STATE OF NEW JESERY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

In the matter of the Suspension
Or Revocation of the License of:

STEVEN C. BRIGHAM, M.D.

To Practice Medicine and Surgery
in the State of New Jersey

FINAL ORDER

Overview

This matter was returned to the New Jersey State Board of Medical Examiners (the "Board") on August 13, 2014, upon the issuance of a comprehensive 86 page Initial Decision ("ID") by Administrative Law Judge ("ALJ") Jeff S. Masin. ALJ Masin's opinion was entered following a 19 day trial at the Office of Administrative Law ("OAL"). In the ID, ALJ Masin concluded that respondent Steven C. Brigham, M.D. engaged in the unlicensed practice of medicine in Maryland, that in doing so he violated Maryland law and that his misconduct "constituted a major violation of professional standards in each of the multiple instances in which he so practiced." (ID, p. 78). ALJ Masin also concluded that Dr. Brigham's patient records - to include Informed Consent forms and Abortion Records maintained within individual patient's records -- "demonstrate[d] confusing terminology and entries that

are not appropriate under professional standards," but that those violations were "relatively minor." (ID, p. 78-79).

ALJ Masin dismissed the remainder of charges within the Complaint, to include charges that Dr. Brigham repeatedly violated the Board's Termination of Pregnancy Regulation, N.J.A.C. 13:35-4.2 and additional claims that Dr. Brigham's actions violated professional standards. ID, 77-79. In doing so, ALJ Masin determined that the TOP regulation only applied to the surgical performance of a D & E procedure, and not to any "prefatory" acts. ALJ Masin concluded that all of the medical activities Dr. Brigham undertook in his Voorhees, New Jersey office before transporting his patients to Maryland - to include insertion of laminaria in all cases, administration of Misoprostol in some cases and, in 43 "Grace" cases, the injection of Digoxin to effect fetal demise -- were "prefatory" and thus did not trigger the regulatory restrictions and requirements. (ID, p. 11-28).

Finally, ALJ Masin, after reviewing Dr. Brigham's extensive track record of disciplinary actions in New Jersey, New York, Pennsylvania and Florida, opined that "Dr. Brigham has finally cut enough corners." ALJ Masin recommended that the Board revoke Dr. Brigham's license, (ID 79-85), assess a civil penalty of $30,000 ($20,000 for violations "stemming from the unauthorized practice in Maryland" and $10,000 for "the various minor violations of record keeping requirements") and hold Dr. Brigham responsible

for two-thirds of the costs of investigation and prosecution. (ID p. 85).

Following the issuance of the ID, the parties filed written exceptions with the Board and written replies to the respective exceptions, and were afforded an opportunity to present oral argument at the Board meeting on October 8, 2014. Dr. Brigham was additionally afforded an opportunity to make a statement to the Board during a hearing on penalty.

Upon careful consideration of the extensive record in this matter, we conclude that good cause exists to adopt the findings of fact made by ALJ Masin in the ID. Indeed, we note from the outset that the facts in this case - particularly as they pertain to Dr. Brigham's general practice pattern - are not in dispute.[1] And, while the parties do dispute the degree and

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[1] Respondent specifically recognized that "the factual framework of this case is not in dispute." (see Respondent's Exceptions Brief, p. 1). The core facts of the case are summarized at the outset of Judge Masin's opinion as follows:

> In various portions of the Complaint, the Attorney General charges that in his New Jersey office in Voorhees Township, Camden County, Dr. Brigham treated various patients identified in the Complaint and the record of this hearing by initials, who were seeking terminations of their pregnancies. Over several days, in New Jersey, Brigham inserted laminaria, a device that is derived from seaweed or the dogwood tree and which has the property of becoming swollen and therefore causing the cervix to dilate. He also provided drugs, such as Misoprostol, also used as a dilative agent, and Digoxin, which causes fetal demise. Then, on a subsequent day, he had these patients travel by automobile to a facility he operated in Elkton, Maryland, where he, or in some instances, another physician acting under his supervision, performed a dilation and evacuation (D & E), a surgical procedure, on the patient.

meaningfulness of Dr. George Shepard's involvement in the care of patients whose termination procedures were performed by Dr. Brigham, we fully concur with and adopt ALJ Masin's conclusion that "Dr. Brigham knowingly effectuated a scheme to allow himself to practice in Maryland, possibly but in no sure sense for a limited time, and with no illusions that he had any actual need for medical consultation with Dr. Shepard on the specific cases he was treating, later rationalizations to the contrary." ID at 50.

Turning to legal conclusions, for reasons that will be set forth in greater detail below:

1) We reverse Judge Masin's conclusions on the applicability of N.J.A.C. 13:35-4.2, and instead conclude that Dr. Brigham in fact commenced abortions and violated the requirements of the regulation when he performed prefatory acts in his Voorhees, New Jersey office, in every case that was ultimately completed in Elkton, Maryland. Notwithstanding that conclusion, however, we find that Dr. Brigham could have reasonably believed, based on the holdings made in "Brigham I" and based on what were referred to below as the "Phillips letters," that he would not have been subject to the requirements of the regulation in cases which involved only the insertion of laminaria and/or the administration

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Again these facts are not disputed. The D & E was intended to remove all of the fetal remains and products of conception from the woman's uterus.

ID at p. 5

of Misoprostol. Accordingly, for purposes of penalty, we will only hold Dr. Brigham accountable for violations of the Board's Termination of Pregnancy Regulation in the 43 "Grace" cases where patients were administered Digoxin in New Jersey to effect fetal demise, prior to being transported to Elkton, Maryland for the performance of their D & E procedure.

2) We adopt ALJ Masin's conclusion that Dr. Brigham's conduct constituted the unlicensed practice of medicine in Maryland. While we generally defer to and accept ALJ Masin's analysis of Maryland law, we point out that, from the viewpoint of practicing physicians, we find it clear that the relationship between Dr. Brigham and Dr. Shepard could not reasonably be considered to be a "consultative" relationship. We further clarify that the finding that Dr. Brigham engaged in the unlicensed practice of medicine in Maryland substantiates the charges made within the Administrative Complaint that Dr. Brigham engaged in acts which would constitute a crime or offense relating adversely to the practice of medicine, which in turn provides basis for disciplinary action in New Jersey pursuant to N.J.S.A. 45:1-21(f).

3) We adopt ALJ Masin's determination that Dr. Brigham's medical records failed to conform to the requirements of the patient record rule, N.J.A.C. 13:35-6.5. While we would agree, in any individual case, with the ALJ's characterization that the record-keeping violations were "minor," we reject that

characterization as it applies collectively to all of the patient records in evidence, and instead find that Dr. Brigham's repeated and consistent violations of the record-keeping rule are "substantial" and "serious." We further modify ALJ Masin's conclusions and specifically find that Dr. Brigham's repeated failure to have properly documented the specific procedure that he performed in a straightforward, non-confusing manner, and his repeated failure to identify the physician who was to perform or who actually performed the termination procedure (both on the Recovery Room Log sheets that were maintained in Elkton and on Informed Consent forms signed by patients) were acts of deception or misrepresentation, which independently provide grounds for disciplinary sanction pursuant to N.J.S.A. 45:1-21(b).

4) We conclude that the record of this case supports the remainder of charges made in Counts 1, 2, 3, 5[2], 6, 7 and 8 of the Third Amended Administrative Complaint (Count 4 was not pursued).

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[2] ALJ Masin found in the ID that the Attorney General had not presented any specific evidence referencing patient J.P., who is the sole patient identified in Count 5 of the Third Amended Complaint (see footnote 3, ID, p. 4). In his written exceptions, the Acting Attorney General pointed out that J.P.'s patient record was in fact admitted into evidence as Exhibit P-20 on October 24, 2013, and that other evidence regarding J.P. is included within Exhibits P-70, P-72 and P-73. Respondent neither addressed nor contested those claims in his reply to the Attorney General's exceptions. Based on review of the record below, we are satisfied that the referenced exhibits were all in evidence and that those exhibits, in combination with the full record below, are sufficient to prove the facts alleged in Count 5. We thus specifically modify the ID to include findings for the Attorney General on all charges set forth in Count 5 of the Third Amended Complaint.

Specifically, we sustain the charges made in Counts 2, 3 and 7 that Dr. Brigham's conduct constituted professional misconduct in violation of N.J.S.A. 45:1-21(e) and constituted the use or employment of dishonesty, deception and/or misrepresentation in violation of N.J.S.A. 45:1-21(b)[3], and the charges made in all seven Counts that Dr. Brigham engaged in repeated acts of negligence in violation of N.J.S.A. 45:1-21(d) and/or acts of gross negligence in violation of N.J.S.A. 45:1-21(c).

Finally, on the issue of penalty, we fully concur with ALJ Masin's conclusion that Dr. Brigham's license to practice medicine and surgery in the State of New Jersey should be revoked. Given, however, that we have concluded that the scope of Dr. Brigham's violations of law was far more expansive and the extent of his misconduct far more pervasive than found below, we find that good cause exists to enhance the proposed civil penalty from $30,000 to an aggregate total of $140,000, and to require that Dr. Brigham pay all (rather than two-thirds) of the costs of investigation and prosecution of this matter (subject to review of additional submissions to be made by the parties). We set forth below a summary of the procedural history of this matter (limited to discussion of events that occurred subsequent to the issuance of

[3] We do not find there to be sufficient evidence in the record to support charges that Dr. Brigham engaged in the use or employment of fraud, and instead limit the findings of violations of N.J.S.A. 45:1-21(b) to the remaining provisions of that section which allow that a physician's license may be suspended or revoked for engaging in the use or employment of dishonesty, deception or misrepresentation.

the ID) and a fuller explanation of the basis for each of the determinations set forth above.

Procedural History

The Board initially received ALJ Masin's ID on August 13, 2014. Because this matter could not be scheduled to be heard prior to October 8, 2014, the Board sought and obtained an Order from the OAL extending the time for entry of a final decision by an additional 45 days through November 13, 2014. The Extension Order was entered by Chief Administrative Law Judge Laura Sanders on September 22, 2014.

