

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION  
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ROLL NUMBER

DESCRIPTION

1262

2001 HOUSE HUMAN SERVICES

HB 1262

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1262

House Human Services Committee

☐ Conference Committee

Hearing Date January 23, 2001

Tape Number	Side A	Side B	Meter #
Tape 1	X		0 to End
Tape 1		X	0 to End
Committee Clerk Signature <i>Connie Easton</i>			

Minutes:

Chairman Price, Vice Chairman Devlin, Rep. Dosch, Rep. Galvin, Rep. Klein, Rep. Pollert, Rep. Porter, Rep. Tieman, Rep. Weiler, Rep. Weisz, Rep. Cleary, Rep. Metcalf, Rep. Niemeier, Rep. Sandvig.

Chairman Price: Opened hearing on HB 1262.

Rep. Porter: This bill would remove the State Board of Podiatry and place the Podiatrists under the authority of the State Board of Medical Examiners. The bill may not be in perfect form but it would accomplish a couple of things. First it would bring strength by numbers to the Podiatrists in North Dakota and after their debt is paid off, potentially reduce license fees. I did not include membership on the State Board of Medical Examiners. I felt that if the membership of this committee was compelled to include a Podiatrist on the board we should first hear arguments from both sides regarding that issue. (See written testimony.)

Dr. Brian Gale: I am here to support HB 1262. I believe that there is a need for change in the Board system in North Dakota. There have been many instances of abuse of power and conflict of interest involving board members in this state. I'm sure you have hear the stories of the doctors, attorneys, police officers, cosmetologists, architects and other professionals. Some of them have been kept out of North Dakota. Others have been forced out of this state. And others have had their careers and lives ruined. There are way to many conflicts of interest and coincidences for so many people to be so unlucky. The way to fix the podiatry board is to enforce the term limits. I would like to see an amendment of this bill that would allow for immediate replacement of any members of the current podiatry board who have been on it for more than 4 years in succession. (See written testimony.)

Rep. Galvin: The paragraph you refer to, the terms of the board members? Usually on most boards the four year term merely means that one of them is up for reelection every four years so that the terms are staggered. Isn't that true also of this board?

Dr. Brian Gale: This would be a sentence in the statute, and how it is interpreted I don't know. I have asked several people about what this sentence means, and the only interpretation that I've gotten is that the purpose of this four year term and one term expiring is to allow other Podiatrists of the state to be on the board, so there aren't the same people on the board year after year.

Rep. Galvin: I don't agree with you, most boards operate this way. There are four members and there is a member elected every year, so this gives an opening every four years. I really think that is the purpose of this paragraph in the statute.



Rep. Weiler: I believe in that same paragraph you go on to say about the problems that you've had with this board for the last eight years. Is the Board of Podiatry the only board or agency that you've had problems with in your twenty years?

Dr. Brian Gale: Yes. This is where all my problems have started.

Rep. Metcalf: Going back to Rep. Galvin's question, are these board members appointed or are they elected?

Dr. Brian Gale: These board members, I believe on all of the boards in the state, are nominated by someone in the state. From what I've been told it usually comes from the state association president. That is why I nominated several members a few years ago.

Gary Thune: Special Assistant Attorney General and retained to represent the North Dakota Board of Podiatric Medicine. I appear in opposition to HB 1262. The history of the board is relevant to this consideration. The board was formed by legislative enactment in 1929. Two basic purposes are to license Podiatrists, and to discipline Podiatrists. That summarizes the essence of the statute. The discipline process has been in two stages. For 65 years the average has been one complaint per year and held no formal hearings. Not a single formal administrative hearing involving the discipline of a Podiatrist. Since 1994, one single Podiatrist has had 25 complaints received against him resulting in two formal hearings and two court cases appealing the decision of the Board of Podiatrists. We are about to start a third round of formal hearings involving additional complaints by a patient against Dr. Gale. The current financial status of the board was accurately stated by Rep. Porter, we are indebted approximately \$30,000. This board has 18 instate Podiatrists, and 4 out-of-state Podiatrists at the present time; generating \$500 per year in license fees per Podiatrist. In the first 68 years of this board there was no debt. Dr. Gale stated that he is at war with the Board of Podiatry and has been for eight years. He has stated

that he has spent \$500,000 fighting this board. This is the third bill Dr. Gale has presented and they were unsuccessful. Rep. Calvin is right with the fact that while the board is a four-year term, there are no term limits. The legislative branch should not undercut a board that is doing its job, especially when the judicial branch is repeatedly determined it is doing its job properly. This bill is opposed by the Board of Podiatric Medicine. It is my understanding that the North Dakota Association of Podiatrists oppose this bill. The solution is not to abolish the Board of Podiatry that is assigned the responsibility to discipline its own members. The solution is really two fold. Give this bill a DO NOT PASS recommendation. Do not set the precedence that if a Doctor is disciplined, then the board that disciplines him should be disciplined. Second, support the pending legislation HB 1377 that authorizes the existing board of Podiatrists to borrow money to get out of this financial problem and pay it back. They are willing to pay maximum dues and increased dues, if that is necessary, to pay back their debts, retain their autonomy, and do their job.

Rep. Cleary: How were those malpractice claims resolved?

Gary Thune: The two that we have as public record in the current mitigation were resolved with settlements of \$65,000 and \$75,000. Settled by the Podiatry Insurance of America. In the neighborhood of a total of \$150,000 for the two claims.

Rep. Cleary: It wasn't the court case that was just settled?

Gary Thune: That is correct. The thing that went to court was the challenge by Dr. Gale to the right of the Podiatry Insurance Company of America to not renew his license. The settlements were in 1996 or 1997, and the litigation was over the non-renewal of his insurance was in 1995.

Rep. Weisz: Aside from the whole issue with Dr. Gale, do you see a potential conflict because of a small group, almost 25% of your total members are made up of the board, does that open itself up to potential conflict in the future?

Gary Thune: For 70 years it hasn't been a problem.

Chairman Price: Can you provide us with a list of the board members, when their current terms expire and how long they've been on the board?

Gary Thune: I don't have that with me, but I certainly can submit it.

Rep. Cleary: How often are malpractice charges brought against other Podiatrists?

Gary Thune: I don't recall in the six or seven years that I have been in Legal Council approximately two or three times.

Vice Chairman Devlin: Can you refresh our memory what statute identifies the term limits for the Board of Podiatry?

Gary Thune: The statute is Sec. 43-05-03 North Dakota Century Code, that provides that appointments are for four year terms. One appointment comes up annually in their four year terms. That same statute provides that four to be Podiatrists, and one a medical doctor.

Rolf Sletten: Executive Secretary and Treasurer of the North Dakota State Board of Medical Examiners. We strongly oppose this bill. One of the long-standing cornerstones of professional regulation in North Dakota is the fact that the professions who practice in this state have regulated themselves. The Board of Medical Examiners is more than 110 years old. The State Board of Podiatric Medicine was created in 1928. It seems to us that you would not want to tamper with that arrangement unless it is possible to clearly articulate some very compelling reason why you need to do so. We recognized long ago that if the State Boards of Medical Examiners don't do an adequate job of regulating medicine then someone else (presumably the

Feds) will eventually do it for us. It seems reasonable to expect that if we do a good job of regulating medicine, then there is little reason to contemplate a change. If we don't do a good job, then it is logical to consider some other regulatory scheme. The same is true of any of the other licensing boards including the State Board of Podiatric Medicine. As far as I know, there is no evidence that suggests that they haven't done a competent job of regulating their profession. It appears they are in a very tough spot right now because of this prolonged series of disciplinary actions against one individual, but that is always a difficult spot for any Board to be in. It appears that much of this debate has been spawned by the complaints of one licensee who has had disciplinary action taken against him by the Podiatry Board. It certainly isn't unusual to find that the respondent is upset with the board, in fact, it is naive to expect otherwise. If you lined up all of the doctors who have been disciplined by the Board of Medical Examiners, you would find some unhappy campers in the group. If this bill is premised on the Podiatry Board's difficulty with this one series of cases, then we strongly urge you to take a much longer view of that board's work. We offer the following comments regarding the specific language of this bill. The last paragraph of the bill would required the Board of Medical Examiners to absorb the debts of the Podiatry Board. The bill expects the M.D.'s and D.O.'s who are licensed to practice in North Dakota to subsidize or actually to fund the regulation of podiatry. The cost of regulating podiatry is very substantial. Over the past several years the State Board of Podiatry has accrued a very significant debt. We are told that the debt is approximately \$30,000. Worse than that it appears the podiatrists are facing another Supreme Court Appeal and that they are starting a whole new disciplinary action against the same man they have been dealing with for the last several years. It seems reasonable to assume that all of these legal proceedings will greatly increase the already large debt. These legal proceedings appear to be a very long ongoing

process that won't end any time soon. Under the Administrative Rules of the Board of Medical Examiners, the annual renewal fee for a physician's license is \$150. There are about 20 licensed podiatrists in North Dakota. If those numbers remain constant, the total amount of licensing fees paid to the Board of Medical Examiners by the podiatrists will be only about \$3,000 per year. At that rate it will be a very long time before the podiatrist's licensure fees can retire the current debt, much less pay any of the expenses which accrue in the meantime. If this bill passes the Board of Medical Examiners will be required to regulate podiatry in spite of the fact that many years will elapse before the podiatrists contribute a single dollar to the cost of that process. In other words, the regulation of podiatry will be funded by the board's other licensees, i.e., M.D.'s, D.O.'s and P.A.'s. Abolishing a licensing board that has served the state well for 70 years simply because one person who is being prosecuted by that board is unhappy with the process would be an extreme, unnecessary, and unfair measure.

Rep. Porter: Can a board in North Dakota declare bankruptcy?

Rolf Sletten: I would suspect that the answer is no.

Rep. Porter: The reason I bring up that question because I was looking at this piece of legislation and I asked the Legislative Council what would happen if a board dissolved and the response back to me was that it would be the burden of the tax payers to pay off whatever debt is left from that board.

Vice Chairman Devlin: There were other states that went to sharing a board, I'll call it a Super Medical Board. Do you want to share your thoughts on that?

Rolf Sletten: There are all kinds of licensing schemes, there are huge umbrella boards, there are some where the boards are essentially autonomous and there are all kinds of arrangements in between where there might be a few professions that share a board. The conclusion that is

reached by the Federation of State Medical Boards when they have studied the efficiency of the various boards, was that the boards that are the most autonomous are the most effective.

Chairman Price: In going through the Century Code for example the Board of Nursing may be appointed for no more than two consecutive terms, and we had one yesterday that a board member may not be reappointed until four years has passed without service on the board. Have there ever been any problem with yours?

Rolf Sletten: No.

Rep. Porter: One of the issues brought up was the board's structure and size, and on your board you have lay persons assigned to your board, can you enlighten us on how that works? Can the Board of Podiatry be enhanced by adding a lay person?

Rolf Sletten: We have 11 members on board, 9 are doctors, 2 are lay members.

Rep. Weisz: Can you explain why you feel that the specialty of podiatry should not be under your board?

Rolf Sletten: Podiatry is recognized as a separate discipline, different education, and different curriculum.

Rep. Galvin: If the Medical Board absorbs the Podiatry Board, would the debt still be the responsibility of the existing podiatrists?

Rolf Sletten: Yes, in the last paragraph of HB 1262.

Dr. Aaron Olson: President of the Board of Podiatry. Submitted two letters that the individuals asked I present at this hearing. One is from the President of the Podiatry Association, Dr. Bradley McCusker. He had polled 18 members of our association, they all reiterated they were not in favor of this HB 1262. I have spoken individually to all of my five board members, and we all stand opposed to HB 1262. I do would like to clear up a bit of fuzzy math by Dr. Gale.

I am the current President. I have served two terms, and my term will end in June 2001.

Preceding that 9 years I was not on the board. I did serve one term prior to that and I believe I have only served 12 years on the Board of Podiatry Examiners. I may have served one year of an unfulfilled term in the early '80s. We are appointed by the Governor and we have no staff. Our only money comes from license renewals. Essentially we serve at the request of the Governor. We are not paid. We have no paid staff other than legal council. Our duty is to enforce the Century Code which we are mandated to do. I believe our board has done that extremely objectively. My only role with the one complainant, which I've received some complaints and of which I have passed on to our attorney. I have recused myself of all involvement with Dr. Gale. Other board members have recused themselves when they have had other complaints. This is a routine process. This is what creditable people do who are professionals. We don't seek this job, we do this job because it needs to be done.

Rep. Weisz: Why do you feel podiatry is a different enough discipline that it wouldn't fall under the Board of Medical Examiners

Dr. Aaron Olson: A general analogy for podiatrists would be to compare us to the dental or oral surgeons. Our first four years are as medical doctors. We differ in our clinical years. We are considered limited scope practitioners. We do the lower extremity, the foot and ankle. We spend our clinical years concentrating just on that area. We do not receive the intense clinical experience that the doctor does.

Rep. Pollert: Do you as a board have the power to revoke a license?

Dr. Aaron Olson: Yes.

Rep. Pollert: Is there a process you go through to revoke a license?

Dr. Aaron Olson: For us to act it has to be a written complaint from a patient, and then it is passed to an attorney. We try to handle that very objectively and very carefully to protect the public, but also to protect the practitioner who is the result of a complaint.

Rep. Porter: When I looked at the practice and functions of a podiatrist, and then the size of the board and the financial problems, it just seemed that there would be more strength with numbers. That was mainly why I introduced this bill, and the other reason was based on a Bismarck Tribune article that has quotes from you that stated that there might be problems with the board and that something needs to be done and you wouldn't be opposed to doing things to strengthen the structure of the board. I thought that by looking at the bill the strength in number concept has some relevance and it would take care of some perception problems from the other side and fix the problem once and for all.

Dr. Aaron Olson: The Bismarck Tribune does not always quote people appropriately. Yes, I think there are things we should do either administratively or legislatively to strengthen our process. I do not think that HB 1262 is the appropriate way of doing that.

Rep. Porter: What administratively or legislatively would you recommend to be done.

Aaron Olson: When we first started receiving complaints, I think we had about \$15,000 in the bank at the time. I call the Secretary of State's office and said that in a second legal fees are going to go through this, where do we go? He said you have to do this on your own, we cannot help you. As time evolved we did receive some legal support from the Attorney General's office.

Rep. Porter: Would you see a problem increasing the board membership to include lay persons?

Dr. Aaron Olson: I do not have a personal problem with that at all. I have served on board with both and I think they would be an asset.



Rep. Porter: If you were going to start this board from scratch, what would you think the ideal number of people on it would be and from what profession should they be made up of?

Dr. Aaron Olson: I think the size of our board right now is efficient. The medical doctor on our board is because we do branch into some forms of medicine. I would not be opposed to having a lay member on our board. Adding more podiatrists we get into the same problem we already have. We only license 18 people in the state. We have four on the board right now.

Chairman Price: How many applications for licenses have you received in the last five years?

Dr. Aaron Olson: For the year 2000 we received five, the previous year we received two.

Chairman Price: How many of those were issued?

Dr. Aaron Olson: Of the five this year we issued three temporary and two permanent licenses.

Rep. Niemeier: What are the allowable avenues for appeal for a practitioner under disciplinary action?

Dr. Aaron Olson: I don't know the specifics, but there are multiple avenues for the appeal depending on what stage of the discipline we are in.

Rep. Dosch: What are the conditions in which a license is approved or denied?

Dr. Aaron Olson: We have a standard application form. You have had to pass your national boards part 1 and part 2. You have to be 21 years of age. You have had to graduated from an approved podiatry school, and if you practiced in another state you have to be a member of good standing, and sit for an oral practicum exam.

Gary Thune: After we get a complaint the first thing I do is send the complaint to the physician who is complained about and ask for medical records. Once those are received then we determine if there are other medical records and we get those as well. I have two doctors looking at them. We then go back to the board and recommend whether or not to proceed with the

formal complaint. If there is a formal complaint issue, then there is the opportunity to some mutual agreement. If that does not occur, there is a hearing before an administrative law judge, a formal administrative hearing, a testimony taken, and then recorded. The law judge issues recommended conclusions that he gives the board. The board reviews those with the podiatrist present and represented by counsel if they chose to do, then makes a decision to adopt the findings, and then goes to the discipline phase. Once the board has issued its findings and conclusions and discipline, then the podiatrist has the right to appeal that to state district court. The judge will review the record and determine whether the board has violated its responsibility of the due process rights of the podiatrist. Once that court issues a decision, then are 60 days in which to appeal that to the North Dakota Supreme Court.

Rep. Niemeier: Is the review of the medical records done by the physicians on the board?

Gary Thune: Scattered practice is to have two members of the board do that. I often use Dr. Moan as one, and depending upon the issue and the experience I will select one other member of the board to review the medical records as well.

Dr. Francisco Tello: N.D. Podiatry Association. I had the opportunity to work with Dr. Brian Gale for about 2-1/2 years. I unfortunately had the unpleasant opportunity of witnessing a lot of the acquisitions, and how this thing materialized. This began in 1994. That issue in of itself I'm not sure it is necessarily appropriate to discuss in this particular manner, however, in discussing specifically the bill and whether or not the bill should be passed the phone poll over the weekend that the majority of the podiatrists in the State of North Dakota are vehemently oppose to this bill for array of different reasons. The biggest reason that has been brought up on multiple occasions is whether or not we as a podiatrist wish to be members of a board without representation on that board. As was given earlier by Mr. Thune, regarding the complaints that were lodged against Dr.

Gale, he made the comment that many of the complaints were made by orthopedic surgeons and it makes it very clear that without representation of podiatry on that particular board and so many of the complaints in this particular case by orthopedic surgeons themselves I think would very inappropriate to be at the mercy of a board with these physicians on the board who many of which care little or not. There was an array of different issues that were taken this morning regarding the legal battles between the licensing board and Dr. Gale vying himself against Dr. Olson in court over civil matters. I think unfortunately these have worked to cloud many of the issues on the complaints that were brought against Dr. Gale. I want to clarify several different issues, one was the funds that have spent. Brian gave testimony that he had spent over \$500,000 in legal fees. This does not take into account the legal fees accrued by the licensing board. I think it would be safe to say we are pushing well over three quarters of a million dollars in legal fees to date. To say that the medical board would be willing to absorb any additional legal fees, would be pretty close to absurd. The N.D. Podiatry Licensing Board does have problems. I strongly feel that many of the podiatrists within the state see problems that we feel can be solved. A lot of it is administrative, how complaints are being handled, and things that we can do to perhaps handle these in a more appropriate manner.

Rep. Porter: What would you recommend legislatively?

Dr. Francisco Tello: Complaints be handled in a different manner. I've been led to believe by Dr. Aaron Olson, that apparently it is inappropriate to form an investigative committee to investigate the complaints prior to them going through the licensing board. I think there is a certain bias in the licensing board, however, if an investigative committee were to be formed to look over these complaint forms prior to and outside the licensing board, whether they be other podiatrists or whether MD's.

Rep. Cleary: Do most of the complaints come from the orthopedic surgeon instead of the patients?

Dr. Francisco Tello: Most might be inappropriate but a large percentage, yes. If not from the orthopedic surgeons themselves it should be noted that many patients who, for second opinion, go to an orthopedic surgeon then a complaint arises from the patient after getting a second opinion.

Chairman Price: Closed hearing on HB 1262.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1262 b

Human Services House

☐ Conference Committee

Hearing Date 1-24-01

Tape Number	Side A	Side B	Meter #
3	xx		2790--3600
Committee Clerk Signature <i>Corinne Easton</i>			

Minutes: Chair Price : Take up HB1262.

Rep. Porter : There is a new amendment going around. There is just a little wording change, typo. Doesn't change the intent. HB1262 is hog house. With the testimony provided yesterday and the concerns of the committee yesterday, I looked at the bill. People commented after the hearing that a board of 22 is just not feasible. The amendment does a good fix and gets it going in the right direction. The first part in section 1, increases the size of the board to 6 and adds one lay person, who has no medical ties at all. It also takes care of term limits. After two successive terms, an individual must be off the board for two years before they can be appointed again to the board. In section 2, is new. This is taken right out of the Medical Examiner's Board existing law. This board is in severe financial condition. They are over \$30,000 in the red. They have no way to get their money back. The court cases are not going to go away. If you had enough money, you could put one of these boards right out of business, if you did not have this provision. We need to put some protection in there to allow them a safe guard. If they are doing their job the

way they are suppose to be, and doing it right, and they win the case; the fees and deposits should be the person who they have been acting against. **I move these amendments.**

Rep. Dosch : **I second.**

Rep. Cleary : These two amendments that we have seem to be a bit different.

Rep. Porter : The wording was copied verbatim on the first set out of the Board of Medical Examiner's section of code. The Board of Podiatry does not have a board of medical competency as does the Board of Medical Examiners. That needed to be removed, in order to be within their section of law. That was the only wording change.

Rep. Cleary : Does that mean that Dr. Gale has paid the fees?

Rep. Porter : I don't think we can go retroactive on anything. This prevents something in the future from happening like it is now, as far as magnitude.

Rep. Dosch : Does this need an emergency clause on.

Rep. Porter : Most of what they are dealing with is appeals. I guess they would go retroactive because the date has already been established. They are looking at Supreme Court appeals. There is no new action sitting out there.

**VOICE VOTE: ALL YES. MOTION PASSED.**

Chair Price : We have a new bill in front of us.

