

FILED

STATE OF CALIFORNIA

MEDICAL BOARD OF CALIFORNIA

SACRAMENTO *Jan 13, 2004*BY *Brenda Wilson* ANALYST

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10 BEFORE THE
DIVISION OF MEDICAL QUALITY
11 MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

12 In the Matter of the Accusation Against:

Case No. 18-2002-139768

13 EUGENE P. O'DONNELL, M.D.

ACCUSATION

14 8038 S. Painter Avenue

(Cal. Gov. Code, § 11503.)

15 Whittier, California 90602

16 Physician's and Surgeon's Certificate
No. C 27965,

Respondent.

18 Complainant Ron Joseph, as causes for disciplinary action, alleges:

19 PARTIES

- 20 1. Complainant is the Executive Director of the Medical Board of California,
21 Department of Consumer Affairs, State of California (hereinafter the "Board"), and makes and
22 files this Accusation solely in his official capacity as such and not otherwise.
23 2. At all times mentioned herein, Eugene P. O'Donnell, M.D. (hereinafter
24 "respondent") has been licensed by the Board under Physician's and Surgeon's Certificate No.
25 C 27965. Said Certificate was issued by the Board on March 21, 1966, is currently in full force
26 and effect, and will expire on April 30, 2004, unless renewed.

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JURISDICTION

This Accusation is brought before the Division of Medical Quality ("Division") of the Medical Board of California under the authority of the following laws. All section references are to the California Business and Professions Code ("Code") unless otherwise indicated.

3. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Division deems proper.

4. Section 2234 of the Code provides:

"The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5, the Medical Practice Act].

"(b) Gross negligence.

"(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

"(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

"(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

1 "(d) Incompetence.

2 "(e) The commission of any act involving dishonesty or corruption which is
3 substantially related to the qualifications, functions, or duties of a physician and surgeon.

4 "(f) Any action or conduct which would have warranted the denial of a
5 certificate."

6 5. Unprofessional conduct under section 2234 of the Code is conduct which
7 breaches the rules or ethical code of the medical profession, or conduct which is unbecoming to a
8 member in good standing of the medical profession, and which demonstrates an unfitness to
9 practice medicine. (*Shea v. Board of Medical Quality Assurance* (1978) 81 Cal.App.3d 564,
10 575.)

11 6. Section 2266 of the Code provides:

12 "The failure of a physician and surgeon to maintain adequate and accurate
13 records relating to the provision of services to their patients constitutes
14 unprofessional conduct."

15 7. Section 2271 of the Code states:

16 "Any advertising in violation of Section 17500, relating to false or
17 misleading advertising, constitutes unprofessional conduct."

18 8. Section 17500 of the Code provides:

19 "It is unlawful for any person, firm, corporation or association, or any
20 employee thereof with intent directly or indirectly to dispose of real or personal
21 property or to perform services, professional or otherwise, or anything of any
22 nature whatsoever or to induce the public to enter into any obligation relating
23 thereto, to make or disseminate or cause to be made or disseminated before the
24 public in this state, or to make or disseminate or cause to be made or disseminated
25 from this state before the public in any state, in any newspaper or other
26 publication, or any advertising device, or by public outcry or proclamation, or in
27 any other manner or means whatever, including over the Internet, any statement,
28 concerning that real or personal property or those services, professional or

1 otherwise, or concerning any circumstance or matter of fact connected with the
2 proposed performance or disposition thereof, which is untrue or misleading, and
3 which is known, or which by the exercise of reasonable care should be known, to
4 be untrue or misleading, or for any person, firm, or corporation to so make or
5 disseminate or cause to be so made or disseminated any such statement as part of
6 a plan or scheme with the intent not to sell that personal property or those
7 services, professional or otherwise, so advertised at the price stated therein, or as
8 so advertised. Any violation of the provisions of this section is a misdemeanor
9 punishable by imprisonment in the county jail not exceeding six months, or by a
10 fine not exceeding two thousand five hundred dollars (\$2,500), or by both that
11 imprisonment and fine."

