IN THE MATTER OF

DAN K. MORHAIM, M.D.

Respondent

License Number: D24875

BEFORE THE MARYLAND STATE BOARD OF PHYSICIANS

Case Number: 2003-0709

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CONSENT ORDER


(a) Subject to the hearing provisions of § 14-405 of this subtitle, the Board, on the affirmative vote of a majority of the quorum,² may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:

(3) Is guilty of...unprofessional conduct in the practice of medicine;

(11) Wilfully makes or files a false report in the practice of medicine.

The Board’s charges were based in large part on the Respondent’s pre-signing forms used to initiate Advance Directives of nursing home residents. The statutory authority governing Advance Directives in Maryland is found under the

¹ Pursuant to Maryland Laws 2003, Chapter 252, effective July 1, 2003, the former Board of Physician Quality Assurance was renamed and reconstituted as the Maryland Board of Physicians.

² Effective July 1, 2003, as a result of the legislative repeal and reenactment of Health Occ. § 14-404(a), the voting requirement has been changed to the affirmative vote of a majority of the quorum. See Maryland Laws 2003, Chapter 252.
Health Care Decision Act, Md. Health Gen. Code Ann. ("Health Gen.") § 5-601 et al. (2000 Repl. vol.). The pertinent provisions of the Health Care Decision Act, Health Gen. § 5-606 are as follows:

(a)(1) Prior to providing, withholding, or withdrawing treatment for which authorization has been obtained or will be sought under this subtitle, the attending physician and a second physician, one of whom shall have examined the patient within 2 hours before making the certification, shall certify in writing that the patient is incapable of making an informed decision regarding treatment. The certification shall be based on a personal examination of the patient.

(b) A health care provider may not withhold or withdraw life-sustaining procedures on the basis of an advance directive where no agent has been appointed or on the basis of the authorization of a surrogate, unless:

1. The patient’s attending physician and a second physician have certified that the patient is in a terminal condition or has an end-stage condition; or

2. Two physicians, one of whom is a neurologist, neurosurgeon, or other physician who has special expertise in the evaluation of cognitive functioning, certify that the patient is in a persistent vegetative state.

INTRODUCTION


The balanced approach desired by the Legislature is reflected in a preamble, which states that the intent of the Act is to ensure an individual’s right to “personal health care decision making”; to honor the societal value that every individual’s life “has worth in and of itself, and is not to be devalued by reason of an individual’s incapacity or perceived
diminished ‘quality of life’...’; and to afford “reasonable safeguards” so that
decision making on behalf of incapacitated persons is focused solely on
their wishes and interests.


Before “providing, withholding or withdrawing treatment,” a patient’s
attending physician and one other physician are required to certify in writing that
the patient is incapable of making an informed decision regarding such
treatment. The certification “shall be based on a personal examination of the
patient.” Health Gen. § 5-606(a)(1). This is referred to as “Certification of
Incapacity.” Id.

“A person may use an advance directive, written or oral, to decide
against the use of life sustaining procedures under three circumstances:
“terminal condition,” “persistent vegetative state,” or “end-stage condition.”
78 Md. Op. Atty. Gen. at 208; Health Gen. § 5-606(b). If the individual does not
have an agent (an adult appointed by the patient under an advance directive to
make health care decisions), two physicians are required by law to certify that the
patient meets one of those three circumstances in order to withhold or withdraw
life-sustaining procedures. This is referred to as “Certification of Condition.”

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3 Terminal condition is defined as an incurable condition caused by injury, disease, or illness
which to a reasonable degree of medical certainty, makes death imminent and from which,
despite the application of life-sustaining procedures, there can be no recovery. Health Gen. § 5-
601(q).

4 Persistent vegetative state is defined as a condition caused by injury, disease or illness: (1) In
which a patient has suffered a loss of consciousness, exhibiting no behavioral evidence of self-
awareness or awareness of surroundings in a learned manner other than reflex activity of
muscles and nerves for low level conditioned response; and (2) From which, after the passage of
a medically appropriate period of time, it can be determined, to a reasonable degree of medical
certainty, that there can be no recovery. Health Gen. § 5-601(o).