On September 9, 2014, both parties submitted written exceptions to the ID. Both parties thereafter submitted written reply briefs dated September 17, 2014 (addressing each other's exceptions). The matter was scheduled for a hearing (to include oral argument on exceptions and a hearing on penalty) before the Board on October 8, 2014.[4]

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[4] Both parties were advised in writing, prior to October 8, 2014, that the opportunity to supplement their written exceptions with oral argument would be time limited to forty-five minutes. Additionally, the parties were advised that, were the Board to conclude that basis for disciplinary sanction existed against Dr. Brigham, a supplemental hearing on the issue of penalty would be held before the Board.

It should be noted that a hearing on penalty was also conducted at the OAL on July 25, 2014. At that hearing, the Attorney General moved into evidence disciplinary Orders that had been previously entered in New Jersey and in sister states against Dr. Brigham, and Dr. Brigham offered two witnesses who testified regarding the circumstances which led to the entry of certain of the Pennsylvania Orders. Dr. Brigham also testified on his own behalf in mitigation. The record of the July 25, 2014 hearing was fully considered by the Board in its deliberations on penalty.

On October 8, 2014, respondent appeared, represented by Brach Eichler, LLC, Joseph Gorrell, Esq. appearing. Deputy Attorneys General Jeri L. Warhaftig, Joshua M. Bengal and Gezim Bajrami appeared representing Complainant John Hoffman, Acting Attorney General of New Jersey.

Mr. Gorrell urged the Board to adopt ALJ Masin's analysis of the applicability of N.J.A.C. 13:35-4.2, which analysis he argued was dictated by the determinations made in Brigham I. He urged the Board to reject ALJ Masin's interpretation of the meaning of Maryland law, suggesting that the ALJ engaged in "tortured logic." Mr. Gorrell urged that the Board should instead conclude that, regardless whether Dr. Brigham actually needed Dr. Shepard to be present during the D & E procedures, the interaction between the two physicians was more than sufficient to meet the definition of a "consultation" and thus satisfy the requirements of Maryland law as it existed in 2010. In making that argument, Mr. Gorrell suggested that there were 23 independent items that Dr. Shepard performed, all of which should be found to support a conclusion that Dr. Shepard and Dr. Brigham were consulting with one another. Finally, Mr. Gorrell urged the Board to overturn ALJ Masin's determination that Dr. Brigham's records were confusing, pointing out that both Dr. Lichtenberg (the State's expert witness) and Dr. Mucciello (respondent's expert witness) were able to readily determine that

each patient in fact had a surgical abortion and not a spontaneous delivery.

DAG Warhaftig argued that the Board should go further than ALJ Masin and find that Dr. Brigham engaged in gross and/or repeated acts of negligence in his care of over 240 patients, that his conduct constituted professional misconduct and that the conduct was deceptive and dishonest. She urged the Board to review testimony offered by the State's expert witness, Dr. Lichtenberg, and argued that the Board should adopt Dr. Lichtenberg's construct that an abortion is a process that starts with counseling and includes consent, cervical preparation and the actual surgical procedure to evacuate the uterus.

Following oral arguments, we conducted deliberations in closed session. Thereafter, we returned to open session and announced our determination to adopt the findings of fact in ALJ Masin's ID and to adopt in part, modify in part and reject in part the conclusions of law therein. We then conducted a hearing limited to the issue of penalty. During that hearing, Dr. Brigham testified and implored the Board to "see me for who I truly am." Dr. Brigham stated that he was a passionate proponent of women's rights, willing to provide abortion services as far as he legally could. He urged the Board to conclude that his relationship with Dr. Shepard was a consultative relationship sufficient to allow Dr. Brigham to practice in Maryland, and to recognize that there was a

true medical benefit to their relationship. Finally, Dr. Brigham suggested that the case against him was, at its core, a case about limiting late term abortions.

In addition to his own testimony, Dr. Brigham called Nancy Luke, the Chief Financial Officer who oversees Dr. Brigham's finance department, who testified generally regarding Dr. Brigham's financial circumstances. Ms. Luke testified that Dr. Brigham draws an annual salary of $50,000 from the companies he owns which provide abortion services, but that his actual take home pay is reduced by IRS garnishments.[5]

In summations, Mr. Gorrell urged the Board to recognize, irrespective of holdings made, that Dr. Brigham's actions were taken in good faith, that the laws in both Maryland and New Jersey were ambiguous and that Dr. Brigham should not be accountable for any violation of Maryland law given that he had consulted and received advice from legal counsel in Maryland before he started any medical practice. Finally, Mr. Gorrell urged the Board to recognize, in mitigation, that Dr. Brigham provided an important

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[5] The Attorney General did not present any additional witness testimony during the penalty hearing, but did offer and move into evidence a copy of a public document obtained from Camden County tax court lien against Dr. Brigham (P-94) which purports to show a federal tax lien totaling approximately $460,000 against Dr. Brigham. DAG Warhaftig also sought to move into evidence copies of two prior disciplinary Orders (one from Pennsylvania and one from New York), identified as P-88 and P-84 below, which she had sought to enter into evidence during the July 25 penalty hearing. We denied entry of those Orders, for the same reasons expressed by ALJ Masin.

service and that he had consistently provided competent, high quality care to his patients.

In closing, DAG Warhaftig argued that the case against Dr. Brigham was anything but a referendum on abortion, but was instead a case brought to redress Dr. Brigham's deceitful conduct and his multiple acts of gross negligence and professional misconduct. She urged the Board to adopt ALJ Masin's recommendation that Dr. Brigham's license be revoked, but to reject his recommendations on penalty and to instead assess the "maximum" civil penalty allowed by law, as well as all costs of investigation and prosecution.

Findings of Fact

As noted above, we find good cause exists to adopt, in their entirety, findings of fact made by ALJ Masin within the ID. For the limited purpose of detailing the core facts which form the predicate for our legal conclusions, we summarize certain undisputed facts established below. Except where otherwise noted, the summary is intended to cover the time period from September 2009 through August 2010.

Steven Brigham, M.D. was the holder of a plenary, unrestricted New Jersey medical license. Dr. Brigham did not hold any licenses to practice medicine in any other states, to include the State of Maryland. Dr. Brigham held no hospital privileges in

New Jersey or elsewhere, nor was he privileged to practice at any New Jersey licensed ambulatory care facility ("LACF").

Dr. Brigham practiced medicine in (among other locations) an office located in Voorhees Township, New Jersey - that office was not a LACF. Although Dr. Brigham had extensive experience prior to 2009 in performing abortions (he estimated that he had performed approximately 40,000 abortions, to include approximately 1,000 to 1,500 second or third trimester procedures), he never completed a residency or fellowship in obstetrics/gynecology. As a result, Dr. Brigham was neither certified by nor eligible for certification by the American Board of Obstetrics-Gynecology.

Between September 2009 and August 2010, Dr. Brigham performed abortions on not less than 241 patients in Elkton, Maryland. All of the 241 patients were initially seen in Dr. Brigham's Voorhees, New Jersey office, and all of whom had pregnancies that were greater than 14 weeks LMP (that is, 14 weeks from the first day of the patient's last menstrual period).[6]

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[6] The above numbers were derived from review of recovery room logs maintained at Dr. Brigham's Elkton, Maryland facility for dates between September 22, 2009 and August 13, 2010 (P-38 in evidence). The exact number of patients that Dr. Brigham treated between September 2009 and August 2010 is not established, and we are aware that ALJ Masin did not make any specific finding of fact conclusively establishing a finite number of termination procedures that Dr. Brigham performed or participated in between September 2009 and August 2010.

While Dr. Brigham was not specifically charged with having performed 241 procedures in the Third Amended Complaint, we note that he is charged in Count II of the complaint with having performed an unspecified number of abortions in the Elkton, Maryland offices (see ¶25) and in Count III

Generally, the patients could be divided into one of two "categories" based on the stage of their pregnancy at the time the termination procedure was performed - patients who were more than 14 weeks LMP but less than 24 weeks LMP (hereinafter "American Woman Services," or "AWS" patients), and patients who were equal to or greater than 24 weeks LMP (hereinafter "Grace Medical Care", or "Grace" patients). Forty-three of the 241 patients were denominated as "Grace" patients.[7]

AWS patients were initially examined by Dr. Brigham in his Voorhees, New Jersey office. Dr. Brigham typically inserted laminaria on the first day of treatment in his Voorhees office, for the purpose of cervical preparation. Patients would thereafter generally return home, and then come back to the Voorhees office the following day, at which time additional laminaria were inserted. In some cases, patients would also receive Misoprostol (Cytotec) in order to effect cervical dilation. AWS patients would then travel by car, on the second day, to Elkton, Maryland, where their termination procedures were performed by Dr. Brigham (or, in

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of the Complaint with having engaged in a "wide-scale pattern of practice whereby terminations of pregnancy that cannot be legally performed by Respondent Brigham in his New Jersey office are begun by him and/or at his direction in New Jersey and completed in Maryland" (see ¶48). We read those general allegations to be sufficiently broad to encompass all of the abortions which Dr. Brigham began in New Jersey and completed in his Elkton office between September 2009 and August 2010.

[7] 40 of those 43 were 24 weeks LMP or greater; the other three are indicated as being less than 24 weeks LMP but nonetheless "Grace" patients.

certain cases performed on or after July 30, 2010, by Dr. Nicola Riley, a Maryland licensed physician employed by Dr. Brigham).