Rep. Porter : **I move a Do Pass As Amended.**

Rep. Pollert : **I second.**

**VOTE: 13 YES and 0 NO with 1 absent. PASSED. Rep. Pollert will carry the bill.**

## FISCAL NOTE

Requested by Legislative Council

01/29/2001

Bill/Resolution No.:

Amendment to: HB 1262

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The fiscal impact of this Bill, as amended, would be substantially less than \$5,000.00.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Gary R. Thune, Special Asst. Ally. Gen'l	Agency:	Board of Podiatric Medicine
Phone Number:	223-2890	Date Prepared:	02/07/2001

**FISCAL NOTE**  
Requested by Legislative Council  
01/16/2001

Bill/Resolution No.: HB 1262

Amendment to:

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0					
Expenditures	\$0					
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Rolf P. Sletten	Agency:	ND State Board of Medical Examiners
Phone Number:	701/328-6500	Date Prepared:	01/19/2001



## PROPOSED AMENDMENTS TO HOUSE BILL 1262

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 45-05 of the North Dakota Century Code, relating to the state board of podiatric medicine; and to amend and reenact section 43-05-03 relating to the state board of podiatric medicine.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. 43-05-03. Board of podiatric medicine - Appointment of members - Term of office -Qualifications- Vacancies - Duties - Quorum - Records.** The board of podiatric medicine consists of five ~~six~~ persons appointed by the governor for a term of four years each with the terms of office so arranged that one term only expires on the thirteenth day of June of each year. No member of the board may serve for more than two successive terms unless the individual has been off of the board for two years. Four members of the board must hold doctor of podiatric medicine degrees and must have practiced podiatric medicine in this state for at least two years before their appointment, and ~~the fifth one~~ one person must be a doctor of medicine, who holds a doctor of medicine degree and has practiced in this state for at least two years before the appointment, and one person who is designated as a public member, who must be a resident of this state, be at least twenty-one years of age and not be affiliated with any group or profession that provides or regulates health care in any form.

A member of the board shall qualify by taking the oath of office required of civil officers and shall hold office until a successor is appointed and qualified. The governor shall fill any vacancy by appointment for the unexpired term. The board may employ and compensate attorneys, investigative staff, clerical assistants, or others to assist in the performance of the duties of the board.

A majority of the board constitutes a quorum to transact business, make any determination, or take any action. The board shall keep a record of its proceedings and of applications for licenses. Applications and records must be preserved for at least six years beyond the disposition of the application or record or the last annual registration of the licensee, whichever is longer.

**SECTION 2.** A new section to chapter 45-05 of the North Dakota Century Code is created and enacted as follows:

**Costs of prosecution - Disciplinary proceedings.** In any order or decision issued by the board in resolution of a disciplinary proceeding in which disciplinary action is imposed against a podiatrist, the board may direct any podiatrist to pay the board a sum not to exceed the reasonable and actual costs, including attorney's fees, incurred by the board in the investigation and prosecution of the case. When applicable, the podiatrist's license may be suspended until the costs are paid to the board."

Renumber accordingly.

✓  
1/25/01

HOUSE AMENDMENTS TO HB 1262

HOUSE HS

1-26-01

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 43-05 of the North Dakota Century Code, relating to the cost of disciplinary proceedings undertaken by the state board of podiatric medicine; and to amend and reenact section 43-05-03 of the North Dakota Century Code, relating to the state board of podiatric medicine.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 43-05-03 of the North Dakota Century Code is amended and reenacted as follows:

**43-05-03. Board of podiatric medicine - Appointment of members - Term of office - Qualifications - Vacancies - Duties - Quorum - Records.** The board of podiatric medicine consists of ~~five~~ six persons appointed by the governor for a term of four years each with the terms of office so arranged that ~~one term only expires~~ no more than two terms expire on the thirteenth day of June of each any year. A member of the board may not serve for more than two successive terms. A member may not be reappointed to the board after serving two successive terms unless at least two years have elapsed since the member last served on the board. Four members of the board must hold doctor of podiatric medicine degrees and must have practiced podiatric medicine in this state for at least two years before their appointment, ~~and the fifth person~~ one member must be a doctor of medicine, who holds a doctor of medicine degree and has practiced in this state for at least two years before the appointment, and one member, who is designated as a public member, must be a resident of this state, be at least twenty-one years of age, and may not be affiliated with any group or profession that provides or regulates health care in any form.

A member of the board shall qualify by taking the oath of office required of civil officers and shall hold office until a successor is appointed and qualified. The governor shall fill any vacancy by appointment for the unexpired term. The board may employ and compensate attorneys, investigative staff, clerical assistants, or others to assist in the performance of the duties of the board.

A majority of the board constitutes a quorum to transact business, make any determination, or take any action. The board shall keep a record of its proceedings and of applications for licenses. Applications and records must be preserved for at least six years beyond the disposition of the application or record or the last annual registration of the licensee, whichever is longer.

**SECTION 2.** A new section to chapter 43-05 of the North Dakota Century Code is created and enacted as follows:

**Costs of prosecution - Disciplinary proceedings.** In any order or decision issued by the board in resolution of a disciplinary proceeding in which disciplinary action is imposed against a podiatrist, the board may direct the podiatrist to pay the board a sum not to exceed the reasonable and actual costs, including attorney's fees, incurred by the board in the investigation and prosecution of the case. When applicable, the podiatrist's license may be suspended until the costs are paid to the board.

Renumber accordingly

Date: 1-24-01  
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1262

House Human Services Committee

☐ Subcommittee on \_\_\_\_\_  
or  
☐ Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass as amended

Motion Made By Rep. Porter Seconded By Rep. Pollert

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairman	✓		Audrey Cleary	✓	
William Devlin - V. Chairman	✓		Ralph Metcalf	✓	
Mark Dosch	✓		Carol Niemeier	✓	
Pat Galvin	✓		Sally Sandvig	✓	
Frank Klein	✓				
Chet Pollert	✓				
Todd Porter	✓				
Wayne Tieman	✓				
Dave Weiler	✓				
Robin Weisz					

Total (Yes) 13 No \_\_\_\_\_

Absent one

Floor Assignment Rep. Pollert

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1262: Human Services Committee (Rep. Price, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1262 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 43-05 of the North Dakota Century Code, relating to the cost of disciplinary proceedings undertaken by the state board of podiatric medicine; and to amend and reenact section 43-05-03 of the North Dakota Century Code, relating to the state board of podiatric medicine.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 43-05-03 of the North Dakota Century Code is amended and reenacted as follows:

**43-05-03. Board of podiatric medicine - Appointment of members - Term of office - Qualifications - Vacancies - Duties - Quorum - Records.** The board of podiatric medicine consists of ~~five~~ six persons appointed by the governor for a term of four years each with the terms of office so arranged that ~~one term only expires~~ no more than two terms expire on the thirteenth day of June of each any year. A member of the board may not serve for more than two successive terms. A member may not be reappointed to the board after serving two successive terms unless at least two years have elapsed since the member last served on the board. Four members of the board must hold doctor of podiatric medicine degrees and must have practiced podiatric medicine in this state for at least two years before their appointment, ~~and the fifth person~~ one member must be a doctor of medicine, who holds a doctor of medicine degree and has practiced in this state for at least two years before the appointment, and one member, who is designated as a public member, must be a resident of this state, be at least twenty-one years of age, and may not be affiliated with any group or profession that provides or regulates health care in any form.

A member of the board shall qualify by taking the oath of office required of civil officers and shall hold office until a successor is appointed and qualified. The governor shall fill any vacancy by appointment for the unexpired term. The board may employ and compensate attorneys, investigative staff, clerical assistants, or others to assist in the performance of the duties of the board.

A majority of the board constitutes a quorum to transact business, make any determination, or take any action. The board shall keep a record of its proceedings and of applications for licenses. Applications and records must be preserved for at least six years beyond the disposition of the application or record or the last annual registration of the licensee, whichever is longer.

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Renumber accordingly

2001 SENATE HUMAN SERVICES

HB 1262

# 2001 SENATE STANDING COMMITTEE MINUTES

## BILL/RESOLUTION NO. HB 1262

Senate Human Services Committee

☐ Conference Committee

Hearing Date February 20, 2001

Tape Number	Side A	Side B	Meter #
1	X		37.6
1		X	
February 21, 2001 1	X		46.7
March 12, 2001 2		X	46.2
Committee Clerk Signature <i>Carol Holodychuk</i>			

Minutes:

The hearing was opened on HB 1262.

REPRESENTATIVE PORTER, sponsor, introduced the bill, a hoghouse amendment. It pertains only to the podiatry board. A term limit put on board members. After 2 terms any member should sit out one term before being appointed by the Governor. The board was made up of just podiatrists and 1 physician and it was felt that a public member who has no direct relationship with any existing parties serves as a good neutral to help with those boards, so we added the public member to dilute it. Page 2. Currently the Board of Podiatry is in financial trouble. They are \$15,000 in debt right now. We are dealing with a HB to allow them to take a loan from the Bank of ND to cover ongoing expenses. What happens to a board authorized by the legislature, if they should go bankrupt? The answer is it is the taxpayers responsibility to bail them out. 1337 raises the fees to help them. If we were to combine them with any other board the debt would follow them. The Medical Board won't accept them with the debt. SENATOR LEE:

Why aren't they under Medical Examiners Board? REP. PORTER: They talked about starting a board to cover the practice of medicine in general. A functioning board of less than 100 members puts a huge financial strain not only the practitioners, but also a risk to the board and the taxpayers. In other states podiatrists are under Board of Medical Examiners. They weren't really interested in accepting the 18-20 members at this time.

GARY THUNE, Ass't Attorney General, represents the Board of Podiatrist, supports bill. We put in a great deal of testimony about the history of the board, who was substantially solvent until the court cases that have come up with one Dr. The financial picture has changed. When people are disciplined they oppose the discipliner. The debt is going up not down. The board of Podiatrists support the amendment. We are comfortable with the House amendments.

SENATOR MATHERN: Is Section 2 new to Board history? MR. THUNE: We have no ability to collect expenses. We can recover costs and attorney fees. Dr. Gale is paying \$500 per month with balloon payment in February 2002. SENATOR KILZER: Are you Ass't Attny General?

MR. THUNE: Yes, I was appointed to the Podiatrists Board for the first set of complaints. The second set they did not assist, now with the 3rd set the Attny General's office will assist.

SENATOR KILZER: Does the Attorney General bill the board? MR. THUNE: Yes, there is an unpaid amount to the Attorney General and to our law firm.

DR. AARON OLSON, President of Podiatrist Board, supports 1262 as the House amended. I originally spoke against the bill; the current bill is a result of things that the Board had talked about. We request that it be approved and passed without any amendments.

DR. BRIAN GALE, podiatrist, supports bill. (Written testimony). SENATOR LEE: How many podiatrists are there? DR. GALE: 21 SENATOR MATHERN: Is there anything in law about the officers? DR. GALE: Board members are four year terms. SENATOR KILZER:

Page 3  
Senate Human Services Committee  
Bill/Resolution Number HB 1262  
Hearing Date February 20, 2001

Malpractice is two years from time of discovery. What is it for podiatrists? DR. GALE: I believe it is true. There is no statute of limitations.

DR. FRANCESCO TELLO, podiatrist, supports bill. (Written testimony) He favors the physician be off the board. SENATOR LEE: What about a surgeon on the Board? DR. TELLO: Yes, I would favor that. SENATOR MATHERN: Do you use outside testimony? DR. TELLO: The complaints are reviewed by 2 board members and Mr. Thune. We do not have enough members to use subsidiary board to look at complaints. MR. THUNE: The complaints must be in writing.

The hearing was closed on HB 1262.

February 21, 2001, Tape 1, Side A, Meter, 47.1.

Discussion was held. Committee was recessed until Sandy Tabor of the Attorney General's office can give us some information.

March 21, 2001, Tape 2, Side B, Meter 46.2

Discussion on the bill. SENATOR MATHERN moved a DO PASS. SENATOR FISCHER seconded the motion. Roll call carried 5-0 with vote held open for SENATOR LEE. SENATOR MATHERN will carry the bill.



Date: 3/12/01

Senate HUMAN SERVICES Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Case

Motion Made By Sen. Mathews Seconded By Sen. Fischer

[illegible]

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen Mathews

**If the vote is on an amendment, briefly indicate intent:**

**REPORT OF STANDING COMMITTEE (410)**  
March 16, 2001 3:22 p.m.

Module No: SR-46-5950  
Carrier: T. Mathern  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**HB 1262, as engrossed: Human Services Committee (Sen. Lee, Chairman) recommends  
DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1262  
was placed on the Fourteenth order on the calendar.**

2001 TESTIMONY

HB 1262

TESTIMONY ON HIB 1262

TODD PORTER, STATE REPRESENTATIVE

DISTRICT 34 MANDAN

Good morning, Madam Chair and members of the House Human Services Committee.

For the record, my name is Todd Porter, State Representative from Mandan.

This bill would remove the State board of Podiatry and place the Podiatrists under the authority of the State Board of Medical Examiners.

Currently there are around 20 Podiatrists practicing in North Dakota paying \$500.00 per year to be licensed. Currently the State Board of Podiatry is \$30,000.00 in the hole due to ongoing legal battles. I have left a provision in this bill that would allow the Board of Medical Examiners to access only the Podiatrists extra fees in order to pay off this debt. It would not be fair to the Medical Examiners to assume the debt.

The Podiatry Board is made up of 5 individuals with 4 members being Podiatrists and one medical doctor. This situation creates problems. You have competitors regulating one another. We do not have enough practitioners in the state to have a freestanding board.

The bill may not be in perfect form but it would accomplish a couple of things. First it would bring strength by numbers to the Podiatrists in North Dakota and after their debt is paid off, potentially reduced license fees.

I did not include membership on the State Board of Medical Examiners. I felt that if the membership of this committee was compelled to include a Podiatrist on the board we should first hear arguments from both sides regarding that issue.

I would be happy to answer any questions at this time.



400 E. Burdick Hwy.  
Post Office Box 1449  
Minot, ND 58702-1449

## Medical Arts Clinic

Superboard (701) 857-7000  
Toll Free 1-800-998-1203  
Fax (701) 857-7342

DATE: January 22, 2001

TO: Senators Andrist and Cook  
Representatives Porter, Brusegaard, Delzer and Devlin

FROM: Dr. Bradley A. McCusker, President-North Dakota Podiatric Medical Association

RE: House Bill No. 1262

Dear Senators and Representatives,

I am writing in regards to House Bill No. 1262, which is to be introduced soon. This bill includes a section, which is specifically designed to repeal chapter 43-05 of the North Dakota Century Code, relating to licensure of podiatrists.

A recent telephone poll amongst the podiatrists of North Dakota demonstrated overwhelmingly that this is not an acceptable piece of legislation and therefore cannot be supported.

We are most concerned about the implications in regards to the potential impact on our present scope of practice and lack of podiatric representation on the proposed "Superboard".

The North Dakota Podiatric Medical Association would welcome the opportunity to work with the North Dakota Legislature in constructing an acceptable bill.

I hope that the voice of the North Dakota Podiatric Medical Association will be heard and respected when discussing the future of all podiatrists practicing in the state of North Dakota.

Thank you for your time.

Sincerely,

Dr. Bradley A. McCusker  
President-North Dakota Podiatric Medical Association

BAW/sib

Madam Chairperson and committee members:

I am Dr. Francisco Tello. I have practiced Podiatric medicine since 1995. I initially practiced as an associate with Dr. Brian Gale for two and a half years. I have practiced with MedCenter One for three years. I have been witness to a travesty that began in 1994. The financial stability of the North Dakota Board of Podiatric Medical Examiners has been sorely damaged. As has the financial livelihood of a podiatrist in our state. The North Dakota Board of Podiatric Medical Examiners endeavored to make North Dakota one of, if not the highest, licensure in the United States. In presenting testimony against House Bill 1377 I stated that House Bill 1262 was the first step in preventing this travesty from reoccurring. Its importance can not be overstated. The impact of its term limits is widely recognized by many of the podiatrists of North Dakota as a corrective measure to prevent any one person from usurping too much control over Podiatric medicine in this state.

This bill does not have its shortcomings however, in speaking with one current board member and a previous board member, they both stated that any board made up of an even number of members begs the possibility of a split vote. Secondly they both stated that a lay person without medical background would be sorely challenged when discussing medical care issues, certainly standards of podiatric medical care. The current M.D. on our board, himself without surgical expertise, has at times abstained from expressing an opinion when confronted with surgical issues. How than is it possible for a lay person to participate in discussion of surgical procedures and their outcomes? The Podiatric Association asks that the six person board this bill proposes not be instituted for these significant reasons.

Amend this bill by removing the six-person board and do not place a layperson with no medical background on this board. Madam Chairperson, committee members, we respectfully request your attention to these recommendations and then pass these long overdue changes governing the make up and responsibilities of the the North Dakota Board of Podiatric Medical Examiners. Thank you.

Madam Chairman and Committee Members:

My name is Dr. Brian Gale. My address is 2418 Coolidge Avenue,  
Bismarck.

I am here to support bill # 1262 in the following manner:

I believe that there is a need for change in the Board system in North Dakota. There have been many instances of abuse of power and conflict of interest involving board members in this state. I'm sure you have heard the stories of the doctors, attorneys, police officers, cosmetologists, architects and other professionals. Some of them have been kept out of North Dakota. Others have been forced out of this state. And others have had their careers and lives ruined. There are way too many conflicts of interest and coincidences for so many people to be so unlucky.

When I called to have an application for a license to practice Podiatry sent to me I had to speak to the secretary/treasurer of the board. Not to a receptionist or administrative assistant. When the doctor came to the phone I was not greeted kindly. Instead the first question out of his mouth was, "Why do you want to come to North Dakota?" and several other questions to this effect. This is a standard way of greeting people who have called for an application over the years; even for natives of North Dakota. The exchange is designed to find out what city the



applicant plans to practice in and if he or she will be an economic threat to a board member. The mentality of the board member is to keep competitors out.

I am here today to tell you that there is really only one problem with the Podiatry Board. There has been one very serious flaw in the year-to-year ongoing activity of this board. I believe that if this one correction is made that there is a chance that this board may still be able to serve a purpose to the public instead of being self serving as so many of these boards are in this state and in other states.

I have two suggestions that I would like to be considered as possible amendments to this bill. The first is that a committee or task force be formed to investigate the feasibility of having one board, which encompasses all medically related boards. This has been done in other states and works well for several reasons. This larger board would have the combined financial resources so that there can be an administrative agency that oversees all of the boards. This would result in efficiency and a much higher standard of quality in how the boards are run.

Then there's the larger issue of competition. I came to North Dakota because I knew that there were very few doctors that had some of the specialized training that I possess. I have spent 12 years in training and another 11 years in practice. After investing almost 22 years of my life in the profession that I truly love to do, I am being told by my competitor down the street from me that I am incompetent and that I shouldn't be practicing because I'm a danger to the public. There is something very seriously wrong with having a competitor sit in judgment of me or anyone else. With that concentration of power when the board president states that he "recused himself", it is laughable.

The Podiatry Board has had the same president for 17 of the last 23 years.

The statute reads "Members of the board who are doctors of podiatric medicine shall serve four-year terms arranged so that one term expires each year".

My interpretation and most others whom I have spoken to about this think that this sentence means that one of the board members should change each year. So the burning question then is why is it that when 12 board members should have been changed over the past 12 years, only 2 board members have changed over the past 12 years. And if we go further back in time I'm sure the numbers are even more ridiculous.

That's right, only two board members have changed over the past 12 years.

Now someone may try to argue that no one else wanted to be on the board. That is incorrect. When I was the state association president a few years ago, I nominated several podiatrists who were not on the board and had never been on it. There were 7 podiatrists who were willing to be on the board.

The way to fix the podiatry board is to enforce the term limits.

The way to fix the podiatry board is to enforce the term limits.

I would like to see an amendment of this bill that would allow for immediate replacement of any members of the current podiatry board who have been on it for more than 4 years in succession. There are currently 3 of the 4 who have been board members for at least 5 years. I would suggest that the board members not be allowed to be reappointed unless they have been off the board for a number of years or if there is no one else willing to be on the board.

I would also suggest that more people be added to the podiatry board such as two lay people and possibly another medical doctor. This removes the temptation from a board member to use their power and immunity to harass, torment and run a competitor out of town.

Moreover, complaints instigated or submitted by an economic competitor should be carefully evaluated by an independent third party.

The law governing the boards is called "Administrative Law" not "Civil Law". Under state law board members have immunity while the defendant professional does not have the typical "due process rights". This is because these people serving on these boards are expected

to be ethical and moral people. As a result the system can be severely abused if board members do not act ethically. Having no "checks and balances" allows too much temptation for some of the boards in North Dakota and too much freedom for certain unethical professionals to keep out or discipline their competitors for no other reason than they are financial competitors.

As Senator Porter has just told you, " The Podiatry Board is made up of 5 individuals with 4 members being Podiatrists and one medical doctor. This situation creates problems. You have competitors regulating one another. We do not have enough practitioners in the state to have a freestanding board."

If the board members had been changed when their 4-year term expired as the statute states they should be, I would have never had the problems with this board that I have for the past 8 years. If one person did not dominate this board for the past 23 years along with his hand picked board members coupled with the board member's immunity for all their actions there would not be any problems with this board today. There is no accountability or "checks and balances".