5 End-stage condition is defined as an advanced progressive, irreversible condition caused by
injury, disease, or illness: (1) That has caused severe and permanent deterioration indicated by
incompetency and complete physical dependency; and (2) For which, to a reasonable degree of
medical certainty, treatment of the irreversible condition would be medically ineffective. Health
Gen. § 5-601(i)
FINDINGS OF FACT

The Board finds the following:

1. At all times relevant to these charges, the Respondent was and is a physician licensed to practice medicine in the State of Maryland. He was initially licensed in Maryland on or about May 2, 1980, and his license is presently active.

2. At the time of the acts described herein, the Respondent was the Medical Director at a Nursing Home, Ruxton Health and Rehabilitation Center ("Ruxton") in Pikesville, Maryland.

3. In June 2003, the Office of Health Care Quality ("OHCQ") filed a complaint with the Board alleging that during an April 2003 survey at Ruxton, their surveyors discovered the Respondent had pre-signed approximately twenty blank forms intended to be used for the certification of nursing home residents' medical conditions, in order to initiate the implementation of Advance Directives under Health Gen. § 5-606.

4. The pre-signed forms discovered by the OHCQ surveyors were entitled "Physician's Certification of Medical Condition" and contained two separate sections for two physicians to complete and certify the following:

   I, _________, M.D., have examined the following resident, _____________________________ on __________ (date) at ______ (time).

   Based on this examination, I hereby certify that the Resident’s condition, which is described as follows:

   _____________________________

   demonstrates that the resident is:
in an End Stage Condition (advanced, progressive, irreversible condition)

in a Persistent Vegetative State (loss of consciousness)

in a Terminal Condition (no reasonable expectation of recovery and of which death is imminent)

Date Signature of physician

(Print) Name of physician

The Respondent pre-signed the bottom half of the Certification form, leaving the remaining information blank. The form, in two separate sections, provided for two independent physicians to complete the document, signing and certifying that each had examined the patient.

5. On or about April 9, 2003, the Respondent admitted to the OHCQ surveyors that he had pre-signed approximately twenty of the blank forms used for certification of the residents' medical condition. The Respondent acknowledged to the surveyors that the use of the pre-signed form was not "good practice" and that it had been done for the "short term to accommodate the health needs of the social worker\(^6\) and the schedule of the physician."

6. On July 14, 2003, the Respondent, through his attorney, submitted an initial response to the Board addressing the complaint. The Respondent admitted that he had pre-signed two types of forms

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\(^6\) The "social worker," who was a social service designee, was in her third trimester of pregnancy.
used to initiate Advance Directives. In his response he stated that he had pre-signed fifteen to twenty of the forms used to certify that a resident is incompetent\(^7\) and/or in a terminal condition, a persistent vegetative state or end stage condition. [Emphasis Supplied] The Respondent's rationale for pre-signing these documents was to "catch up" on these forms, and because of the "temporary circumstances of [the Respondent's] schedule and [the social worker's] limitations."

7. The forms used at Ruxton to certify that a resident was "incompetent" were entitled "Physician's Certification of Incapacity to Make an Informed Decision" and required that two independent physicians sign the form, certifying that each examined the patient.

Each section stated:

I __________, M.D., have examined __________ (resident) on __________ (date) at __________ (time). Based on that examination, I find that the above noted resident is incapable of making an informed decision about the provision, withholding, or withdrawing of the following medical treatment: __________. Because of the resident's condition, which includes: __________, the resident is unable to understand the nature, extent, or probable consequences of the proposed treatment or course of treatment, and is:

(check one)

( ) unable to make a rational evaluation of the burdens, risks, and benefits of the treatment, or course of treatment or

( ) is unable to communicate a decision.

\(^7\) "Incompetence" was the term used by the Respondent's attorney in his response to the Board's complaint. Based on the context however, it is more likely that the Respondent intended to state "Incapacity". See Health Gen. § 5-606(a). The surveyors found only pre-signed Certification of Medical Condition forms at Ruxton. The Respondent however, in his response to the Board admitted that he had pre-signed 15-20 forms used to declare a resident incompetent or in a terminal condition, persistent vegetative state or end stage condition. [Emphasis Supplied]
I have ( ) have not ( ) examined the above resident within two (2) hours of completing this document.