The protocol for "Grace" patients differed from AWS patients in that the process would generally extend over three days, and include injection of Digoxin to effect intra-uterine fetal demise in New Jersey. Dr. Brigham would insert laminaria and inject Digoxin on the first day he saw a "Grace" patient in Voorhees. The patient would return to Voorhes the following day, at which time an ultrasound would be performed to confirm fetal demise and additional laminaria were generally inserted.[8] The patient would return to the Voorhees office on the third day, and would then travel by car to Elkton, Maryland, where their termination procedures were performed by Dr. Brigham (or, as referenced above, by Dr. Nicola Riley).[9]

All patients ("AWS" and "Grace") were advised by Dr. Brigham's staff and/or by Dr. Brigham that the actual abortion procedure would not be performed at the Voorhees office, but would instead be performed at a "surgical facility" about an hour away. No patient was initially told that the "facility" was located in

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[8] Patient S.D., who was 25 weeks LMP and carrying twins (the subject of Count 3 of the Complaint) was first seen by Dr. Brigham on August 11, 2010, at which time laminaria were inserted and Digoxin injected. S.D. underwent a second injection of Digoxin on August 12, 2010, when an ultrasound revealed that one of the two fetuses was demised but that the second displayed possible fetal and cardiac movement.

[9] As was the case with AWS patients, a "Grace" patient might also be dispensed Misoprostol for purposes of cervical preparation.

Maryland (or indeed even that the facility was outside New Jersey), and no patient was initially provided with the actual address of the "facility." Patients were not informed that Dr. Brigham could not legally perform a D & E in New Jersey, and were also not told that Dr. Brigham was not licensed in Maryland or any state other than New Jersey.[10]

Patients would generally be required to sign Informed Consent forms on the first day, after meeting with and being counseled by employees of Dr. Brigham. In many of the patient records introduced into evidence, a space on the form to write in the identity of the physician who was being given consent to perform the abortion was left blank.

As noted above, all patients would ultimately travel, either in their own cars or in cars driven by Dr. Brigham's employees, to Elkton, Maryland on the day the procedure was to be performed. Even on the travel date, however, the patient and/or those accompanying the patient would not routinely be told the precise location where they were traveling. While the vast majority of patients never asked to be provided the specific location, a small number who did ask were provided with the actual address of the Elkton "facility."

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[10] All of the patients called as witnesses by Dr. Brigham stated that it would not have mattered to them that Dr. Brigham was not licensed in Maryland.

The actual evacuation of the uterus, through the performance of a D & E procedure, was in all cases (with the exception of patient J.P., see Count 5) performed in Elkton, Maryland. Dr. Brigham alone performed all of the D & Es, other than a small number that were performed on or after July 10, 2010, by Dr. Nicola Riley. Dr. George Shepard, a physician who was then 87 or 88 years old, was employed by Dr. Brigham as the Medical Director of American Womens' Services, and was present in Elkton when Dr. Brigham performed many of the D & E procedures. At other times, when he was not in Elkton, Dr. Shepard would be on the telephone while the D & E procedure was performed by Dr. Brigham.[11]

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[11] There is conflicting evidence in the record below regarding the level, extent and the sophistication of any assistance that Dr. Shepard may have provided to Dr. Brigham. Specifically, the testimony regarding the degree of Dr. Shepard's participation offered by Dr. Brigham and by certain of Dr. Brigham's employees is in stark contrast to statements in evidence of Dr. Shepard - particularly, statements (not under oath) that were memorialized within the transcripts of interviews that Dr. Shepard had with Christine Farrelly, Acting Executive Director of the Maryland Board of Physicians on August 19 and August 30, 2010 and with Detective Sergeant Holly Smith of the Elkton, Maryland Police Department on August 19, 2010 (see P-4, P-5 and P-48 in evidence).

We stand in no better position than ALJ Masin to resolve the inconsistent claims regarding Dr. Shepard's participation, and note that the difficulty in seeking to do so is all the greater given that Dr. Shepard was not able to testify in this proceeding (as a result of declining medical and mental health). For those reasons, we defer to Judge Masin (who as trial judge was best able to assess the credibility of Dr. Brigham and the employee witnesses, and to evaluate and draw conclusions regarding the discrepancies between those witness statements and the recorded statements of Dr. Shepard) and fully adopt and rely on his factual findings, which are interspersed at length in the section of the ID including his analysis of Maryland law, at pages 29-51 of the ID.

Legal Conclusions

We break down our review of ALJ Masin's legal conclusions into four separate parts:

1) analysis of the applicability of N.J.A.C. 13:35-4.2;

2) analysis of Maryland law and of the issue whether Dr. Brigham engaged in the unlicensed or unauthorized practice of medicine in Maryland;

3) analysis of record-keeping issues and

4) analysis of whether Dr. Brigham's conduct supported charges made in the Complaint that he engaged in gross and/or repeated acts of negligence, professional misconduct and in the use or employment of dishonesty, misrepresentation or deception.

Analysis of applicability of 13:35-4.2.

We break down our review of the issue whether or not Dr. Brigham violated the provisions of N.J.A.C. 13:35-4.2[12] into two

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[12] Relevant portions of N.J.A.C. 13:35-4.2 ae set forth below:

13:35-4.2 TERMINATION OF PREGANANCY

a) This rule is intended to regulate the quality of medical care offered by licensed physicians for the protection of the public, . . .

b) The termination of a pregnancy at any state of gestation is a procedure, which may be performed only by a physician licensed to practice medicine and surgery in the State of New Jersey. "Procedure" within the meaning of this subsection does not include the issuing of a prescription and/or the dispensing of a pharmaceutical.

c) Provisions of this rule referring to the stage of pregnancy shall be in terms of weeks from start of last menstrual period or "weeks LMP." For example, the stage of pregnancy at 12 weeks' gestational size, as determined by a physician, is the equivalent of 14 weeks from the first day of the last menstrual period (LMP).

parts - 1) consideration of the question whether Dr. Brigham was subject to, and if so whether he violated, the provisions of the regulation when he performed "prefatory" steps in New Jersey; and 2) consideration of the independent question whether Dr. Brigham could have reasonably believed that he would not be subject to the

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d) After 14 weeks LMP, any termination procedure other than dilation and evacuation (D & E) shall be performed only in a licensed hospital.

e) Fifteen weeks through 18 weeks LMP: After 14 weeks LMP and through 18 weeks LMP, a D & E procedure may be performed either in a licensed hospital or in a licensed ambulatory care facility (referred to herein as LACF) authorized to perform surgical procedures by the Department of Health and Senior Services. The physician may perform the procedure in an LACF, which shall have a Medical Director who shall chair a Credentials Committee. The Committee shall grant to operating physicians practice privileges relating to the complexity of the procedure and commensurate with an assessment of the training, experience and skills of each physician for the health, safety and welfare of the public. A list of the privileges of each physician shall contain the effective date of each privilege conferred, shall be reviewed at least biennially and shall be preserved in the files of the LACF.

f) Nineteen weeks through 20 weeks LMP: A physician planning to perform a D & E procedure after 18 weeks LMP and through 20 weeks LMP in an LACF shall first file with the Board a certification signed by the Medical Director that the physician meets the eligibility standards set forth in (f) 1 through 7 below and shall comply with its requirements.

1) The physician is certified or eligible for certification by the American Board of Obstetrics-Gynecology or the American Osteopathic Board of Obstetrics-Gynecology, . . .

2) The physician has admitting and surgical privileges at a nearby licensed hospital which has an operating room, blood bank, and an intensive care unit. The hospital shall be accessible within 20 minutes driving time during the usual hours of operation of the clinic.

. . .

g) After 20 weeks: A physician may request from the Board permission to perform D & E procedures in an LACF after 20 weeks LMP. Such request shall be accompanied by proof, to the satisfaction of the Board, of superior training and experience as well as proof of support staff and facilities adequate to accommodate the increased risk to the patient of such procedure.

requirements of the regulation when performing "prefatory" actions in New Jersey. The answers to the two questions diverge.

We begin by making four general observations:

1) N.J.A.C. 13:35-4.2 (the "TOP regulation") does not set any standards or requirements that define who may perform, or where a termination of pregnancy can be performed upon women 14 weeks LMP or less. Dr. Brigham could thus have legally performed TOPs in his Voorhees medical office on any woman 14 weeks LMP or less. None of the patients who are the subject of this matter, however, were 14 weeks LMP or less.

2) N.J.A.C. 13:35-4.2 (d) and (e) require that all termination procedures performed on patients 15 weeks LMP or greater, other than dilation and evacuation ("D & E"), must be performed in a hospital. D & Es may be performed either in a hospital or a LACF (see ¶3 below). If performed in a hospital, the physician performing the D & E must be privileged by the hospital. Dr. Brigham did not hold privileges at any New Jersey hospital. Therefore, Dr. Brigham could not have legally performed a D & E procedure (or any other termination procedure) in any New Jersey hospital.[13]

3) While the TOP regulation allows that a D & E procedure (on any patient 15 weeks LMP or greater) may be performed

[13] The record is clear that Dr. Brigham has never held hospital privileges in New Jersey, at any time.

in a LACF, the regulation requires that the physician performing the D & E must be granted operating privileges by a Credentials Committee at the LACF. N.J.A.C. 13:35-4.2(e). Between September 2009 and August 2010, Dr. Brigham held no such operating privileges. He therefore could not have legally performed a D & E in New Jersey on any patient 15 weeks or greater LMP in a LACF.

4) Even if Dr. Brigham had in fact held privileges to perform a D & E in a LACF upon a patient between 15 and 18 weeks LMP, he could not have obtained privileges to perform the procedure (in a LACF) for any patient who was 19 weeks LMP or greater, because the regulation requires that any physician granted those privileges must hold hospital admitting privileges at a nearby hospital and must either hold Board certification, or be eligible for Board certification, in obstetrics/gynecology. N.J.A.C. 13:35-4.2(f). Dr. Brigham met neither precondition.

Given the above observations, it is necessarily the case that Dr. Brigham violated the requirements of the TOP regulation in each and every case below if he was subject to those requirements, as compliance would have been impossible for Dr. Brigham. The question whether Dr. Brigham was or was not subject to the regulatory requirements is ultimately a matter of line-drawing - specifically, it requires that we define the point in time at which a physician who performs an abortion becomes subject to the requirements of the regulation.

