August 30, 1994

OPINION NO. 94-052

Robert Heidt, M.D., President
State Medical Board of Ohio
77 South High Street, 17th Floor
Columbus, Ohio 43266-0315

Dear Dr. Heidt:

Your predecessor requested an opinion of the Attorney General on the following questions:

1. Can the State Medical Board, pursuant to [R.C. 4731.22], proceed to take disciplinary action against a licensee found to be charging excessive fees without prior agreement between the patient and physician as to those fees, and without other evidence of fraud or misrepresentation?

2. If the State Medical Board otherwise has no authority to proceed with disciplinary action, can a continuing pattern of excessive fees charged without prior agreement between patients and the physician as to those fees be deemed as legally sufficient to establish fraud or misrepresentation under division (B)(8) or other related provisions of [R.C. 4731.22]?

3. If the State Medical Board has authority to proceed in excessive fees cases pursuant to [R.C. 4731.22 (B)(18)], without other basis for disciplinary action, must it adopt administrative rules pursuant to [R.C. Chapter 119] to explicitly define the meaning of excessive fees?

4. If the State Medical Board has authority to proceed in cases of excessive fees without other basis for disciplinary action, pursuant to [R.C. 4731.22], are the Board, its agents, consultants, and representatives shielded from liability under existing antitrust provisions for so proceeding?

Statutory Authority of State Medical Board

Within R.C. Chapter 4731, the General Assembly has set forth the responsibilities of the State Medical Board, which is the body authorized to oversee the practice of medicine and surgery, osteopathic medicine and surgery, and various limited branches of medicine or surgery. As a creature of statute, the State Medical Board may exercise only those powers and duties that have been granted to it by the General Assembly. *State ex rel. Copeland v. State Medical Board*, 107 Ohio St. 20, 140 N.E. 660 (1923).

Disciplinary Actions by State Medical Board

The opinion request sets forth the following background information:

> Historically, it has been argued that the Board does not have authority to proceed on excessive fee cases absent other considerations such as fraud or misrepresentation. [R.C. 4731.22] sets forth the bases upon which the State Medical Board can impose disciplinary action. Of particular note are divisions ... (B)(5), and (B)(8) of that section which provide explicit grounds for the Board to act in situations involving fraud or misrepresentation.
> On the other hand, [R.C. 4731.22(B)(18)] requires Board licensees to maintain compliance with applicable ethical provisions.

In light of this information, the State Medical Board request first asks whether R.C. 4731.22 authorizes the Board to take disciplinary action against a "licensee found to be charging excessive fees without prior agreement between the patient and physician as to those fees, and without other evidence of fraud or misrepresentation."

The disciplinary authority of the State Medical Board is set forth in R.C. 4731.22, which states in part:

> (B) The board, pursuant to an adjudicatory hearing under [R.C. Chapter 119] and by a vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:
> ....
> (4) Willfully betraying a professional confidence or engaging in the *division of fees* for referral of patients, or the receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business....
> ....
> (17) Any *division of fees or charges*, or any agreement or arrangement to *share fees or charges*, made by any person licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery with any other person so licensed, or with any other person.... (Emphasis added.)

R.C. 4731.22(B) thus authorizes the State Medical Board, for any of the reasons set forth therein, to limit, revoke, or suspend a certificate, reprimand or place on probation the holder of a certificate, or refuse to either register or reinstate an applicant. The Board's first question asks about its authority to discipline "licensees." This opinion will assume that the term "licensee" refers to a person who holds a certificate to practice in accordance with R.C. Chapter 4731.

Divisions (4) and (17) are the only portions of R.C. 4731.22(B) that address fees, and they address only the division or sharing of fees. R.C. 4731.22(B)(4) specifically proscribes the division of fees for the referral of patients. R.C. 4731.22(B)(17) proscribes the actual division of fees or an agreement to share fees with other licensees or with any other person. Neither R.C. 4731.22(B)(4) nor R.C. 4731.22(B)(17), however, authorizes the State Medical Board to take disciplinary action against a licensee based solely upon the amount the licensee charges a patient for services.

