

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS NEWSLETTER



630 Camp Street
New Orleans, La. 70130

Post Office Box 30250
New Orleans, La. 70190-0250

Telephone: (504) 568-6820 Facsimile:
(504) 568-5754

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New Board Members

Mark Henry Dawson, M.D. Governor Kathleen Blanco appointed Mark Henry Dawson, M.D., of Rayne, Louisiana to serve as a member of the Board. His appointment became effective January 7, 2005. Dr. Dawson is the first appointee from Acadia Parish and represents a community of less than 20,000 people. Dr. Dawson, who also serves as coroner for Acadia Parish, is a 1976 graduate of Louisiana State University School of Medicine. He received his M.B.A. from LSU in 1995. His term expires January 1, 2009.

Tonya Hawkins Sheppard, M.D. Tonya Hawkins Sheppard, M.D., is the first obstetrician/gynecologist appointed to serve on the Board. Dr. Sheppard attended Tulane University and received a degree in Biomedical Engineering. Upon graduation she attended Louisiana State University School of Medicine and obtained her medical degree and residency training. She is board certified in obstetrics and gynecology and in her third year of private practice.

Board Members Depart

Elmo J. Laborde M.D. "Out with the old, in with the new" is not an adage you would associate with Elmo J. Laborde, M.D. whose term of service with the Board has ended. Dr. Laborde served on the Board from July 1985 to January 2005 and held all elected positions, having served as Secretary-Treasurer and President twice. He chaired a number of significant committees, including the Joint Administration Committee for Prescriptive Authority for Advanced Practice Registered Nurses, the Committee on the Management of Chronic Pain, the Committee on the Treatment of Obesity, the Physicians Health Committee and the Office-Based Surgery Committee. He was a member of the American College of Surgeons and has held all elected offices in his local medical societies. As member of the Louisiana State Medical Society, he was voted to the LSMS' *Hall of Fame* in 1999. On the national level, Dr. Laborde served on several Federation of State Medical Boards of the United States' Committees, an organization composed of all state medical licensing Boards in the United States, the most recent being the development of guidelines for the treatment of chronic pain. Certified by the American Board of Surgery and Fellow of the American College of Surgeons, Dr.

Laborde had dedicated his time and energy to organized medicine since beginning his surgical practice in 1962. The Board honored him at a dinner and presented him with a plaque thanking him for giving of his time and talent for the good of the citizens of Louisiana.

Trenton Leroy James II, M.D. The Board lost a tenacious leader in Trenton Leroy James II, M.D. of Baton Rouge. Appointed to the Board September 29, 1995, he served as President from May 2000 until January 2002. During his tenure on the Board, Dr. James was instrumental in the organization of the Board Orientation Program, something he felt would benefit new licensees to the state. He served on numerous Committees, appeared before the Legislature on various issues and was Chairman of the Joint Administration Committee for Advanced Practice Registered Nurses. Dr. James is a 1966 graduate of Louisiana State University School of Medicine and completed a general practice residency in the Charity Hospital System of Louisiana from 1966-68, and a family practice residency at the University of Rochester School of Medicine from 1970-71. He was board certified by the American Board of Family Practice in 1972. Dr. James is an assistant clinical professor, Department of Family Medicine, LSUHSC, since 1971. He was an item writer for the ABFP from 1984-1988. He is a member of several medical organizations, the Louisiana Academy of Family Physicians, East Baton Rouge Parish Medical Society and the Louisiana State Medical Society to name a few. Dr. James was the 1988 Louisiana Family Doctor of the Year and the recipient of several awards relating to his dedication to the practice of medicine. Nationally, Dr. James has been a Member and Item Writer for the United States Medical Licensing Examination. He has several publications appearing in *The Cancer Quarterly*, *Medical Times* and *Patient Education in the Primary Care Setting Proceedings*. The Board and its staff will miss Dr. James for his hard work and commitment to protecting the citizens of this state. A plaque was given to him on March 22, 2005 expressing sincere appreciation for a job well done.

Board Reappointments

Join the Board in congratulating two of its Board Members on their reappointments to serve another term. Governor Blanco reappointed Keith C. Ferdinand, M.D., a cardiologist, who practices in New Orleans, and Kim Edward LeBlanc, M.D., Ph.D., Professor and Chairman of the Department of Family Practice, Louisiana State University Health Sciences Center for another term. This is Dr. Ferdinand's third appointment and Dr. LeBlanc's second. Their terms expire January 1, 2009.