In closing may I quote from Senator Andrist's letter to Governor Schafer:

*"there is something fundamentally wrong when a small board of practicing professionals is empowered to decide who should or should not be allowed to go into competition with them."*

*"I have been at war for years with our licensing system"*

*"I've tried a number of bill approaches, soundly defeated, in past sessions, but had decided to just give up until the flap with Dr. Gale arose"*

*"... the system is a smoking gun waiting to be abused."*

I would be glad to answer any questions at this time.

[From: John M. Andrist [mailto:jandrist@state.nd.us]  
Sent: Monday, April 17, 2000 2:13 PM  
To: Schafer, Ed  
Subject: Licensing Abuse

Governor Ed:

You probably are aware that I have been at war for years with our licensing system. This community had great difficulty getting a capable physician licensed because of silly rules designed to keep out foreign trained competitors. A similar situation happened when an out-of-state architect wanted to do a job here a number of years ago, but was restrained by licensure rules. And the crowning situation was when a popular cosmetologist from Estevan with more than twenty years of experience was prohibited from starting a shop in North Dakota. A young attorney who was a neighbor of mine had to sit for six months after his graduation before he could even take the bar exam. These abuses are particularly destructive for small communities which often have few provider options.

Among other silly abuses licensing laws require nurses to contribute to a scholarship fund, and lawyers must be members of the state (private) bar association to get a license. You no doubt are aware of others.

Many of the licensing abuses have been lessened by the adoption of national standards or board examinations in a number of professions. But the underlying problem remains:

There is something fundamentally wrong when a small board of practicing professionals is empowered to decide who should or should not be allowed to go into competition with them. It can get to be "clubby". I've tried a number of bill approaches, soundly defeated, in past sessions, but had decided to just give up until the flap with Dr. Gale arose. Without wanting to cast judgment on this case, I can only say the system is a smoking gun waiting to be abused.

It seems to me that basic professional competency should be determined at the university level, or by a full-time agency in charge of licensure for numerous professions -- and disciplinary action as well. The insulting part of the system is the presumption that consumers are not capable of determining who can cut hair, that schools are unable to assess the ability of teachers without a license, and that hospitals will hire incompetent nurses unless restrained by licensure laws.

We don't license governors, legislators, journalists, merchants, car sales personnel . . .

We should be a government of enablers, not protectors. End of sermon.

If you should desire to explore this issue at more length I would be happy to be your extended arm in the legislature. Sen. Solberg is another advocate.

Best wishes always.

John



January 19, 2001

Dear Committee Chairman and Members of the Hearing Committee:

I apologize for not being able to present my comments in person, but prior patient commitments prevent me from being there. I would like to enter this letter as testimony against House Bill 1262.

I first learned of House Bill 1262 from an Internet posting done by Dr. Brian Gale. I assume he is lobbying to have this bill passed. He stated in his Internet posting that the board should be abolished for two reasons. First, because it cannot financially support itself; and second, because it does not limit member terms to four years.

In rebuttal to the term limitation, all members are only appointed for four-year terms by the governor, and have always been. This is done at the governor's discretion, and the state law states for the Podiatry Act that they are appointed for four years. Nothing prevents them from reappointment. Members have been reappointed in the past for another four years by a different governor. This adds continuity to the board. There is absolutely nothing wrong, I feel, with the current law, since it does state that term limits are four years, but there is no limitation on any reappointments. This appears to be no different than a state senator or representative being elected for multiple consecutive terms. If there has been a violation, it has been through the governor's office by reappointment for consecutive terms, but I do not feel that this is the case. I feel that the current law does allow for consecutive terms.

As to the second part, the board has to acknowledge and investigate complaints it receives to protect the health and safety of the citizens of North Dakota. Not to do so, I feel, is a violation of the trust given to the board by the governor and the citizens of the state of North Dakota. For several years, one practitioner has generated multiple complaints that have had to be investigated. It is not responsible for the board to ignore these, and they have to be answered. It is not for me to judge if these complaints are valid or not; it is the job of the board to investigate these. These many complaints have generated enormous legal fees for the board, and have put the board on uncertain financial ground.

To abolish the Podiatry Practice Act for the above reasons is really, I feel, not warranted. The solution is to let the board do its job as it has done well in the past, and support it—not destroy it. I do not feel that it is the wishes of the majority of the licensed podiatrists in this state, the Podiatry Board, the Medical Board and the Medical Association in this state to have the Podiatry Board abolished legislatively. It does provide a valuable service to the North Dakota public to help maintain quality of care.

I would like to thank the committee members for their consideration in hearing my comments today concerning House Bill 1262, and my opposition against it.

Sincerely,



Manuel C. Harris, DPM

MCH:gt  
1/22/01

# North Dakota State Board of Medical Examiners

**ROLF P. SLETTEN**  
Executive Secretary and Treasurer

**LYNETTE LEWIS**  
Administrative Assistant

TO: CHAIRPERSON PRICE AND THE MEMBERS OF THE HOUSE HUMAN SERVICES COMMITTEE

FROM: ROLF P. SLETTEN, EXECUTIVE SECRETARY AND TREASURER

RE: HOUSE BILL NO. 1262

DATE: JANUARY 23, 2001

The North Dakota Board of Medical Examiners strongly opposes HB 1262 for both philosophical and practical reasons. One of the long-standing cornerstones of professional regulation in North Dakota is the fact that the professions who practice in this state have regulated themselves. For example, the Board of Medical Examiners is more than 110 years old. The State Board of Podiatric Medicine was created in 1928. It seems to us that you would not want to tamper with that arrangement unless it is possible to clearly articulate some very compelling reason why you need to do so.

We recognized long ago that if the State Boards of Medical Examiners don't do an adequate job of regulating medicine then someone else (presumably the Feds) will eventually do it for us. It seems reasonable to expect that if we do a good job of regulating medicine, then there is little reason to contemplate a change. If we don't do a good job, then it is logical to consider some other regulatory scheme. The same is true of any of the other licensing Boards including the State Board of Podiatric Medicine. As far as I know, there is no evidence that suggests that they haven't done a competent job of regulating their profession. It appears they are in a very tough spot right now because of this prolonged series of disciplinary actions against one individual, but

that is always a difficult spot for any Board to be in. We (the State Board of Medical Examiners) have been in that position many times.

It appears that much of this debate has been spawned by the complaints of one licensee who has had disciplinary action taken against him by the Podiatry Board. It certainly isn't unusual to find that the respondent is upset with the licensing Board, in fact, it is naive to expect otherwise. If you lined up all of the doctors who have been disciplined by the Board of Medical Examiners, you would find some unhappy campers in the group. Some of them would undoubtedly say that Rolf and John should be fired and that the whole Board should be disbanded.

It is not much different than going downtown to the criminal courts and asking the defendants how they feel about the States Attorney. They will say the prosecutors are out to get them and that they (the prosecutors) should all be put out of business.

If this bill is premised on the Podiatry Board's difficulty with this one series of cases, then we strongly urge you to take a much longer view of that Board's work.

We offer the following comments regarding the specific language of this bill. The last paragraph of the bill would require the Board of Medical Examiners to absorb the debts of the Podiatry Board. That is extremely troubling. Presumably no one would suggest that we should absorb the debts for the electricians or the polygraph operators - why would we be expected to pay the bills for the podiatrists? Podiatry is a distinct profession. The bill expects the M.D.'s and D.O.'s who are licensed to practice in North Dakota to subsidize or actually to fund the regulation of podiatry. The cost of regulating podiatry is very substantial.

Over the past several years the State Board of Podiatry has accrued a very significant debt. We are told that the debt is approximately \$30,000 right now. It's a lot of money. Worse than

that, it appears that the podiatrists are facing another Supreme Court Appeal and that they are starting a whole new disciplinary action against the same man they have been dealing with for the last several years. This is expensive stuff. It seems reasonable to assume that all of these legal proceedings will greatly increase the already large debt. These legal proceedings appear to be a very long ongoing process that won't end any time soon.

Under the Administrative Rules of the Board of Medical Examiners, the annual renewal fee for a physician's license is \$150. There are about 20 licensed podiatrists in North Dakota. If those numbers remain constant, the total amount of licensing fees paid to the Board of Medical Examiners by the podiatrists will be only about \$3,000 per year. At that rate it will be a very very long time before the podiatrist's licensure fees can retire the current debt, much less pay any of the expenses which accrue in the meantime. If this bill passes the Board of Medical Examiners will be required to regulate podiatry in spite of the fact that many years, perhaps decades, will elapse before the podiatrists contribute a single dollar to the cost of that process. In other words, the regulation of podiatry will be funded by the Board's other licensees, i.e., M.D.'s, D.O.'s and P.A.'s.

Abolishing a licensing Board that has served the state well for 70 years simply because one person who is being prosecuted by that Board is unhappy with the process would be an extreme, unnecessary, and unfair measure.

HB 1262

01/23/01 @ 8:30 a.m.  
Ft. Union Room

Chairman Price - Members of the Committee

My name - Gary R. Thune  
Special Asst. Atty. General for the  
North Dakota Board of Podiatric Medicine

I appear in opposition to HB 1262

I. HISTORY OF THE BOARD OF PODIATRIC MEDICINE

- A. Formed by Legislative Enactment in 1929
  - 1. Two Basis Purposes: License and Discipline Podiatrists - Foot and Ankle diagnosis and treatment, including prescribing medications
- B. Discipline - Two Stages:
  - 1. Discipline - First 65 years
    - Less than 1 formal complaint/20 years
    - No formal hearings [TAB A - Affidavit of Hoffsommer ¶ 3]
  - 2. Discipline Since 1994
    - 25 complaints against one podiatrist, including 2 formal hearings - - 2 Court proceedings and 1 Formal Hearing Pending.
- C. Current Financial Status
  - 1. 18 In-State and 4 Out-of-State @ \$500/yr licensure.
  - 2. Indebtedness - Legal fees and costs approximately \$30,000.00.  
Note: In first 68 years - no debt - Dr. Gale at war with the Board for 8 years.

II. RECENT ATTACKS ON THE BOARD [TO ALL 3 BRANCHES OF GOVT.]

- A. To the Executive Branch
  - 1. Governor Schaefer's Appointments  
By Statute - 4 yr. Terms § 43-05-03  
4 Podiatrists with Doctor of Podiatric Medicine Degrees  
1 Doctor of Medicine  
Reappointments common and proper under the law.  
No Term Limits - Representatives - 4 yr Terms  
Reappointments by Gov. Schaefer - partly at my request  
Plus American Podiatric Medical Association (pending).

- B. To The Courts - Judicial Branch
  - 1. N.D. Supreme Court - rejected charges and upheld the Board [Gale I - TAB B] April, 1997
  - 2. District Judge Riskedahl - Affirmed Board's Discipline November 16, 2000 [Gale II - TAB C]
  - 3. Also To Court Suing Podiatry Insurance Co. of America (PICA) for nonrenewing his malpractice insurance in 1995
    - a. Lost in Federal District Court - November, 1995 [TAB D]
    - b. Appealed and lost in the 8<sup>th</sup> Cir. Court of Appeals - Oct. 1996 [TAB D]
- C. Now Having Failed to Defeat the Board of Podiatric Medicine in Both the Executive and Judicial branches of governments, he has turned to the Legislative branch and HB 1262.

### III. THE PROBLEM

- A. Should be clearly defined before this Legislative Assembly dismantles a Board that has served the State of North Dakota well for 70 years.
- B. If it is a Financial Problem: Legislation is being introduced to provide authority for this Board to borrow money, short term, and to increase its dues to repay that loan \$30,000.00 - All due to complaint against Gale.
- C. If it is not financial - Then What Problem is the basis for dismantling this Board?

### IV. IT IS CLAIMED TO BE DR. AARON OLSON'S BIAS: (Domination of the Board)

- A. Rejected by two Federal Courts in the Podiatry Insurance Co. of America cases [TAB D]
- B. Rejected by the N.D. Supreme Court in Gale I [TAB B]
- C. Rejected by District Court Judge Riskedahl in Gale II [TAB C]  
Why? Because Dr. Olson, at my request, has voluntarily abstained from all decisions involving Dr. Gale since I became the Board's Special Asst. Attorney General in late 1994.

### V. IT IS CLAIMED TO BE THE BOARD OF PODIATRIC MEDICINE'S BIASED ATTEMPT, DUE TO GET DR. GALE, THEN CONSIDER:

- A. California's Board of Podiatry had charges pending against Dr. Gale in 1993 - He surrendered his license and left California to come to North Dakota [TAB E]
- B. It was two malpractice claims in ND that led to the nonrenewal of his malpractice insurance by the Podiatry Insurance Co. of America [TAB D]

- C. The United States Drug Enforcement Administration revoked his authority to order, receive, possess, store, administer or dispense any controlled substances to his patients for one year, commencing in March of 2000 [TAB F].  
THOSE WERE NOT ACTIONS OF THE N.D. BOARD.

IV. IS HB 1262 THE SOLUTION?

- A. To Dissolve the Board, the first time it is challenged for disciplining one of its podiatrists, is NOT the solution.  
B. The Legislative Branch should not undercut one of its Board, especially when the judicial branch has repeatedly determined it is doing its job, properly under the law.

This Bill is opposed by the:

- 1) Board of Podiatric Medicine;
- 2) N.D. Assn. Of Podiatrists; and
- 3) The ND Board of Medical Examiners.

Incidentally, in an Affidavit [TAB G] dated March 7, 2000, Dr. Gale has rejected being judged by any of his peers who have not had at least the 4 years of residency in foot and ankle that he has. There are, to my knowledge, no such doctors on the Board of Medical Examiners.

- C. THE SOLUTION to this matter is two-fold:

FIRST: Give HB 1262 a DO NOT PASS recommendation  
and

SECOND: ENACT pending Legislation [HB 1377] to authorize the existing Board to borrow sufficient funds to perform its statutory duties.

I would be happy to make my notes available to your Committee Clerk and to answer any questions you may have.

NOTE: At the request of Chairman Price, I have included a list of the current members of the Board and their term expiration dates [TAB H].

**LIST OF  
EXHIBITS**



## LIST OF EXHIBITS

### TAB

### TOPIC

- |   |  |
|---|--|
| A | Affidavit of Dr. Hofsommer - Secretary   |
| B | N.D. Supreme Court - April 25, 1997 [Gale I]   |
| C | District Judge Riskedahl - November 16, 2000 [Gale II]   |
| D | Federal Court - PIC'A nonrenewal - Judge Conmy - November, 1995<br>8 <sup>th</sup> Circuit - October, 1996 |
| E | Hearing Officer Findings Re: <u>Calif.</u> Charges in 1993   |
| F | U.S. Drug Enforcement Administration - March, 2000   |
| G | Affidavit of Dr. Brian Gale - 4 yrs. residency (p. 4)  |
| H | Members of Board of Podiatry<br>(with term expiration date and address)                                    |



STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dr. Brian D. Gale,

CIVIL NO. 00-C-1322

Appellant,

vs.

North Dakota Board of Podiatric  
Medicine,

Appellee.

AFFIDAVIT  
OF

DR. LEE HOF SOMMER

STATE OF NORTH DAKOTA

COUNTY OF CASS

)  
) ss.  
)

DR. LEE HOF SOMMER, being first duly sworn on oath, states as follows:

1. POSITIONS HELD ON BOARD OF PODIATRIC MEDICINE: At all times relevant to these proceedings, I have held the position of Secretary on the North Dakota Board of Podiatric Medicine (hereafter "Board"). In that capacity I am responsible for preparing and maintaining all Board records and for receiving reports from outside agencies, including the National Practitioners Data Bank. I have also served as the Acting Chairman of the Board with reference to all complaints filed against Brian David Gale (hereinafter "Gale"), as a result of Board President Aaron Olson's decision (on the advice of our legal counsel) to disqualify himself, due to his involvement in recently completed litigation involving Gale.

2. NON PARTICIPATION OF DR. AARON OLSON IN GALE MATTERS: In my capacity as Acting Chairman I know that Aaron Olson has not voted on any matter relative to complaints filed with the Board against Gale, since the Board's decision to conduct a formal administrative hearing concerning Gale complaints in 1994. In fact, Aaron Olson has removed

himself from the room when complaints concerning Gale have been discussed at general meetings of the Board and has elected not to attend those Board meetings called for the sole purpose of addressing Gale complaints.

3. BOARD HISTORY RE COMPLAINTS AGAINST LICENSEES: My review of the records of the Board indicate that the number of complaints filed against licensed practicing podiatrists in North Dakota has been minimal, averaging less than one per year, prior to Gale's arrival in North Dakota in 1994. No complaint filed with the Board had gone to formal administrative hearing prior to the four complaints against Gale which were filed in June of 1994. The only other complaints which resulted in formal proceedings were those which again involved Gale and are the subject of this pending litigation. More complaints have been filed against Gale than the combined total of complaints filed against all other licensed podiatrists in North Dakota in the history of the Board.

4. COMPLAINTS AGAINST GALE - FIRST GROUP: The first formal complaint, filed by the Board against Gale in June of 1994, involved the following five matters: Patients Melvin Keator, Matthew Brorby, Patrick Cochran; misleading advertising; and failure to report a California disciplinary proceeding which was brought in January of 1993.

5. FIRST DISCIPLINARY ACTION AND APPEALS: Two of the complaints, namely the failure to properly treat Melvin Keator and the use of misleading advertising, resulted in Board disciplinary action being taken against Gale on May 30, 1995. The two years of probation and a civil penalty of \$6,371.16 were appealed to the Courts, ultimately resulting in a ruling by the North Dakota Supreme Court in 1997. That decision affirmed the Board's investigative procedure and decisions. In the interim, action on other complaints against Gale were placed on hold, due

to the trial court's adverse ruling as to Board procedures. The Supreme Court's reversal of that decision permitted the Board to move forward with the second group of Gale complaints.

6. **COMPLAINTS AGAINST GALE - SECOND GROUP:** The second group of complaints, received between 1994 and 1998, included the following:

<u>Patient</u>	<u>Subject of Complaint</u>
1. Nancy Miller	Unnecessary surgery recommended
2. Johanna Johnson	Billing Practice
3. Doug Lawrence	Billing Practice
4. Cheryl Wetzstein	Possible Wrong Surgery
5. Geraldine Parsley	Achilles Tendon Surgery
6. Gwyn Herman	Plantar Fasciotomy
7. Corrine High Elk	Silastic Implant
8. Patricia Lautenschlager	Improper Ankle Fusion and Calcaneal Osteotomy
9. Margie Pulkrabek	Improper Plantar Fasciotomy
10. Patty Greer	Chevron Osteotomy
11. Marbelle Putz	Plantar Faciotomy
12. Karen Dryden	Plantar Facial Release
13. Gladys Wright	Joint Replacement
14. Shirley Sailer	Hallux Valgus

Of these fourteen complaints, the Board initially elected to address four (Miller, Johnson, Putz and Dryden) without formal proceedings. A formal Complaint was brought in August of 1997 [Appellants's TAB 4] as to eight complainants (Lawrence, Wetzstein, Parsley, Herman, High Elk, Lautenschlager, Pulkrabek and Greer). It was later amended by adding the complaints of Wright and Sailer in an Amended Complaint dated April 20, 1998 [Appellant's TAB 5]. These formal proceedings were brought by Assistant Attorney General Doug Bahr on the Board's behalf.

7. **AGREEMENT TO BINDING REVIEW:** By Settlement Agreement dated June 22, 1998 [Appellant's TAB 6], Gale and the Board agreed to be bound by nonappealable findings of fact to be submitted by Dr. Adolph W. Galinski, a mutually agreed upon independent reviewer. After both the Board and Gale had submitted medical records and briefs, Dr. Galinski issued his

decision on July 20, 1999 [Appellant's TAB 7], finding Gale failed to properly treat and/or care for each of the five patients.

8. REFUSAL TO ACCEPT BINDING FINDINGS: At a Board meeting held on August 11, 1999 in Jamestown, North Dakota, Gale informed the Board he would not be bound by the findings of Dr. Galinski. He stated he would appeal to the Courts unless the four Board members in attendance at that meeting would agree to review the documents filed with Dr. Galinski and reach their own decision, which decision would be binding and nonappealable as to the findings of fact.

9. VERBAL NOTICE OF INTENT TO FILE IN BANKRUPTCY: At this August 11<sup>th</sup> meeting of the Board it was announced by Gale that he intended to file bankruptcy papers in the near future.

10. SECOND SETTLEMENT AGREEMENT: To avoid the substantial delays which would result from a court challenge to Dr. Galinski's report, the four Board members agreed to Gale's proposal and entered into a Stipulated Modification to Settlement Agreement dated August 12, 1999 [Appellant's TAB 8] in which they became the binding finders of fact.

11. FIRST DRAFT OF BOARD FINDINGS: After all four Board members had received and reviewed all the briefs and medical records previously provided to Dr. Galinski, the Board convened via telephone conference call dated January 12, 2000 and provided consensus input to the Board's legal counsel on each of the five complaints. The Board's legal counsel then prepared Recommended Findings of Fact and Conclusions of Law, which were distributed to the members of the Board [TAB A, attached]. At Gale's request, two sets of documents prepared by Gale [TAB B and C] were also sent to the Board members, thereby permitting Gale to challenge the

Board's proposed findings, based upon his presence at the January 12<sup>th</sup> meeting. These documents also included Gale's views as to what disciplinary action he deemed to be appropriate **[Id.]**.