In the administrative complaint, the Attorney General charged that the line should be drawn at the point where Dr. Brigham inserted laminaria. Dr. Brigham was thus charged with having violated the provisions of the TOP regulation in every case, to include both "AWS" cases where cervical preparation performed in New Jersey involved only laminaria insertion and/or Misoprostol administration, and "Grace" cases where intra-uterine fetal demise ("IUFD") was also caused to occur in New Jersey by the injection of Digoxin.

The Attorney General argued in the alternative that, even if Dr. Brigham was not subject to the requirements of the regulation in "AWS" cases, he should be found to have violated the regulation in all "Grace" cases. That argument was predicated on a construct that, at the time Dr. Brigham caused fetal death to occur in New Jersey, he irreversibly committed his patient to having an abortion performed. The Attorney General thus suggested that a distinction could be made between "reversible" and "irreversible" cases, and urged that, at a minimum, Dr. Brigham should be found to have violated the regulation in "irreversible" cases. That argument presupposes that acts which are performed solely for purposes of cervical preparation, to include laminaria insertion or Misoprostol ingestion, do not "irreversibly" commit a patient to having an abortion performed.

Dr. Brigham argued that the requirements of the regulation should apply only at the point in time when a physician commences a D & E. In the ID, ALJ Masin agreed. Devoting eighteen pages of his ID to this issue, ALJ Masin concluded that all of the actions Dr. Brigham performed in New Jersey were properly categorized as "prefatory" steps, and that the regulation only applied to the actual performance of a D & E procedure. In doing so, he rejected any suggestion that any distinction should be drawn between "reversible" and "irreversible" cases, and instead concluded that the requirements of the TOP regulation kick in only at the point where a physician commences a surgical procedure to evacuate the uterus. Based thereon, ALJ Masin concluded that Dr. Brigham did not violate the regulation because he did not perform any surgical abortions in New Jersey.

We agree with ALJ Masin that there is insufficient reason (at least for the limited purpose of deciding whether or not Dr. Brigham was subject to the Board's TOP regulation) to distinguish between cases involving IUFD and those not involving IUFD. We further agree that one could reasonably categorize actions to effect cervical preparation as "prefatory" acts to a surgical D & E.

We part company and disagree with ALJ Masin, however, on the fundamental issue whether Dr. Brigham was subject to the requirements of the regulation when he performed "prefatory" acts,

and instead conclude that the regulation applied in each and every case, to include all "AWS" cases. Simply put, we conclude that Dr. Brigham was subject to the regulatory requirements at the point in time that laminaria were inserted (either directly by Dr. Brigham or at his direction) for the purpose of cervical preparation. From that point forward, Dr. Brigham was required to comply with the TOP regulation. As he neither could nor did comply with those requirements, all of his actions from that point forward were in violation of the regulation.

We base the above conclusion on our collective recognition and understanding that cervical preparation is an absolutely necessary and integral step that must be performed, in advance of surgery, to allow a physician to safely perform a D & E. As such, we find it unreasonable to dissect acts of cervical preparation from the performance of the D & E.

We fundamentally agree with and adopt the testimony offered by the State's expert, Steven Lichtenberg, M.D., that abortion should be viewed as a "process", which "process" includes not only the performance of the actual D & E procedure, but also counseling of patients, obtaining consent, and performing acts of cervical preparation. Alternatively stated, Dr. Brigham's interactions with each patient can be viewed to fall on a continuum of care, which continuum starts at the time of the first patient encounter and ends at the time a patient is discharged following

the performance of a D & E. Cervical preparation is a critical step falling along that continuum, and there is direct and inexorable link between cervical preparation and patient safety.

We hold that the termination regulation applies to all steps along the continuum which are taken for the distinct purpose of allowing a physician to safely perform a termination procedure, which steps typically begin with (and clearly include) the insertion of laminaria. We suggest that any other reading of the regulation is crimped and draws illusory distinctions between actions that must be done to allow for a safe surgical procedure and the procedure itself. Any other reading is also antithetical to public safety, as it would eviscerate the protections for patients built into the regulation.[14]

We also recognize that the need for adequate cervical dilation is heightened and acute where a D & E is to be performed on a patient in her second or third trimester of pregnancy. No competent physician would commence a second or third trimester D & E without first having dilated and softened the cervix, as to do so would necessarily expose the patient to great risk of injury. We read nothing in the expert testimony offered by either Dr.

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[14] Any other reading is directly at odds with the statement of purpose appearing at the very beginning of the regulation - namely, that the "rule is intended to regulate the quality of medical care offered by licensed physicians for the protection of the public."

Lichtenberg or respondent's expert Dr. Mucciello to suggest otherwise.

It is beyond possible dispute that the singular reason that Dr. Brigham inserted laminaria, in each and every one of the 241 cases, was to enable him to safely complete, one or two days later, the patient's surgical abortion in Elkton, Maryland. The same can be said for the administration of Misoprostol and, to a degree, for the injection of Digoxin (done primarily to effect feticide, but also furthering cervical preparation) - namely, that Dr. Brigham's fundamental purpose and intent was to promote cervical softening and dilation, which would then enable him to safely perform a D & E procedure. The prefatory steps, in turn, are medical actions which are not risk free. Once started, there is an absolute need for the physician to be available to monitor and deal with possible complications. ALJ Masin's proposed interpretation that the TOP regulation does not apply to the prefatory actions in essence ignores that reality, and in very real ways would compromise, if not eviscerate, the safeguards which the regulation includes to promote the welfare of patients in this State.[15]

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[15] Our holding obviates the need to further consider any proposed distinction between "reversible" and "irreversible" procedures, as Dr. Brigham violated the regulation in all cases - "Grace" and "AWS" alike - at the time he commenced prefatory steps to include laminaria insertion.

We point out that our finding that Dr. Brigham violated the requirements of this Board's TOP regulation in all cases is made entirely independent and apart from consideration of the issue whether Dr. Brigham could have legally completed the procedures in any other State, as was the case in Brigham I. Even if Dr. Brigham

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We are constrained to note, however, that the underlying proposition that cases involving only laminaria insertion and/or Misoprostol administration should be categorized as "reversible" is tenuous. Applying our collective medical expertise, we point out that once cervical preparation is started, there simply are no assurances that the process can be reversed or otherwise safely undone, nor are there assurances that any such attempt would not expose the patient and/or her fetus to significant risks. Dr. Lichtenberg recognized in his testimony that there are substantial risks to the fetus if a woman commences the process of cervical dilation but then changes her mind, to include risks of birth defects from Misoprostol. Dr. Brigham was well aware of that reality and advised his patients accordingly.

D.M.'s patient record (P-23 in evidence), for example, includes a "Post-Laminaria Instruction Sheet" (AG00642) and a Consent for Laminaria Insertion Form signed by D.M. (AG00645). The Instruction Sheet includes a statement: "Remember that your abortion really begins when the laminaria is inserted into your cervix." The Consent Form includes more specific warnings:

> I understand that insertion of Laminaria into my cervix **IS A DEFINITIVE STEP TOWARDS CAUSING ABORTION AND COMMITS ME TO THE TERMINATION OF MY PREGNANCY.** I understand that although some patients have changed their mind and had their Laminaria removed and gone on to a normal full-term delivery, **NO STAFF OR PHYSICIAN OF AMERICAN HEALTHCARE SERVICES, P.C. HAS MADE ANY PROMISE OR GUARANTEE** that I would be able to continue to carry this pregnancy to term should I change my mind and either remove the laminaria myself or ask someone else to remove the lamanaria (sic). I have carefully evaluated all of my options and have decided of my own free will to terminate this pregnancy.
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> [emphasis in original].

We add only that it would be clearly negligent for any physician to commence cervical preparation (for the purpose of performing a subsequent abortion) without first having communicated with his or her patient and determined that the patient is committed to completing an abortion.

could have properly performed the abortions in Maryland pursuant to that state's "consultation" exemption (or even if he had been licensed in another state where it would have been permissible to complete the abortion), Dr. Brigham made an election to subject himself to New Jersey's regulatory requirements when he commenced cervical preparation in this State rather than in Maryland.[16] By doing so, Dr. Brigham became subject to New Jersey law and this Board's regulations.[17]

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[16] In making the above statements, we are fully aware that we do not and cannot establish standards of medical practice in States outside of New Jersey, nor do we intend to do so. Physicians licensed and qualified to perform termination procedures in other states are free to do so in those other states, without need to meet any of New Jersey's standards, provided that all care is provided outside New Jersey's borders.

Had Dr. Brigham held a license in another state, he could have chosen to provide all of the care at issue herein in that state, and if he had done so, he would not have been subject to New Jersey's regulatory requirements. When Dr. Brigham elected, however, to practice in New Jersey and to treat patients in New Jersey, he became obligated to comply with all laws and regulations governing medical practice in New Jersey.

[17] Finally, before turning to the question whether Dr. Brigham should be held accountable for violations of the regulation, we comment on the language presently found at N.J.A.C. 13:35-4.2(b) that "procedure within the meaning of this subsection does not include the issuing of a prescription and/or the dispensing of a pharmaceutical." Significantly, that language was only first proposed to be added to the regulation on July 6, 2010, see 42 N.J.R. 1310, formally adopted by the Board on November 10, 2010 and filed on May 3, 2011, see 43 N.J.R. 1359. As noted in the summary statement accompanying the rule proposal, the amendment was made "to clarify that the rule does not apply to the provision of a medication to a patient designed to terminate a pregnancy."

Given that the adoption date of the amendment occurred after the events which underlie this complaint concluded, Dr. Brigham clearly did not rely on the added language when he performed the abortions which are the subject of this matter. Nonetheless, even if we were to assume *arguendo* that the dispensing of Misoprostol is not an act encompassed within the regulatory definition of "procedure", Dr. Brigham was clearly subject to the regulatory requirements when he inserted laminaria and

While we as a Board collectively and unanimously have concluded that Dr. Brigham was subject to and violated the requirements of the TOP regulation in every case, fundamental fairness dictates that we also consider the question what Dr. Brigham could have reasonably believed to have been permissible in light of the holding in Brigham I and the advice regarding the practice of inserting laminaria in an office setting by former Executive Director Judith Gleason to Stuart Phillips, Esq. in November 1999. We conclude that Dr. Brigham could have reasonably believed, based on the outcome of Brigham I and the "Phillips letters," that he could have inserted laminaria and administered Misoprostol to his patients without being subject to the regulatory requirements, but could not have reasonably believed that he could have injected Digoxin to effect IUFD without being subject to those requirements.