12 9. Section 125.3 of the Code provides, in pertinent part, that in any order
13 issued in resolution of a disciplinary proceeding, a board may request that the administrative law
14 judge direct a licensee found to have committed a violation or violations of the licensing act to
15 pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case,
16 including charges imposed by the Attorney General. Under section 125.3, subdivision (c), a
17 certified copy of the actual costs or a good faith estimate of costs where actual costs are not
18 available, including investigative and enforcement costs, and charges imposed by the Attorney
19 General, up to the date of the hearing, signed by the designated representative of the entity
20 bringing the proceeding shall be *prima facie* evidence of the reasonable costs of investigation and
21 prosecution of the case.

22 10. Section 14124.12 of the Welfare and Institutions Code provides, in
23 pertinent part, that:

24 "(a) Upon receipt of written notice from the Medical Board of
25 California, the Osteopathic Medical Board of California, or the Board of Dental
26 Examiners of California, that a licensee's license has been placed on probation as
27 a result of a disciplinary action, the Department may not reimburse any Medi-Cal
28 claim for the type of surgical service or invasive procedure that gave rise to the

1 probation, including any dental surgery or invasive procedure, that was performed
2 by the licensee on or after the effective date of probation and until the termination
3 of all probationary terms and conditions or until the probationary period has
4 ended, whichever occurs first. This section shall apply except in any case in
5 which the relevant licensing board determines that compelling circumstances
6 warrant the continued reimbursement during the probationary period of any Medi-
7 Cal claim, including any claim for dental services, as so described. In such a case,
8 the Department shall continue to reimburse the licensee for all procedures, except
9 for those invasive or surgical procedures for which the licensee was placed on
10 probation."

11 FIRST CAUSE FOR DISCIPLINARY ACTION

12 (Gross Negligence)

13 11. Respondent has subjected his Physician's and Surgeon's Certificate No.
14 C 27965 to disciplinary action under sections 2227 and 2234, as defined by section 2234,
15 subdivision (b), of the Code, in that he has committed gross negligence in his care and treatment
16 of patient B.D. as more particularly alleged hereinafter:

17 (a) On or before March 20, 2002, patient B.D. saw an advertisement
18 made and disseminated or caused to be made and disseminated by respondent
19 which stated, in part, that "The Revolutionary O'Donnell 'CryoSurgery' sinus
20 procedure PAINLESSLY gets rid of ♦ Asthma ♦ Snoring ♦ Sinusitis ♦ Allergies
21 ♦ Sleep Apnea ♦ Colds and Flu ♦ Sinus headaches." On or about March 20,
22 2002, patient B.D. went to see respondent regarding his complaints of sinus
23 problems with daily pain in the left side of his forehead and behind his eyes. He
24 also complained of nasal congestion with a lot of mucous. Respondent diagnosed
25 patient B.D. as having chronic pansinusitis and obstructive restrictive lung
26 disease. Respondent started patient B.D. on Entax PSE and scheduled him for a
27 nasopharyngolaryngoscopy and a CT scan. Respondent also discussed
28 cryosurgery with patient B.D. and told him that it would cost \$4,000.00 but, if

1 patient B.D. had health insurance, it would cost \$8,000.00. Thereafter, it was
2 determined that patient B.D. had health insurance.

3 (b) On or about March 21, 2002, patient B.D. underwent the CT scan
4 which revealed (1) sinusitis involving the maxillary ethmoid and frontal sinuses;
5 (2) retention cyst of the left maxillary sinus; (3) small bone cyst of the right
6 maxillary sinus; and (4) hypertrophy of the inferior nasal turbinates and Concha
7 Bullosa of the right middle turbinate. On or about March 21, 2002, respondent
8 also performed a nasopharyngolaryngoscopy on patient B.D. at the Beverly Hills
9 Surgical Institute. Respondent had recommended the procedure be done at the
10 Beverly Hills Surgery Center because that looked more professional to the
11 insurance company and the surgery center did a better job collecting from the
12 insurer. The procedure was done under local anesthesia with an Olympus flexible
13 endoscope. Examination of both nasal cavities revealed that the interior
14 turbinates were not enlarged, but the middle and superior turbinates were
15 hypertrophied. No polyps were noted. Following the procedure, respondent
16 diagnosed patient B.D. as having chronic pansinusitis and hypertrophic superior
17 and middle turbinates with obstruction of the sinus ostial to the frontal maxillary
18 ethmoid and sphenoid sinuses and markedly narrowed nasal passages. Patient
19 B.D. was billed a total of approximately \$7,152.50 for the procedure done at
20 Beverly Hills Surgery Center of which approximately \$6,252.50 was for the
21 surgical facility.

