

**N.D.A.G. Letter to Wentz (Nov. 20, 1992)**

November 20, 1992

Representative Janet Wentz  
District 3  
505 Eighth Avenue SE  
Minot, ND 58701

Dear Representative Wentz:

Thank you for your September 15, 1992, letter requesting an opinion concerning the responsibility of the North Dakota Board of Medical Examiners (hereafter Board) to address the medical propriety of certain surgical procedures. Your request specifically relates to issues of public concern regarding "unusually high cesarean section rates and routine infant circumcision." Two persons have recently written to the Board asserting that high cesarean section rates and routine infant circumcision amount to a continued pattern of inappropriate care, including unnecessary surgery, proscribed by North Dakota Century Code (N.D.C.C.) § 43-17-31(21) (previously codified as N.D.C.C. § 43-17.1-07(4) until repealed and reenacted as N.D.C.C. § 43-17-31(21). 1987 N.D. Sess. Laws, ch. 525, §§ 12, 13). Neither of the persons is a physician.

You specifically inquire whether the Board has any legal responsibility to address the medical appropriateness of cesarean section rates and routine infant circumcision in general.

The Board is a state agency, Sletten v. Briggs, 448 N.W.2d 607, 609 (N.D. 1989), cert. denied, 493 U.S. 1080 (1990), consisting of ten physicians appointed by the Governor. N.D.C.C. § 43-17-03. "The Legislature has established the Board and empowered it to issue licenses to practice medicine and to revoke or suspend those licenses for the various reasons set forth in Section 43-17-31, N.D.C.C." Sletten v. Briggs, 448 N.W.2d at 609.

The Board may take disciplinary action against a physician including the revocation or suspension of a physician's license to practice upon finding that a physician has engaged in "[a] continued pattern of inappropriate care . . . , including unnecessary surgery." N.D.C.C. § 43-17-31(21). The Board is authorized to take disciplinary action in response to complaints filed by the Commission on Medical Competency (hereafter Commission). N.D.C.C. §§ 43-17.1-05(2), 43-17.1-06(7). The Commission consists of two members of the Board and two physicians that have been engaged in the practice of medicine for at least eight years selected by the State Medical Association, the Insurance Commissioner and the Attorney General or their designees. N.D.C.C. § 43-17.1-02. Any resident may file a complaint with reference to "the acts, activities, or qualifications of any physician" with the Commission. N.D.C.C. § 43-17.1-05.

N.D.C.C. § 43-17.1-05 provides:

**43-17.1-05. Complaints.**

1. All residents have the right to make or refer complaints to the commission with reference to the acts, activities, or qualifications of any physician licensed to practice in this state, or to request that the commission review the qualifications of any physician to continue to practice in this state. Upon receipt of any complaint or request, the commission shall conduct such investigation as it deems necessary to resolve the matter as it deems appropriate. The commission shall determine whether the physician has committed any of the grounds for disciplinary action provided for by section 43-17-31.
2. If the commission determines that a formal hearing should be held to determine whether any licensed physician has committed any of the grounds for disciplinary action provided for by section 43-17-31, it shall inform the respondent physician involved of the specific charges to be considered by serving upon him a copy of a formal complaint filed with the board of medical examiners for disposition pursuant to the provisions of chapter 28-32. The board members who have served on the commission may not participate in any proceeding before the board relating to said complaint. The complaint must be prosecuted before the board by the attorney general or one of his assistants.
3. If the commission finds that there are insufficient facts to warrant further investigation or action, the complaint must be dismissed and the matter is closed. The commission shall provide written notice to the individual or entity filing the original complaint and the person who is the subject of the complaint of the commission's final action or recommendations, if any, concerning the complaint.

(Emphasis added).

A formal hearing is required to "determine whether any licensed physician has committed any of the grounds for disciplinary action provided for by section 43-17-31." N.D.C.C. § 43-17.1-05(2). You suggest that N.D.C.C. § 43-17-31(21) applies to the medical procedures questioned by private citizens. In my opinion, neither the Commission nor the Board is authorized to determine that certain medical procedures are inappropriate in general without regard to a specific complaint against an identified physician with reference to "the acts" of such physician. N.D.C.C. § 43-17.1-05(1).

Administrative agencies are creatures of legislative action, and as such have only such authority or power as is granted to them or necessarily implied from the grant. First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-585 (N.D. 1984).

Neither the Commission nor the Board is authorized to deal in the abstract or make advisory determinations. In my opinion, the Board does not have legal authority or responsibility to address "public concern" regarding certain medical procedures in general without respect to a complaint about an identified physician concerning specific patients.

One strategy which has been utilized by some states in attempting to curtail the use of certain medical procedures has been to enact legislation specifying information which must be given to a patient prior to the procedure being performed. An example is the informed consent statutes relating to hysterectomies passed by California and New York.

Sincerely,

Nicholas J. Spaeth

tam/krb