We start our analysis by reviewing the filed complaint, facts and holding in Brigham I. In Brigham I, Dr. Brigham was charged in a complaint filed on November 24, 1993 (subsequently amended) with, among other items, having violated N.J.A.C. 13:35-4.2 by having inserted laminaria in patients denominated as J.K.

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when he injected Digoxin into the uteral cavity. Simply put, neither act can be reasonably equated to the administration of a pharmaceutical or the issuance of a prescription.

and B.A.[18] On February 3, 1994, the Board entered an Interim Decision and Order which placed restrictions on respondent's practice, to include a directive that he not initiate or participate in second trimester abortions, including the insertion of laminaria in patients for purposes of cervical dilation preceding evacuation of the uterus and an appointment of a practice monitor. The case was then transferred to OAL, and tried over 29 hearing dates before ALJ Joseph Fidler.

Brigham I involved cases that occurred at a time that Dr. Brigham held plenary medical licenses in both New Jersey and New York. Based on review of the record, it appears that Dr. Brigham in fact then practiced in both New Jersey and in New York, and that it was lawful for him to have performed abortions on patients who were post 14 weeks LMP in New York at a facility identified as "All Women's Medical Pavillion" in Queens, New York.

Patient J.K. was 24 weeks pregnant when she sought an abortion from Dr. Brigham in his Voorhees office on July 14, 1992. Dr. Brigham examined J.K. and concluded that there had been a fetal demise. He explained to J.K. that he would insert laminaria to dilate her cervix for two days and on the third day he would perform the abortion in Queens, New York. Dr. Brigham inserted

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[18] Dr. Brigham was also charged with violating the regulation in the case of patient S.C. and in the case of an unidentified patient in May 1993, but Judge Fidler did not find that Dr. Brigham in fact performed an abortion on the unidentified patient and found that S.C. was not beyond 14 weeks LMP. see ID, p. 75.

eight laminaria in his Voorhees office on the day he initially examined J.K. She returned to Voorhees the next day, at which time Dr. Brigham removed the eight laminaria and inserted 22 fresh laminaria. That evening, J.K. was admitted to labor and delivery at Robert Wood Johnson Hospital and ultimately delivered a dead fetus. (see discussion p. 11 -23, Fidler ID).[19] In the case of patient B.A., Dr. Brigham inserted laminaria in New Jersey, and then completed B.A.'s post 14 week LMP abortion procedure in his New York office.[20]

ALJ Fidler's analysis of the issue whether Dr. Brigham violated N.J.A.C. 13:35-4.2 by having inserted laminaria is set forth at pages 75-78 of his Initial Decision. After reviewing the testimony offered by Dr. Brigham and expert witnesses, ALJ Fidler concluded:

> It is clear that insertion of laminaria does not terminate a pregnancy. It is likewise clear that it is a necessary step in achieving adequate cervical dilation so that evacuation of the uterus can be accomplished safely. The Board is of course free to interpret the scope of its rule on termination of pregnancy, in accordance with reason, fairness, and adequate notice to those who are regulated. It would be well if the rule specifically

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[19] ALJ Fidler initially concluded that the care Dr. Brigham provided to J.K. did not support allegations of gross or repeated acts of negligence, malpractice or incompetence or professional misconduct. See Fidler Initial Decision, p. 11-23.

[20] It is difficult to determine, from review of ALJ Fidler's opinion, precisely what facts were found regarding Dr. Brigham's conduct as it concerned patient S.C, as the discussion in the opinion focused on the question of possible record alteration rather than the underlying facts of S.C.'s case.

> addressed the use of laminaria, as I am convinced that Dr. Brigham would not have utilized the procedure in New Jersey for patients beyond the 14th week of pregnancy if the rule expressly defined laminaria insertion as a termination procedure. Dr. Brigham voluntarily stopped inserting laminaria in New Jersey about a year before the Board issued its interim order barring him from such procedures, when he learned of the Board's apparent interpretation.
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> Based upon the foregoing, I FIND that respondent did not intentionally nor negligently violate N.J.A.C. 13:35-42. Thus, I CONCLUDE that respondent's conduct does not constitute grounds for the revocation or suspension of his license to practice medicine and surgery in this State.

In an Order filed on August 28, 1996, the Board adopted ALJ Fidler's findings and conclusions, without making any direct comment on issues regarding the applicability of N.J.A.C. 13:35-4.2.

We read ALJ Fidler's findings, and the Board's adoption of those findings, to directly exonerate Dr. Brigham not from having engaged in conduct which violated the regulatory requirements, but only from having engaged in conduct which intentionally or negligently violated the regulatory requirements. We are unpersuaded that ALJ Fidler or the Board ever directly decided the core question whether Dr. Brigham in fact violated the provisions of N.J.A.C. 13:35-4.2 when he inserted laminaria in either J.P. or B.A. In analyzing Dr. Brigham's culpability, ALJ Fidler expressly considered and weighed the fact that Dr. Brigham voluntarily stopped inserting laminaria in his New Jersey office

over a year before charges were filed when he "learned of the Board's apparent interpretation" of the regulation. While ALJ Fidler did not expressly address what he meant when he referenced the Board's "apparent interpretation," we suggest it is fair and reasonable to read that language to connote that the Board in 1994 did consider Dr. Brigham to be violating the requirements of the regulation when he inserted laminaria in his patients.

While one can certainly posit, with the benefit of hindsight, that it would have been beneficial for ALJ Fidler or the Board to have squarely addressed and ruled on the issue whether Dr. Brigham violated the regulation when he inserted laminaria -- distinct and apart from the related question whether or not any violation was intentional or negligent --that simply did not occur.[21] We point out, however, that had ALJ Fidler concluded that Dr. Brigham did not violate the regulatory requirement when he inserted laminaria, his analysis of Dr. Brigham's culpability would have logically ended at that point. Any additional analysis or consideration of the question whether the violation was "intentional" or "negligent" would have been entirely unnecessary and gratuitous. We suggest that the only reasonable inference that can be drawn from the fact that ALJ Fidler considered the question

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[21] It is likewise the case that, notwithstanding ALJ Fidlers' suggestion that the regulation might benefit from clarification, no substantive amendments were made to the language in the regulation from 1996 through August 2010. See fn 17, infra.

whether Dr. Brigham's violations were "intentional" or "negligent" is that ALJ Fidler in fact first concluded that Dr. Brigham violated the regulatory requirements when he inserted laminaria in his patients.[22]

Notwithstanding the above analysis, we recognize that Dr. Brigham in fact was charged, in Brigham I, with having violated the termination regulation when he inserted laminaria in New Jersey, and that at the conclusion of proceedings, the charges against him were dismissed. Given that fact, we cannot say that Dr. Brigham could not have reasonably concluded that it would be legal for him to insert laminaria in patients in New Jersey, even in cases where he could not legally perform the subsequent termination procedure in New Jersey, provided that he could legally perform the D & E in another jurisdiction. There is nothing, however, to suggest that the issue whether Dr. Brigham would have been subject to the requirements of the TOP regulation for dispensing Misoprostol or for injecting Digoxin were before ALJ Fidler or the Board in Brigham I.

Turning to the "Phillips" letters, Stuart Phillips, Esq. wrote to the Board on January 26, 1999 and on October 21, 1999 and asked that the Board advise whether a physician would be deemed to

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[22] If we are incorrect in our interpretation of the holding in Brigham I - that is, if the holding therein should more properly be considered to be a determination that Dr. Brigham did not violate the terms of the TOP regulation when he inserted laminaria in his New Jersey office without then being legally qualified and able to complete the planned abortion in New Jersey -- we would today summarily reverse that holding.

violate the provisions of the TOP regulation if that physician inserted laminaria in his or her office, and then performed an abortion in a hospital or LACF the next day. Mr. Phillips specifically stated that it was his unidentified client's absolute intention to otherwise comply with the requirements of the TOP regulation and to perform the subsequent abortion in a hospital or licensed/approved facility. In a response dated November 8, 1999, former Executive Director Judith Gleason stated that "there would appear to be no problem with regard to the insertion of laminaria prefatory to a termination of pregnancy whether in an office setting or in a licensed ambulatory care facility." Significantly, Mr. Phillips did not ask for an opinion whether a physician could or could not dispense Misoprostol or inject Digoxin in his or her office, and Ms. Gleason's response in no way broached those issues.

At most, then, Ms. Gleason's letter would provide a safe harbor against any charge that a physician violates the TOP regulation if he or she inserts, or directs the insertion, of laminaria in his or her office (as opposed to laminaria insertion occurring in a hospital or LACF).[23] That question, however, is

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[23] While we simply do not perceive the Phillips letters to have at all addressed the issue of Digoxin injection, we point out that Mr. Phillips himself, in seeking an opinion about the in-office administration of laminaria, pointed out that his client had stated:

> [L]aminaria insertion involves only the cervix, not the uterus, and . . . neither kills the fetus nor evacuates the uterus. Hence, laminaria insertion does not cause, and is not, an abortion. Patients have been known to change their

entirely apart and distinct from the question whether a licensee violates the regulation when he or she inserts laminaria in the office setting when the physician is not otherwise qualified to complete the abortion in a manner consistent with the requirements of the regulation. We clarify that Dr. Brigham has been found herein to have violated the regulation not because he inserted laminaria in his office rather than in a hospital or LACF, but because by doing so he commenced abortions that he could not thereafter legally complete.[24]

In sum, we conclude that Dr. Brigham could have reasonably believed, based on the holding in Brigham I and Ms. Gleason's November 8, 1999 letter to Mr. Phillips, that he could

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> minds after laminaria insertion, and for those patients the laminaria can be removed and the patient will go on to deliver a baby, with no ill effects from the laminaria. Indeed, this is well documented in the literature (please see the enclosed two published papers.)
>
> Letter from Phillips to Gleason, January 26, 1999, P-74 in evidence

We cite the above language solely for the purpose of demonstrating (particularly given that we now know that Dr. Brigham was Mr. Phillips' unidentified client) that Dr. Brigham, at least prior to January 1999, continued to draw a distinction in his own mind between reversible prefatory acts and irreversible prefatory acts which preclude a live birth. That recognition, in turn, supports our determination that Dr. Brigham could not reasonably have relied on the advice provided in the Phillips letters to conclude, in 2009, that he could inject Digoxin in his office setting without being subject to the requirements of the Board's termination rule.