22 (c) On or about March 27, 2002, respondent performed a second
23 procedure, the "O'Donnell Ostio-Meatal Complex (OMC) Sinus Cryosurgery with
24 Cryosurgical Destruction of Superior and Middle Turbinates," on patient B.D. at
25 the Beverly Hills Surgery Center. The procedure was performed under general
26 anesthesia, although the patient was also given a sphenopalatine ganglion block.
27 According to respondent's operative report, the procedure consisted, among other
28 things, of a cryoprobe being placed and firmly lodged superiorly against the

1 sphenoid bone and nasal surface of the ethmoid bone. With this placement, the
2 ostio-meatal complex was reportedly attacked to destroy the diseased and
3 hypertrophic mucous membranes which were surrounding the ostia and narrowing
4 the ostia. Respondent's operative report also describes global destruction of all
5 the diseased and hypertrophic ostio-meatal complex tissue and that the drainage
6 pathways of the frontal sinuses were also opened up so that all areas of the sinuses
7 have improved ventilation and drainage. The report also describes polyps being
8 frozen completely and destroyed. Patient B.D. was billed a total of approximately
9 \$23,859.50 for this second procedure done at Beverly Hills Surgery Center of
10 which approximately \$14,259.50 was for the surgical facility and approximately
11 \$9,600.00 was for respondent.

12 (d) On or about April 1, 2002, patient B.D. was seen by respondent for
13 a postoperative evaluation. At that time, patient B.D. complained of a mild
14 headache, was instructed to use a saline spray, and was also given magnetothermal
15 facial treatments.

16 (e) On or about April 8, 2002, patient B.D. was again seen by
17 respondent for a re-evaluation. At that time, patient B.D. was diagnosed as having
18 continual right sinusitis and was given Duratuss and Keflex.

19 (f) On or about April 12, 2002, patient B.D. was again seen by
20 respondent for another re-evaluation. At that time, respondent diagnosed patient
21 B.D. as having hypertrophic inferior turbinates and recommended coblation
22 therapy of the inferior turbinates.

23 (g) On or about June 4, 2002, patient B.D. underwent coblation
24 therapy to the inferior turbinates under local anesthesia at respondent's medical
25 office.

26 (h) Respondent committed gross negligence in his care and treatment
27 of patient B.D. which included, but was not limited to, the following:

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1 (1) Using cryosurgery as the primary modality to treat patient B.D.'s
2 chronic sinusitis.

3 **SECOND CAUSE FOR DISCIPLINARY ACTION**

4 **(Repeated Negligent Acts)**

5 12. Respondent has further subjected his Physician's and Surgeon's Certificate
6 No. C 27965 to disciplinary action under sections 2227 and 2234, as defined by section 2234,
7 subdivision (c), of the Code, in that he has committed repeated negligent acts in his care and
8 treatment of patient B.D. as more particularly alleged hereinafter:

9 (a) Paragraphs 11, 11(a), 11(b), 11(c), 11(d), 11(e), 11(f), 11(g), and
10 11(h), above, are hereby incorporated by reference as if fully set forth herein; and

11 (b) Respondent has committed repeated negligent acts in his care and
12 treatment of patient B.D. which included, but was not limited to, the following:

13 (1) Failure to utilize conservative medical therapy to treat patient
14 B.D.'s condition prior to considering surgery; and

15 (2) Failure to treat the inferior turbinates during the second procedure
16 described in paragraph 11(c), above, even though the CT Scan reported
17 hypertrophy of the inferior turbinates.