Who are the Members of the Board?

A family physician from Morgan City, Louisiana, Melvin Gerard Bourgeois, M.D., was appointed to the Board on March 23, 2000 by Governor Mike Foster and reappointed January 23, 2002, representing the Academy of Family Practice Physicians. He is the first physician to be appointed from St. Mary Parish. He is a New Orleans native and graduate of Jesuit High School.



Dr. Bourgeois graduated from Louisiana State University School of Medicine in May 1961 having obtained a bachelor of science degree in pharmacy from Loyola University, College of Pharmacy, New Orleans in May 1957.

Dr. Bourgeois has been a member of the American Academy of Family Practice since 1965 and was a Diplomate of the American Academy of Family Practice from 1976-1992. He is also a member of the American College of Occupational & Environmental Medicine, member of the St. Mary Parish Medical Society and the Louisiana State Medical Society. He is currently certified as a Medical Review Officer, MROCC and has been Assistant Coroner of St. Mary Parish for many years. He continues to serve on the Board of Commissioners of Hospital Service District #2 of St. Mary Parish overseeing Teche Regional Medical Center, formerly Lakewood Hospital and has been Chief of Staff several times.

He and his son, Robert M. Bourgeois, M.D. opened Bourgeois Medical Clinic in January 1993. The younger Dr. Bourgeois is also an LSU Medical Center graduate and is board certified in both Emergency Medicine and Occupational Medicine and has an MPH in Occupational Medicine. Bourgeois Medical Clinic was honored for outstanding achievement by the St. Mary Parish Chamber of Commerce as Business of the Year in 1997.

Dr. Bourgeois served his country in the United States Navy, where he was a Lieutenant Commander, serving from 1966-68 as Clinical Medical Director of the Eighth Naval District Support Activity and of the Eight Naval District, which comprised five states. He was honorably discharged as Commander.

Dr. Bourgeois earned his pilot's license in 1972 and became a flight surgeon the same year. He retired from the Civil Air Patrol, an auxiliary of the United States Air Force, after 20 years of service, with the rank of Lieutenant Colonel. He was St. Mary Parish Squadron Commander, as well as Medical Officer and Vice Commander of the Louisiana Wing, Civil Air Patrol.

During his tenure on the Board, Dr. Bourgeois has served as a member of the Board's Licensure Committee, functioned as representative of the Board on the Joint Administration Committee for Advanced Practice Registered Nurses, which was instrumental in the development of the administrative rules governing their prescriptive authority. Having served in that capacity, the Board called upon his expertise in formulating the prescriptive authority rules for Physicians Assistants in 2004. He currently serves as the Board's Secretary-Treasurer, monitoring the Board's day-to-day financial activities.

He is married to Geri Biundo Bourgeois, affectionately called "Geri" and they have six children and ten grandchildren.



The President's Corner

Physician Assistants. As you know, the legislature amended the Physician Assistant Practice Act last year to allow PAs the ability to prescribe medical devices, legend drugs and only Schedule III-V controlled

substances *to the extent designated* by a supervising physician [La.Rev.Stat. §37:1360.31 (B)(8), Act. No.10]. In conformity with the legislation the Board published *Notice of Intent* to adopt rules in the September issue of the *Louisiana Register* for PAs with prescriptive authority and supervising physicians who wish to delegate it. The rules were adopted and became final upon promulgation in the January 20, 2005 edition of the *Register*.

These rules provided qualifications and procedures for PAs and supervising physicians prescriptive authority registration, renewal and expiration as well as identifying the form of prescription and record-keeping requirements. These rules also specify prohibition-including treatment of chronic pain and obesity and provide for mandatory countersigning of records and other mutual obligations incumbent on the PA and supervising physician.

Medical Psychologists. Under the law adopted last year, medical psychologists are authorized to prescribe legend and controlled drugs (but not narcotics) related to the diagnosis and treatment of mental and emotional disorders. [La.Rev.Stat. § 37:3271 et seq., Act 11]. Under the rules adopted by the Louisiana Board of Medical Psychologists on January 20, 2005, a medical psychologist shall not prescribe medications outside his/her areas of competency consistent with his or her training and experience. Furthermore, under no circumstance, shall a medical psychologist order, prescribe or distribute narcotics, defined as natural or synthetic opioid analgesics and their derivatives used to relieve pain.