12. **REVISIONS TO PROPOSED FINDINGS AND CONCLUSIONS:** After reviewing the recommended findings and Gale's arguments for revisions, the Board convened on January 27, 2000 to render its decision. The Board reviewed each item in the Recommended Findings and made changes that reflected Gale's arguments **[See Tab D, a red-lined copy of the Recommended Findings and Conclusions]**. The Board then discussed and acted upon their final Findings of Fact, Conclusions of Law and Order Imposing Discipline **[Appellant's TAB I]**

13. **BANKRUPTCY NOTICE RECEIVED:** The bankruptcy filing which Gale threatened in August of 1999 has now been accomplished and legal counsel for the Board has been notified accordingly.

14. **MEDICAL MALPRACTICE PAYMENT REPORTS:** As Board Secretary, I have received two Medical Malpractice Payment Reports from the National Practitioner Data Bank concerning Gale. The first involved a payment of \$60,000.00 for improper performance of surgery and was paid on May 12, 1997 **[TAB E at p. 2]**. The second involved a payment of \$87,500.00, also for improper performance of surgery, and was paid on May 8, 1998 **[TAB F at p. 2]**. Both of the incidents giving rise to these settlements occurred in 1993 and were settled by Gale's insurer, the Podiatric Insurance Company of America. I recently also received a copy of the decision of the United States Court of Appeals for the Eighth Circuit, affirming U.S. District Judge Conmy's dismissal of Gale's lawsuit against the Podiatric Insurance Company of America **[TAB G]**. In that suit, Dr. Gale unsuccessfully asserted that the nonrenewal of his malpractice insurance was caused by his former associate (Dr. Aaron Olson).

15. **CURRENT PENDING COMPLAINTS:** Subsequent to the Board's decision on January 27, 2000, the Board has received the following new complaints filed by the named patients against Gale:

	<u>Patient</u>	<u>Subject of Complaint</u>
1.	James Allmer	Heel Surgery
2.	Peggy Mehlhoff	Toe Surgery (4 toes)
3.	Lila Gienger	Partial Amputation of Toe

The Board is currently in the process of conducting preliminary investigations into these new complaints.

Dated this \_\_\_\_\_ day of March, 2000.

\_\_\_\_\_  
Lee Hofsommer, D.P.M.  
Secretary of the Board

Subscribed and sworn to before me this \_\_\_\_\_ day of March, 2000.

\_\_\_\_\_  
Notary Public  
My Commission expires: \_\_\_\_\_





IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

1997 ND 83

Dr. Brian Gale,

Appellee

v.

North Dakota Board of  
Podiatric Medicine,

Appellant

Civil No. 960295

Appeal from the District Court for Burleigh County, South  
Central Judicial District, the Honorable Thomas J. Schneider,  
Judge.

REVERSED.

Opinion of the Court by Neumann, Justice.

Orell D. Schmitz (argued), of Schmitz, Moench & Schmidt,  
P.O. Box 2076, Bismarck, ND 58502-2076, for appellee.

Ken R. Sorenson (argued), Assistant Attorney General,  
Attorney General's Office, 600 East Boulevard Avenue, Bismarck, ND  
58505-0040, for appellant.

treatment of conditions affecting the human foot and ankle and their governing and related structures").

[13] Dr. Olson and Dr. Gale were former associates in a podiatric practice, and when those inquiries were made, Dr. Olson was involved in civil litigation with Dr. Gale regarding the termination of their business relationship. According to Dr. Gale, Dr. Olson also was engaged in the area of podiatric practice identified in the inquiries and had been involved in Dr. Gale's treatment of Keator. See Keator v. Gale, 1997 ND 46.

[14] Dr. Olson convened a special Board meeting by teleconference in February 1994 to discuss the inquiries. The Board's counsel and all five Board members, Dr. Olson, Dr. Lee Hofsommer, Dr. Doug Moen, Dr. Robert Deichert, and Dr. Manuel Harris, participated in the teleconference. At the direction of counsel, the Board appointed a committee consisting of Dr. Hofsommer, Dr. Harris, and Dr. Moen to investigate the inquiries about Dr. Gale.

[15] The three-member investigatory committee met in March 1994. The investigatory committee decided the scope-of-practice inquiries were meritorious and recommended bringing the matter before the full Board. The committee also learned Dr. Gale, in renewing his 1994 North Dakota podiatric license, had not disclosed disciplinary proceedings against him by the State of California. Additionally, Dr. Moen suggested addressing Dr. Gale's standard of care.

functions. Our review of the record of the formal hearing reflects Dr. Gale received a fair hearing by the hearing officer. Compare Municipal Servs. Corp. v. State, 483 N.W.2d 560, 565 (N.D. 1992) (hearing officer's "prejudgment" about issues precluded fair hearing). Except for two conclusions of law, see fn. 1, the Board adopted the hearing officer's findings, conclusions, and recommendation. See Steen v. North Dakota Dep't of Human Servs., 1997 ND 52, ¶10 (agency must sufficiently explain rationale for rejecting hearing officer's recommendation). Although Dr. Olson, as Board president, was involved with some pre-complaint proceedings concerning Dr. Gale, Dr. Olson did not vote in the Board's decision to adopt the hearing officer's recommendation and to impose discipline. Dr. Olson's limited participation at the beginning of these proceedings, although ill-advised, did not permeate the entire proceeding. The Board is presumed to perform its duty regularly and to refuse to allow any preconceived biases from interfering with its ultimate decision. See Opdahl; Froyland. Dr. Gale was not denied a fair hearing or due process. We hold Dr. Olson's limited participation did not permeate the entire administrative proceeding with partiality.

B

[¶31] - The Board also argues the district court erred in concluding the Board engaged in discriminatory, selective prosecution against Dr. Gale.

Keator's angulation exceeded the acceptable level of five degrees. Dr. Bopp also testified x-rays taken during Dr. Gale's treatment of Keator revealed the unacceptable angulation and should have resulted in further monitoring, rather than a discharge from treatment. A reasoning mind could reasonably find Dr. Gale's treatment of Keator failed to conform to the minimal standards of acceptable and prevailing podiatric medical practice. We hold the Board's findings about Dr. Gale's treatment of Keator are supported by a preponderance of the evidence.

[¶45] We reverse the district court judgment, and we affirm the Board's order imposing discipline against Dr. Gale. Because we affirm the Board's order, we conclude Dr. Gale is not a prevailing party and is not entitled to attorney's fees under N.D.C.C. § 28-32-21.1. See Western Gas Resources v. Heitkamp, 489 N.W.2d 869, 874 (N.D. 1992), cert. denied, 507 U.S. 920, 113 S.Ct. 1281, 122 L.Ed.2d 675 (1993).

[¶46] We reverse the district court judgment, and we remand with instructions to reinstate the Board's decision.

[¶47]

*Wande Walles*  
*Zane Anderson*  
*Herbert H. Horschel*  
*Zane Anderson D.J.*  
*Mary Muehlen Muehlen, Atty. C.J.*

[¶48] ZANE ANDERSON, D. J., sitting in place of VANDE WALLE, C.J., disqualified.



STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

Dr. Brian D. Gale,

Appellant,

v.

North Dakota Board of Podiatric  
Medicine,

Appellee.

MEMORANDUM OPINION

00-C-1322

Dr. Gale has appealed to this court from the Findings of Fact, Conclusions of Law, and Order Imposing Discipline of the North Dakota Board of Podiatric Medicine, as issued on February 2, 2000. The Findings and Conclusions of the Board were in response to complaints filed with the Board relating to five different patients who had been treated by the Appellant. The Board concluded the Appellant had violated certain provisions of N.D.C.C. 43-05-16, which establishes grounds for disciplinary action against licensed podiatrists. As a result of its findings and conclusions, the Board issued an order imposing discipline which had the effect of restricting Dr. Gale's practice to non-operative podiatric care, with certain exceptions, and requiring certain retraining programs through the Orthopedic Learning Center, sponsored by the American College of Foot and Ankle surgeons.

In his Specification of Error, Dr. Gale contends that the Board breached an agreement which had been entered into, which called for four members of the Board acting as reviewers of the record, to determine whether violations of Section 43-05-16 had occurred. Dr. Gale's attack on the Board's decision includes allegations that their

findings were based on matters not contained in the record, that they ignored certain portions of the record, including briefs and arguments of Dr. Gale and his expert, and failed to set forth the standard of practice expected of podiatrists in reaching its conclusions. In the proceeding, the Appellant seeks this Court's determination that the Appellant's rights were violated and that the Board did not comply with the requirements set forth in N.D.C.C. 28-32-19 of the Administrative Agency's Practice Act.

The case has a complicated history dating back to April 1998, when an amended complaint was filed against the Appellant based on his care of five different patients. The amended complaint took the place of an earlier complaint filed in August of 1997, which included allegations involving additional patients not included in the later-amended complaint.

On June 22, 1998, the Board and Dr. Gale entered into a settlement agreement which provided that the records of the patients involved in the amended complaint would be submitted to an independent reviewer who would determine whether Dr. Gale had failed to properly treat the patients in question. The settlement agreement, which is a part of the record, included provisions wherein each side agreed to be bound by the findings of the independent reviewer, and that the findings would not be appealable. The agreement contemplated that Dr. Adolph Galinski, Associate Dean of the Scholl College of Podiatric Medicine of Chicago, would act as the independent reviewer. Approximately 13 months later, after Dr. Galinski had reviewed the record, he issued an opinion which in summary concluded that Dr. Gale had failed to properly treat or care for each of the five patients. Dr. Gale contended that the independent reviewer had gone outside of the scope of the review and had focused his findings on purported problems with proper maintenance of medical records on the part of the Appellant.

In spite of the "no appeal" provisions of the settlement agreement, Dr. Gale intended to seek judicial review. As a result, the parties entered into a second agreement on August 12, 1999, wherein counsel for each of the parties executed a "stipulated



modification to settlement agreement," which called for four members of the Board to replace Dr. Galinski as the reviewer and issue new findings, which the parties again agreed would be non-appealable.

After their independent review of the extensive record which had been compiled, the Board (actually the four members designated as reviewers) convened meetings on January 12, 2000, and January 27, 2000, to discuss their opinions and craft Findings and Conclusions with the assistance of their counsel, Mr. Thune. Dr. Gale and his attorney, James Norris, were present for the meetings. Dr. Gale's written objections to certain matters addressed at the first meeting were submitted as a part of the record, and were considered by the Board before its decision was finalized.

When the Findings and Conclusions of the reviewers was formalized, the opinion concluded that the Appellant had violated the provisions of Century Code Section 43-05-16 as to all five patients. Based on its conclusions, it imposed the discipline previously outlined.

Counsel for the Board contends that the Court is without jurisdiction to consider, review, and possibly reverse the Findings and Conclusions of the Board. The Board contends that the stipulations entered into, in which the parties agree to be bound by the Findings and Conclusions and waived appeal rights thereto, would preclude this Court's considering the case on review in accordance with the requirements of Century Code Section 28-32-19. That section of law generally contemplates that a Court would affirm the order of an administrative agency unless it found defects in the agency proceeding. Under this section, if the Court concludes that the opinion of the agency is not in accordance with the law, that the constitutional rights of the appellant have been violated, that there were procedural defects in the administrative proceedings, that a fair hearing was not accorded the appellant, that Findings of Fact are not supported by a preponderance of the Evidence, or Conclusions of Law are not supported by Findings of Fact, the agency's decision should not be upheld.

Counsel for the Appellant has submitted a brief and a reply brief, with a total of 61 pages of argument, much of it devoted to the contention that this Court should scrutinize the review process engaged in by the four Board members, find defects in it, and therefore reverse its decision. In summary, the Appellant contends that much of the record was not considered by the Board, that certain things outside of the record were considered, that the Board ignored facts favorable to the Appellant which were in the record, failed to establish the required standard of care, and disregarded his briefs and arguments and expert testimony.

The case will be dismissed. This Court concludes that the arguments that the Appellant waived his right to have the agency's decision subject to judicial review is meritorious. Having stipulated and agreed to the second alternative conceived by the parties, that being having the Board, except for Dr. Olson, sit as a reviewing panel, the appellant agreed to the procedures employed. The fact that the reviewers have not conducted their review in the manner the appellant believes should have occurred does not vitiate their conclusions. Arguments to the effect that some of the Board members are less medically qualified than Dr. Gale, and in one case not trained in podiatric medicine, carry little weight when the Appellant expressly agreed to accept the Board's decision as conclusive. The agreement did not contemplate that the Board would, for example, accept, or give weight to the opinions of the Appellant or the Appellant's expert. In performing their function as fact finders, the procedures utilized by each individual member may have been less than perfect. If counsel's arguments, for example, that the Board in examining MRI results had gone outside of the scope of the evidence is accepted, that would constitute an irregularity. For the most part, however, it appears the Board accepted evidence in the record in making its conclusions and may have rejected a significant part of the record which supports the Appellant's position in the case in reaching its conclusions.

Secondly, counsel for the Board is correct in asserting that this Court cannot substitute its judgment for that of the Board if a reasoning mind could have reasonably determined that the factual conclusions were supported by the evidence. Pleins v. N.D. Worker's Comp. Bureau, 472 N.W.2d 459 (N.D. 1991), and Volesky v. N.D. Game and Fish Dept, 566 N.W.2d 812 (N.D. 1997). While this Court may have reached certain conclusions different from those reached by the Board, based on a review of the evidentiary record, the record taken as a whole cannot be construed in such a way as to not support the Board's decision.

Counsel for the Board should submit an appropriate order dismissing the case.

Dated this 16<sup>th</sup> day of November, 2000.

BY THE COURT:

Burt L. Riskedahl

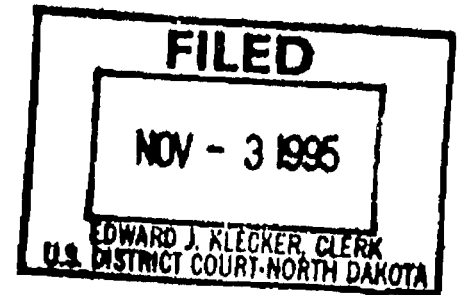
Burt L. Riskedahl, District Judge  
South Central Judicial District

Distribution:

Gary R. Thune  
James L. Norris

D

UNITED STATES DISTRICT COURT  
DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION



Brian D. Gale, D.P.M.  
Plaintiff,

vs.

A1-95-092

Podiatry Insurance Company  
of America, a foreign mutual  
company,  
Defendant.

---

MEMORANDUM AND ORDER

The plaintiff was issued a malpractice policy by the defendant with coverage beginning July 1, 1992 and continuing for a year. This policy was renewed for the annual period beginning July 1, 1993, and again for the annual period beginning July 1, 1994. In early 1995 the defendant notified the plaintiff that the policy would not be renewed for the period beginning July 1, 1995.

Plaintiff sues, asking that the Court order the defendant to write malpractice coverage for the plaintiff, and seeking economic and possibly punitive damages. The complaint is premised upon the existence of some duty, either contractual, statutory, or grounded in some concept of "good faith and fair dealing" owed by the defendant to the plaintiff to afford him malpractice insurance. A review of the file demonstrates the belief of the plaintiff that the action of non renewal was taken at the request of the plaintiff's former associate who apparently wields more political clout within the professional association of podiatrists than does the plaintiff.

The defendant moves for summary judgment, alleging that no such duty to insure the plaintiff exists in any of the areas claimed by plaintiff, and pointing out that it has the absolute right to exercise discretion in insuring one adult caucasian practitioner and not another adult caucasian practitioner. Plaintiff's counsel challenges the accuracy and sufficiency of the information used in the underwriting review process which led to the decision to not renew the plaintiff's policy, again urging the existence of a duty to renew absent "sufficient cause".

North Dakota's statutory framework applicable to cancellation or non-renewal of insurance policies (26.1-39-10 et seq) applies to legal and medical malpractice policies. The statute (26.1-39-16) sets out the notice requirements, which were followed, and the statement of reasons, which apparently was followed. The next section (26.1-39-17) sets out the prohibited reasons for "declination" of a covered policy. These are race, religion, nationality, ethnicity, age, sex, marital status, lawful occupation, age or location of the residence of the applicant, (unless justified), previous rejection by another insurer, or previous risk pool coverage placement. No prohibited reason for declination is alleged or appears.

No Statutory duty to renew appears.

The policy does not contain any contractual obligation to renew.

If any renewal duty exists, it must be predicated upon concepts of good faith and fair dealing. The cited authorities are

almost universal in rejecting the Plaintiff's position. (Counsel cites Armstrong v. Safeco Insurance Company, 748 P2d 666 (Wash. 1988) without bothering to advise the court that this is an interim appellate decision and that Armstrong v. Safeco Insurance Company, 765 P2d 276 (1988) is the proper precedent and is the opposite of what is urged. This leads to a loss of credibility.

Any stated reason, not prohibited by statute, whether it increases underwriting risk or not, is sufficient. The insured is also free to not renew and no requirement for any reason at all is applicable to the insured although this leads my learned colleague and clerk to mutter "ah, the wonderful and impartial blindness of the law which forbids both the rich and poor alike from sleeping under the bridge."

A party cannot breach a non-existent duty.

The Court does not reach the issue of pre-emption, preferring to consider the merits of the matter.

Defendant's motion for summary judgment is granted. (9) The action is ordered dismissed with prejudice.

SO ORDERED


Dated this 3rd day of November, 1995.

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 3 day of

Nov. 1995

EDWARD J. KLECKER, CLERK

  
Patrick A. Conmy, District Judge,  
United States District Court

By:   
Deputy

A1-95-92

No. 95-4066

Brian D. Gale, DM,

Appellant,

v.

Podiatry Insurance Company  
of America, a foreign mutual,

Appellee.

\*  
\*  
\*  
\* Appeal from the United States  
\* District Court for the  
\* District of North Dakota.  
\* [UNPUBLISHED]  
\*  
\*

Submitted: September 24, 1996

Filed: October 2, 1996

Before BOWMAN, LOKEN, and MURPHY, Circuit Judges.

PER CURIAM.

Dr. Brian D. Gale appeals from the district court's (1) grant of summary judgment in favor of Podiatry Insurance Company of America (PICA). Having carefully reviewed the record and the parties' briefs, we conclude that the judgment of the district court was correct. Accordingly, we affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

(1) The HONORABLE PATRICK A. CONMY, United States District Judge for the District of North Dakota.

-4-

2/21/00 10:30 PM



E

## BOARD OF PODIATRIC MEDICINE

**IN THE MATTER OF:**

Brian D. Gale

**HEARING OFFICER'S  
RECOMMENDED FINDINGS  
AND RECOMMENDED ORDER**

This action was initiated with a complaint against Brian D. Gale, dated June 28, 1994, alleging that while licensed as a doctor of podiatric medicine by the North Dakota State Board of Podiatric Medicine, he violated certain provisions of the statutes governing the practice of podiatric medicine. The Board of Podiatric Medicine requested the Office of Administrative Hearings to furnish a hearing officer to conduct a hearing for Dr. Gale and the recommended findings and a recommended order concerning the allegations in the complaint. Robert P. Brady was assigned on August 5, 1994. A prehearing conference was held on September 9, at which time counsel for the Board, Assistant Attorney General Ken Sorenson, and for Dr. Gale, Carol Kapsner, advised that they would not be available and prepared to proceed with the hearing until late January 1995. The hearing was then scheduled for January 25, 1995. Ms. Kapsner subsequently withdrew as Dr. Gale's attorney and was replaced by Bismarck attorney William P. Zuger. The hearing was held as scheduled on January 25 and 26, 1995. Members of the Board of Podiatric Medicine were in attendance at the hearing, along with Board legal counsel Tracey Lindberg. For that reason, I will not undertake here, as is often done, a

23 degrees, and insufficient healing of the tibial fracture, constituted the failure to conform to the minimal standards of acceptable and prevailing podiatric medical practice, and, as such, is a ground for disciplinary action under N.D.C.C. § 43-05-16(1)(k).

11. (Findings of fact) A complaint was served on Brian Gale in January 1993 by the State of California, alleging that he had violated certain provisions of the law in that state regulating the practice of podiatric medicine. Dr. Gale did not report that California action to the North Dakota Board of Podiatric Medicine.

12. (Conclusion of law) Brian Gale's failure to report that he was the subject of a disciplinary action in the state of California was in violation of N.D.C.C. 43-05-16(1)(k), requiring licensed podiatrist to report to the board any charges that have been brought in another state regarding such person's license.

13. (Finding of fact and conclusion of law) Brian Gale's failure to report the California disciplinary action was not willful and was contributed to in part by the manner in which the question is presented on the license renewal application form used by the Board. Therefore, disciplinary action for Dr. Gale's failure to report the California action is not warranted in this instance.

14. (Finding of fact) Brian Gale advertises that he specializes in the management of "failed orthopedic and podiatric operations."