18 **THIRD CAUSE FOR DISCIPLINARY ACTION**

19 **(Incompetence)**

20 13. Respondent has further subjected his Physician's and Surgeon's Certificate
21 No. C 27965 to disciplinary action under sections 2227 and 2234, as defined by section 2234,
22 subdivision (d), of the Code, in that he has demonstrated incompetence in his care and treatment
23 of patient B.D. as more particularly alleged hereinafter:

24 (a) Paragraphs 11, 11(a), 11(b), 11(c), 11(d), 11(e), 11(f), 11(g), and
25 11(h), above, are hereby incorporated by reference as if fully set forth herein; and

26 (b) Paragraphs 12, 12(a), and 12(b), above, are hereby incorporated by
27 reference as if fully set forth herein.

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FOURTH CAUSE FOR DISCIPLINARY ACTION

(False and/or Misleading Advertising)

14. Respondent has further subjected his Physician's and Surgeon's Certificate No. C 27965 to disciplinary action under sections 2227 and 2234, as defined by section 2271 of the Code, in that he has made and disseminated, or caused to be made and disseminated, false and/or misleading advertising in violation of section 17500 as more particularly alleged hereinafter:

(a) Paragraphs 11, 11(a), 11(b), 11(c), 11(d), 11(e), 11(f), 11(g), and 11(h), above, are hereby incorporated by reference as if fully set forth herein;

(b) Contrary to respondent's advertising as described in paragraph 11(a), above, cryosurgery is not "revolutionary";

(c) Contrary to respondent's advertising as described in paragraph 11(a), above, cryosurgery cannot "painlessly" get rid of asthma, snoring, sinusitis, allergies, sleep apnea, colds and flu, and sinus headaches;

(d) Respondent maintains a web site on the Internet which is located at <http://www.ultimatesinussolution.com> on which he advertises "Cryo-Surgery" as "The Latest Scientific Advancement" when, in fact, it is not;

(e) Respondent maintains a web site on the Internet which is located at <http://www.ultimatesinussolution.com> on which he advertises "Cryo-Surgery" as "More Effective Than Laser Surgery" when, in fact, it is not;

(f) Respondent maintains a web site on the Internet which is located at <http://www.ultimatesinussolution.com> on which he advertises that "Dr. O'Donnell [sic] Patented and Painless 'Nose Freezing' Procedure Offers Sinus Problem Sufferers Relief From Congestion, Headaches and Infection Once and For All!" when, in fact, it does not; and

(g) Respondent maintains a web site on the Internet which is located at <http://www.ultimatesinussolution.com> on which he advertises that "Dr. O'Donnells [sic] Procedure can stop: Asthma, Sleep Apnea, Sinus Infections,

1 Headaches, Snoring, Drowsiness" when, in fact, it cannot.

2 **FIFTH CAUSE FOR DISCIPLINARY ACTION**

3 **(Dishonesty or Corruption)**

4 15. Respondent has further subjected his Physician's and Surgeon's Certificate
5 No. C 27965 to disciplinary action under sections 2227 and 2234, as defined by section 2234,
6 subdivision (e), of the Code, in that he has committed an act or acts of dishonesty or corruption
7 which is/are substantially related to the qualifications, functions, or duties of a physician and
8 surgeon as more particularly alleged hereinafter:

9 (a) Paragraphs 11, 11(a), 11(b), 11(c), 11(d), 11(e), 11(f), 11(g), and
10 11(h), above, are hereby incorporated by reference as if fully set forth herein;

11 (b) Paragraphs 14, 14(a), 14(b), 14(c), 14(d), 14(e), 14(f), and 14(g),
12 above, are hereby incorporated by reference as if fully set forth herein;

13 (c) Performing the nasopharyngolaryngoscopy procedure described in
14 paragraph 11(b), above, at the Beverly Hills Surgical Center where the charges for
15 the surgical facility were approximately \$6,252.50 instead of performing it at
16 respondent's medical office as an outpatient procedure where the charges should
17 have been no greater than approximately \$300.00 to \$500.00; and

18 (d) Falsely billing patient B.D., through and in conjunction with the
19 Beverly Hills Surgical Center, approximately \$9,600.00 for a nasal endoscopy of
20 the frontal sinus, sphenoid surgery with removal of polyp, nasal endoscopy with
21 maxillary antrostomy, nasal endoscopy with partial ethmoidectomy, and cautery to
22 the turbinates, as having been performed during the procedure described in
23 paragraph 11(c), above, when, in fact, respondent did not perform these
24 procedures but, rather, simply performed cryotherapy around the sinus ostium.