Physicians should clearly understand that just as is the case with a collaborating physician for an APRN with prescriptive authority, or a physician who is consulted and *must concur* with a proposed prescription recommended by a medical psychologist, that *whether or not and the extent to which* a PA, APRN, or medical psychologist may prescribe medication is up to the discretion of the supervising physician, or the collaborating physician, or the consulting physician as the case may be. Following up on what we have done with PAs, the Board is working on rules that will govern the obligations imposed on physicians who collaborate, supervise or consult with any other mid-level provider with prescriptive authority.

Treatment of Chronic Pain and Pain Clinics. There has been a public outcry over physicians practicing in pain clinics in certain parishes and the actions taken or contemplated by the governing bodies to deal with them. Previous investigations of some of these physicians in these clinics typically reveals they are non-physician owned and operate on a cash-only basis. Patients have little physician contact and less medical evaluation and diagnosis (typically being seen if at all by a physician for 2-3 minutes) Form medical records are prepared that have little to do with patient complaints or the reality of what occurred on the visit, but focus more on creating an appearance of compliance with the Board's pain rules. These patients are typically given prescription for narcotics, benzodiazepines and muscle relaxants.

Until a few years ago, the Board had this practice well controlled with our pain rules that allow for the unfettered treatment of *legitimate* chronic pain in a manner that embodies sound principles of good medical practice.

The Board is aware of some of these clinics that do not practice in a legitimate manner. Rest assured that whenever the Board receives a complaint(s) or becomes aware of a suspect pain medicine practice, this clinic will be investigated.

It is always a difficult scenario, but the Board does prosecute physicians who violate our rules. If any physician has a concern, our pain rules (as well as all of the rules and regulations) are on the Board's website at www.lsbme.louisiana.gov.

Referrals for Imaging Services

The Louisiana State Board of Medical Examiners has the authority and responsibility to interpret and enforce La. Rev. Stat. 37:1745 (the "anti-kickback law") as it applies to physicians licensed to practice medicine in Louisiana. The Board has recently become aware that Louisiana physicians are participating in certain business arrangements that, in the Board's opinion, violate the anti-kickback law. Specifically, it is the Board's opinion that an arrangement under which a referring physician "leases" and/or purchases the full complement of technical and professional services necessary to provide imaging services to the physician's patients on an unscheduled, per-use basis for less than the referring physician's reimbursement from the patient or the patient's third-party payer, as set forth below, violates the anti-kickback law. The Board is providing this guidance on its interpretation and enforcement of the anti-kickback law to assist Louisiana licensed physicians in conducting their business affairs.

The anti-kickback law provides in pertinent part that "No health care provider shall offer, make, solicit, or receive payment, directly or indirectly, in cash or in kind, for referring or soliciting patients." Board regulations interpreting the anti-kickback law provide that "A physician shall not knowingly and willfully solicit, receive, or accept any payment, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring a patient to a health care provider for the furnishing or arranging for the furnishing of any health care item or service."¹

The arrangements that are the subject of this guidance typically involve an owner of diagnostic imaging equipment (a "Company") that makes all the equipment, personnel, supplies and other items or services necessary to provide MRI or other imaging services (collectively, the "Services") available to a referring physician at the Company's facilities on a turn-key, as-needed basis for a pre-determined, per-use fee. The referring physician orders an MRI or other diagnostic imaging service for a patient and refers the patient to the Company's facilities. The Company provides the Services. The Company then bills and collects for the Services from the patient or the patient's third-party payer, excluding Medicare or Medicaid, using the referring physician's provider number. The Company then deposits the collections attributable to the Services, less the Company's fee, in the referring physician's account. The referring physician retains the difference between the amount collected from the patient or third-party payer and the amount paid to the Company for the Services.

The Louisiana anti-kickback statute is similar in scope to its federal counterpart.² Federal law, however, regulates activities, arrangements and transactions intended to induce referrals for goods or services paid for in whole or in part by governmental payers, while the Louisiana Law is applicable to all payers—private and governmental alike. At the same time, any payments, remuneration, practices or arrangements that qualify as "safe harbors" under the federal anti-kickback statute are also protected under the general exception to the Louisiana anti-kickback law for arrangements that satisfy federal safe harbor standards (the "General Exception").³ To analyze whether an arrangement violates the Louisiana anti-kickback law, then, the Board is guided by federal law and regulations, as well as Advisory Opinions issued by the Office of the Inspector General ("OIG") of the United States Department of Health and Human Services.

