practice that have not yet arisen to the level of a violation of the standard of care and leave the Board with no means for determining whether corrective action requested by the Board has been taken by a physician. Such a narrow reading would thwart the Legislature's intent to provide the Board with sufficient authority to assure a high standard of medical care from physicians licensed in this State.

Id. at p. 455.

The Respondent's Continued Failure to Respond to the December 4, 1999 Subpoena

By her own admission, the Respondent has not, and maintains that she will not, comply with the December 2, 1999 subpoena for 19 patient records. She argues that, because the subpoena was not pursuant to an investigation of a complaint, the Board was required to certify that each patient whose records were subpoenaed was notified of the subpoena. She maintains that each patient has a right to the confidentiality of his or her patient records, and, therefore, each should have notice of the subpoena so that he or she may take legal action to object to the release of the medical record to the Board or the peer reviewers for the Board.

To support her position, the Respondent relies on Maryland Code, Health General Art. § 4-306(b)(6). She argues that this section of the statute provides that unless the subpoena is issued pursuant to a pending investigation, the agency subpoena must contain a certification that a copy of the subpoena has been served on the person whose records are sought.

The Respondent argues that, at the time the subpoena for the 19 patient records was issued, neither she nor her attorney had received notice from the Board that there was any pending investigation of her practice. She maintains that the Board's statement in its August 26, 1998 letter to her that "Since the Board has closed this case with an Informational Letter, the Board does not consider this action pending against you. Further, this letter is not considered disciplinary action." *See* Board Ex. 5.

In addition to this argument, the Respondent maintains that the December 2, 1999 subpoena was overly broad and, therefore, illegal and unenforceable and that the Informational Letter of August 26, 1998 addressed the issue of informed consent only. Thus, the subpoena for complete patient records for the 19 patients is overly broad. She cites several cases to support her contention: *Unnamed Atty. v. Attorney Grievance Com'n*, 313 Md. 357, 365, 545 A.2d 685 (1988), *Equitable Trust Co. v. State Commission on Human Relations*, 42 Md.App. 53, 68, 399 A.2d 908 (1979), and *Banach v. St. Comm'n on Human Relations*, 277 Md. 502, 506, 356 A.2d 242 (1976). In *Banach*, the Court of Appeals held that an administrative subpoena must be relevant to the inquiry and not too overbroad. *Id.* at page 506. Finally, she cited *Solomon* wherein the Court of Special Appeals stated:

> We caution the Board, however, that if its investigation proceeds beyond the scope of the issues raised in the initial complaint, without any reasonable justification, we may take a different view of this matter.

Solomon at pages 449-450.

The Respondent's reliance on Health General § 4-306(b)(6) is misplaced. Health General § 4-306(b)(2) specifically permits the Board to obtain patient medical records without the authorization of the person in interest, and also specifically requires that the health care provider disclose such records to the Board without the authorization of the person in interest. This section specifically exempts professional licensing boards from including any such certifications. Thus, Respondent's argument fails as the law does not require that the Board provide certification when it subpoenas a physician's medical records as part of an investigation of the physician's medical practice.

In addition, the Respondent's argument that she had no notice of any investigations pending against her fails on the facts as established in this case. The August 26, 1998 letter from the Board to the Respondent put her on specific notice that her practice would be subject to "re-review" in six (6) months, and that the review would involve the obtaining of her medical records by Board personnel. It is also note worthy that counsel for the Respondent, in her response to the Board's March 4, 1999 subpoena, requested that the Board "supply all of the regulations and procedures which relate to the investigation of [Respondent] now pending before the Board..." *See* Board Ex. 10.

Additionally, in the Respondent's Complaint for Relief, filed in the Circuit Court for Baltimore County, the Respondent specifically admitted that it was her understanding that the Board was continuing its investigation of her practice, notwithstanding its prior issuance of an Informational Letter to her. *See* Board Ex. 11. Most obviously, the Board's August 26, 1998 letter, the initial March 4, 1999 subpoena and all of its subsequent correspondence, and legal memoranda placed her on notice of an investigation into her medical practice.