[24] We continue today to endorse the position taken in Ms. Gleason's letter, as we simply neither read nor interpret the TOP regulation to preclude a physician from performing laminaria insertion or from dispensing Misoprostol in an office setting.

legally insert laminaria in his office without running afoul of the requirements of the TOP regulation, and that he could thereafter complete the abortion in another state where he was licensed. Further, although there is nothing in the record to suggest that either the holding in Brigham I or the Phillips letters would have provided a predicate for Dr. Brigham to conclude that he could dispense Misoprostol to his patients in an office setting, it is nonetheless the case that both prefatory acts effect cervical dilation alone, and do not have any direct impact on the viability of the fetus. As such, we will afford Dr. Brigham the benefit of the doubt, and conclude that he might have reasonably believed that administering Misoprostol to patients in Voorhees would not have subjected him to the regulatory requirements.[25]

It strains credulity, however, to suggest that Dr. Brigham could have reasonably believed that he could have injected Digoxin to cause IUFD in New Jersey without being subject to the requirements of the regulation. We base that conclusion on Dr. Brigham's own testimony in Brigham I - specifically, Dr. Brigham then opined that the insertion of laminaria did not constitute the

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[25] The above should not be taken to suggest that the insertion of laminaria should be fully equated to administration of the cervical ripening agent Misoprostol. Rather, Misoprostol administration does present risks beyond those presented by laminaria insertion alone, to include a greater risk (in any case where an abortion is not completed after Misoprostol is ingested) of causing birth defects. Misoprostol is a known toxic agent to the fetus. It is a drug which alone can cause irreversible labor and delivery.

performance of an abortion because "it neither kills nor evacuates the fetus." See Fidler ID, p. 77, and see Exhibit P-70.[26] Given that testimony, Dr. Brigham could not have reasonably believed or concluded, based on the holding in Brigham I and/or based on the advice provided in the Phillips letters, that it was legal or permissible for him to cause fetal death in New Jersey by injecting Digoxin.

Finally, we point out that Dr. Brigham could have elected in 2009 to have sought written clarification from the Board on the issue whether Digoxin could be injected in an office setting without violating N.J.A.C. 13:35-4.2, as Dr. Brigham was no stranger to that process. It is clear that he did not do so. For all the above reasons, we conclude that Dr. Brigham should be held accountable (for purposes of penalty) for violating the requirements of the TOP regulation in each of the 43 Grace cases,

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[26] As Judge Fidler stated in his Initial Decision:

> It was the opinion of respondent Brigham that insertion of laminaria does not constitute performance of an abortion. He offered several reasons. First, insertion of laminaria does not terminate the pregnancy; it neither kills nor evacuates the fetus. It is possible to remove the laminaria and have the patient go on to deliver a healthy baby.

While it may be clear, from his testimony below, that Dr. Brigham would no longer in 2014 subscribe to the position he took in 1995, his testimony in Brigham I significantly shapes our analysis of the question what Dr. Brigham could have reasonably believed to have been the law in New Jersey in 2009 and 2010.

and be subject to penalty for violating the regulation in those 43 cases alone.

Unlicensed Practice of Medicine in Maryland

The issue whether Dr. Brigham violated Maryland law when he performed terminations in that State is a question that uniquely and singularly requires a legal interpretation of Maryland law - namely, the Maryland statute which provided in 2009 and 2010 that "subject to the rules, regulations and orders of the Board, the following individuals may practice medicine without a license: . . . (2) a physician licensed by and residing in another jurisdiction while engaging in consultation with a physician licensed in this State. Md HEALTH OCCUPATIONS Code Ann. §14-302. ALJ Masin copiously analyzed the meaning of that statute - in particular, the phrase "while engaging in consultation with a [Maryland licensed] physician" - and did so without the benefit of any direct precedent from the Maryland Board or the Maryland courts. Further, his interpretation of the law was ultimately predicated on his analysis and resolution of the question whether the Maryland legislature, when passing an amendment to the law in 2013, changed or clarified prior law.

We substantially defer to ALJ Masin's detailed discussion of the principles of statutory interpretation and his ultimate conclusions regarding the meaning of the consultation exemption as it existed in 2009 and 2010 under Maryland law. We note that the

issue of the legal interpretation of another state's law is an issue that we, as a Medical Board, are not often called upon to decide, and in this instance are no more qualified to do than an experienced ALJ. As such, it is an interpretive issue that stands in stark contrast to other issues in this case which we can and do bring our experience and expertise to, such as questions involving the interpretation of this Board's own regulations or questions whether Dr. Brigham engaged in acts of medical negligence or gross negligence. We find ALJ Masin's analysis of Maryland law to be persuasive, and adopt that analysis in its entirety.

The only additional point that we make to amplify this record is that, viewing the relationship between Dr. Brigham and Dr. Shepard through the lens of medical practitioners, we find that their "relationship" was anything but an ordinary or typical consultative relationship. Dr. Shepard possessed neither the skill set nor the experience level which one would typically expect from a medical consultant. Ordinarily, a treating physician requests that a consultant examine his or her patient because the consultant possesses specialized knowledge and expertise above and beyond that held by the treating physician. For example, a general practitioner may request that a pulmonologist or cardiologist examine and provide opinions and guidance about the care and treatment of a patient experiencing shortness of breath or chest pains. The general practitioner does so because he or she

recognizes both the need for and benefit of having the specialist's input.

In this case, Dr. Brigham did not need Dr. Shepard to perform any of the functions a true medical consultant would be expected to perform. The record below suggests that Dr. Shepard had never performed an abortion on a patient greater than 11 weeks LMP, and that he last performed an abortion in 2001. While we recognize that Dr. Shepard, as a Board-certified OB/GYN, may have had some knowledge about the general practice of obstetrics and gynecology different and apart from Dr. Brigham, we reject any suggestion that Dr. Brigham had any need to tap Dr. Shepard's knowledge base or any need to consult with him.

With specific focus on the question whether Dr. Brigham needed Dr. Shepard present as a "consultant" when he performed surgical abortions on second or third trimester patients in Elkton, we suggest it is patently obvious that Dr. Shepard was not then acting as a consultant. At best, at times that he was present in Elkton, Dr. Shepard performed functions that otherwise could have been performed by a nurse or qualified medical assistant. When he was present on the phone alone, he couldn't perform even those limited functions.[27]

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[27] As for Dr. Brigham's claims that Dr. Shepard was "consulted" on the issue whether any "Grace" patient would be accepted into the practice, we suggest that, even if that in fact occurred, it would in no way be an act sufficient to qualify Dr. Shepard as a medical consultant. Further, we note that there is simply no documentation in the record below evidencing

We note further that the record is devoid of other indicia of a true consultative relationship between Dr. Brigham and Dr. Shepard. There is no suggestion that Dr. Shepard ever independently billed for performing a consultation - rather, the record is clear that Dr. Shepard was employed and paid by Dr. Brigham. Nor is there a single written or typed consultation report or note from Dr. Shepard in any patient record. It is thus clear to us that, from a medical perspective alone, there is more than ample reason to adopt ALJ Masin's ultimate conclusions that any claimed consultative relationship was a sham and that Dr. Brigham simply effectuated a scheme to allow him to practice in Maryland with no illusions that he had any actual need for medical consultation with Dr. Shepard.

In his written exceptions, respondent suggested that ALJ Masin "never directly answered [the] question" whether Dr. Brigham committed a crime under Maryland law. N.J.S.A. 45:1-21(f) provides that a licensee may be sanctioned if he is convicted of, or if he "engage[s] in acts that constitute" a crime or offense involving

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that Dr. Shepard participated in any such filtering process, much less any documentation suggesting that Dr. Shepard ever unilaterally made a decision to reject a patient. We also note that Dr. Brigham's testimony regarding Dr. Shepard's participation and involvement in care provided to patients in Elkton as well as his testimony regarding Dr. Shepard's participation in preliminary decision-making whether to accept a patient is entirely inconsistent with the recorded statement that Dr. Shepard provided to Detective Smith of the Elkton police (P-48), which statement clearly suggests that Dr. Shepard played a far more limited and inconsequential role.

moral turpitude or that relates adversely to the activity regulated by the Board. Maryland law, in turn, in 2010 specifically prohibited the unlicensed practice of medicine, see Md. HEALTH OCCUPATIONS Code § 14-601, and further provided that a person who violates §14-601 is: "(i) guilty of a felony and on conviction is subject to a fine not exceeding $10,000 or imprisonment not exceeding 5 years or both; and (ii) subject to a civil fine of not more than $50,000 to be levied by the Board. [28]

While it is a fact that Dr. Brigham was not criminally charged in Maryland with having engaged in the unlicensed practice of medicine, it is clear that the unlicensed practice of medicine in Maryland is in fact punishable as a crime, and that the crime would be one that relates adversely to the activity regulated by the Board. Dr. Brigham is thus subject to penalty in New Jersey for having engaged in the unlicensed practice of medicine in Maryland, even if he was neither convicted nor charged with that offense. As such, ALJ Masin's determinations that respondent was not authorized under Maryland law to practice medicine in that State, and that the activity he undertook in Elkton was therefore in violation of that State's law, see ID p.50 fully support a conclusion that respondent repeatedly engaged in actions which constituted a crime or offense relating adversely to the practice