The Board is not aware of any safe harbor or OIG Advisory Opinion under the federal anti-kickback statute that would protect the business arrangements described above. Indeed, these business arrangements typically do not apply to services covered by governmental payers, and may even prohibit the physician from referring federal program patients to the Company, no doubt in recognition that the arrangement could violate the federal anti-kickback statute if applied to a governmental payer. While the failure to satisfy a safe harbor does not necessarily mean that an arrangement is unlawful *per se*, it does not qualify for the General Exception. Thus, the Board must determine whether the referring physician in these business arrangements is receiving a payment in return for referring a patient to the Company for the provision of health care services in violation of Louisiana anti-kickback law.

In applying the Louisiana anti-kickback law, the Board recognizes that physicians owe a fiduciary duty to patients to exercise their professional judgment in providing, furnishing, prescribing, recommending or referring patients for health care items and services without regard to personal financial recompense. Accordingly, the expressed purpose of the anti-kickback law is to prevent payments by or to a physician as a financial incentive for the referral of patients to other physicians or health care providers for diagnostic or therapeutic services or items.⁴

In the Board's opinion, a physician entering an arrangement with a Company as described above would receive a payment in exchange for the physician's referral to a health care provider for health care items and services in violation of Louisiana Law. The referring physician's payment is the amount collected from his or her patients and their third-party payers over and above the discounted rate the physician pays the Company. By foregoing the

Statement Regarding Medical Licenses on Probation

The Louisiana State Board of Medical Examiners ("the Board") issued the following statement in July 1995 and would like to take this opportunity to affirm its usage to date.

The LSBME has been advised by a number of physicians whose medical licenses have been placed "on probation" by Board decision or order that such licensure status has been considered by a variety of interests -e.g., hospital medical staffs, managed care organizations, certifying agencies, professional associations and professional liability insurers- to constitute an encumbrance or restriction on a physician's medical licensure, by virtue of which such entities have declined to credential or insure such physicians. As the Board does not intend that probationary licensure status, per se, have such an effect on a physician's capacity to practice medicine, the Board believes it appropriate to issue a general statement clarifying the meaning, intent and effect of probationary medical licensure status and how it should be properly understood.

The Board may place a physician's medical license on probation by formal decision following an administrative disciplinary hearing, by Consent Order in disposition of a pending investigation, or by order imposing conditions on initial licensure in this state. While any of such orders may also impose certain restrictions or limitations on a physician's practice, probationary status in and of itself denotes nothing more than that the physician's maintenance of licensure is subject to the physician's satisfaction of certain conditions prescribed by the Board, which may not implicate any restrictions on

the scope of a physician's practice. It should be emphasized, moreover, that probationary status is not intended by the Board to bear any implication whatsoever with respect to the subject physician's cognitive or clinical competence to practice medicine. Indeed, a Board order placing a physician's license on probation reflects the Board's considered conclusion that the physician is capable of practicing medicine, provided that the physician complies with any prescribed probationary terms and conditions. Misunderstanding of the nature and effect of probationary status is most troubling to the Board in the context of physicians who are in recovery from alcohol or substance abuse. In such cases, the Board may place a physician's license on probation as a means of monitoring the physician's continuing recovery and insuring his or her compliance with aftercare treatment recommendations, often under the auspices of the Physicians' Health Foundation of Louisiana and often without any substantive limitation on the scope of the physician's practice. The Board's imposition of probationary status in such circumstances does not, in itself, imply a question as to the physician's professional or medical competence. Organizations and entities who deem a recovering physician unqualified solely because of probationary licensure status may, in fact, impede the physician's recovery.

The Board does not, by this Statement, intend to intrude upon the functions or judgements of organizations which must make credentialing and similar decisions respecting physicians whose medical licenses are held on probation. In a given instance, a Board order imposing probation may also impose other conditions, restrictions or limitations which render the physician unqualified for or unable, without reasonable accommodation, to perform in a given professional position. Or there may be other reasons quite aside from a physician's probationary status, which justify an adverse decision or action. The emphasis of this Statement is simply that probationary status should not, in and of itself, be fastened upon as grounds to question a physician's ability to practice medicine competently and with reasonable skill and safety to patients.