15. (Findings of fact) Brian Gale's use of the words "specializing in the management of failed orthopedic operations" is plainly designed to lead the reader to believe that he



UNITED STATES DEPARTMENT OF JUSTICE  
DRUG ENFORCEMENT ADMINISTRATION

MEMORANDUM OF AGREEMENT

BRIAN D. GALE, D.P.M., DOCKET NUMBER 00-01



Dr. Brian D. Gale, DPM, is registered with the Drug Enforcement Administration as a practitioner with DEA Registration Number, BG1912080. On September 10, 1999, the DEA issued an Order to Show Cause proposing to revoke Dr. Gale's registration pursuant to 21 U.S.C. § 824 (a)(4), and deny any pending applications for renewal of such registration pursuant to 21 U.S.C. § 823(f), on grounds that his continued registration would be inconsistent with the public interest.

The Order To Show Cause alleged the following:

1. On January 24, 1996, DEA investigators conducted an inspection of your registered premises. Investigators found no record of any biennial inventory in violation of 21 U.S.C. § 827 and 21 C.F.R. § 1304.13 (1995).
2. During their review of receiving records, investigators did not find, nor were they offered, receiving records consistent with the amount of controlled substances on hand. Some receiving records were later acquired through your suppliers. Accordingly, you failed to maintain records for the required two year period pursuant to 21 C.F.R. § 1304.04 (a) and did not maintain complete and accurate records in accordance with 21 C.F.R. § 1304.21(a). Furthermore, in their review of Schedule II order form records, investigators located three DEA Form 222, which did not indicate the date of receipt or quantity received as required by 21 U.S.C. § 828 and

21 C.F.R. § 1305.09(e). In addition, you failed to maintain complete DEA Form 222 records as required by 21 CFR §§ 1305.12 (a) and 1305.13 (c).

3. The subsequent inventory and audit revealed shortages of fifteen controlled substances totaling 5,169 dosage units, including over 5,000 dosage units of the Schedule III controlled substance hydrocodone. Also, you had overages of four other controlled substances totaling more than 300 dosage units. You indicated that you maintained no independent record of dispensing or distribution, and relied on patient chart entries. However, only eight patient records had any such entries, and only six records indicated quantities dispensed. Accordingly, you failed to record the date of receipt or distribution under 21 C.F.R. §§ 1304.24 (c) and 1304.24 (d) and failed to maintain complete and accurate records pursuant to 21 C.F.R. §§ 1304.04 (a) and 1304.21 (a).

In response to the Order To Show Cause, Dr. Gale requested a hearing and the matter was docketed before a DEA Administrative Law Judge (ALJ) and docketed as Docket Number 00-01.

The facts recited above constitute grounds for revocation of Dr. Gale's DEA Certificate of Registration and denial of any pending applications for renewal. In lieu of continuing with the proceeding to revoke Dr. Gale's DEA registration, and with Dr. Gale having been fully advised of the alleged grounds for revocation, the DEA and Dr. Gale agree to the following:

1. The Drug Enforcement Administration (DEA) agrees to initiate a motion to terminate further administrative proceedings in the matter of Brian D. Gale, D.P.M., Docket Number 00-01. DEA also agrees to approve Dr. Gale's pending application for renewal of his Certificate of Registration, without restriction, but subject to the terms and conditions as outlined below.

2. Dr. Gale shall not order, receive, possess, store, administer or dispense any controlled substances in any schedule at his registered premises. Dr. Gale's controlled substance authority shall be limited to the prescribing of controlled substances for a legitimate medical purpose.
3. Dr. Gale shall not prescribe, administer or dispense any controlled substance for Dr. Gale's own use or for Dr. Gale's family members' use.
4. For a period of one year from the date of execution of this agreement, Dr. Gale shall maintain a daily record of any controlled substances that he prescribes. This record shall list the patient name, the reason for the prescription, the drug, quantity, and dose prescribed, and whether refills are authorized. This record shall be made available for review by the DEA at the DEA's request.
5. Dr. Gale shall abide by all Federal, state and local laws and regulations relating to controlled substances.
6. During the pendency of this agreement, Dr. Gale shall allow DEA personnel access to his controlled substance records for the purpose of verifying his compliance with this agreement and with all Federal, state and local laws and regulations relating to controlled substances. Dr. Gale agrees to permit such entry of DEA personnel to his registered premises, during regular business hours, without an administrative inspection warrant and without prior notification to Dr. Gale.
7. Dr. Gale shall provide immediate written notification of any change in his registered address to the DEA Minneapolis Resident Office prior to making any changes to his registered address. Dr. Gale shall provide written notification to the Minneapolis Resident Office of the DEA the name and address of all places where Dr. Gale has medical privileges. Dr. Gale further

agrees to promptly notify the DEA prior to any change of business address and/or change of status of his state podiatric license. Notification shall be made, in writing, and sent by certified mail with return receipt requested, to Drug Enforcement Administration, Diversion Group Supervisor Carol L. Dubrosky, 330 Second Avenue South, Suite 450, Minneapolis, Minnesota 55401.

8. The parties acknowledge that violation of the terms of this agreement may constitute additional grounds for the initiation of proceedings for the revocation of any DEA registration issued hereunder and any such violation may result in an action to revoke such registration. In the event that such future administrative proceedings become necessary, nothing in this agreement shall be construed as a waiver on the part of the Drug Enforcement Administration to utilize the underlying facts of this matter as grounds for revocation or denial of a DEA registration, either by themselves or in conjunction with other grounds.

9. Dr. Gale agrees that a violation of any provision of this agreement shall result in the initiation of proceedings to revoke his DEA Registration.

10. This agreement, with the exception of paragraph 4 above, shall remain in effect for a period of three years from the time the agreement is fully executed. The agreement shall be considered fully executed when all parties to the agreement have signed and dated the agreement.

11. The parties acknowledge that this Agreement is entered into by Dr. Gale for the purpose of avoiding the time and expense of further proceedings, and shall not be construed as an admission by Dr. Gale to any allegation contained in the Order To Show Cause recited herein.

12. The Drug Enforcement Administration enters into this agreement with the understanding that Dr. Gale will abide by its contents in good faith, and so long as Dr. Gale abides by this



Agreement, DEA will seek no further administrative or civil action against Dr. Gale.

ON BEHALF OF THE DRUG ENFORCEMENT ADMINISTRATION

Carol L. Dubrosky

Carol L. Dubrosky  
Diversion Group Supervisor  
Drug Enforcement Administration  
330 Second Avenue South, Suite 450  
Minneapolis, Minnesota 55401

Date: 3/16/2000

Wayne M. Patrick

Wayne M. Patrick, Attorney  
Office of Chief Counsel  
Drug Enforcement Administration  
Washington, D.C. 20537

Date: March 3, 2000

ON BEHALF OF BRIAN D. GALE, D.P.M.

Brian D. Gale, M.D.

Brian D. Gale, M.D. *DPH*  
Tuscany Square - Suite 250  
107 West Main Avenue  
Bismarck, North Dakota, 58501

Date: 3/9/00

James L. Norris

James L. Norris, Esq., James L. Norris, P.C.  
313 North First Street  
Bismarck, North Dakota 58501.

Date: 3-9-00

G

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 00-C-1322

Dr. Brian D. Gale,

Appellant,

vs.

North Dakota Board of Podiatric  
Medicine,

Appellee.

**AFFIDAVIT OF DR. BRIAN GALE**

I, Dr. Brian Gale, make the following sworn affidavit.

1. The Appellee's (Board) Findings, Conclusions and Order Imposing Discipline against me dated February 2, 2000 has had a devastating and adverse affect upon me. Even before the Board had issued its Findings, Conclusions and Order Imposing Discipline against me, the news media began running news spots concerning the Board's decision to discipline me. The media coverage has been intense and it has caused serious financial and emotional repercussions to me. This news coverage has seriously curtailed any new patients coming to me. Prior to the news media coverage I was seeing approximately four new patients a day, now I am down to about one patient a day at the present time. I have received excellent support from my current patients who know me, however, without new patients I will have a difficult time making it financially. Emotionally this news coverage has caused my family and I humiliation and embarrassment.

2. The Board's decision against me is one of the reasons I have filed a Chapter 13 Bankruptcy. I filed this Bankruptcy on February 22, 2000, case number 00-30228 since neither I nor my professional corporation have the financial ability to pay Dr. Galilnski \$2,175 on or before

March 1, 2000 as the Board ordered me to do. Likewise neither I nor my professional corporation have the financial ability to pay the Board's attorney fees and costs of approximately \$30,000 that the Board has ordered me to do by its February 2, 2000 Order of Discipline (i.e., \$500 per month for approximately two years with a balloon payment on the balance at that time).

3. The Board's decision to severely restrict my practice plus their requirement for retraining me imposes upon me even more irreparable injury. Restricting my surgical practice limits a very significant portion of my income and this aspect of the Board's decision in and of itself is causing me serious financial concern. I have had several patients that were scheduled for surgery during the month of February and all of them have told me that they have decided to wait for their surgery until I am able to have my surgical privileges restored. Adding to my financial hardship, is the Board's additional requirement that I must travel to Tucker, GA on three separate occasions with each time requiring me to be gone from my practice for a full week's time to attend three separate mini-residency courses. This means that in addition to having to shut-down my office for three full weeks (and as a sole practitioner this could have a very deleterious effect upon me) plus, I must also pay for tuition, meals, lodging and air fair to and from Tucker, GA each time. Further I am also required to take two additional courses at the Orthopedic Learning Center. I estimate that my out of pocket costs to take these courses will be approximately \$6,000. The Board has stated that it will reinstate full operative privileges to me only after completion of the three one week mini-residency courses in Georgia and one of the courses at the Orthopedic Learning Center. At the Board meeting on January 27, 2000, when the Board decided its discipline requirements against me, the Board stated that I would be able to complete the three one week mini-residency courses and the Orthopedic Learning Center courses within three months so that the restriction on my surgical privileges would

not create any serious financial problems for me. This is an untrue statement by the Board. Since that January 27, 2000 meeting, I have checked into the three mini-residency courses in Georgia and it will take me at least nine months to complete them. I do not have the money at the present time to attend even the first mini-residency course. In addition, I see no way in the foreseeable future to get the money because of the Board's severe restriction on my surgical privileges. As a result of the Board's limiting my surgical privileges, St. Alexius Medical Center and Med-Center One have now limited my surgical privileges at their hospitals. The effect of the Board's discipline on me is seriously impacting my ability to make a living. Without being allowed to do even the most common procedures that most podiatrists perform (e.g., bunion procedures), it makes it extremely difficult to be able to keep my office open indefinitely. My performance regarding bunion procedures was not a procedure that was any part of the basis for any of the complaints that the Board is disciplining me for and yet, the Board is restricting me from doing bunion procedures as well as other common procedures that could at least provide me with additional income to continue my practice of Podiatry. Unless I am able to get the Board's discipline against me stayed until such time as the Court is able to render a decision on the merits of my appeal against the Board, the Board's order is going to continue to cause me serious and irreparable harm.

4. My wife and I and our children have had very little to live on the past few years because of the never ending fight with the Board and also with its President, Dr. Aaron Olson. Between the two disputes, I have had to pay out substantial amounts for attorney fees in defense of these charges. Additionally, I have had to devote much time away from my practice; time sorely needed to establish my own practice and to build a new business as a sole practitioner here in Bismarck. The toll of all of this on both my wife and I has been devastating to us and our families. There is a limit as to just

how much my wife and I can endure (or that anyone can endure for that matter), both emotionally and financially. I feel that the Board's decision is wrong and its decision is based upon improper influence and improper consideration by the Board, and upon the Board's desire to put me out of business and to ruin my career. Every time that I see a patient now causes me to worry and causes me to start to doubt myself and my ability to perform. The expert in the field of Podiatry that I hired to assist with the Board's complaint against me stated that based upon the total record my performance as a podiatrist fell within the acceptable standard of care; and furthermore, such expert even provided to the Board evidence supporting my professional decisions with authoritative literature from the Podiatric profession. Further the Board's own expert witness has published authoritative literature himself that actually supports the surgery that I performed on some of the five patients who the Board was reviewing. Importantly, the surgical training of the Board members is as follows: Dr. Robert Deckert has no surgical residency training in foot and ankle surgery, Dr. Lee Hofsommer has one year of surgical residency training in foot and ankle surgery, Dr. Mike Stone has one year of surgical residency training in foot and ankle surgery and Dr. Doug Moen has no surgical residency training in foot and ankle surgery; while I have four years of surgical residency training in foot and ankle surgery. Dr. Hart, one of the orthopedic surgeons who filed complaints against me, has only six months of fellowship training in foot and ankle surgery. Without exception, my qualifications and experience in surgery for the foot and ankle is far superior to at least three of the four reviewing Board members. Yet, these same Board members somehow arrived at a decision that my surgery was performed improperly. Most importantly, this adverse decision against me was made by this Board without so much as a single reference as to how the standard of care, or how even the minimum standard of care, was defined and/or determined. No definition of any kind was

ever provided by the Board as to just what the standard of care is or should be. Yet, this is perhaps the most critical element needed in order to determine whether my (or anyone's) surgical abilities fall above, below or somewhere in between the minimum acceptable standard of care. Defining and/or establishing just what the standard of care is for the operations that I performed has never been provided by the Board. The Board's decision that my conduct was below the standard of care is arbitrary and capricious. Further, and very significantly, the Board never once referenced either of the two expert witnesses' reports as to just what is the accepted standard of care or what is the accepted minimum standard of care involved for the procedures that I performed; experts who both reviewed my surgical procedures. A standard of care is that level of care determined by those experts who have actually performed such procedures in order that they can set forth what the accepted standard of care really is. Rather here the four reviewing Board members (three of which have never even performed such procedures) did not even attempt to determine from an expert just what the standard of care really was and thus they had no basis upon which to evaluate my surgical procedures. Of critical importance here, is the fact that St. Alexius hospital conducted an independent review of ninety surgical cases that I performed at St. Alexius Medical Center; and notably, St. Alexius had no concerns about any of the procedures I performed or about any of the records that St. Alexius reviewed. Clearly, the Bone & Joint Center doctors (and the President of the Board, Dr. Aaron Olson) are in competition with me for podiatric patients in the Bismarck area; therefore, it is understandable that they would try to create problems for me. Accordingly, and most likely not coincidentally, it was the referrals by the Bone & Joint Center to the Board that constituted the majority of the five complaints against me; only one patient actually ever filed a complaint. It is my fervent hope that this Court will see what is happening here. Likewise it is my fervent hope

that this Court will grant a stay of the Board's disciplinary action against me until such time as the Court has had an opportunity to study the Board's decision and until such time as the Court has been allowed the time necessary to render its decision.

5. The Board interjecting a statement in its decision that there is a concern for the public safety regarding my surgical skills lacks any credibility whatsoever and such a statement was inserted in the Board's decision for the sole purpose of trying to prevent this Court from granting a stay. The five complaints against me that the Board reviewed date back to June 12, 1995, almost five years ago. Three of those five patients I treated back in 1993 and 1994. The doctors from the Bone & Joint Center (who are the ones who submitted the complaints to the Board) also saw those patients back in 1994. Therefore, if my surgery skills were truly of any genuine concern to public safety then why did the Board allow me to continue to go right on practicing for nearly five years from June 12, 1995 to February 2, 2000? The surgery that I perform is performed on only the foot and ankle and while there is and always should be vital concerns for the patients health and safety, nothing contained in any of the medical records or in any of the complaints against me indicates and/or even suggests that my surgery is in any way a concern for public safety.

By this affidavit, I respectfully request that the Court recognize what the Board is attempting to do here in order to prevent me from being granted a stay. Based upon the evidence in my case and on the facts and arguments in the record and those presented to the Court, I respectfully request that the Court grant a stay of this Board's actions against me.


Dated this 7<sup>th</sup> day of March 2000.

  
\_\_\_\_\_  
Brian Gale



Subscribed and sworn to before me this 7<sup>th</sup> day of March 2000.

(S E A L)

  
\_\_\_\_\_  
Notary Public  
Burleigh County, North Dakota  
My Commission Expires: October 11, 2002



## NORTH DAKOTA BOARD OF PODIATRY

<u>Member</u>	<u>Term Expires</u>
Dr. Aaron Olson, D.P.M. 525 North 9th Street Bismarck, ND 58501	June, 2001
Dr. Robert Deckert, D.P.M. 20 Burdick Expressway West, Rm 404 Minot, ND 58701	June, 2002
Dr. Doug Moen, M.D. Family Practice Center 2830 North Washington Bismarck, ND 58501	June, 2002
Dr. Michael Stone Southpointe Clinic 2400 32 <sup>nd</sup> Avenue, S.W. Fargo, ND 58103	June, 2003
Dr. Richard Lochner Altru Clinic - Main Clinic 1000 South Columbia Road Grand Forks, ND 58206	June, 2004

Submitted by:

Gary R. Thune  
Special Asst. Atty. General  
01/23/01

**Madam Chair Lee and Committee Members:**

**My name is Dr. Brian Gale. My address is 2418 Coolidge Avenue in Bismarck.**

**I am testifying today in support of HB 1262.**

**I have testified at the House Committees in regards to bill 1262 as well as 1377. I am submitting my testimony from these two committees as part of today's testimony as well.**

**There are serious problems with many of the professional licensing Boards in North Dakota. Many of these problems are due to professionals submitting complaints or coercing patients or clients into submitting complaints about their competitors.**

**There are several examples of "sham peer review" that I know of including my own current situation. There is certainly a better way to run a Board than to have a president who has been in that position for approximately 19 of the past 23 years and to allow that same person to hand pick all of the Board members during that time. There is something wrong when a board's statute states that there are 4-year terms and only two board members change over a 12 year period. There is something wrong with a board where there are no term limits for its members. It is a step in the right direction to finally have the term limits in this bill.**

**I realize that this committee has only limited power to make changes. However, part of the purpose of my testimony today is to bring this serious problem to the forefront so that changes can at least begin to take place.**

**There are doctors, lawyers, architects, police officers, cosmetologists and others who could not work in this state due to problems with their respective Boards.**

Competitors using the peer review process and the immunity that goes along with it have forced professionals out of the state or disciplined them unfairly. If you are not familiar with this personally just ask Senator Andrist because he is all too familiar with it.

I would like to specifically point out a problem with the wording of this bill in regards to the last sentence. It states, "When applicable, the Podiatrist's license may be suspended until the costs are paid to the Board."

On the surface, this appears to be reasonable because the Board should be able to suspend a Podiatrist's license if the Podiatrist refuses to pay costs from a disciplinary action. It is also logical that the Board would want to be paid and this is a means to make sure that the Board is paid.

However, let us assume that the Podiatrist cannot pay the amount that is owed. Let us assume that the Board has made an unreasonable demand for payment such as a large payment that is due on a certain date and the Podiatrist does not have the financial means to pay this sum. Then the Podiatry Board can suspend this license and not only does the Podiatrist have to stop practicing but the Board never gets payment either.

The Board can use this to put someone out of business rather than using it as a means to ensure the Board is paid. The result is that the Podiatrists in general from all over the state finance the destruction of a competitor of a Board member. I would suggest that the wording is changed so that if there are financial limitations preventing payment of the costs of disciplinary action that a reasonable payment plan be instituted.

Approximately two weeks ago, the State Association for Podiatrists in North Dakota met via phone conference. There were 15 of the 21 licensed Podiatrists who participated in this meeting. There were several issues discussed concerning HB 1262 and 1377.

There was unanimous agreement that we prefer not to have a Medical Doctor on the Podiatry Board any longer. The original purpose of having an MD was to gain "respect" from Blue Cross/ Blue Shield because at the time this insurer did not accept Podiatrists. The feeling at this meeting by everyone including two of the Board members is that an MD can be of very little help when discussing disciplinary issues especially the current MD because he is not a surgeon. We felt that another Podiatrist should replace the MD.

The following are some of the topics that are in other Board's statutes and I think should be added to the Podiatry Boards statute.

1. Conflict of Interest Statement: There should be a statement which discusses the conduct of the Board members and examples of conflicts of interest. The most serious conflict of interest is when a local competitor is using a board for personal gain and abuse of power as is the situation with the current Podiatry Board. If a competitor is put out of business, the Board member could potentially gain HUNDREDS OF THOUSANDS OF DOLLARS.
2. The Medical Board can remove one their Board members with a vote of about 70% of it's members. There must be some way to be able to have a system of checks and balances whereby the Podiatrists in North Dakota have some say in how their licensing fees are spent and in turn to be able to nominate and

remove Podiatrists who are not serving the majority. The non Board Podiatrists should be able to remove a Board member if they are unhappy with their conduct.

3. Some boards have in their statute that the state association nominates members for the board and that the governor must choose from those nominations. Since there have been so many problems with our Board in this area of appointing members to the Podiatry Board, I think this would be one way to prevent this type of problem from occurring again. There is no reason for us to have a board member on our board for 19 of the past 23 years with most of those 23 years spent as president of our board. There is no reason why some of the current board members have been on our board for over 10 years continuously. There is also something wrong when a board member has repeatedly talked patients into suing doctors and talked patients into sending complaints to the board. The only way the Board president can exercise his power is when a complaint is made. The more complaints, the more power; whether they are legitimate complaints or not.
4. Statute of limitations for complaints. The Board should not be allowed to review complaints by patients concerning their treatment from many years prior. The statute of limitations for medical malpractice is 2 years. The Podiatry Board's own statute states that it's records only have to be kept for six years. Why should the statute of limitations for a complaint to a board be unlimited? I admit that this last suggestion is self-serving because the Podiatry Board has recently submitted a complaint for a formal hearing against me that is from a patient whom I treated eight years ago.