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SIXTH CAUSE FOR DISCIPLINARY ACTION**(General Unprofessional Conduct)**

16. Respondent has further subjected his Physician's and Surgeon's Certificate No. C 27965 to disciplinary action under sections 2227 and 2234, as defined by section 2234 of the Code, in that he has engaged in conduct which breaches the rules or ethical code of the medical profession, or conduct which is unbecoming to a member in good standing of the medical profession, and which demonstrates an unfitness to practice medicine in his care and treatment of patient B.D. as more particularly alleged hereinafter:

(a) Paragraphs 11, 11(a), 11(b), 11(c), 11(d), 11(e), 11(f), 11(g), and 11(h), above, are hereby incorporated by reference as if fully set forth herein;

(b) Paragraphs 14, 14(a), 14(b), 14(c), 14(d), 14(e), 14(f), and 14(g), above, are hereby incorporated by reference as if fully set forth herein; and

(c) Paragraphs 15, 15(a), 15(b), 15(c) and 15(d), above, are hereby incorporated by reference as if fully set forth herein.

SEVENTH CAUSE FOR DISCIPLINARY ACTION**(Failure to Maintain Adequate and Accurate Records)**

17. Respondent has further subjected his Physician's and Surgeon's Certificate No. C 27965 to disciplinary action under sections 2227 and 2234, as defined by section 2266 of the Code, in that he failed to maintain adequate and accurate records relating to the provision of services to patient B.D. as more particularly alleged hereinafter:

(a) Paragraphs 11, 11(a), 11(b), 11(c), 11(d), 11(e), 11(f), 11(g), and 11(h), above, are hereby incorporated by reference as if fully set forth herein; and

(b) In his operative report for the procedure performed on or about March 27, 2002, as described in paragraph 11(c), above, respondent reported polyps being frozen completely and destroyed even though in his operative report for the nasopharyngolaryngoscopy procedure performed on or about March 21, 2002, as described in paragraph 11(b), above, respondent reported that no polyps were noted.

FACTORS IN AGGRAVATION

18. Disciplinary action has been previously taken against respondent's Physician's and Surgeon's Certificate No. C 27965. In particular, on or about January 8, 1998, an Accusation was filed against respondent. Thereafter, on or about October 26, 1998, respondent entered into an Agreement with the Board and, as a result thereof, respondent was issued a Public Letter of Reprimand on September 22, 2000 which stated, in pertinent part, as follows:

"In 1992 and 1994, you treated two unrelated patients, who were hospitalized, for a variety of chronic conditions.

"As to both patients, your records failed to reflect complete and adequate documentation.

"By reason of your failure in this regard, and pursuant to the authority provided in Business and Professions Code section 2233, you are hereby issued this Public Letter of Reprimand by the Medical Board of California."

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters alleged herein and, following the hearing, that the Division of Medical Quality of the Medical Board of California issue its Decision and Order:

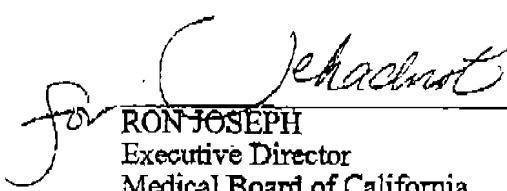
1. Revoking or suspending Physician's and Surgeon's Certificate No. C 27965 heretofore issued by the Board to Eugene P. O'Donnell, M.D.;

2. Revoking, suspending or denying approval for Eugene P. O'Donnell, M.D., to supervise physician's assistants pursuant to section 3527 of the Code;

3. Ordering Eugene P. O'Donnell, M.D., to pay the Board the reasonable costs of the investigation and enforcement of this case, and, if placed on probation, the costs of probation monitoring;

4. Taking such other and further action as the Division deems necessary and proper.

DATED: January 13, 2004



RON JOSEPH
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California

Complainant

TSL/

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