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opportunity to collect full reimbursement for the Services from patients and third-party payers, the Company is effectively sharing the profit from the Services with the referring physician. In the Board's opinion, the excess payment retained by the referring physician is simply remuneration to the physician in exchange for the physician's referral to the Company for the Services. A physician participating in such an arrangement would, thus, be subject to disciplinary action by the Board.⁵

Please note that this guidance is limited to arrangements described above. We do not mean to suggest that all arrangements under which physicians provide imaging services to their patients by leasing and/or purchasing the capability to provide those services violate the anti-kickback law. Different business structures, such as equipment leases and personal services arrangements that satisfy federal anti-kickback safe harbor standards, would require a different analysis. We will continue to address such issues as they arise on a case-by-case basis.

¹ La. Admin. Code 46:XLV, § 4205(B). The Board's regulations further define the terms "payment", "referral", "health care provider" and "health care item". La. Admin. Code 46:XLV, § 4203. It is sufficient to note that these terms, as defined by regulation, support the Board's analysis as set forth in this guidance.

² 42 U.S.C. §1320a-7b(b).

³ See: La. Rev. Stat. §37:1745C(1), (2); La. Adm. C. 46:XLV§ 4207B.

⁴ See: La. Adm. C. 46:XLV.4201B, *Declaration of Purpose*.

⁵ Pursuant to La. Adm. C. 42:XLV§.4209, violation of the Section 4205 is deemed to constitute a violation of R.S. 37:1285 providing cause for the board to suspend or revoke, refuse to issue, or impose probationary or other restrictions on any license or permit held or applied for by a physician culpable of such violation. See also: La. Rev. Stat. §37:1745C(3).

Vital Records Registry

Electronic Death Registration System

Over the years the execution of the death certificate in a timely fashion has been problematic for funeral home directors and the family of the deceased. For families, the processing of insurance claims and completions of wills and successions cannot proceed without a completed death certificate. Sometimes assets and bank accounts are frozen until released upon proof of death. The LSBME has met with the Louisiana State Board of Embalmers and Funeral Directors on several occasions and listened to complaints relative to physicians who ignore their obligation under the law. We would like to reemphasize that La.Rev.Stat.§40.49 provides that the last physician to attend a decedent is required to complete and certify death within 24 hours of death.

As you may be aware, the death certificate is a permanent record of the fact of death, with emphasis placed on the certification of medical information relative to the circumstances and cause of death. It is also a source for state and national mortality statistics. This mortality data is valuable to physicians, indirectly, by influencing funding that support medical and health research that may alter clinical practice, and, directly, as a research tool. The physician's principal responsibility in death registration is to complete the medical part of the death certificate, certifying the cause of death.

To help facilitate the proper filing of death certificates and other records, the Louisiana Vital Records Registry is in the process of developing and implementing a secure web-based records registration system for death as well as birth, marriage, divorce, fetal death, and induced termination of pregnancy. With the implementation of a web-based system, the physician will be able to go online and complete and authenticate the death certificate for filing with the Office of Vital Records. The EDR system will improve the timeliness and quality of death registration, enable participants of death registration to register death certificates with local and state registrars electronically, provide online access to decedent's facts such as date, time, cause and demographic information. This system will allow information to be entered by the various death registration participants working at the same time on the same case. The process may begin with the funeral home securely sending the death record to the physician electronically using the web-based registration system and the physician can then sign onto the system. The physician will then enter all the pertinent information and register the death with the Vital Records Registry electronically.

The LSBME has a responsibility to the public of assisting with the proper and timely filing of death certificate. To assist in this role, the LSBME included a Vital Records presentation on its agenda of the Board Orientation Program. Attendance is a requirement for all first time renewal licensees. Information presented on vital records is an educational tool to ensure new physicians are informed in this area.

In a cooperative effort to better serve the citizens of Louisiana, the LSBME has asked the LSBEFD to provide the name of any physician who repeatedly fails his/her obligation to sign death certificates promptly. This information will indicate whether the physician has refused to comply with the law altogether, the length of time taken to execute a certificate, the number of complaints, and the number of attempts made by their office and/or any other requesting compliance. The LSBME may consider failure to execute a timely death certificate to constitute professional incompetency or unprofessional conduct, providing grounds under the Medical Practice Act for disciplinary action. Help eliminate the problem by completing the death certificate in a timely fashion.