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The Florida Board of Medicine Part II: Common Disciplinary Actions

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Part I of this series presented a review of the Florida Board of Medicine, how it functions, the general process a complaint against a provider follows, and a selection of the types of legal hearings and actions often taken by the Board. Part II presents selected examples of some of the more common Florida Statutes which form the bases of the prosecution of these claims. Complete references for statutes referenced can be found at **leg.state.fl.us/statutes/**.

A physician's actions and/or behavior may be the subject of the nightly news. The public may be confused, even angry if the discipline imposed appears lenient. *"How could they let that physician keep his license?"* What is often not appreciated, is that the severity of discipline issued by the BOM must follow specific guidelines set forth in statutes and rule. Further, with the ability to pursue a formal hearing before the Division of Administrative Hearings or appeal a final Board action, physicians are often able to continue practicing until all appeal opportunities are exhausted. There are times when the Board is able to place the physician on probation and/or suspend their license until additional disciplinary penalties are satisfied. In this manner, the health, welfare, and safety of the public is most quickly protected.

There are several disciplinary actions that the BOM can impose. A common route is to issue a formal Letter of Concern or a Letter of Reprimand. These letters are considered discipline and are reportable to the National Practitioner Data Bank (NPDB). Additional discipline often includes a monetary fine, court costs, continuing medical education (CME) in areas related to the complaint, and/or a prepared lecture to be presented before peers on the subject of the complaint. More seriously, action taken against a physician's license may include probation, suspension, or even complete revocation of the practitioner's license. The BOM can order that a physician practice under supervision or complete a competency and/or a neuropsychological evaluation, which may result in a multi-year monitoring contract.

There are over one hundred statutory provisions that directly relate to the practice of medicine. Spending a few minutes online reviewing these would be an eye-opening experience for most practitioners. Presented below are selected provisions from Sections 458.331 and 456.072, Florida Statutes, which provide the grounds for discipline.[1]

Practicing Below the Standard of Care/ Medical Malpractice

Multiple Florida Statutes relate to Medical Malpractice

1. In addition to sections 458.331 and 456.072, physicians should review Chapter 64B8-9, Florida Administrative Code, which provides that Standards of Practice for Medical Doctors

and Standards of Care. Sections 458.331(1)(t)-(v), F.S., provide the following:

(t) Notwithstanding s. 456.072(2) but as specified in s. 456.50(2):

1. Committing medical malpractice as defined in s. 456.50. The board shall give great weight to the provisions of s. 466.102 when enforcing this paragraph. Medical malpractice shall not be construed to require more than one instance, event or act.
2. Committing gross medical malpractice.
3. Committing repeated medical malpractice as defined in s. 456.50. A person found by the board to have committee repeated medical malpractice based on s. 456.50 may not be licensed or continue to be licensed by the state to provide health care services as a medical doctor in this state.

Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph. A recommended order by an administrative las judge or a final order of the board finding a violation under this paragraph shall specify whether the licensee was found to have committed "gross medical malpractice," "repeated medical malpractice," or "medical malpractice," or any combination thereof, and any publication by the board must so specify.

(u). Performing any procedure or prescribing any therapy which, by the prevailing standards of medical practice in the community, would constitute experimentation on a human subject, without first obtaining full, informed, and written consent.

(v) Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform. The board may establish by rules standards of practice and standards of care for particular practice settings, including, but not limited to, educations and training, equipment, and supplies, medications including anesthetics, assistance of and delegation to other personnel, transfer agreements, sterilization, records, performance of complex or multiple procedures, informed consent, and policy and procedure manuals.

Other examples of relevant Florida Statutes include those pertaining to performing a procedure on the wrong site, side, patient or doing the wrong procedure on the correct patient, leaving a foreign body in a patient, and incomplete, illegible, inaccurate medical records. These are common examples of actions or activities which may be the basis for action against a licensee by the Board. Such an action is parallel to, and independent of, any civil malpractice that also may be filed against the practitioner.