The opinion request also asks, assuming no prior agreement between patient and physician as to the fee to be charged and assuming no fraud or misrepresentation on the part of the licensee, whether R.C. 4731.22(B)(18) authorizes the Board to discipline a licensee for charging fees that the Board finds to be excessive. R.C. 4731.22(B)(18)(a) establishes as a basis for disciplinary action,

> [t]he violation of any provision of a code of ethics of the American medical association, the American osteopathic association, the American podiatric medical association, and any other national professional organizations as are determined by rule, by the state medical board.... The practitioner whose certificate is being suspended or revoked shall not be found to have violated any provision of a code of ethics of an organization not appropriate to his profession.

Pursuant to R.C. 4731.22(B)(18)(a), the Board may take disciplinary action against a licensee who violates a provision of a code of ethics of a national professional organization appropriate to that licensee's profession.

Enclosed with the Board's opinion request were a number of ethics provisions from various national professional organizations, as described in R.C. 4731.22(B)(18)(a). Whether a particular set of circumstances involving a licensee's charging of a fee may constitute a violation of an appropriate ethical provision, however, is a question that cannot be addressed in an opinion of the Attorney General. Rather, interpretation of the ethical standards applicable to the professions regulated under R.C. Chapter 4731 has been delegated to the expertise of the State Medical Board. The rationale for delegating the decision of such matters to the State Medical Board was discussed in *Pons v. Ohio State Medical Board*, 66 Ohio St. 3d 619, 621-22, 614 N.E.2d 748, 751 (1993), as follows:

> [W]hen reviewing a medical board's order, courts must accord due deference to the board's interpretation of the technical and ethical requirements of its profession. The policy reason for this was noted in *Arlen v. State* (1980), 61 Ohio St.2d 168, 173, 15 O.O.3d 190, 194, 399 N.E.2d 1251, 1254-55: "_***The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of

> [people] equipped with the necessary knowledge and experience pertaining to a particular field. ***_" (Quoting *Farrand v. State Med. Bd.* [1949], 151 Ohio St. 222, 224, 39 O.O. 41, 42, 85 N.E.2d 113, 114.)

Thus it is clear that interpretation of the ethical standards applicable to the professions regulated under R.C. Chapter 4731 has been delegated to the expertise of the State Medical Board. It would be inappropriate, therefore, for the Attorney General to opine on a matter left to the expertise and discretion of the members of the State Medical Board for determination. *See* 1985 Op. Att'y Gen. No. 85-007 (the Attorney General has no authority to exercise on behalf of a state official the discretion delegated to that official). While R.C. 4731.22(B)(18)(a) does empower the State Medical Board to discipline a licensee for violation of a provision of a code of ethics of a national professional organization appropriate to the licensee's profession, whether a provision of such a code of ethics may prohibit the particular activity you describe is a matter to be determined by the State Medical Board within the discretion conferred upon it by statute.[1]

In answer to the first question, in the absence of any evidence of fraud or misrepresentation on the part of a licensee, and in the absence of a violation of an ethical provision of a national professional organization appropriate to the licensee's profession, R.C. 4731.22(B) does not authorize the State Medical Board to discipline that licensee solely on the basis of the amount charged by the licensee for services rendered.

Violation of R.C. 4731.22(B)(8)

The second question of the Board's request asks whether a continuing pattern of excessive fees charged by a physician without prior agreement between the patient and the physician as to those fees constitutes fraud or misrepresentation for purposes of R.C. 4731.22(B)(8), which prohibits "[t]he obtaining of, or attempting to obtain, money or anything of value by *fraudulent misrepresentations* in the course of practice" (emphasis added). In order to find a licensee in violation of R.C. 4731.22(B)(8), the Board must find that the licensee, in an attempt to obtain money or something of value, has made fraudulent misrepresentations in the course of practice.[2] A

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[1] It does not appear that the ethics provisions you have submitted expressly regulate the amount a licensee may charge for his services. One provision within the American Podiatric Medical Association Code of Ethics states that fees must not "exploit patients or others who pay for the services." This particular provision, however, sets forth no standards, factual grounds, or specific bases for finding that a particular fee might be exploitative, and thus its meaning is sufficiently vague to render its possible application to the situation you describe uncertain.