I also reject the Respondent's argument that the December 2, 1999 subpoena is overly

broad, and, therefore illegal and unenforceable. The Respondent cites *Unnamed Atty. v. Attorney Grievance Com'n*, 313 Md. 357, 545 A.2d 685, (1988) as a basis for her contention that the December 2, 1999 subpoena was overly broad and therefore unenforceable. She refers specifically to the following language in that case:

> ...we recognized the following factors as among those relevant in determining the validity of an administrative subpoena: "Whether the inquiry is authorized by statute, the information sought is relevant to the inquiry, and the demand is not too indefinite or overbroad."

Id. at p. 365 (citing *Banach v. St. Comm'n on Human rel.*, 277 Md. 502, 356 A.2d 242 (1976))

The Respondent maintains that there was no factual basis to support the overly broad demand for complete confidential medical records for 19 patients. However, *Unnamed Att.* expressed the reasonableness test in the following terms:

> We think that, in order to meet the test of reasonableness, an investigation of an individual by an administrative agency may not be based upon mere conjecture or supposition that a violation of law exists. Rather, it is incumbent upon an agency to demonstrate some factual basis to support its concern. In any event, the subpoenaed testimony or documents must appear relevant to the investigation.

Id. at p. 364.

The Board, in this case, had a proper factual basis for its request for records: the February 13, 1997 complaint letter from Patient A, which reported concerns regarding the Respondent's compliance with the standard of care as well as issues related to informed consent and unprofessional conduct. In order to determine whether the Respondent's medical practice conformed to the standard of care, the Board followed the protocol established at its inception in 1988 and which has been formalized in their COMAR at 10.32.02.03B, obtaining a randomly selected group of medical records to be evaluated by Med Chi. The selection of the records was accomplished by selecting the third patient from each third page of the office patient logs. *See* Board Ex. 50. As medical records should present contemporaneous and truthful documentation of her medical practice, common sense dictates that an examination of her medical records will

be the best and most efficient way to determine her compliance with proper medical practices, including provision of proper informed consent and use of any experimental medical devices in an impermissible manner. The material requested in the subpoena was directed to an evaluation of the issues raised in the February 13, 1997 complaint letter, and, therefore, the subpoena was not overly broad.

The facts establish that the Respondent was on notice of an investigation into her medical practice and the law establishes the Board's right to pursue its investigation by issuing subpoenas for medical records. The Respondent, by her own admission in all pleadings related to this case and through her own testimony at the hearing, has not and does not intend to comply with the December 2, 1999 subpoena.

For all of the reasons stated in the discussion above, I conclude that the Respondent has failed to cooperate with a lawful investigation conducted by the Board in violation of HO § 14-404(a)(33).

Failure to Cooperate with the Lawful Investigation by the Board is Unprofessional Conduct

The Respondent argues that she cannot be punished for unprofessional conduct for failing to respond to a subpoena. In support of her position, the Respondent cites *Board of Physician Quality Assur v. Banks*, 354 Md. 59, 729 A.2d 376, (1999). From *Banks*, she cites the language that unprofessional conduct subject to sanction under HO § 14-404(a)(3) must be conduct that is directly tied to the physician's conduct in the actual performance of the practice of medicine, i.e., in the diagnosis, care, or treatment of patients. The Respondent maintains that any failure to provide records in response to an "invalid" subpoena is not conduct directly tied to the diagnosis, care, or treatment of patients.

The Board, also in reliance on *Banks* points out that the Court of Appeals noted that a critical factor in determining whether a physician's conduct might be considered unprofessional is "whether the conduct occurred while the physician was performing a task integral to his or her medical practice." *Banks* at pp. 74 – 75. The Court acknowledged that courts have not applied an extremely technical and narrow definition of the practice of medicine, and noted that such behaviors as submission of false reports and bills to an attorney, fraudulent self-prescribing of drugs, as well as sexual harassment of co-workers have been held to constitute unprofessional conduct in the practice of medicine. *Id.* at pp. 74 – 75.

