

**COPY**

*Before the Board of Medical Examiners  
of the State of Nevada*

\* \* \* \* \*

**In The Matter of Charges and  
Complaint Against  
MARK CAPENER, M.D.,  
Respondent.**

Case No. 07-12771-1

**FILED**

**MAY 12 2009**

NEVADA STATE BOARD OF  
MEDICAL EXAMINERS

**SETTLEMENT, WAIVER AND CONSENT AGREEMENT**

**THIS AGREEMENT** is hereby entered into by and between the Investigative Committee (IC) of the Nevada State Board of Medical Examiners (the Board) composed of Sohail U. Anjum, M.D., S. Daniel McBride, M.D., and Donald H. Baepler, Ph.D., D.Sc. (since replaced by Van Heffner), at the time the associated Complaint was authorized, by and through General Counsel, Edward O. Cousineau and Mark Capener, M.D., (Respondent), through his counsel of record, Michael Wheeler, Esq., as follows:

**WHEREAS**, on December 27, 2007, the Board's IC filed a formal Complaint in the above-referenced matter charging Respondent with engaging in conduct that is grounds for discipline pursuant to the Medical Practice Act (NRS Chapter 630), to wit: one count of malpractice, a violation of NRS 630.301(4); and

**WHEREAS**, Respondent has received a copy of the Complaint, reviewed it, understands it, denies the allegations contained in the complaint, and has consulted with competent counsel J. Michael Wheeler, Esq., concerning the nature and significance of the complaint, and Respondent is fully advised concerning his rights and defenses to the complaint as well as the possible sanctions that may be imposed if the Board finds and concludes that he has violated one or more provisions of the Medical Practice Act; and

**WHEREAS**, Respondent understands and agrees that he has certain rights under the United States Constitution and the Constitution of the State of Nevada, as well as under the Medical Practice Act (NRS

1 Chapter 630) and the Nevada Administrative Procedures Act (NRS Chapter 233B) including but not  
2 limited to the right to a formal hearing on the charges against him, the right to representation by counsel in  
3 the preparation and presentation of his defense, the right to confrontation and cross-examination of  
4 witnesses against him, the right to present evidence and witnesses on his own behalf, the right to written  
5 findings, conclusions and order regarding a final decision by the Board, and the right to judicial review of  
6 any final decision by the Board that is adverse to him; and

7 **WHEREAS**, provided this Agreement is approved by the Board, Respondent, agrees to waive all  
8 of his rights under the United States Constitution, the Constitution of the State of Nevada, the Medical  
9 Practice Act and the Nevada Administrative Procedures Act, including but not limited to the right to a  
10 hearing on the charges and written findings of fact, conclusions of law and order, and he agrees to settle  
11 and resolve this matter of the formal complaint against him by way of, and in accordance with, this  
12 Settlement, Waiver and Consent Agreement; and

13 **WHEREAS**, Respondent understands and agrees that this Agreement is entered into by and  
14 between himself and the Board's IC, and not with the Board, but that the IC will present this Agreement to  
15 the Board for consideration in open session at a regular meeting duly noticed and scheduled, and that the  
16 IC shall advocate approval of this Agreement by the Board, but that the Board has the right to decide in its  
17 own discretion whether or not to approve this Agreement; and

18 **WHEREAS**, Respondent understands and agrees that if the Board approves the terms, covenants  
19 and conditions of this Agreement, then the terms, covenants and conditions enumerated below shall be  
20 binding and enforceable upon him and the Board, and

21 **WHEREAS**, Respondent understands and agrees that if the Board does not approve the terms,  
22 covenants and conditions of this Agreement, then the terms, covenants and conditions enumerated below  
23 shall not be binding and enforceable upon him or the Board except the provisions as to disqualification of  
24 adjudicating panel members in paragraph number 9, and he will be provided with an opportunity to defend  
25 himself against the charges against him at a regularly scheduled hearing in accordance with all applicable  
26 laws;

27 **NOW THEREFORE**, in order to resolve Case No. 07-12771-1 and the charges alleged by the  
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1 Board's IC in the above captioned matter, Respondent and the IC hereby agree to the following terms,  
2 covenants and conditions:

3 1. **Jurisdiction.** At all times mentioned in the Complaint filed in the above-captioned matter,  
4 Respondent was a physician licensed to practice medicine in the State of Nevada. The IC contends that  
5 Respondent is subject to the jurisdiction of the Board to hear and adjudicate charges of violations of the  
6 Medical Practice Act (NRS 630), and to impose sanctions as provided by the Act. Respondent has  
7 denied that the Board continues to have jurisdiction over him nine (9) years after the fact but agrees, for  
8 purposes of this Agreement only, that the Board may exercise jurisdiction over him. By entering into this  
9 Agreement, Respondent does not waive his right to deny Board jurisdiction over him.

10 2. **Representation by Counsel.** Respondent is represented by counsel herein, whom  
11 Respondent covenants and agrees is fully capable, competent, and fully advised in these circumstances and  
12 Respondent further covenants and agrees that he enters into this Agreement knowingly, willingly, and  
13 intelligently after full consultation with counsel.

14 3. **Waiver of Rights.** In connection with this Agreement, and the terms, covenants and  
15 conditions contained herein, Respondent knowingly, willingly and intelligently, with the advice of above  
16 identified counsel, waives all rights arising under or pursuant to the United States Constitution, the  
17 Constitution of the State of Nevada, NRS Chapter 630 and NRS Chapter 233B that may be available to  
18 him or that may apply to him in connection with the proceeding on the Complaint filed herein, the defense  
19 of said Complaint and the adjudication of the charges in said Complaint, and Respondent further agrees  
20 that the matter of the Complaint herein may be settled and resolved in accordance with this Agreement  
21 without a hearing or any further proceeding, and without the right to judicial review. In the event this  
22 Agreement is not approved by the Board, this Agreement shall have no force and effect and Respondent  
23 shall have all rights arising under or pursuant to the United States Constitution, the Constitution of the  
24 State of Nevada, NRS Chapter 630 and NRS Chapter 233B that may be available to him or that may apply  
25 to him in connection with the proceeding on the Complaint filed herein.

26 4. **No Admission of Liability.** This Agreement is neither an admission of liability by  
27 Respondent nor a concession by the IC that its claims as alleged in the underlying complaint are not  
28 well founded.

1           5.     Consent to Entry of Order. In order to resolve the matter of these disciplinary  
2 proceedings and to avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of  
3 the underlying claims by the IC, the parties agree and Respondent does not contest that an order may be  
4 entered herein by the Board finding that the underlying complaint herein, Case No. 07-12771-1, is to be  
5 dismissed with prejudice and that the Board will be paid ten thousand dollars (\$10,000.00) as partial  
6 reimbursement of costs and fees incurred in the investigation and associated prosecution of the matter.  
7 Further, reimbursement of the costs and fees are to be paid to the Board, by Thomsen Stephens Law  
8 Offices of Idaho Falls, Idaho, within thirty (30) days of acceptance, adoption and approval of this  
9 Agreement by the Board. The settlement shall not be disclosed by the Board to the National  
10 Practitioner's Data Bank.

11           6.     Release From Liability. In execution of this Settlement Agreement, the Respondent,  
12 for himself, his executors, successors and assigns, hereby releases and forever discharges the state of  
13 Nevada, the Board, the Nevada Attorney General, and each of their members, agents and employees in  
14 their representative capacities, and in their individual capacities, from any and all manner of actions,  
15 causes of action, suits, debts, judgments, executions, claims and demands whatsoever, known and  
16 unknown, in law or equity, that Respondent ever had, now has, may have or claim to have, against any  
17 or all of the persons or entities named in this paragraph arising out of or by reason of the investigation,  
18 settlement, or administration of Case No. 07-12771-1.