[28] The unlicensed practice of medicine is also a criminal offense in New Jersey. See N.J.S.A. 2C:21-20.

of medicine, subject to sanction in New Jersey pursuant to N.J.S.A. 45:1-21(f).[29]

Record Keeping Issues

We adopt ALJ Masin's findings that Dr. Brigham violated provisions of the Board's record-keeping rule, however reject his characterization of the violations as being "minor" and instead conclude that the violations are more aptly depicted as "substantial" and "serious." We do so because we found that Dr. Brigham consistently prepared records in a manner that likely would deceive anyone reading his records (at a later date) regarding the specific identity of the physician who performed the abortion or the specific procedure performed. Our specific concerns focus on three distinct issues: 1) Dr. Brigham's consistent practice of falsely representing in the "Abortion Record" that the patient spontaneously delivered the fetus and placenta; 2) his practice of identifying only Dr. Shepard (and never himself) as the "doctor" on a "Recovery Room Log" which was kept at the Elkton facility; and 3)

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[29] It is also beyond reasonable dispute: (1) that the Maryland State Board of Physicians considered Dr. Brigham's practice to be the practice of medicine in Maryland without a license. See P-7, Cease and Desist Order in the Matter of Steven Chase Brigham, M.D., and see P-9, Consent Order in the Matter of George Shepard, M.D. (concluding as a matter of law that Dr. Shepard practiced medicine with an unauthorized person or aided an unauthorized person in the practice of medicine); and (2) that, whatever the reason, Dr. Brigham never applied for a medical license in Maryland, and never submitted an application for an exception from licensing with the Maryland Board (see P-11 in evidence).

his practice of leaving blank the identity of the physician who would be performing a patient's abortion on Informed Consent Forms.

Focusing on the issues regarding the actual procedure performed, Dr. Brigham's "Abortion Record" form included a pre-printed line stating: "The patient [ ] did [ ] did not, spontaneously deliver the fetus and placenta." In all of the records in evidence, the box to indicate that the patient did have a spontaneous delivery was checked, when in fact none of the deliveries were "spontaneous." While that mistake could certainly be excused as a record-keeping error in an isolated instance, it instead was clearly a deliberate practice as the same error was made in each and every case. We infer that the practice was done to mislead or confuse anyone subsequently reading or reviewing Dr. Brigham's records as to what actually occurred.[30]

A second consistent misrepresentation that permeates the records below was the identification of Dr. Shepard alone as the "doctor" on the "Recovery Room Logs" which were maintained at the Elkton facility (P-38). Those logs, which were retrieved from the Elkton office subsequent to D.B.'s procedure, list the 241 patients whose procedures were performed in Elkton, Maryland. The logs

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[30] In making the above statement, we are aware that both expert witnesses were able, upon review of the entire record, to determine that a surgical abortion occurred, rather than a spontaneous delivery. We do not believe, however, that it is reasonable to assume or conclude that any subsequent reader of Dr. Brigham's records would necessarily have a level of experience and sophistication similar to that of the two expert witnesses , and instead suggest that the consistent misrepresentation that a spontaneous delivery occurred had the potential to mislead.

additionally list, for each patient, the number of weeks pregnant, the procedure performed (in all cases, the procedure was denominated simply as TOP), the type of sedation used, the fee for the procedure and the manner in which the fee was paid. The logs also denominate "Grace" patients. The logs were maintained independently from the patient records, and Dr. Brigham's name does not appear on any log sheet. Because Dr. Shepard alone is listed as the physician on the logs, the logical inference one reviewing the logs would draw is that Dr. Shepard performed each TOP procedure. Indeed, it appears that inference was in fact initially drawn by investigators for the Maryland Board of Physicians, as Dr. Shepard was interviewed by those investigators based on their review of the recovery room logs. See Order for Summary Suspension of License to Practice Medicine in the Matter of George Shepard, Jr., M.D., entered by the Maryland State Board of Physicians, ¶19, P-6 in evidence.

Finally, with regard to the Informed Consent Forms, often (but not always) Dr. Brigham was not identified on the form as the physician who would be performing the patient's abortion, notwithstanding the fact that, in each and every case, Dr. Brigham was in fact the physician to whom the patient provided consent to perform her abortion. While these forms were apparently maintained within a larger patient record (wherein Dr. Brigham was identified), our concern is that one reviewing the Informed Consent

form alone would again have no way to know that Dr. Brigham was the physician who was to perform the abortion. Additionally, based on our collective expertise, we point out that such practice is inconsistent with general standards for obtaining and recording an informed consent. While the failure to have identified Dr. Brigham on an Informed Consent form could again readily be excused, or considered to be a "minor" violation in any isolated instance, the consistency of the practice renders the violation far more concerning.

Taken in the aggregate, we additionally conclude that Dr. Brigham's misleading record-keeping practices support a conclusion that he engaged in the use or employment of dishonesty, deception or misrepresentation. For the reasons set forth above, we infer that each deceptive practice was done to mislead and confuse a subsequent reader of Dr. Brigham's records, and to generally obscure the truth about the actual procedure performed and the identity of the physician who performed the procedure. We thus conclude, based on record-keeping practices alone, that Dr. Brigham should be found to have violated N.J.S.A. 45:1-21(b), and should be subject to penalty for that reason as well as for the reason that his records failed to conform to the requirements of the Board's record-keeping regulation, N.J.A.C. 13:35-6.5 [in turn providing basis for disciplinary sanction pursuant to N.J.S.A. 45:1-21(h)].

Additional Allegations in Complaint

The Attorney General has urged, in his exceptions, that we should herein address and decide claims made in the Third Amended Complaint that ALJ Masin did not specifically reach, to include allegations that Dr. Brigham should be found to have engaged in gross and/or repeated acts of negligence, professional misconduct and to have engaged in the use or employment of misrepresentation, deception or dishonesty. We conclude that the established facts support all of those charges.

We start with the core question whether Dr. Brigham engaged in gross negligence and/or repeated acts of negligence. Initially, we recognize and point out that this is simply not a case focused on Dr. Brigham's technical competency to perform a D & E, and that the record is devoid of evidence that any individual patient (with the exception of patient D.B., whose termination procedure was performed by Dr. Nicola Riley) suffered physical harm as a result of any termination procedure performed by Dr. Brigham. Our analysis of the issue of negligence, however, is necessarily broader and focuses upon the risk of harm to which patients were exposed, and whether Dr. Brigham's conduct endangered the health, safety and welfare of his patients.

We conclude that every patient treated in New Jersey by Dr. Brigham was placed in harm's way once Dr. Brigham commenced cervical preparation, because each patient then became committed to having a termination procedure performed in circumstances where

their treating physician, Dr. Brigham, knew that he could not legally perform the procedure in New Jersey, and knew or should have known that he could not legally perform the procedure anywhere else. The patients were further exposed to substantial risk of harm because Dr. Brigham held no hospital or LACF privileges, and thus had nowhere in New Jersey (or any other state) where he could go to complete the termination procedures in the event of any emergency or unforeseen complications. The latter point is particularly significant because, even if we assume that Dr. Brigham honestly believed his practice in Maryland was legal, he had to know that there was a possibility that a patient could go into active labor, and that a termination procedure would need to be performed before a patient traveled to (or arrived in) Elkton on an emergent basis. There is nothing in the record below to suggest that Dr. Brigham had any contingency plan for those patients, beyond possibly assuming that the patient would then be rushed to a hospital emergency room and have their care (and presumably their abortion procedures) completed by a physician who had no relationship with Dr. Brigham or the patient. Dr. Brigham's failure to have such back-up plans in place was a clear abrogation of his responsibility as a treatment provider and placed each and every patient at substantial risk of suffering grave harm.[31]

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[31] We further suggest that Dr. Brigham's practice of injecting Digoxin in his office setting was a practice that likely was inconsistent with

We unanimously conclude that such conduct constituted gross negligence in each and every instance. The lesser charge of repeated acts of negligence is necessarily subsumed by our finding.

Additionally, we conclude that the charges that Dr. Brigham repeatedly violated N.J.S.A. 45:1-21(b) by engaging in acts of dishonesty, deception or misrepresentation are fully supported on the record below.[32] Most fundamentally, Dr. Brigham repeatedly withheld pertinent, if not crucial, information from his patients. We unanimously hold that each and every patient treated by Dr. Brigham had a right to know, and should have been told, what Dr. Brigham himself knew - namely, that he could not legally perform an abortion in New Jersey. Each and every patient had a right to know that, in the event there was any emergency requiring hospitalization in New Jersey before the time of the scheduled procedure, Dr. Brigham could not have performed their abortion in New Jersey, and could not even have been involved in their care because he held no hospital privileges. Each and every patient should likewise have been told that her abortion would be performed in Maryland rather than in New Jersey, and should have been given far more specific information about the nature and location of the

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the standard of care, and could have exposed patients to risk. Dr. Brigham's own expert witness, Dr. Mucciello, testified that his patients are referred to a perinatologist, practicing in a hospital setting, for any necessary Digoxin injections.

[32] We make this finding distinct and apart from our independent finding that Dr. Brigham engaged in acts of deception and misrepresentation in his record-keeping practices.

facility where Dr. Brigham intended to perform the abortion. Similarly, each and every patient had a right to know, and should have been told, that Dr. Brigham was not in fact licensed in Maryland, that his intent was instead to rely on an exemption to Maryland licensure law and to perform their abortion "in consultation" with Dr. George Shepard.

Whether those disclosures would or would not have changed patients' elections to have Dr. Brigham perform their procedure is speculative but ultimately irrelevant - what is relevant is that those were crucial facts and key elements necessary to allow a patient to make a knowing and informed choice about her care options. Dr. Brigham's failure to be forthright and honest with his patients corrupted the informed consent process and fundamentally shattered the trust inherent in the physician-patient relationship.