Every licensed physician is subject to the police power of the Board. *Stillman*, 291 Md. at pp. 405 – 406. Consequently, every licensed physician is subject to the issuance of subpoenas by the Board as part of its investigatory function. HO § 14-206 (a); HO § 14-401(g). It is the responsibility of every licensed physician to cooperate with the Board when that licensee's competence or professionalism is at issue, and failure to cooperate with the Board may result in disciplinary action against him or her. HO § 14-404(a)(33). Thus, the licensee's cooperation with the Board in determining his or her level of competence or professionalism is a task integral to the physician's medical practice because licensees are required by law to cooperate with the Board as part of their continued licensure.

If a subpoena for the same office patient records had been issued by the Internal Revenue Service, or a State agency looking into her compliance with wage and hour law or compliance with State taxes, and the Respondent failed to respond in the same manner as demonstrated in this case, I may not have found that her actions were "in the practice of medicine." However, failure to comply with a subpoena issued by the Respondent's own professional licensing board for the purpose of reviewing the standard of care she utilized in treating her patients is clearly

integral to her continued practice of medicine. Thus, Respondent's failure to comply with the subpoenas issued by the Board in order to conduct an investigation of the standard of care she utilized in her treatment of patients is unprofessional conduct in the practice of medicine.

Sanction

For the reasons set forth above, I find that the Board has provided clear and convincing evidence that the Respondent failed to cooperate with a lawful Board investigation. The Maryland legislature has specified in Section 14-404(a)(33) that such failure to cooperate is a sufficient ground, in and of itself, to justify revocation of a medical license. The right to sanction a physician for unprofessional conduct resulting from his or her failure to cooperate with a lawful investigation has been expressed by courts in several jurisdictions. Most notably, the Oregon Court of Appeals considered a factually similar case where a physician's license to practice medicine was revoked for violating the state licensing board's investigatory requirements by failing to comply with a subpoena duces tecum. The court noted that, pursuant to the governing statute, failure to cooperate with an investigation is a separate ground for revocation, as is the case in Maryland. "Had the legislature not so provided and had it created only 'substantive' grounds for revocation, the Board's ability to revoke a license would often be dependent on the outcome of an investigation that the licensee could impede or prevent." *Anderson v. Board of Medical Examiners*, 770 P.2d 947, 950 (1989). In the present case, the Respondent has repeatedly failed to cooperate with the Board's lawful investigation. Under the circumstances, revocation is an appropriate sanction.

The Board has also shown that the Respondent is guilty of unprofessional conduct in the practice of medicine, a separate ground for revocation set forth in Section 14-404(a)(3). As the Board can sanction a physician's license to practice medicine because of his or her failure to

cooperate with the Board's investigation, compliance with the Board investigatory subpoenas is an essential element of a physician's medical practice. *See* above discussion.

The Respondent's refusal to respond to the Board's subpoenas raises serious questions about her medical practice which cannot be put to rest absent the investigation she has so doggedly tried to avoid. As the Respondent did not timely comply with the July 27, 1999 subpoena issued by the Board, and, by her own admission, has not and does not intend to comply with the December 2, 1999 subpoena issued by the Board, I recommend that her license to practice medicine be revoked.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Respondent violated Sections 14-404(a)(3) and (33). I further conclude that, as a result, the Board may discipline the Respondent. Md. Code Ann., Health Occ. §§14-404(a) (1994 & Supp. 1999).

PROPOSED DISPOSITION

I **PROPOSE** that the charges filed by the Board on May 25, 2000, against the Respondent be **UPHELD**.

I **PROPOSE** that the Respondent's license to practice medicine in the State of Maryland be **REVOKED**.

Date

Suzanne S. Fox
Administrative Law Judge

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party may file exceptions to this Proposed Decision with the Board of Physician Quality Assurance within fifteen (15) days of receipt of the decision. Md. Code Ann., State Gov't § 10-216 (1999) and COMAR 10.32.02.03F.