Date ___________________ Signature of Attending Physician

8. Health Gen. § 5-606(a)(1) requires that prior to providing, withholding, or withdrawing treatment the attending physician and a second physician, one of whom shall have examined the patient within two hours before making the certification, shall certify in writing that the patient is incapable of making an informed decision regarding treatment. *The certification shall be based on a personal examination of the patient.* [Emphasis Supplied]

9. When interviewed by the Board’s investigative staff, the Respondent admitted that the pre-signed forms had been used for approximately five residents. He could not recall for whom precisely the pre-signed forms had been used.

10. The Board subpoenaed the following medical records of nursing home residents\(^8\) cited in OHCQ’s survey as having deficiencies related to Advance Directives,\(^9\) and the records reflected the following:

a. On January 20, 2003, the Respondent’s signature appeared on the form entitled “Physician’s Certification of Incapacity to Make an Informed Decision” for Patient A, a 90 year old female, certifying that he had examined her on this date. There was no entry in Patient A’s chart however, that the Respondent had examined her on this date. Moreover,

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\(^8\) For purposes of confidentiality, the names of the nursing home residents will not appear in this document, but will be provided to the Respondent.

\(^9\) Not all of the deficiencies noted in OHCQ’s survey were related to the Respondent’s care.
another writer had completed the following statement (see bold): Based on the examination, I find that the above noted resident is incapable of making an informed decision about the provision, withholding, or withdrawing of the following medical treatment: **all med txs**. The same unknown writer had also written the following to be Patient A’s condition: **dementia**.

b. On January 20, 2003, the Respondent’s signature appeared on the form entitled “Physician’s Certification of Incapacity to Make an Informed Decision” for Patient B, an 82 year old female, certifying that he had examined her on this date. There was no entry in Patient B’s chart however, that the Respondent had examined her on this date. Moreover, another writer had completed the following statement (see bold): Based on the examination, I find that the above noted resident is incapable of making an informed decision about the provision, withholding, or withdrawing of the following medical treatment: **all med txs**. The same unknown writer had also written the following to be Patient B’s condition: **dementia**.

c. On January 13, 2003, the Respondent’s signature appeared on the forms entitled “Physician’s Certification of Medical Condition” and “Physician’s Certification of Incapacity to Make an Informed Decision” for Patient C, an 90 year old female, certifying that he had examined her on this date. There was no entry in Patient C’s chart however, that the Respondent had examined her on this date. Moreover, another writer had completed both of the forms (see bold). By the Respondent’s signature on the “Certification of Medical Condition,” form he certified that Patient C had **dementia** and was in an “End Stage Condition.” By the Respondent’s signature on the “Physician’s Certification of Incapacity to Make an Informed Decision,” form he certified that “Based on that examination, I find that the above noted resident is incapable of making an informed decision about the provision, withholding, or withdrawing of the following medical treatment: **all med txs**. Because of the resident’s condition, which includes: **dementia**.”
11. In Respondent's July 14, 2003 response to the Board he did not indicate that he had examined all of the nursing home residents that he had certified but instead that:

In all cases, [the Respondent] knew the resident either from the QA meetings, rounds or discussions with [the Social Service Designee], and in all cases, the pre-signed form was used ONLY AFTER the resident's primary physician had signed the form.

Health Gen. § 5-606(a)(1) and (b)(1) and (2) however, both require the certifications of two physicians. Health Gen. § 5-606(a)(1) specifies that the certification of incapacity be done by a "personal examination of the patient." Moreover, on both forms (Certification of Medical Condition and Certification of Medical Incapacity), the Respondent was certifying by his signature that he had "examined" the resident on a date certain.

12. The Respondent's actions in pre-signing forms that indicated he had "examined" a nursing home resident on a date certain, when he had not, constitutes the making or filing of a false report in the practice of medicine.

13. The Respondent's actions in pre-signing the forms were willful; according to his admission he did so on a "short term" basis to accommodate the health needs of the social service designee and his professional schedule.

