

Statement of the Board of Medical Examiners  
December 12, 2007

At its regularly scheduled meeting on December 12, 2007 the Board of Medical Examiners reviewed the recent decision of Judge Robert P. Contillo, J.S.C. in Garcia v. HealthNet and Wayne Surgical Center and entertained an application from the Medical Society of New Jersey and other physician organizations (“Applicant”) seeking the issuance of a Special Advisory Opinion. The Board also heard public comments from a number of interested persons, including representatives of physician groups and two insurers (HealthNet and Allstate). The Board notes that earlier this week Judge Contillo denied the applicant’s request to intervene in the case, on the grounds that the application was not timely, the applicant’s interests were ably represented in the litigation and, in any event, his earlier ruling was intended to affect only the rights of the parties before him. It is clear from Judge Contillo’s decisions of November 20 and December 10 that based on the record before him he did not view Wayne Surgical Center as a “medical office” within the meaning of the term as it appears in N.J.S.A. 45:9-22.4 (“the Codey Act”), more specifically at N.J.S.A. 45:9-22.5(c). He has noted that the facility was at a different location from the other medical offices maintained by the doctors, the doctors did not control the personnel, and different bills were generated for the professional services rendered and for the facility fees. He distinguished the case before him from a situation addressed in a 1997 letter of the Board (addressed to a different party), suggesting that were an ambulatory surgical center (“ASC”) in a joint venture with a hospital, there might be a different outcome.

The Board recognizes that the health care arena has changed substantially since the enactment of Codey Act in 1989. At the outset, the Board was asked to review business structures in which several physicians pooled their capital to establish an additional practice site at which they could perform services integral to their area of practice. The model then presented appeared to easily resemble a “medical office.” In the absence of any statutory provision barring physicians from maintaining multiple offices, the Board has always focused on the facts of a particular entity, making certain that it is the doctor himself or herself who is performing the service and a bill is being generated in the name of the practice. The 1997 letter expressly reflected the Board’s expectation that the facility fees involved would be “nominal”. From time to time the Board has issued other letters to individual inquirers pertaining to specific factual situations. (Representative letters were attached to the application.) Despite the admonitions that the advice provided was grounded upon the generally limited facts presented and not intended to guide others, the business model, as Judge Contillo has noted, has become widespread. Moreover, based on the statements before the Board today, there may be ASCs in current operation where a physician investor refers a patient for the performance of surgery by another doctor who may or may not be an investor. To date, the Board has not viewed the “medical office” exception applicable to such situations. Further, based on the statements provided to the Board today and Judge Contillo’s observations, the facility fees that may be involved are not nominal.

In light of these developments, it is time for a clarification of the indicia that an entity

should have in order to view it as a “medical office”, and thus excepted from the self-referral ban of the Codey Act. While Judge Contillo found it compelling that the center at issue was in a different location, that the doctors did not employ the personnel directly, and that separate bills were generated, we do not see these criteria as dispositive in all cases. Consistent with N.J.S.A. 45:9-22.9, the Board has the authority to promulgate rules to better define the attributes that would support the recognition of a practice site as a “medical office.” It is through developing regulatory standards - not through the adoption of a Special Advisory Opinion, - that the Board hopes to bring greater clarity to the issue and clear guidance that can be applied, and enforced, across the spectrum of offices and facilities, rather than as to isolated parties. Accordingly, we are declining to adopt the Special Advisory Opinion that had been sought.

We are however, very concerned that the uncertainty that the applicant has described - as more fully documented in the certifications presented in support of its motion to intervene before Judge Contillo - has a significant potential to affect patient access to health care services. Judge Contillo has acknowledged the positive benefits of such centers and the important role they play in the delivery of health care in New Jersey. Were ASCs to close or cut back on the services provided, it is not clear that alternative providers - hospitals or offices- could immediately absorb additional cases, providing timely services. Any effort on the part of insurers to deny claims submitted by physicians-owners will likely have a significant impact on the availability of services, representing a potential imminent peril to the public health. As such, the Board will undertake an effort to pursue an emergency rule defining a “medical office” for purposes of Codey Act. We have reviewed the section of a more expansive rule proposal that has been under consideration relating to this issue. A committee of the Board will review the relevant portion of the larger proposal, in light of recent developments, and will propose a rule, by the quickest means available to implement a reform measure tailored to address this issue.