There are many state boards and hospitals in the United States that have serious problems with the peer review process. I have personally spoken and corresponded with many professionals who have had unwarranted actions taken against them. These are not disgruntled doctors who have murdered their wives or had sexual intercourse with their patients while the patient was under anesthesia. These professionals have not been found guilty of trafficking drugs or other criminal acts.

There is a growing trend nationally to revise the peer review process because of the tremendous potential for abuse. The time has come for North Dakota to begin revising the process of peer review as well and I believe that the place to start it is with this Committee today.

Thank you. I would be glad to take any questions at this time.



Madam Chairperson and Committee Members,

This letter is in response to the testimony given in regards to House Bill #1262 on Tuesday, January 23, 2001. I am responding to specific statements made by Gary Thune and Aaron Olson.

I am not going to defend myself on every issue because I realize that I was not on trial although I felt that way. The truth is that it would be very gratifying if I would be given a chance to debate or even discuss the specific issues regarding the circumstances by which I have been disciplined. There never has been a trial and I have never been given a fair chance to be heard although I made several points repeatedly, they were never considered seriously.

The issue is the board system in North Dakota and my personal experience happens to be with the problems that are ongoing with the Podiatry Board. It would be helpful if you could see all of the letters that have been sent to the Governor's office over the past several years concerning this issue. I am in the process of trying to obtain copies of those letters. Up to the point of submitting this to you I have not been allowed access to those letters.

The issue is not Gale vs. Olson. I am not the only person who has a serious problem with the Board system in North Dakota and the Podiatry Board; as you heard from Dr. Francisco Tello.

Gary Thune and Aaron Olson have asked to have Bill # 1377 be sponsored by the House. This is a bill that would allow unlimited loan money from the Bank of North Dakota for legal expenses for the Podiatry Board as well as increase the annual licensing fee to \$750.00. This Bill has been proposed without ever asking for any input by the Podiatrists in North Dakota. If Senator Porter hadn't mentioned the Bill being introduced before his testimony, it may have never been brought to the attention of anyone. This is another example of how this board has been run the years since I have been practicing in this state. This is not right.

It should not be the intent of the Legislature to create a dictatorship that serves the economic interest of its president rather than the citizens of the state.

The Board already has unlimited power and, by administrative law is able to deny civil rights to the accused. Board transcripts and board members depositions amply prove that.

The individual has only limited means to fight a board supported by the unlimited state funds. There are no checks and balances. The state would have exposure for the additional creative acts of this errant board.

During the testimony for Bill # 1377 it's very likely that you will hear from other Podiatrists in addition to myself that state we are only willing to support Bill #1377 if the Dr. Olson and the other Board members are changed. We are tired of this ongoing battle. It's not just me. If this was handled in a fair manner by Mr. Thune and Dr. Olson they would have seriously considered the offers to settle by me.

The medical boards around the country do not spend hundreds of thousands of dollars every year to discipline doctors. Both sides are realistic about the fact that these legal battles can be extremely costly and the doctor should be given the benefit of the doubt and allowed to continue to practice with some type of realistic discipline. The cases that involve serious disciplinary action are one's involving actions such as sexual misconduct, criminal charges and illegal use of drugs.

I think it's safe to say that most boards presume competence until proven otherwise. It's very unusual that some of the most highly trained specialists in our state are the one's who get caught up in the Board fights. On the other hand just look at Dr. Larry Martin. Dr. Martin is a PhD audiologist in Minot. He is the only audiologist who is certified to diagnose and treat children for hearing problems in North Dakota. Dr. Martin has gone through a very similar experience as I have over the past several years. He would be glad to discuss his feelings about the Board system with anyone.

The result of keeping out competition and especially highly trained specialists such as myself and Dr. Martin is that it lowers the standard of care for healthcare in North Dakota. So as the quality of healthcare improves everywhere else in the United States we suffer. It's naturally more difficult to recruit and keep the highly specialized doctors from outside North Dakota in our state because of the cold winters.

I came to North Dakota because I grew up in a small town in the Midwest outside of Chicago and I was tired of living in places like Philadelphia, California and south Florida because of the crime and cost of living. I thought that I would be appreciated by the medical community however I have been discriminated against and persecuted since before the day I moved here.

The reason I stay here is because my wife is from here and because I believe this is a wonderful place to live and raise a family. I also have had incredible support from my patients. I have estimated that my patient approval rating is approximately 98%. The dedication and understanding my patients have for my situation has been a source of strength for me.

In response to a few of the comments made towards me I would like to clarify the following points. Of the two malpractice cases against me, the first was started after Dr. Charles Dahl of the Bone & Joint Center talked the patient into suing me. This was also the first complaint that was sent in against me, not by the patient but by Dr. Dahl. To many people it wasn't even a complaint it was a letter of inquiry asking Dr. Olson what the scope of practice was for a Podiatrist in North Dakota. Interestingly, Dr. Olson was responsible for expanding the scope of practice for Podiatrists prior to me coming to North Dakota in approximately 1990. This was considered to be "housekeeping" by Dr. Olson as a way of putting the Bill through at that time. Expanding the scope of practice wasn't considered housekeeping when it was reviewed by an administrative judge a few years later. In fact this judge felt that the scope was never really expanded properly and felt that Podiatrists should only be treating feet and not ankles until it were to be properly made into law. Of course the Podiatry Board did not accept this part of the Judge's decision.

The other malpractice case that I have had involved a patient who sued me based upon Dr. Olson's recommendation to her and her husband. Dr. Olson told them that he would be an expert against me and then once the suit was filed he refused to help the attorney for the patient. I have Dr. Olson's hand written documentation of this information.

Mr. Thune and Mr. Stetten talked about how the Podiatry Board has been present in this state for about 70 years and there weren't any problems until Dr. Gale came to town. I was brought here by Dr. Olson to expand his practice. There was never any competition for Dr. Olson until I left his practice and opened my practice in Bismarck. Dr. Olson explained himself that he was the first Podiatrist to come to North Dakota in 26 years so there was no competition for Dr. Olson for several years and there were no Podiatrists so there was no one who could be disciplined. It's likely that if there was a complaint or a problem that it was settled in an informal manner and therefore there wouldn't be any records kept.

Despite the fact that there was a Board, there really was no organized Board. When Dr. Olson took over the Board he put his friends on the Board and that's the way it has stayed ever since then. Dr. Chierian Mathew told me recently that Dr. Mathew was the Board president from 1988-1992. Dr. Mathew also told me that he Dr. Olson talked a patient into suing him as well. This has been a common practice of Dr. Olson; to speak in a negative manner about the other Podiatrists in the state. In fact there are four current complaints pending against me at this time. Three of the four complaints involve patients who were seen by Dr. Olson when they submitted the complaint to the Podiatry Board. The fourth patient was being seen by a previous Board member, Manuel Harris, DPM of Jamestown. Dr. Olson and Dr. Harris have worked together on these type of problems before. I am a witness of one Board meeting when Dr. Harris submitted a complaint concerning Dr. Francisco Tello. I have also seen another patient who sent in a complaint against Dr. Tello that is just being reviewed now. This complaint would have been normally given very little attention however because Dr. Tello practices in Bismarck, there is little doubt that Dr. Tello will be disciplined for his treatment of this patient. The stories go on and on.

Dr. Olson testified that he has only been on the Podiatry Board for about 12 years since he started practicing here in 1977. He also testified that a Podiatrist has to be practicing for 2 years before they can be on the Board. I have included a copy of Dr. Olson's Curriculum Vitae with this rebuttal which lists the following:

1. Dr. Olson's own CV lists him as being on the Board in 1977
2. Dr. Olson states in his CV that he was Board president from 1981-1987
3. Dr. Chorian Mathew told me that the only time Dr. Olson was not on the Board was when Dr. Mathew was president of the board (1988-92). Therefore, I was incorrect when I stated that Dr. Olson was president of the Podiatry Board for 17 of the past 23 years. He was only president for 15 of the past 23 years and he has been on the Board for 19 of the past 23 years.

Dr. Olson was sued and found guilty for the death of a patient. A jury found that Dr. Olson was 41% responsible for the patient's death. Prior to the trial date, a complaint was sent to the Board by the patient's daughter. The Board took only 2 months to decide that Dr. Olson had done nothing wrong in regards to the treatment of this patient. Yet a nationally renown expert testified at the trial that Dr. Olson was directly responsible for the patient's death because of the medication that was prescribed.

Mr. Thune stated that there have been 25 complaints submitted by the Board about my treatment of patients. However, Mr. Thune conveniently forgot to mention that all but 2 or 3 three of these complaints were submitted by either orthopedic surgeons or patients who were seeing Board

members (mainly Dr. Olson). It's absolutely impossible for someone to have so many complaints and at the same time for the complaints to be legitimate when they only come from same doctors. Of all of these complaints that the Board has taken seriously against me, the only patient who ever sued me was the one who was told to do so by Dr. Dahl of the Bone & Joint Center. None of these patients have filed for any type of disability and of the patients who had serious problems prior to coming to see me, to my knowledge no one else has been able to help any of them.

These are critical points in my case because many of the medical people who have reviewed the documents have been shocked that the Board can proceed in such an aggressive manner when there have been no law suits and none of the patients have even been interviewed.

Last February when I was disciplined, there were five patients involved. Two of the five healed completely and are doing well and extremely satisfied with the results of their treatment by me but the Board decided that I did something wrong anyway. The other three of the five patients were treated by me for complications as a result of the treatment of other doctors. Two of these three patients had been treated by Dr. Olson. There were no complaints against anyone of the other doctors that caused the problems to begin with. In some states there are laws that prevent complaints and malpractice law suits from being filed against a doctor who is trying to correct another doctors mistakes or problems.

I am also adding a recent letter from Dr. Steven Kilwein, who is a Podiatrist from Hettinger, North Dakota. Dr. Kilwein would probably be the unanimous choice for a replacement of the president of the Podiatry Board.

I believe that the time has come to correct the longstanding problems with the Podiatry Board. If the current Board members who have been on the Board for more than 4 years are replaced, I'm very confident that the disciplinary problems will cost much less to resolve.

I am not suggesting that I should not have complaints against me investigated. In fact I want any complaints against me or any other Podiatrist investigated. I just want what every other doctor would want who has a complaint submitted concerning their care; a fair and reasonable evaluation of the treatment of that doctor's care.

I was chosen by the president of our state association to be the American Podiatric Medical Association delegate to represent our state at the national convention this past summer. The American Podiatric Medical Association has voted to have a board of inquiry investigate the members of the Podiatry Board in North Dakota for unethical activities against me. If anyone is interested in seeing the documents sent to the board of inquiry I would be glad to review them.

I am more than willing to settle any pending complaints against me. I am more than willing to accept any appropriate discipline that a fair and unbiased board decides I deserve. Please help us to resolve the unfair actions and status of the current Podiatry Board.

Respectfully submitted.

Brian Gale, DPM, FACFAS



Testimony to be added for Bill # 1262

Madam Chairperson and Committee Members,

This letter is in response to the testimony given in regards to House Bill #1262 on Tuesday, January 23, 2001. I am responding to specific statements made by Gary Thune and Aaron Olson.

I am not going to defend myself on every issue because I realize that I was not on trial although I felt that way. The truth is that it would be very gratifying if I would be given a chance to debate or even discuss the specific issues regarding the circumstances by which I have been disciplined.

There never has been a trial and I have never been given a fair chance to be heard and although I tried to make several points repeatedly, they were never considered seriously.

The issue is the board system in North Dakota and my personal experience happens to be with the problems that are ongoing with the Podiatry Board. It would be helpful if you could see all of the letters that have been sent to the Governor's office over the past several years concerning this issue. I am in the process of trying to obtain copies of those letters. Up to the point of submitting this to you I have not been allowed access to those letters.

There are some serious problems with the amended portion of 1262 in reference to the discipline and the payments to the Board added to section 43-05, Section 2, Costs of prosecution -

Disciplinary proceedings. This section is directly

targeted at me because the Board has fined me the \$20,000 they spent to prosecute me. I spent much more than that and was always willing to settle with them. Please understand that the only purpose of prolonging the disciplinary process against me was to cost me a tremendous amount of legal fees. Then they put their fees on top of mine as if I was the reason they had to spend all that money. In approximately one year I will have to pay some amount close to \$15,000 or I will have my license suspended the way this is written. They have always had a plan to continue to destroy me and this is just part of it. There has to be some way to protect the doctor and this isn't it.

On the surface this legislation appears reasonable. One can make the argument for the errant doctor to pay for the costs of his investigation. However, it is all too easy for this to become yet another club to beat up on innocent doctors.

Once again, there are no checks and balances as to the reasonableness of the investigation and how much it costs. The motivation for the Board to find the doctor guilty is increased by this amendment to Bill 1262 because then they know they will have their expenses paid. If they want to ruin a doctor they just have to drag things out for a few years and then find him guilty and he has to pay for his expenses and the Board's.

The purpose of any professional board is the protection of the citizens. If there is any doubt as to the quality of their decisions, it behooves the legislature to remove the members of the board and allow other members to take their place.

The issue is not Gale vs. Olson. I am not the only person who has a serious problem with the Board system in North Dakota and the Podiatry Board; as you heard from Dr. Francisco Tello.

Gary Thune and Aaron Olson have asked to have Bill # 1377 be sponsored by the

House. This is a bill that would allow unlimited loan money from the Bank of North Dakota for legal expenses for the Podiatry Board as well as increase the annual licensing fee to \$750.00. This Bill has been proposed without ever asking for any input from the majority of the Podiatrists in North Dakota. If Senator Porter hadn't mentioned the Bill being introduced before his testimony, it may have never been brought to the attention of anyone. This is another example of how this board has been run since I have been practicing in this state. This is not right.

It should not be the intent of the Legislature to create a dictatorship that serves the economic interest of its president rather than the citizens of the state.

The Board already has unlimited power and, by administrative law is able to deny civil rights to the accused. Board transcripts and board members depositions amply prove that.

The individual has only limited means to fight a board supported by the unlimited state funds. There are no checks and balances. The state would have exposure for the additional creative acts of this errant board.

During the testimony for Bill # 1377 it's very likely that you will hear from other Podiatrists in addition to myself that state we are only willing to support Bill #1377 if the Dr. Olson and the other Board members are changed. We are tired of this ongoing battle. It's not just me. If this was handled in a fair manner by Mr. Thune and Dr. Olson they would have seriously considered the offers to settle by me. The medical boards around the country do not spend hundreds of thousands of dollars every year to discipline doctors. Both sides are realistic about the fact that these legal battles can be extremely costly and the doctor should be given the benefit of the doubt and allowed to continue to practice with some type of realistic discipline. The cases that involve serious disciplinary action are one's involving actions such as sexual misconduct, criminal charges and illegal use of drugs. None of these patients they claim I have injured have filed for any type of

disability and none have sued me.

I think it's safe to say that most boards presume competence until proven otherwise. It's very unusual that some of the most highly trained specialists in our state are the one's who get caught up in the Board fights. For example, just look at Dr. Larry Martin. Dr. Martin is a PhD audiologist in Minot. He is the only audiologist who is certified to diagnose and treat children for hearing problems in North Dakota. Dr. Martin has gone through a very similar experience as I have over the past several years. He would be glad to discuss his feelings about the Board system with anyone.

The result of keeping out competition and especially highly trained specialists such as myself and Dr. Martin is that it lowers the standard of care for healthcare in North Dakota. So as the quality of healthcare improves everywhere else in the United States we suffer. It's naturally more difficult to recruit and keep the highly specialized doctors from outside North Dakota in our state because of the cold winters.

I came to North Dakota because I grew up in a small town in the Midwest outside of Chicago and I was tired of living in places like Philadelphia, California and south Florida because of the crime and cost of living. I thought that I would be appreciated by the medical community however I have been discriminated against and persecuted since before I moved here.

The reason I stay here is because my wife is from Mandan and because I believe this is a wonderful place to live and raise a family. I also have had incredible support from my patients. I have estimated that my patient approval rating is approximately 98%. The dedication and understanding my patients have for my situation has been a source of strength for me.

In response to a few of the comments made towards me I would like to clarify the following points. Of the two malpractice cases against me, the first was started after Dr. Charles Dahl of the Bone & Joint Center talked the patient into suing me. This was also the first complaint that was sent in against me; not by the patient but by Dr. Dahl. To many people it wasn't even a complaint it was a letter of inquiry asking Dr. Olson what the scope of practice was for a Podiatrist in North Dakota. Interestingly, Dr. Olson was responsible for expanding the scope of practice for Podiatrists prior to me coming to North Dakota in approximately 1990. This was considered to be "housekeeping" by Dr. Olson as a way of putting the Bill through at that time. Expanding the scope of practice wasn't considered housekeeping when it was reviewed by an administrative judge a few years later. In fact this judge felt that the scope was never really expanded properly and felt that Podiatrists should only be treating feet and not ankles until it were to be properly made into law. Of course the Podiatry Board did not accept this part of the Judge's decision.

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Dr. Cherian Mathew told me that the only time Dr. Olson was not on the Board was when Dr. Mathew was president of the board (1988-92). Therefore, I was incorrect when I stated that Dr. Olson was president of the Podiatry Board for 17 of the past 23 years. He was only president for 15 of the past 23 years and he has been on the Board for 19 of the past 23 years.

Dr. Olson was sued and found guilty for the death of a patient. A jury found that Dr. Olson was 41% responsible for the patient's death. Prior to the trial date, a complaint was sent to the Board by the patient's daughter. However, the Podiatry Board took only 2 months to decide that Dr. Olson had done nothing wrong in regards to the treatment of this patient. Yet a nationally renowned expert testified at the trial that Dr. Olson was directly responsible for the patient's death because of the medication that was prescribed.

Mr. Thune stated that there have been 25 complaints submitted by the Board about my treatment of patients. However, Mr. Thune conveniently forgot to mention that all but 2 or 3 three of these complaints were submitted by either orthopedic surgeons or patients who were seeing Board members (mainly Dr. Olson). It's absolutely impossible for someone to have so many complaints and at the same time for the complaints to be legitimate when they only come from same doctors. Of all of these complaints that the Board has taken seriously against me, the only patient who ever sued me was the one who was told to do so by Dr. Dahl of the Bone & Joint Center. None of these patients have filed for any type of disability and of the patients who had serious problems prior to coming to see me, to my knowledge no one has else has been able to improve their problem due to being so difficult to correct. It's impossible to have 25 serious complaints that are legitimate and not have most of them result in malpractice suits unless the attorneys can't find any reason to have damages.

These are critical points in my case because many of the medical people who have reviewed the documents have been shocked that the Board can proceed in such an aggressive manner when there have been no law suits and none of the patients have even been interviewed. My expert who reviewed my records saw right through all of the Board's actions and it took him very little time to see that there no problems with care of the patients and that the Board was out to get me.

Last February when I was disciplined, there were five patients involved. Two of the five healed completely and are doing well and extremely satisfied with the results of their treatment by me but the Board decided that I did something wrong anyway. The other three of the five patients were treated by me for complications as a result of the treatment from other doctors. Two of these three patients had been treated by Dr. Olson. There were no complaints against any of the other doctors that caused the problems to begin with. In some states there are laws that prevent complaints and malpractice law suits from being filed against a doctor who is trying to correct another doctors mistakes or problems. We couldn't even get the Board to consider that issue.

I believe that the time has come to correct the longstanding problems with the Podiatry Board. If the current Board members who have been on the Board for more than 4 years are replaced, I'm very confident that the disciplinary problems will cost much less to resolve.

I am not suggesting that I should not have complaints against me investigated. In fact I want any complaints against me or any other Podiatrist investigated. I just want what every other doctor would want who has a complaint submitted concerning their care; a fair and reasonable evaluation of the treatment of that doctor's care.

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I am more than willing to settle any pending complaints against me. I am more than willing to accept any appropriate discipline that a fair and unbiased board decides I deserve. Please help us to resolve the unfair actions and status of the current Podiatry Board.



Respectfully submitted.



Brian Gale, DPM, FACFAS

2418 Coolidge Avenue

Bismarck, ND

701-255-3338

[www.briangale.com](http://www.briangale.com)

Chairman Klein and Committee Members:

My name is Dr. Brian Gale. My address is 2418 Coolidge Avenue in Bismarck.

I am testifying in opposition of Bill #1377. I believe that the best way to correct the current debt problems with the Podiatry Board is to change the Board members immediately (not in four years); otherwise the current debt problems will worsen instead of improve.

Wednesday evening at a telephone conference meeting of the Podiatrists in the state, there were some very strong feelings that were expressed. The most important point that was agreed upon by everyone was that 1377 was proposed without having a discussion amongst the podiatrists. Instead, there was an attempt to push this through without anyone knowing about it. The fact that we had to meet to discuss 1377 after it became a bill means that someone is putting their own personal agenda and gain in front of what is really best for the podiatrists and the citizens in this state. This Bill is self-serving to say the least. The Podiatrists voted to oppose this Bill.

Another point that was discussed was that some of the current Board members were using outrageous scare tactics to try to convince the others to support 1377. The Board's attorney and the Board's president are the ones who stand to gain by having this Bill go forward in its present state. Unfortunately, they did not think the Board would ever get into so much debt. If the Board were being run fairly and ethically, there would be no problems with the current Board's finances. Why would any attorney allow their client to go so far into debt without advising the Board or all of the Podiatrists in the state for that matter about the possible risks that would go along with this debt. At least tell the Podiatrists who have been funding the effort that it is costing a tremendous amount and will put them into debt for several years.