14. The Respondent's actions as outlined above including pre-signing the "Physician's Certification of Medical Condition" forms and/or the
"Physician's Certification of Incapacity to Make an Informed Decision" and/or the Respondent's use of approximately five of these pre-signed forms for health care decision-making of nursing home residents constitute a violation of Health Gen. § 14-404(a)(3) and (11).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Board concludes as a matter of law that the Respondent is guilty of …unprofessional conduct in the practice of medicine in violation of Health Occ. § 14-404(a)(3) and willfully made or filed a false report in the practice of medicine in violation of Health Occ. § 14-404(a)(11).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is this 24th day of March, 2005, by a quorum of the Board considering this case:

ORDERED that the Respondent be and is hereby REPRIMANDED; and it is further

ORDERED that the Respondent shall be placed on PROBATION for a minimum period of ONE (1) YEAR from the effective date of this Consent Order; that date being the date the Board executes this Consent Order; subject to the following terms and conditions:

1. The Respondent shall practice according to the Maryland Medical Practice Act and in accordance with all applicable laws;
2. Within one (1) year from the effective date of this Consent Order, the Respondent's documentation relating to Advance Directives shall be subject to review by a Board designee, to be determined at the discretion of the Board. If the Board finds the review to be unsatisfactory, this may, in the Board's discretion, constitute a violation of this Consent Order;

AND BE IT FURTHER ORDERED that any violation of any of the terms and/or conditions of this Consent Order shall be deemed a violation of the probation and/or this Consent Order; and it is further

ORDERED that if the Respondent violates any of the terms and conditions of the probation and/or this Consent Order, the Board, in its discretion, after notice and an opportunity for an evidentiary hearing before an Administrative Law Judge if there is a genuine dispute as to the underlying material facts, or an opportunity for a show cause hearing before the Board otherwise, may impose any sanction which the Board may have imposed in this case under Health Occ. §§ 14-404(a) and 14-405.1 of the Medical Practice Act, including a reprimand, probation, suspension, revocation and/or a monetary fine, said violation of probation being proved by a preponderance of the evidence; and be it further

ORDERED that after the conclusion of the entire one (1) year period of PROBATION, the Respondent may file a written petition for termination of his probationary status without further conditions or restrictions, but only if the Respondent has satisfactorily complied with all
conditions of this Consent Order, including all terms and conditions of probation, including the expiration of the one (1) year period of probation, and if there are no pending complaints regarding the Respondent before the Board, and be it further

ORDERED that if the Respondent violates any of the terms and conditions of his probation and/or of the Consent Order, the Board, in its discretion, after notice and opportunity for a hearing, may impose additional sanctions under §§ 14-404(a) and 14-405.1 of the Medical Practice Act, including a reprimand, probation, suspension, revocation and/or monetary fine; and be it further

ORDERED that the Respondent shall not petition the Board for early termination of his probationary period or the terms of this Consent Order; and be it further

ORDERED that the Respondent shall be responsible for all costs incurred in fulfilling the terms and conditions of this Consent Order; and be it further

ORDERED that this Consent Order is considered a PUBLIC DOCUMENT pursuant to Md. State Gov't Code Ann. § 10-611 et seq. (1999 Repl. Vol.).

Date C. Irving Pinder, Jr., Executive Director
Maryland Board of Physicians
CONSENT

I, Dan K. Morhaim, M.D., acknowledge that I have had the opportunity to consult with counsel before signing this document. By this Consent, I agree that the Board has a preponderance of the evidence to prove these allegations, and I agree and accept to be bound by the foregoing Consent Order and its conditions and restrictions. I waive any rights I may have had to contest the Findings of Fact and Conclusions of Law.

I acknowledge the validity of this Consent Order as if entered into after the conclusion of a formal evidentiary hearing in which I would have had the right to counsel, to confront witnesses, to give testimony, to call witnesses on my own behalf, and to all other substantive and procedural protections as provided by law. I acknowledge the legal authority and the jurisdiction of the Board to initiate these proceedings and to issue and enforce the Consent Order. I also affirm that I am waiving my right to appeal any adverse ruling of the Board that might have followed any such hearing.

I sign this Consent Order after having had an opportunity to consult with counsel and I fully understand and comprehend the language, meaning and terms of this Consent Order. I voluntarily sign this Order, and understand its meaning and effect.

[Signature]

Dan K. Morhaim, M.D.

Date
I HEREBY CERTIFY that on this 1st day of March, 2003, before me, a Notary Public of the State and County aforesaid, personally appeared Dan K. Morhaim, M.D., and gave oath in due form of law that the foregoing Consent Order was his voluntary act and deed.

AS WITNESS, my hand and Notary Seal.

CAROLE B. SCHNEIDER
Notary Public

My commission expires: 9/1/06

Reviewed by:

Date

Henry Schwartz, Esquire