While typically complaints are filed by the patient and/or their family, complaints are also filed by plaintiff attorneys. Since actions at the level of the Board are open to the public, and practitioners provide testimony under oath, this is a viable (and inexpensive) avenue for plaintiff attorneys to gather additional information to support their case. It is important to understand that the best strategy for defending a physician in a civil medical malpractice action may differ from that in a regulatory case. Following one without consideration of the other can result in significant financial, emotional, and professional long-term consequences. If presented with this situation, a physician is best advised to consider engaging the services of an attorney who specializes in health regulatory law, who has significant experience representing clients before the BOM, and who can coordinate with the physician's civil defense counsel.

Inappropriate Prescribing

Newspapers and the media regularly present stories of physicians who over-prescribe (usually controlled substances) to patients. Many of these stories have been

associated with Chronic Non-Malignant Pain Management Clinics. Complaints against practitioners involved in these activities often find their way to the BOM, where discipline is imposed.

Unrecognized by many physicians is the fact that inappropriate prescribing can run afoul of not just one, but multiple statutes. Some examples include Sections 456.072(1)(gg) and (mm), F.S.:

> (gg) Engaging in a pattern of practice when prescribing medicinal drugs or controlled substances which demonstrates a lack of reasonable skill or safety to patients, a violation of this chapter or ss. 893.055 and 893.0551, a violation of the applicable practice act, or a violation of any rules adopted under this chapter or the applicable practice act of the prescribing practitioner. Notwithstanding a. 456.073(13), the department may initiate an investigation and establish such a pattern from billing records, data, or any other information obtained by the department.
>
> (mm) Failure to comply with controlled substance prescribing requirements of s. 456.44.

And Sections 458.331(1)(q), (r) and (pp)(3), F.S.:

> (q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.
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> (r) Prescribing, dispensing, or administering any medicinal drug appearing on any schedule set forth in chapter 893 by the physician to himself or herself, except one prescribed, dispensed, or administered to the physician by another practitioner authorized to prescribe, dispense, or administer medicinal drugs.
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> (pp) Applicable to a licensee who serves as the designated physician of a pain-management clinic as defined in s. 458.3265 or s. 459.0137:
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> . . .
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> 3. Failing to comply with any requirement of chapter 499, the Florida Drug and Cosmetic Act; 21 U.S.C. ss. 301-392, the Federal Food, Drug, and Cosmetic Act; U.S.C. ss. 821 et seq., the Drug Abuse Prevention and Control Act; or chapter 893, the Florida Comprehensive Drug Abuse Prevention and Control Act

Sometimes seemingly "innocent" prescribing habits result in problems for the physician due to violation of other, non-prescribing Florida Statutes. For example, your friend has problems falling asleep and asks for a prescription for Lunesta. Being considerate, you write the prescription; only a few tablets, no refills. Or perhaps your nurse shares that she is traveling abroad and asks for a Z-Pak "just in case." You run a busy office. She hands you a completed Rx to sign, which you do.

These examples seem innocuous, and many physicians have personally written such prescriptions. Section 458.331 (1)(m), F.S., relating to medical record documentation reads:

> (m) Failing to keep legible, as defined by the department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records pf drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

Physicians providing the "hallway consult" prescription to a co-worker or doing a favor for a friend or partner

rarely view these recipients as formal patients, and therefore fail to keep medical records with the required documentation. These actions can generate a formal complaint to the Board. The physician who wrote prescriptions for his/her spouse may find a complaint filed during a subsequent divorce action. Providing prescriptions to an employee may result in a complaint should that employee subsequently be disgruntled. Such individuals should be referred to their own physicians for prescriptions. If a physician does write prescriptions in such circumstances, best practice would be to treat the recipient as one would any patient, with documentation in a medical chart, appropriate care and follow up.