The third point that was made is that we do not feel there is a need for a medical doctor to be on our Board any longer. This was unanimous among everyone taking part at the meeting.

**The Board members should be changed immediately.** There should be some way for the board members to be held accountable because of their immunity. There must be a way to keep them honest. They should not be able to prevent doctors from being licensed and they should not be able to destroy doctors who are competitors.

The following are examples of topics that are in other Board's statutes however are not in the podiatry boards statute and I think should be seriously considered to be added to ours.

1. Conflict of Interest statement: There should be a statement which discusses the conduct of the Board members and examples of conflicts of interest. The most serious conflict of interest is when a local competitor is overseeing a board as is the situation with the current Podiatry Board. If the doctor can longer practice the Board member could financially gain hundreds of thousands of dollars.
2. The medical board can remove one of the members of their board with a vote of about 70% and because there are so few Podiatrists in the state, we should have the ability to remove a board member if 70% of the licensed Podiatrists in the state agree to it.
3. Some boards have in their statute that the state association nominates people for the board and that the governor must choose from those nominations. Since there have been so many problems with our Board in this area I think this would be one way to prevent this type of problem from occurring again. There is no reason for us to have a board member on our board for 19 of the past 23 years with most of those 23 years spent as president of our board. There is no reason why some of the current board members have been on our

board for over 10 years continuously. There is also something wrong when a board member has repeatedly attempted to talk patients into suing doctors and talked patients into sending complaints to the board that he is part of. The only way the Board president can exercise his power is when a complaint is made. The more complaints, the more power whether they are legitimate complaints or not.

4. Statute of limitations for complaints. The Board should not be allowed to review complaints by patients concerning their treatment from many years prior. The statute of limitations for medical malpractice is 2 years. Why should the statute of limitations for a complaint to a board be unlimited?

There is something wrong with a board who accepts and takes relentless action against a doctor when 22 of 25 complaints come from a few competitors or patients who are seeing a local competitor.

Thank you. I would be glad to take any questions at this time.

## **Additional Testimony for H.B. 1377**

### **Submitted by Brian Gale, DPM**

1. Dr. Olson has a history of misleading the Legislative Session participants as you can see from the public documents included with this statement. In a decision by Judge Robert Brady after a hearing, he states in his Findings and Conclusions, "relative to H.B. 1479, Dr. Aaron Olson appeared and testified, among other things, "the bill doesn't change anything that is not currently being done." "... Dr. Olson specifically explained while most of the bill is merely housekeeping... it does contain a new definition of Podiatric Medicine." "In view of Dr. Olson's implication in his prepared testimony... For that rule to have an effective date of December 1, 1991, the Board had to have begun the rulemaking process almost immediately after H.B. 1479 became law, and strongly suggests that if the moving parties behind the legislation were the same as those involved in the drafting and adoption of the administrative rule, both the Medical Association and the legislature were not dealt with in good faith."

In 1997, attorney Joe Cichy testified on behalf of the North Dakota Podiatrists for S.B. 2060. During his testimony, he stated, "The association, in a telephone survey, agreed to resist a fee increase that the Board is attempting to establish through the rulemaking process. The Association members had no prior notice regarding this bill... Finally; my understanding is that the sponsor was informed that this bill was merely a housekeeping bill. As you can see, it is considerably more than that."

2. Dr. Olson lists 21 Podiatrists practicing in North Dakota and 5 of those are practicing elsewhere. The state association does not even have a list of all of the Podiatrists who are licensed in North Dakota so they could be contacted to see if they wanted to be on the telephone conference call.
3. Dr. Olson states that he "represents" 4 Board members and has 9 letters of support. However he did not submit 9 letters of support. **He submitted 8 letters of support and another letter strongly opposing H.B. 1377 from Dr. Cherian Mathew. THERE IS**

**DRAMATIC EVIDENCE THAT OLSON AND OTHER BOARD MEMBERS USED OUTRAGEOUS MISINFORMATION TO GET PODIATRISTS TO AGREE WITH 1377.**

4. Dr. Olson says that he has spoken to all but 5 of the 21 Podiatrists.  
Why didn't he speak to all 21? Why did he call them in the first place? **Why didn't Dr. Olson participate in the FORMAL STATE ASSOCIATION phone conference meeting? WHY DO YOU THINK THAT HE WOULD NOT FACE NOR DID HE WANT OTHERS TO FACE KNOWLEDGABLE OPPOSITION?**
5. Dr. Olson state's, "4 who have not sent letters have told me they believe Board should be solvent & pay bills. What does that have to do with supporting H.B. 1377? **How do we know for sure that Dr. Olson really spoke to anyone?**
6. Dr. Olson also states," President of the state association (abstention) supports concept of bill. What does it mean to support the concept? Does the president of the association know that Dr. Olson was going to say this to the Committee? Why didn't the president put that in his letter to the committee?
7. Then he states, "18 Podiatrists support boards autonomy. What does that mean in regards to H.B. 1377? Dr. Olson is throwing around a lot



of numbers but the fact is that the state association took a vote where there were 15 licensed Podiatrists present. No one knows what Dr. Olson told the people whom he received his letters from and we have no proof that he talked to anyone else. Especially in light of Dr. Olson's previous misleading testimony in 1991 and 1997, his testimony on this bill should be taken very cautiously.

8. Another document included at this time is the first three pages of the analysis of the five cases that I was disciplined for in the year 2000. Dr. Harold Vogler who has an international reputation as a foot and ankle surgeon has made multiple statements about the sloppiness of the investigation, inaccuracies and obvious and overwhelming conflicts of interest of local competitors.
9. The next document is from Dr. Steven Kilwein who reviewed 90 surgical cases and found nothing wrong with any of them.
10. The last document is a jury verdict from a malpractice case involving a patient who died from the treatment of Dr. Olson. The jury decided that Dr. Olson was 41% responsible for the patient's death. The Board received a complaint from the patient's daughter and within two months the Board decided that Dr. Olson had not done anything wrong.

JULY 1975 - JUNE 1976 Ohio College of Podiatric Medicine, Cleveland, Ohio First Year Resident. Rotation as Follows:

Proxym - Orthopaedic Hospital Internal medicine, Emergency Room, General and Podiatric Surgery, Anesthesiology.

Women's General Hospital Admitting, General Medicine, General and Podiatric Surgery, Anesthesiology.

Cleveland Clinic Foundation Research Department, PVO, Dermatology,  
Ohio College of Podiatric Medicine General Patient care, Teaching and Supervision of 3rd and 4th year students.

AFFILIATIONS

OFFICES HELD

North Dakota Podiatry Association, 1975 - present

President, 1976 - 1985

North Dakota Board of Podiatry Examiners, 1978 - present

President, 1981 - 1987

North Dakota Diabetes Association, Board of Directors  
1978 - present

State Fund  
Raising Chairman  
1983 - 1984

North Dakota American Red Cross, Board of Directors, 1978 - 1984

North Dakota Continuing Health Education Resource Center,  
Board of Directors, 1977 - 1981

Treasurer 1979 - 1980

American Public Health Association, 1976 - present

State Delegate  
National Meeting  
1978 - 1983

American Podiatry Association, 1975 - present

State Delegate,  
National Meeting  
1978 - present

American Podiatry Medical Association National Fraud and Abuse Committee  
1987 - present

Rotarian, 1977 - 1982

Elks, 1968 - present

Bismarck Early Childhood Education Program, 1977 - 1985  
Health Advisory Committee

JANUARY 7, 1997

SENATE HUMAN SERVICE COMMITTEE  
SB 2060

MR. CHAIRMAN AND SENATE COMMITTEE MEMBERS:

My name is Joe Cichy and I represent the North Dakota Podiatric Association.

Senate Bill 2060 essentially deals with two principal areas: A fee increase in Section 1, and allowing for a referral fee in Section 2.

The Association, in a telephone survey, agreed to resist a fee increase that the Board is attempting to establish through the rulemaking process. At the present time, there is a rule pending that would increase the licensure fees from \$200.00 to \$500.00. The Association members had no prior notice regarding this bill and its President only became aware of Senate Bill 2060 late last week. There was no time to poll the members about the Board's attempt to remove the cap on fees, however, with the opposition to the administrative fee increase, it is safe to say that the members would be opposed to removing the limitation the Board presently has on increasing fees.

The Association's concern is that the Board, at this time, has acted in an arbitrary and capricious manner resulting in excess costs being incurred by the Board and which continue to be incurred. In the case of Dr. Brian Gale v. The North Dakota Board of Podiatric Medicine, (in which Dr. Gale prevailed) an appeal of an order imposing discipline on Dr. Gale, the Court said: "There has been discriminatory, selective prosecution by the Board. And

It is rather obvious that the Board has held Dr. Gale to a stricter standard than it has concerning identical conduct on the part of two Board members who participated in the proceedings against Dr. Gale"; and "Despite the Board's knowledge that Board President Dr. Olson practiced co-extensively in the anatomical area claimed in the administrative complaint against Dr. Gale to be outside the scope of practice, no disciplinary action was brought against Dr. Olson."

The Court also stated that Dr. Olson's participation permeated the entire proceedings with partiality while Dr. Olson is involved in a civil suit against Dr. Gale.

As a result of the Board's handling of this matter, there are various serious concerns on the part of the Association members that this Board, with its present leadership, would abuse the fee issue if no cap is in place.

Concerning Section 2, the Association has not had time to poll its members on this issue. However, the essence of it would be to allow fee splitting, referral fees, and payments to doctors for medical services not actually or personally rendered. Clearly, this is not good public policy and should be rejected.

Finally, my understanding is that the sponsor was informed that this bill was merely a housekeeping bill. As you can see, it is considerably more than that. This Machiavellian attitude is what concerns the Association members and for that and the above reasons, the Association requests that this Committee recommend a "do not pass" on Senate Bill 2060.

Thank you for your consideration.

recitation of the witnesses called and their testimony, nor detail the exhibits offered by the parties.

EVALUATION OF THE EVIDENCE AND APPLICABLE LAW

Complaint allegation re treating fractures of fibula and tibia as exceeding the scope of licensure: The essence of Paragraph IV of the complaint against Dr. Gale is that in treating three patients, Melvin Keator, Matthew Brorby, and Patrick Cochran, for fractures of the fibula and/or tibia above the distal part of the fibula or tibia shaft that did not involve injury or damage to the foot, he exceeded the scope of his licensure to practice podiatric medicine.

Dr. Gale testified that all of the fractures in question were in the distal portions of the fibula and tibia near the malleoli of those bones, and thus involved the "ankle and its governing and related structures," an anatomic area that a podiatrist licensed in North Dakota may permissibly treat. He added that his belief was reinforced by the fact that he was recruited to North Dakota from California in 1992 by Bismarck podiatrist Dr. Aaron Olson because of his advanced medical and surgical training and experience in treating injuries to the distal tibia and fibula, as well as the ankle and foot. In that regard, he explained that while the residency training of most podiatrists is approximately a year, he had undergone a four year residency involving surgery of the lower leg, ankle, and foot, and offered supporting testimony concerning his credentials from Dr. John Buckholz, who headed that residency program.

A fair assessment of both the complaint allegation, as well as Dr. Gale's contention, requires a look at the recent

legislative history of the licensing of podiatrists in North Dakota, as well as the administrative rules adopted by the Board.

The statutes pertaining to the licensing and regulation of podiatrists are codified at Chapter 43-05 of the North Dakota Century Code (N.D.C.C.). Prior to the 1991 session of the Legislative Assembly, the term "podiatric medicine" was not defined or used in the statutes. The scope of practice was delineated in a round-about way through the definition of the term "podiatrist." Subsection 1 of N.D.C.C. § 43-05-01 defined the term as "one who examines, diagnoses, and treats ailments of the human foot by medical, surgical, and other means ... ." There can be no dispute that under that definition, treatment of fractures to the distal fibula or tibia was off-limits to a podiatrist.

The licensing law was extensively rewritten in 1991. H.B. 1479 of the 1991 Legislative Assembly, among other things, introduced the term "podiatric medicine" and delineated the scope of practice through the definition of that term, as is relevant here, as "the diagnosis and treatment of conditions affecting the human foot and ankle ... ." This bill was enacted into law (1991 Session Laws, Chapter 450, § 1; N.D.C.C. § 43-05-01, Subsection 5) without revisions to this definition, and remains the same to date.

The term "ankle" has not been defined in either statute or administrative rule. However, the Board has, interestingly, attempted to expand the statutory scope of practice by means of redefining "podiatric medicine" through an administrative rule, North Dakota Administrative Code (N.D. Admin. Code) § 63-01-05-01(3), effective December 1, 1991. The scope of practice under that rule has been expanded to include "the

diagnosis and treatment of conditions affecting the human foot and ankle and their governing and related structures ... ." This is significant because the gist of Dr. Gale's position, aside from what he was led to believe to be permissible when he was recruited by Dr. Olson, is that the "ankle" includes at least the malleoli of the distal fibula and tibia; the malleoli of the distal fibula and tibia are merely prominences of those two bones; thus, the distal fibula and tibia are, anatomically, within the term "ankle ... and related structures," and, as such, treatment of fractures immediately above the malleoli of either of those bones is within the scope of practice permitted of a licensed podiatrist who, as he, has the education and professional certification to do so.

Ordinarily, a duly adopted administrative rule has "the force and effect of law." [N.D.C.C. 28-32-03(3)] N.D. Admin. Code § 63-01-05-01(3) is a duly adopted administrative rule. Nevertheless, I cannot recognize this particular administrative rule, despite the status accorded it by law, for the following reasons:

According to the 1991 Committee Minutes of the House Committee on Human Services and Veterans' Affairs for February 5, 1991, relative to H.B. 1479, Dr. Aaron Olson appeared and testified, among other things, that "the bill doesn't change anything that is not currently being done." Either this is an erroneous or incomplete summary of what Dr. Olson, in fact, represented to the committee relative to the effect of H.B. 1479 on the scope of practice of podiatrists, (and that, in my experience, is entirely possible); or it is evidence that it was not the intent of the sponsors of that bill to expand the scope of

practice beyond treatment of "the foot," as the law at that time provided, and the addition of the word "ankle" was only intended to describe the ankle joint portion of "the foot," or, lastly, but most unlikely, Dr. Olson's alleged statement was a deliberate misrepresentation. A deliberate misrepresentation is most unlikely because those minutes also reflect that Dr. Olson also submitted written testimony, which appears to be the same as Hearing Exhibit E, titled "Fact Sheet to Support House Bill #1479," in which he specifically explained that "while most of the bill is merely housekeeping ... it does contain a new definition of Podiatric Medicine." He went on to explain that the definition in H.B. 1479 had evolved from attempts by podiatrists on a national level to standardize the scope of podiatric practice in all fifty states. According to Dr. Olson's prepared testimony, in the standardized definition agreed upon by the 1990 House of Delegates of the American Podiatric Medical Association, the scope of podiatric practice included the diagnosis and treatment of conditions affecting the human "foot, ankle and their governing and related structures," but that the phrase "and their governing and related structures" was removed from the proposed bill draft after discussion with the North Dakota State Medical Association "to better match the philosophy of the State of North Dakota."

It is not apparent from the committee minutes of either the House or Senate (where Dr. Olson is recorded as having again offered prepared testimony) or the evidence of record in Dr. Gale's administrative hearing what this "discussion with the North Dakota State Medical Association" entailed, or what "the philosophy of the State of North Dakota" is. However, it seems



fair to surmise that the phrase "and their governing and related structures" was removed for the purpose of deterring podiatrists from expanding the scope of their practice beyond the foot and foot-ankle and into the lower leg on the rationale that the bones, muscles, and connective tissues there were "governing and related structures."

In view of Dr. Olson's implication in his prepared testimony that the phrase "and their governing and related structures" was deliberately removed from the bill draft in order to defuse legislative opposition by the State Medical Association, as well as to reflect "the philosophy of the State of North Dakota," the Board of Podiatric Medicine's reinstatement of that objectionable phrase by means of an administrative rule is, to say the least, most disturbing. For that rule to have an effective date of December 1, 1991, the Board had to have begun the rulemaking process almost immediately after H.B. 1479 became law, and strongly suggests that if the moving parties behind the legislation were the same as those involved in the drafting and adoption of the administrative rule, both the Medical Association and the legislature were not dealt with in good faith.

Without an adequate explanation of this situation, I must conclude that, aside from the impermissibility of an administrative agency rewriting a statutory definition by means of an administrative rule, the Attorney General would not have approved N.D. Admin. Code § 63-01-05-01(3) if the above-described events had been disclosed at the time the proposed rule was submitted to that office for the required statutory opinion. Therefore, I will only recognize the legislative delineation of

the scope of practice, that being "the diagnosis and treatment of conditions affecting the "foot and ankle," as set forth at N.D.C.C. § 43-05-01, Subsection 5. The question remains, however, as to what the addition of the term "ankle" was intended to mean.

As noted earlier, the term "ankle" is not defined in either the licensing statutes or the Board's administrative rules. The word "ankle," as used by the layman, describes the general area of the lower leg and rear foot around the malleoli of the distal tibia and fibula. However, this layman's "ankle," extending as it does into the lower leg, but not leaving identifiable boundaries, is too vague to be of practical use by a regulatory board in assessing complaints of podiatric practice beyond the scope of licensure where the treatment involves the region of the distal tibia and fibula near their malleoli.

The term "ankle" is defined in Black's Medical Dictionary as "the joint between the leg bones (tibia and fibula) above, and the talus (the Roman dice-bone) below." Therefore, in view of the unusability of the layman's definition of "ankle," the necessity of an operative definition of that term in order to administer the provisions of the law, and the medical definition of the term "ankle," I will conclude that, at least with regard to podiatric treatment of bone fractures, the term "ankle" at N.D.C.C. § 43-05-01, subsection 5, refers to a joint, and not a general anatomical area, and is intended to define the anatomical boundary between the foot and the leg, namely the talus bone, beyond which the podiatrist in North Dakota cannot practice. This means that even fractures in the malleoli of the distal fibula and tibia are off-limits to the podiatrist in North Dakota, as a matter of law,

regardless of a podiatrist's education, training, or certification in treating fractures beyond the talus. This would also be the only interpretation that would be compatible with Dr. Aaron Olson's testimony, as recorded in the minutes of the House Committee relative to H.B. 1479 that "the bill doesn't change anything that is not currently being done."

When this statutory construction is applied to the complaint allegations concerning Dr. Gale's treatment of fractures to the distal tibia and/or fibula of patients Melvin Keator, Matthew Brorby, and Patrick Cochran, the resulting conclusion is that he exceeded the scope of his licensure to practice podiatric medicine. However, Dr. Gale cannot be expected to have his conduct weighed against the hearing officer's interpretation of the law, reached after the fact, unless that interpretation also reasonably reflects the law as enforced by the licensing Board at the time the treatment occurred. The "law" in place at the time the three patients in question were treated was the Board's administrative rule defining the scope of practice as including the "ankle and [its] governing and related structures." The term "governing and related structures" has never been defined, and there was no evidence offered at the hearing to show that the Board, in adopting that administrative rule, did not intend the term to include the region in the immediate area of the distal fibular and tibial malleoli. This, coupled with hearing evidence that Dr. Gale was recruited and employed by Dr. Aaron Olson because of his training and experience in treating injuries in that anatomical region, and Dr. Olson's participation in the 1991 legislative changes and subsequent administrative rulemaking,

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militates against a finding that Dr. Gale was on notice that his treatment of the fractures in question was outside the scope of podiatric practice, as interpreted and enforced by the Board of Podiatric Medicine.

Complaint allegation re failing to "properly treat" patients Melvin Keator, Matthew Brorby, and Patrick Cochran. Prior to the hearing the Board withdrew the allegations at Paragraph V of the complaint that Dr. Gale failed to properly treat patients Matthew Brorby and Patrick Cochran, leaving only the allegation concerning Melvin Keator. The evidence relative to Dr. Gale's treatment of Mr. Keator came principally from testimony of Mr. Keator and Timothy J. Bopp, M.D., a Bismarck orthopedic surgeon, and x-rays taken by Dr. Gale and Dr. Bopp. Mr. Keator testified that he had slipped on some ice on February 5, 1993, and fractured the distal shafts of both fibula and tibia. He related that he was treated by Dr. Gale until released from his care on August 24, 1993, and at that time Dr. Gale advised him that the fractures were healing satisfactorily. Mr. Keator said that when he later began to experience pain when walking, and the pain continued to worsen, he went to Dr. Bopp.

