

DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

in re: The Petition for Declaratory
Statement of:

JOHN ROBERT LEIKENSOHN, M.D.

FINAL ORDER

THIS CAUSE came before the Board of Medicine (hereinafter Board) pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on February 2, 1990, for the purpose of considering the Petition for Declaratory Statement filed by Robert John Leikensohn, M.D. (hereinafter Petitioner). No person or entity sought to intervene as a party. Having considered the petition, the other evidence and documents of record, the applicable law, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. Petitioner is licensed to practice medicine in the State of Florida pursuant to Chapter 458, Florida Statutes, and maintains an office at Plastic Surgery Center, 5807 - 21st Avenue West, Bradenton, Florida 34209.

2. The Petitioner has used and desires to continue to use the advertising services of American Plastic Surgery, Inc., and has entered into a contract with this company. A copy of the contract is attached to the petition. The contract states that American Plastic Surgery, Inc. (APS) is a Florida corporation specializing in marketing plastic surgery services to consumers who have an interest in plastic surgery by providing them with the information necessary for them to make an informed decision. Marketing services including producing ad copy for all media, paying for advertising

expenses and running such media promotions as are consistent with the services available from participating plastic surgeons located in the area serviced by the media. APS states that it believes its services will create additional patients for the surgeon while saving the surgeon the time and expense of soliciting and qualifying new patients. APS states that these benefits will provide the surgeon with a more informed patient and allow surgeons to devote more time to practice actual surgery.

3. The contract outlines APS's responsibilities, in summary, to be that APS will distribute information on plastic surgery in the surgeon's area, then will have a national 800 number. When patients call, APS will do one of the following: send general information on APS services, make an appointment for consultation with an APS physician or have the prospect call the physician for consultation, or answer telephone questions without sending information. APS explicitly states that it will not do any medical screening except what is done through a booklet called, "The Wonder of Plastic Surgery." A copy of "The Wonder of Plastic Surgery" was provided to the Board.

4. The contract states that the surgeon's responsibilities, in summary, are that the surgeon must coordinate all consultations and eventual surgery with prospective patients referred by APS and will provide to APS in writing, a list of all the patients that were referred by APS and have undergone surgery during the previous month.

5. The contract further provides for payment options to be selected by the surgeon. They are, in brief:

a. **Fixed fee per call to APS with APS handling the consultation.** This option allows the physician to elect the minimum or maximum number of calls that he or she wants to receive each month.

b. **Fixed fee per call to APS with surgeon handling the consultation.** This option provides that the surgeon will pay APS \$40 for every call received by APS from the surgeon's designated area that is the result of APS's advertising and results in APS sending out an informational booklet and personalized letter to the caller designating the surgeon as the doctor to consult regarding the caller's plastic surgery. In this case the patient will call the surgeon directly and the surgeon's staff will be responsible for patient screening.

c. **Fixed fee per consultation.** This option provides that APS will bill the surgeon \$400 for all prospective patients that schedule and have a consultation with the surgeon. APS will tell the patient that there is no consultation fee, but that a \$25 reservation fee is required. This reservation fee is refunded to patient selecting surgery or cancelling with one full working day's notice.

d. **Fixed monthly media budget.** Under this option, the surgeon pays APS a fixed monthly fee to receive consultations that call from the surgeon's designated area. APS reserves the right to send consultations to other surgeons from the designated area if the person requesting the consultation so requests. The contract contains the provision, "It is understood by both parties that this fixed amount may be modified from month to month by mutual agreement in order to increase or decrease the total number of people responding to APS advertising."

6. In the letter sent with the Petition for Declaratory Statement by counsel for Petitioner, counsel for Petitioner stated that Petitioner and others are under investigation by the Department of Professional Regulation for the activities described above. For purposes of this proceeding, the Board accepts this assertion as true.

7. Petitioner requests the Board to review the abovestated facts and to state whether the conduct described violates Section 458.331(1)(i), Florida Statutes.

8. This petition was noticed by the Board of Medicine in the January 26, 1990, issue of the Florida Administrative Weekly (Vol. 16 No. 4 Pg. 378)

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code. The Petition for Declaratory Statement filed by Petitioner is in substantial compliance with the provisions of Section 120.565, Florida Statutes, and Chapter 284, Florida Administrative Code.

2. While the Board recognizes a the person who is licensed to practice medicine in the State of Florida and wishes an interpretation of Chapter 458, Florida Statutes, usually has the requisite standing to maintain a declaratory statement action, the Board finds that such is not the case when that individual is already under an investigation by the Department of Professional Regulation with regard to the very conduct which Petitioner describes in the Petition. The purpose of a Petition for Declaratory Statement is to allow an interested person or entity to ascertain whether proposed conduct or conduct which is not under investigation is permissible. The purpose of a declaratory statement is not to head off disciplinary action after an investigation has already been initiated. Thus, the Board finds that the Petitioner does not have the requisite standing to maintain this Petition for Declaratory Statement in light of the admission by Petitioner that there is a current investigation of Petitioner's conduct. See Fox vs. State of Florida Board of Osteopathic Medical Examiners, 395 So.2d 192 (Fla. 1st DCA 1981); Couch vs. State Department of Health and Rehabilitative Services, 377 So.2d 32 (Fla. 1st DCA 1979). Because the Board finds that Dr. Leikensohn does not have standing to maintain this Petition for Declaratory Statement, the Board declines to render an opinion as to the propriety of the conduct as set forth in the petition.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED: That the Petition for Declaratory Statement is hereby

DISMISSED based on the fact that the Petition lacks the requisite standing to maintain the petition.

DONE AND ORDERED this 2 day of February, 1990.

BOARD OF MEDICINE

MARGARET C.S. SKINNER, M.D.
CHAIRPERSON