[2] A number of other provisions within R.C. 4731.22(B) address fraud or misrepresentation on the part of a licensee. *See, e.g.*, R.C. 4731.22(B)(5) ("[s]oliciting patients or publishing a false, fraudulent, deceptive, or misleading statement"); R.C. 4731.22(B)(7) ("[r]epresenting, with the purpose of obtaining compensation or other advantage for himself or for any other person, that an incurable disease or injury, or other incurable condition, can be permanently cured"). The Board's question is limited, however, to the possible application of R.C. 4731.22(B)(8) to the situation

licensee's charging of a particular fee without a prior agreement between the licensee and patient as to that fee does not, in itself, indicate that fraudulent misrepresentations have been made. Rather, in order for the State Medical Board to find a licensee in violation of R.C. 4731.22(B)(8), the Board must find that the licensee has made fraudulent misrepresentations in the course of practice in order to obtain or attempt to obtain such fee. Such a finding is necessary whether or not there exists a prior agreement between the patient and the licensee as to the fee to be charged for the licensee's services in a particular situation.[3]

The third question reads as follows: "If the State Medical Board has authority to proceed in excessive fee cases pursuant to [R.C.4731.22(B)(18)] without other basis for disciplinary action, must it adopt administrative rules pursuant to [R.C. Chapter 119] to explicitly define the meaning of excessive fees?" The final question asks: "If the State Medical Board has authority to proceed in cases of excessive fees without other basis for disciplinary action, pursuant to [R.C. 4731.22], are the Board, its agents, consultants, and representatives shielded from liability under existing antitrust provisions for so proceeding?" In light of the answer to the first question, it is not necessary to address these final two questions.

Conclusion

It is, therefore, my opinion, and you are hereby advised that:

1. Absent evidence that a person holding a certificate under R.C. Chapter 4731 has engaged in fraud or misrepresentation, and in the absence of a violation of a provision of a code of ethics of a national professional organization appropriate to the certificate holder's profession, R.C. 4731.22(B) does not authorize the State Medical Board to discipline

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described in the request.

[3] In *Burr v. Board of County Commissioners*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986) (syllabus, paragraph two), however, the court set forth the legal elements of fraud, as follows:

> (a) *a representation or, where there is a duty to disclose, concealment of a fact,*
> (b) which is material to the transaction at hand,
> (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
> (d) with the intent of misleading another into relying upon it,
> (e) justifiable reliance upon the representation or concealment, and
> (f) a resulting injury proximately caused by the reliance.

(Emphasis added.) Unlike R.C. 4731.22(B)(8), one may be responsible for committing the tort of fraud not only by making a false representation but also, where there is a duty to disclose, by concealing a fact that is material to the transaction.

that person solely on the basis of the amount charged for services by that person.

2. Whether or not there exists a prior agreement between the patient and a person who holds a certificate under R.C. Chapter 4731 as to the fee to be charged for the certificate holder's services in a particular situation, in order for the State Medical Board to find the certificate holder in violation of R.C. 4731.22(B)(8), the Board must find that the certificate holder has made fraudulent misrepresentations in the course of practice in order to obtain or attempt to obtain such fee.

Respectfully,

LEE FISHER
Attorney General

August 30, 1994

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SYLLABUS: 94-052

1. Absent evidence that a person holding a certificate under R.C. Chapter 4731 has engaged in fraud or misrepresentation, and in the absence of a violation of a provision of a code of ethics of a national professional organization appropriate to the certificate holder's profession, R.C. 4731.22(B) does not authorize the State Medical Board to discipline that person solely on the basis of the amount charged for services by that person.

2. Whether or not there exists a prior agreement between the patient and a person who holds a certificate under R.C. Chapter 4731 as to the fee to be charged for the certificate holder's services in a particular situation, in order for the State Medical Board to find the certificate holder in violation of R.C. 4731.22(B)(8), the Board must find that the certificate holder has made fraudulent misrepresentations in the course of practice in order to obtain or attempt to obtain such fee.