19           7.     Procedure for Adoption of Agreement. The IC and counsel for the IC shall  
20 recommend approval and adoption of the terms, covenants and conditions contained herein by the  
21 Board in resolution of the Complaint pending herein against Respondent. In the course of seeking Board  
22 approval, adoption and/or acceptance of this Agreement, counsel for the IC may communicate directly  
23 with the Board staff and members of the panel of the Board who would adjudicate this case if it were to  
24 go to hearing. Respondent acknowledges that such contacts and communication may be made or  
25 conducted ex parte, without notice or opportunity to be heard on his part or on the part of his counsel  
26 until the public Board meeting where this Agreement is discussed, and that such contacts and  
27 communications may include, but not be limited to, matters concerning this Agreement, the Complaint,  
28 and any and all information of every nature whatsoever related to the Complaint or the proceedings

1 herein against Respondent. The IC and its counsel agree that Respondent and his counsel may appear at  
2 the Board meeting where this Agreement is discussed, and if requested, to respond to any questions that  
3 may be addressed to the IC or its counsel.

4       8.     **Effect of Acceptance of Agreement by Board.** In the event the Board approves,  
5 accepts and adopts the terms, covenants and conditions set out in this Agreement, counsel for the IC  
6 will cause to be entered herein the Board's Order accepting, adopting and approving this Settlement,  
7 Waiver and Agreement, ordering full compliance with the terms herein and ordering that this case be  
8 closed, subject to the provisions of Section 5.

9       9.     **Effect of Rejection of Agreement by Board.** In the event the Board does not approve,  
10 accept and adopt the terms, covenants and conditions set out in this Agreement, this Agreement shall be  
11 null, void, and of no further force and effect except as to the following covenant and agreement  
12 regarding disqualification of adjudicating Board panel members. Respondent agrees that,  
13 notwithstanding rejection of this Agreement by the Board, nothing contained herein and nothing that  
14 occurs pursuant to efforts of the IC or its counsel to seek acceptance and adoption of this Agreement by  
15 the Board shall disqualify any member of the adjudicating panel of the Board from considering the  
16 charges against Respondent and participating in the disciplinary proceedings in any role, including  
17 adjudication of the case, and Respondent further agrees that he shall not seek to disqualify any such  
18 member absent evidence of bad faith and/or bias and/or prejudice established by evidence of something  
19 other than said member rejecting or failing to approve this Agreement.

20       10.    **Binding Effect.** Providing this Agreement is approved by the Board, the parties hereto  
21 covenants and agrees that this Agreement is a binding and enforceable contract which may be enforced  
22 in a court or tribunal having jurisdiction.

23       11.    **Forum Selection Clause.** The parties hereto covenant and agree that in the event either  
24 party is required to seek enforcement of this Agreement in the District Court, the exclusive jurisdiction  
25 shall be in the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

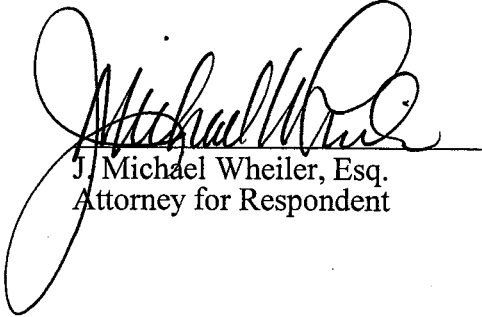
26       12.    **Attorneys Fees and Costs.** The parties hereto covenant and agree that in the event an  
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1 action is commenced in the district court to enforce any provision of this Agreement, the prevailing  
2 party shall be entitled to recover costs and reasonable attorneys' fees.

3 Dated this 23<sup>rd</sup> day of April, 2009.

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6 Edward O. Cousineau, Esq.  
7 Attorney for the Investigative Committee of the  
8 Nevada State Board of Medical Examiners



J. Michael Wheeler, Esq.  
Attorney for Respondent

9 I, Mark Capener, M.D., hereby agree to the foregoing Settlement, Consent and Waiver as to the  
10 complaint in Nevada State Board of Medical Examiners Case No. 07-12771-1.

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12 Dated this 20 day of April, 2009.

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16 Mark Capener, M.D., Respondent  
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1 **IT IS HEREBY ORDERED** that the foregoing Settlement, Waiver and Consent Agreement is  
2 approved and accepted by the Nevada State Board of Medical Examiners on the 8<sup>th</sup> day of  
3 May, 2009, with the final total amount of costs due of \$10,000.00 payable within 30 days.

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6 CHARLES N. HELD, President  
7 NEVADA STATE BOARD OF MEDICAL EXAMINERS

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