Finally, based on the constellation of factual findings and conclusions above, we are convinced and specifically conclude that the allegations that Dr. Brigham engaged in professional misconduct, and thereby violated N.J.S.A. 45:1-21(e), are fully supported on the record below. Dr. Brigham went to great lengths to create a thick haze to shroud his practice from scrutiny by licensing authorities in Maryland and New Jersey, and even to keep his patients from learning critical information. He repeatedly and consistently prepared his records in ways designed to confuse or

obscure any review of both who was doing, and what was being done, in Elkton. Those acts evidence a fundamental lack of candor and ultimately evince a brazen disregard and disrespect of the rights of patients, as well as for the authority of licensing agencies and the need for those agencies to be able to protect the public interest. They are thus acts which support, if not dictate, a conclusion that Dr. Brigham engaged in professional misconduct.

Penalty

Moving finally to the issue of penalty assessment, we fully support ALJ Masin's recommendation that Dr. Brigham's license should be revoked. ALJ Masin reached that conclusion based solely on conclusions that Dr. Brigham engaged in the unlicensed practice of medicine in Maryland and committed "minor" record-keeping violations. We fully agree with that recommendation, and we would order the revocation of Dr. Brigham's license, for the reasons ALJ Masin expressed in the ID, based on those findings alone (particularly when viewed and considered in the context of Dr. Brigham's extensive history of disciplinary violations, see discussion at ID, p. 79-83).

We have, however, found the scope of Dr. Brigham's misconduct and the panoply of his violations of law to be far more extensive than did ALJ Masin. We thus view the predicate supporting the revocation of Dr. Brigham's license to be all the more comprehensive and compelling, and unanimously conclude that no

action short of revocation of licensure could adequately redress the violations of law found or adequately protect the public interest.

On the issue of financial penalty, we have concluded that good cause exists to increase the amount of any civil penalty assessment above the $30,000 recommended by ALJ Masin, to an amount that is more consistent with the enhanced breadth and gravity of the misconduct that we have found. The Attorney General urged us to impose "maximum" penalties in this case, but stopped short of making any suggestion what the amount of any proposed "maximum" penalty should be. While we agree with the Attorney General that the seriousness and the scope of Dr. Brigham's misconduct supports assessment of "maximum" civil penalties, we have settled on assessing those penalties on a per Count (rather than on a per patient) basis, to avoid imposition of an excessive penalty. As Dr. Brigham has been found to have committed violations of law in each of the seven extant counts of the Third Amended Complaint, we conclude that an aggregate penalty assessment of $140,000 is warranted in this case.[33]

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[33] As noted above, we have concluded that Dr. Brigham committed multiple statutory violations when treating not less than 241 patients (to include 43 "Grace" patients). For purposes of penalty, Dr. Brigham could be found to be liable to penalty imposition for six separate violations of law for each "Grace" patient and five violations of law for all other patients - specifically:

1) violations of N.J.S.A. 45:1-21(h), based on his having performed termination of pregnancy procedures in New Jersey in violation of N.J.A.C. 13:35-4.2 ("Grace" patients only);

2) violations of N.J.S.A. 45:1-21(h), based on his failure to maintain patient records consistent with the requirements of N.J.A.C. 13:35-6.5 (all patients);

3) violations of N.J.S.A. 45:1-21(c), based on his having engaged in gross negligence (note: given that the analysis herein is on a per patient basis, we decline to suggest that Dr. Brigham should be subject to an additional penalty for engaging in repeated acts of negligence, see N.J.S.A. 45:1-21(d), as those findings are in essence subsumed within our finding that his practice involving each patient was grossly negligent) (all patients);

4) violations of N.J.S.A. 45:1-21(f), based on his having engaged in acts which constitute a crime or offense relating adversely to the practice of medicine; namely, having engaged in the unlicensed practice of medicine in Maryland (all patients);

5) violations of N.J.S.A. 45:1-21(e), based on his having engaged in acts of professional misconduct (all patients); and

6) violations of N.J.S.A. 45:1-21(b), based on his having engaged in acts which constitute the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense [While we have found two independent bases for this conclusion, namely, the deception that occurred when Dr. Brigham failed to inform patients of salient facts and the consistent deceptive record-keeping practices, we would find it fair to merge and combine the two violations for purposes of penalty analysis.] (all patients).

Given the above findings, and given that Dr. Brigham was previously found to have violated provisions of the Uniform Enforcement Act in a Consent Order of reprimand (see P-93), the Uniform Enforcement Act allows for penalty assessments of $120,000 for each "Grace" patient and $100,000 for all other patients. See N.J.S.A. 45:1-25. If assessments were made at those "maximum" levels, Dr. Brigham could be assessed a penalty that approaches $25,000,000. In the alternative, assessment of a "maximum" penalty capped at $20,000 per patient would yield a penalty of approximately $6,000,000. Even were we to forego any assessment of civil penalties for non-"Grace" patients and cap penalties at $20,000 per patient, Dr. Brigham could be assessed a penalty of $860,000.

We ultimately decided that all of the above penalty assessments would be excessive, particularly given our holding that Dr. Brigham is to be responsible for all costs of investigation and prosecution, which

In making the above penalty determination, we have sought to balance the seriousness of Dr. Brigham's offenses with all mitigation evidence presented. We are satisfied that a penalty assessment of $140,000 strikes a reasonable balance. Clearly, both the breadth and brazenness of Dr. Brigham's misconduct is staggering - as we have found, he fundamentally compromised the physician/patient relationship he established with each patient by acts of deception, compromised the integrity of his medical records by repeatedly preparing records in a manner that was intended to mislead, and exposed all of his patients to grave risk of harm by crafting and then implementing a two-state practice scheme, both designed to skirt the requirements of Maryland law and to ultimately evade having to comply with requirements of New Jersey law. It is well established that the public has a right to expect the highest degree of honesty and trustworthiness of licensed physicians. See In re Zahl, 186 N.J. 341 (2006). Dr. Brigham's conduct was, in a real sense, the antithesis thereof.

By way of mitigation, we accept Dr. Brigham's testimony that his intent was to fill a void created after the murder of Dr. George Tiller, and to make second and third trimester abortion services more readily available to patients on the east coast of

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amounts approximated $460,000 as of October 8, 2014. We have thus elected not to assess monetary penalties calculated on a per patient basis, but instead concluded that imposition of penalties on a per Count basis, capped at a penalty of $20,000 per Count, yields an aggregate penalty assessment that is both supportable and fair.

the United States. We also respect his zeal for women's rights, and his passionate desire to make abortions a realistic choice for second and third trimester patients. Clearly, Dr. Brigham was moved and affected by Dr. Tiller's murder, and we can appreciate that he may well have had good reason, both for his own safety and for the safety of his staff and patients alike, not to actively trumpet his services. We are not persuaded, however, that any of the mitigation evidence would provide grounds to condone or excuse the lengths that Dr. Brigham went to evade the law or his pervasive misconduct. Patients have a right to know and expect that their physicians are licensed and legally able to perform any given medical procedure. Dr. Brigham was neither, and shielded that information from his patients. He sought to do an end-run around the requirements of law in both New Jersey and Maryland. That conduct, in our judgment, fully supports the penalty assessment herein.[34]

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[34] In written exceptions and in oral argument, counsel for respondent urged that the Board should recognize, in mitigation, that Dr. Brigham sought the advice of legal counsel in Maryland before commencing any practice there. He has also suggested that we should discount actions taken in other states against Dr. Brigham, most notably the revocation of Dr. Brigham's Florida license, because those actions may have occurred as a result of poor legal representation (to include a failure to timely answer interrogatories). We decline to mitigate Dr. Brigham's conduct based on any claims of improper legal advice or incompetent legal representation. Dr. Brigham could have sought to challenge or reopen the Florida action, but there is no suggestion that he has ever done so. As for his claims regarding advice received from counsel in Maryland, we simply decline to speculate on the precise circumstances and/or fact patterns that any such advice may have been predicated upon. We further point out that Dr. Brigham clearly could have, sought guidance from the

Finally, we are satisfied that good cause exists to modify ALJ Masin's recommendation that Dr. Brigham be assessed two-thirds of the costs in this matter, and instead conclude that he should be liable for and assessed all costs, given that the Attorney General did prevail on all of the seven active Counts of the Third Amended Complaint and on all of the charges of misconduct therein. Before setting the amount of costs, however, we will await the submission of a full accounting of costs (through and including October 8, 2014), and will first afford respondent an opportunity to review and set forth in writing any objections he may have to the Attorney General's cost application. We will thereafter review this matter at our next Board meeting on November 12, 2014, and determine the precise amount of any cost assessment.

WHEREFORE it is on this 12th day of November, 2014

ORDERED nunc pro tunc October 8, 2014:

1. The license of respondent Steven Brigham, M.D., to practice medicine and surgery in the State of New Jersey is hereby revoked. Respondent shall hereafter comply with all of the Directives applicable to Revoked Licensees attached hereto and incorporated herein.

Maryland State Board of Physicians on that issue, but instead elected to eschew any contacts with the Maryland Board. Ultimately, though, our rejection of the suggestion that Dr. Brigham's conduct should be mitigated based on faulty legal advice or representation rests on the bedrock recognition that it is Dr. Brigham, and Dr. Brigham alone, who must be held accountable and responsible for his own decisions and actions.

2. Respondent is assessed an aggregate civil penalty in the amount of $140,000.

3. Respondent is assessed all costs of investigation and prosecution of this matter. As stated orally on the record on October 8, 2014, the Attorney General shall submit, not later than October 15, 2014, a supplemental certification to include all costs of investigation and prosecution through and including October 8, 2014. Respondent shall thereafter be afforded an opportunity to review said submission. In the event respondent has any objection to any of the costs sought, he shall, on or before October 27, 2014, submit his objections in writing. The Attorney General may submit a reply in writing on or before October 31, 2014. The Board shall thereafter review the cost application and all written submissions received from the parties at the Board's next scheduled meeting on November 12, 2014, and shall thereafter determine the precise amount of any cost assessment. A supplemental written order assessing costs shall thereafter be entered.

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

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