Dr. Bopp related that Mr. Keator had come to him on December 21, 1993, for examination because he was experiencing severe pain in his lower left leg, and that x-rays revealed fibular malunion and tibial nonunion, along with an inward angulation, or varus, measured at 23 degrees, which was repaired and brought into acceptable alignment by surgical intervention on January 10, 1994. Dr. Bopp stated that this amount of varus was far beyond the maximum of five degrees considered acceptable, and

June 7, 1999

RE: Gale v. North Dakota Board of Podiatric Medicine  
(Board)

Dear Mr. Norris:

Thank you for discussing the above matter with me in some detail. As you know, I have spent considerable time over the past few months reviewing voluminous documents and files materials pursuant to this action, taken against Dr. Brian Gale by the North Dakota Board of Podiatric Medicine. This action generally alleges violations of the North Dakota Statutes, under Chapter 43-05, and in specific, 43-05-16 (g.), (k.), & (u.). This has included:

- 1.) Individual physician files from the office of Dr. Gale in the five cited cases including radiographs pursuant to same.
- 2.) The proceedings & minutes of The North Dakota Board of Podiatric Medicine's deliberations and actions aimed at Dr. Gale and obtained by Dr. Gale's legal counsel.
- 3.) Written "complaints" filed with the Board by two local Bismark orthopedists (all from the same group *The Bone & Joint Center-Dr. Bopp & Dr. Hart*), against Dr. Gale relating to various patient care cases.
- 4.) Written complaint from the administrator of the same local orthopedic group, *The Bone & Joint Center*, specifying generically, "grave concerns" about Dr. Gale's care in "several patient cases" without specifying the nature of those "concerns".
- 5.) Written complaint by one Fargo orthopedist-Dr. Johnson, relating to a patient that Dr. Johnson formerly treated and ultimately was treated by Dr. Gale with surgery-this complaint was filed with a member of the Board.
- 6.) "Excerpted report" information from Dr. Dalton McGlamry-the Board's expert against Dr. Gale in this action, incorporated in the formal Amended Complaint delivered to Dr. Gale. The full report was not provided or available for review. It is noted that Dr. McGlamry also reviewed at least three other

also reviewed at least three other complaints filed by the NDBPM also generated from petition by *The Bone & Joint Center*, against Dr. Gale and discarded them. After investigation and Dr. McGlamry's evaluation, no deviation from the standard of care (SOC) nor any violations of the North Dakota Statutes was confirmed, under Chapter 43-05, and in specific, 43-05-16 (g.), (k.) & (u). These were all dismissed. This has left five cases incorporated into the present Amended Complaint, subject herein for review and analysis.

In each of these discarded cases, it was noted that the NDBPM failed to consider all available information, and even more reckless failed obtain additional file information, known to exist, that would have substantiated and justified Dr. Gale's treatments. Equally reckless, the two complainant orthopedists also failed to obtain outside records that would have provided the necessary perspective in these same cases, which were discarded. Such proper diligence would have precluded these complaints from being filed initially.

Also notable, only one of the ultimate five complaints dated 12/20/98, filed by the Assistant AG-Douglas A. Bahr, on behalf of the NDBPM against Dr. Gale originated from a patient-Shirley Sailor. This particular complaint was received by the NDBPM on 1/29/98. All others originated from two local orthopedists of *The Bone & Joint Center*-local competitors. The one exception being an orthopedist from Fargo, Dr. Philip Johnson previously mentioned as a prior care giver of this particular patient. None of these cases involve allegations of malpractice nor are any professional lawsuits pending from these cases nor is there any evidence of factual disability resultant in any of these cases in the records.

All these cases are suspect based on existing file information that would lead the casual observer to conclude a conspiracy to harm Dr. Gale professionally exists both within the orthopedic group-*The Bone & Joint Center*, the NDBPM and it's President Dr. Olson or both. It should be noted that the President of the NDBPM, Dr. Olson, formerly employed Dr. Gale and subsequently have had a well known adversarial professional relationship. Additionally, it seems clear there is an animus to harm Dr. Gale professionally in his community based in part by anticompetitive considerations with *The Bone & Joint Center* & a few of it's orthopedic physicians as well as Dr. Olson individually along with others working in concert, within the NDBPM. Even Dr. Johnson in Fargo, another orthopedist, had previously treated the patient in question, Geraldine Parsley and failed to consider all information available, in particular Dr. Gale's records, prior to filing his complaint against Dr. Gale to the NDBPM. Also notable, none of these cases has resulted in professional litigation against Dr. Gale by the involved patients. This is in spite of efforts

to provoke same by some of the orthopedists directly with attorneys as evidenced by file correspondence.

Also consider the complaint filed by Dr. Hart (again, of *The Bone & Joint Center*) related to Gladys Wright. The NDBPM's own expert Dr. McGlamry, notably indicates that Dr. Hart himself (the complainant in this particular case) demonstrated "lack of competence or judgment" as well as other notable failures in his records. This included failure recognize and document loosened screws and problems with the internal fixation, obvious wrongful flexion position of the fusion site and malunion, in his improper surgery to this patient, which in the opinion of Dr. McGlamry, will result in the need for further unnecessary risk and surgery!

And finally, as a backdrop, please note that the Dr. Olson, the President of the NDBPM is involved as a care provider significantly in three of the present five cases that have resulted in complaints against Dr. Gale. Two cases-Gladys Wright and Shirley Sailor-were previously operated by Dr. Olson and resulted in serious post operative problems quite apparently due to inappropriate surgery performed by Dr. Olson some years earlier. Both of these cases resulted in destroyed joints that were avoidable by proper technique and surgery. A third case of the five involved in this action against Dr. Gale by the NDBPM, also involved Dr. Olson as a first assistant in surgery to Dr. Gale-Patricia Lautenschlager.

Many of these issues and questions are legal questions, and will be undertaken by Dr. Gale's legal counsel. It is revealing however, to demonstrate the environment in which these proceedings are taking place. There is overt hostility demonstrated between Dr. Olson (Dr. Gale's former employer), *The Bone & Joint Center*, and in particular, the orthopedists Dr. Hart and Dr. Bopp. Professional discrimination is a frequent general occurrence in the orthopedic community against podiatric surgeons, which is well known professionally and quietly discussed behind closed doors. (See attachment from the American College of Foot & Ankle Surgeon). With this background perspective, I would like to proceed with the individual complaints and allegations made by NDBPM against Dr. Gale mostly by hostile competitors. The format will address mostly the opinions and "criticisms" by the NDBPM's expert, Dr. McGlamry. "The Defense response" will also simultaneously address the formal Board Complaints, which in part, are also included in Dr. McGlamry's criticisms.

### 1.) Gladys Wright:

Final Summary given by Steven Kilwein, DPM Regarding a Review of  
Brian Gale, DPM

Review Conducted: April 17 & 18, 1999

After extensive review of 90 charts regarding Brian Gale, DPM, I have come up with a couple of conclusions.

Although it must be realized that without x-rays for most of these cases, a total accurate review probably cannot be made. But relying on documentation and concentrating on a couple of important areas, I am confident in reporting that there are no patterns that I can identify.

Dr. Gale's operative time was very reasonable in all cases that I reviewed and his blood loss was also quite reasonable in all cases that were reviewed. Procedure time was very compatible with safety for the patient and for cost effectiveness. Also, no cases were accomplished in an unusual fast rate of time.

All cases showed a well documented H&P performed by Dr. Gale but there were some questions I had regarding the H&P based on bylaws. I'm not sure what the bylaws at St. Alexis read but many of the charts reviewed had no H&P done by a medical doctor. Some cases involved general anesthetics which I believe are always supposed to have a medical doctor H&P. I do know that the anesthesiologists do these many times because many of the H&P's that were done by anesthesiologists were documented. In other places I could not find any documentation of this although it may have been included with the review and evaluation the anesthesiologist made with the patient and it just was not documented in the same nature as many of the others.

Again, an area of concentration was to make sure that all pre-operative indications were documented appropriately. I found no discrepancies although without x-ray examinations with many podiatric cases, there could be some chance of error. Although, too, many times each physician has their own preference of the type of surgery they would like to do based on their evaluation of x-rays. But in all cases the documentation did show appropriate indications to do the surgeries that were performed.

Also, all of Dr. Gale's operative reports were complete, accurate and very timely. In reviewing his operative reports and his H&P's, the pre-operative diagnosis seemed to always coincide well with post-operative findings.

In most cases all the necessary information recorded by the physician was in a timely manner and in the patient's medical record. There were a couple of discharge summaries that looked like they had been missed or maybe I didn't find them in the right spot. Again, I don't know if the hospital requires a discharge summary.

In my review of the records, very few patients were in the hospital as most were outpatient. In the cases reviewed, the patients did have rounds made on them daily although there were a couple of missed rounds. One was excused by the blizzard and one of the others may have been the result of the sheet actually lost because there was no documentation of that day by any physician.



Review of Brian Gale, DPM  
Page 2

An evaluation of the charts showed that post-operative care seemed to be adequate but again most of these were outpatient and there would be no post-operative follow up other than the post-operative orders which were timely and accurate.

No consistent complications were recognized in reviewing the charts. The few that were noted seemed to be handled appropriately and in a timely manner.

My conclusion is that there were no aspects of any of the patient's charts that I reviewed for evaluation and treatment that would make me uneasy or uncomfortable. I actually found no patterns consistent with any problems and although I may disagree with some of the techniques used only because I do not do it that way, I find no techniques Dr. Gale uses inappropriate.

Thank you for your confidence in allowing me to review these charts.

Sincerely yours in healthcare,

Steven C. Kilwein, DPM

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dr. Brian Gale,

Civil No. 08-95-C-2503

Plaintiff,

vs.

ORDER

RECEIVED

MAR 14 1996

North Dakota Board of  
Podiatric Medicine,

ZUGER LAW OFFICES

Defendant.

Dr. Brian Gale brought an appeal from the Findings,  
Conclusions and Order Imposing Discipline dated May 30, 1995.

The North Dakota Board of Podiatric Medicine (Board)  
disputes and denies each specification of error claimed by Dr.  
Gale.

From the record it appears that the Board violated § 28-32-  
08(1), N.D.C.C., by conducting its initial investigatory hearing  
on March 13, 1994, without the required notice to Dr. Gale.

It also appears that the Board violated N.D.A.C. § 64-04-01-  
02 by conducting the preliminary investigation itself rather than  
assigning the matter to counsel. This case is not a minor or  
routine issue.

By allowing Board members who had served as ex parte  
investigators to make the ultimate decision for the Board  
violated § 28-32-12.2(1), N.D.C.C. See, Ertelt v. North Dakota

Department of Transportation, 491 N.W.2d 736 (N.D. 1992).

Clearly, there has been discriminatory, selective prosecution by the Board. And, it is rather obvious that the Board has held Dr. Gale to a stricter standard than it has concerning identical conduct on the part of two Board members who participated in the proceedings against Dr. Gale.

Dr. Lee Hofsommer, a Board member whose advertising was found to be misleading by the Board, was not subjected to any disciplinary action. Despite the Board's knowledge that Board president Dr. Olson practiced co-extensively in the anatomical area claimed in the Administrative Complaint against Dr. Gale to be outside the scope of practice, no disciplinary action was brought against Dr. Olson.

What is most striking in this case is Dr. Olson's participation in bringing the administrative action against Dr. Gale. Appellant's brief on pages 25 and 26 clearly demonstrates that participation by Dr. Olson permeated the entire proceedings with partiality. Dr. Olson is involved in a civil suit against Dr. Gale.

Based on the foregoing the Court finds:

(1) The Order Imposing Discipline is not in accordance with law;

(2) The provisions of chapter 28-32 have not been complied

with;

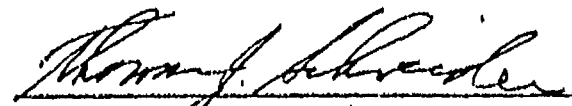
(3) The rules or procedure of the agency have not afforded the Appellant a fair hearing.

It Is Hereby Ordered, that the Order Imposing Discipline be reversed and that the case be remanded for dismissal.

It Is Further Ordered, that Appellant be awarded his costs and expenses.

Dated this 13<sup>th</sup> day of March, 1996.

By The Court

  
Thomas J. Schneider  
District Judge

MEMORANDUM

ROBERT N. MEALS, P.L.L.C.

TO: David Utlak, M.D.  
CC: Larry Poliner, M.D.  
FROM: Robert N. Meals *BoRnMeALs*  
DATE: June 11, 2000  
RE: Serious flaws in Peer Review process

I apologize for the delay in sending this information to you. The following information is derived from 27 years of experience as an attorney and 23 years of representing physicians in peer review proceedings.

The peer review process in this country today is basically a sham that has been made immeasurably worse by the immunities granted by the Health Care Quality Improvement Act of 1986 to members of peer review committees, and by state peer review privileges that are consistently used to shield misconduct by hospitals that make it difficult if not impossible for a physician who is the subject of a peer review proceeding to obtain information necessary for his or her defense.

Doctors who are granted medical staff privileges usually believe they are entitled to keep those privileges as long as their work is good and they behave as good citizens. They are further led to believe that if complaints are made about their quality of care or conduct, that the peer review process provides an avenue of relief by which the merits of such complaints can be fairly determined by their peers before adverse action is taken against their ability to practice their profession and make a living. But that is not the way it actually works. Here are the main problems with the peer review process as it stands now:

1. **Widespread abuse of the Summary Suspension procedure.** A summary suspension is supposed to be imposed only where the failure to take the action may result in imminent danger to the health of any individual. That is the law in California and the position of the California Medical Association. Years ago, most "Corrective Action" was taken after notice and a hearing to determine the validity of the complaints. However, in recent years, we almost *never* see cases of routine Corrective Action---practically every peer review proceeding today begins with a summary suspension of the physician's privileges, which means the practitioner is irreparably harmed from the beginning, regardless whether there is any merit to the complaints being made against him or her. From that moment on, the doctor will

always have to disclose the summary suspension to multiple parties---hospitals, insurance companies and managed care organizations---no matter what the outcome is or the eventual truth of the matter, and that is in and of itself harmful to their ability to practice from that point on.

2. **Summary suspensions based on criticism generated by direct economic competitors or non-objective "outside" reviews obtained by hospitals.** Some of the greatest injustices occur when a physician's privileges are summarily suspended based mainly on criticism generated by economic competitors, or by peer review organizations who are paid by the hospital to review medical records and come up with a list of criticism that can then be used by the hospital to justify a summary suspension. These untested comments are used to justify summary suspension of privileges often before the affected practitioner even knows what is being said. The suspension is imposed *without the benefit of any independent, objective outside review of the medical records in question*. Instead of being objective, it is often the product of a handful of medical staff "insiders" who make the determination.
3. **The "Standard of Care" is skewed.** Frequently, violations of the "standard of care" determined by non-objective "experts" turn out to be nothing more than a disagreement among doctors over the management of cases when both approaches are well within the standard of care. One doctor's point of view is suddenly converted into a "standard of care" not met by the physician under review, contrary to the medical-legal definition, which is usually defined by a broad spectrum of approaches to medical or surgical management.
4. **The Medical Staff Bylaws fail to provide a "risk hearing" or any meaningful hearing within thirty days, which means the damaging summary suspension is then reported to the National Practitioner Data Bank before the doctor ever has a chance to defend himself or herself.**
5. **Inadequate notice of the charges before the "due process" hearing.** The notice of summary suspension rarely even provides much insight into the basis for it. The doctor is informed of a right to request a hearing within 30 days, and only after that request is made, is more information provided. But the information provided often provides little insight into the issues. Sometimes, the hospital simply provides a list of medical record numbers with a generic list of "concerns," such as "lack of judgment," "documentation," "poor surgical technique" etc. and leaves it up to the doctor and his or her attorney to figure out what they are getting at. Only after the hearing begins do the details become known, when the doctor has no chance to prepare for the surprises being sprung on him or her by arrogant hospital attorneys.
6. **Unqualified hearing panels.** This presents a real dilemma. Usually, the doctors who are most qualified to judge whether or not the doctor under investigation has met or violated the standard of care are direct economic competitors. Since these physicians can't serve on a peer review panel, less qualified people are appointed. Just because everyone went to medical school doesn't mean they understand the nuances of a specialty like invasive cardiology. The more enlightened hospitals

sometimes obtain a true expert in the affected physician's specialty--someone who practices in a different area of the country--to be a member of the local peer review panel, and in these instances, the result is usually fairer. Another major problem these days is that the doctors who are appointed to the hearing panels are beholden in some way to the hospital--either as hospital-based physicians whose contracts include "termination without cause" clauses, which puts subtle pressure on them to agree with the hospital's point of view, or as doctors who are heavily dependent on the hospital to provide them with equipment necessary to maintain their practice.

7. "Rambo" hospital attorneys who take a "no holds barred, win-at-any-cost" approach to peer review proceedings on behalf of their client. Two types of legal proceedings, although adversarial, should be approached more with an interest in discovering the truth than in "winning" and "losing." One is divorce, where there can never be any real "winners," and the other is peer review, where a professional's entire career is usually on the line. Yet many hospital attorneys will stop at nothing to "win" on behalf of their client, making it as difficult as possible for the affected practitioner to defend himself or herself. They delay proceedings, fight to keep important documents such as committee minutes from being disclosed, and do the best they can to keep the doctor from effectively cross-examining the witnesses against them.
8. Inherently unfair Hearing Procedures in the Medical Staff Bylaws. These include making the doctor "appeal" an adverse action before the hospital or medical staff has ever proven the case against him or her; putting the "burden of proof" on the affected doctor to prove that the adverse action taken against him or her was "arbitrary, irrational or without any factual basis," which is almost impossible burden to carry, when the burden should simply be on the hospital at the beginning to prove a lack of competence or conduct that significantly disrupts its operations; allowing rank hearsay such as a report by an expert to be considered as evidence without any opportunity to cross-examine the person who wrote it; and, in many bylaws, allowing the doctor to have an attorney, but not allowing the attorney to speak at the hearing, which forces the doctor to present the entire case himself or herself. The latter is often seen particularly in Texas and Georgia, and in every instance I know of, it results in disaster for the doctor, who has no legal training and is inept at representing himself or herself. The worst abuse, however, is a procedure that provides that whatever decision is made by the hearing panel is then referred back to the Medical Executive Committee, which is usually the adverse party to begin with. The bylaws then provide that the MEC can "modify the 'recommendation' of the hearing committee" any way it wants. What this allows the MEC to do---and this frequently happens in cases I have seen---is simply REJECT THE DECISION OF THE HEARING COMMITTEE WITHOUT EVEN GIVING A REASON, and then make the doctor who just prevailed appeal that decision to the Board of Directors or Trustees, which almost always rubber-stamps the MEC's decision! This turns the whole process into a true sham (usually after the doctor has spent thousands of dollars in attorneys fees and expert witness fees trying to defend the case) because even though his or her peers sided with the doctor and recommended reinstatement of privileges, the MEC just voids the decision and the doctor loses anyway. This

COPY  
IN DISTRICT COURT

STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Hollis Holsveen, personally,  
and as personal representative  
of the Estate of Milo W. Holsveen,

Plaintiff,

vs.

Aaron C. Olson,

Defendant.

Case No. 08-95-C-1917

VERDICT

Adhering to these instructions, we the jury, for our Verdict, answer the questions as set forth herein in accordance with the instructions already given as follows:

QUESTION 1: Was the Defendant negligent in the medical services provided to Milo Holsveen during the period of September 27, 1990, through October 1, 1990?

ANSWER: Yes  
(Yes or No)

If your answer to Question 1 is "no," omit all other questions, the presiding juror shall then sign the Verdict form and notify the bailiff.

If your answer to Question 1 is "yes," please proceed to answer Question 2.

QUESTION 2: Was the negligence of the Defendant the proximate cause of injury to Milo Holsveen?

ANSWER: Yes  
(Yes or No)

If your answer to Question 2 is "no," then you omit all further questions, sign the verdict form and notify the bailiff.

If your answer to Question 2 is "yes," then you should proceed to the next question.

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QUESTION 3: Was Milo Holsveen at fault, as defined in these instructions, for his own injury or death?

ANSWER: Yes  
(Yes or No)

If your answer to Question 3 is "no," then you should omit Question 4 and answer the remaining questions.

If your answer to Question 3 is "yes," then you should proceed to answer the remaining questions.

QUESTION 4: Was the fault of Milo Holsveen a proximate cause of the injury or death suffered by Milo Holsveen?

ANSWER: Yes  
(Yes or No)

QUESTION 5: Were other medical professionals negligent in the medical care and services provided to Milo Holsveen during the applicable period of time?

ANSWER: Yes  
(Yes or No)

If your answer is "no," omit Question 6. If your answer is "yes," then proceed to answer remaining questions.)

QUESTION 6: Was the negligence of persons other than Defendant Aaron Olson or Milo Holsveen a proximate cause of injury to Milo Holsveen?

ANSWER: Yes  
(Yes or No)

QUESTION 7: Based upon your answers to the foregoing questions, what percentage of negligence do you assign to:

Others	<u>20</u> %
Defendant Aaron C. Olson	<u>41</u> %
Milo Holsveen	<u>39</u> %
	100 %

QUESTION 8: What amount of damages, if any, do you award to Plaintiff Hollis Holsveen:

- A. Past economic damages (Wrongful death) \$ -0-
- B. Loss of love, affection, and support by Milo Holsveen (Wrongful death) -0-
- C. Milo Holsveen's pain & suffering (Injury) -0-
- TOTAL DAMAGES \$ -0-

QUESTION 9: Is plaintiff entitled to interest on damages as awarded above?

ANSWER: NO  
(Yes or No)

QUESTION 10: If you awarded interest on damages, what interest rate do award, not to exceed six percent?

ANSWER: NA %

Dated this 23 day of October, 1998, at Bismarck, North Dakota.

William D. Wilson  
PRESIDING JUROR