Action in Another Jurisdiction

Physicians may maintain medical licenses in multiple jurisdictions. This has become more common with the growth of telemedicine. Most states, including Florida, have the statutory authority to act against a physician disciplined in another jurisdiction as if the action/behavior occurred in their jurisdiction. This is noted in Section 458.331(1)(b), F.S.:

> (b) Having a license or the authority to practice medicine revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of any jurisdiction, including its agencies or subdivisions. The licensing authority's acceptance of a physician's relinquishment of a license, stipulation, consent order, or other settlement, offered in response to or in anticipation of the filing of administrative charges against the physician's license, shall be construed as action against the physician's license

Many jurisdictions share information about licensed practitioners. One such mechanism is a Board Action Disciplinary Alert report, sent to any jurisdiction where a physicians has a license following action taken by another jurisdiction. Thus, other jurisdictions where a practitioner is licensed learn of such action and often act reciprocally by imposing similar disciplines, further escalating the fines, costs, and other disciplinary requirements imposed by the initial jurisdiction. This cascading situation can become very convoluted, time consuming, and expensive for the practitioner. Many physicians consider withdrawing their license from jurisdictions where they no longer need to or intend to practice. However, this too is fraught with professional consequences, as doing so during an active investigation is also considered reportable to all other jurisdictions and the NPDB. As a result, all entities which subscribe to the NPDB (healthcare facilities, insurance companies, etc.) will have access to this information.

Timely Notification to the Board of Medicine

Unbeknownst to many physicians is the requirement to notify the BOM in writing within 30 days of action imposed by another jurisdiction, or being found guilty of or entering a plea of nolo contendere to a crime. Section 458.331(1)(kk), F.S.:

> (kk) Failing to report to the board, in writing, within 30 days if action as defined in paragraph (b) has been taken against one's license to practice medicine in another state, territory, or Country.

456.072(1)(x), F.S.:

> (x) Failing to report to the board, or the department if there is no board, in writing within 30 days after licensee has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction. Convictions, findings, adjudications, and pleas entered into prior to the enactment of this paragraph, must be reported in writing to the board, or department if there is no board, on or before October 1, 1999.

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Regardless of the severity of the criminal case, failing to report the action to the BOM can alone result in disciplinary action; whereas additional action by the BOM may or may not occur if properly reported in accordance with state law.

Timely Updating of the Practitioner Profile

Most physicians do not recall that a professional practitioner profile is created at the time they file an application for medical licensure nor is it realized that they are required to keep the information in the practitioner profile current as mandated by Section 456.042, F.S:

> A practitioner must submit updates of required information within 15 days after the final activity that renders such information a fact. The Department of Health shall update each practitioner's practitioner profile periodically. An update profile is subject to the same requirements as an original profile.

Section 456.072(1)(w), F.S. provides the grounds for discipline:

> (w) Failing to comply with the requirements for profiling and credentialing, including, but not limited to, failing to provide initial information, failing to timely provide updated information, or making misleading, untrue, deceptive, or fraudulent representations on a profile, credentialing, or initial or renewal licensure application.

This violation is often found during an investigation and added to the Administrative Complaint, further increasing the potential discipline to be imposed.

Criminal Issues

Multiple Florida Statutes apply to criminal activity, examples of which are provided below. Generally, such activity is felt to be inconsistent with the expectations and trust placed by the State on physicians.

Examples include, but are not limited to, Sections 458.331(1)(c), (i), and (pp)7., F.S.:

> (c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine.
>
> (i) Paying or receiving any commission, bonus, kickback, or rebate, or engaging in any split – fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent a physician from receiving a fee for professional consultation services.
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> 7. Being convicted of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction of the courts of this state, of any other state, or of the United States which relates to health care fraud;

And 456.072(1)(ll), F.S.:

> (ll) Being convicted of, or entering a plea of guilty or nolo contendere to, any misdemeanor or felony, regardless of adjudication, a crime in any jurisdiction which relates to health care fraud.

Physicians commonly think that criminal history is only relevant if it pertains to fraud, theft, pill mills, etc. Misunderstood is the fact that criminal convictions relating to driving under the influence, driving while impaired, reckless driving, and domestic violence may satisfy the scope of these statutes, exposing physicians to additional professional risk. Generally, the Board is less concerned with the isolated incident during college or medical training, as such histories lack evidence that the violations may be impacting the practitioner's

ability to provide safe care to patients. However, repeated incidents, acts of violence, and work-related incidents are scrutinized by the BOM with much greater risk of formal discipline against a physician's license.

Health Issues

A very real issue is the perceived stigma attached to illnesses that may affect the physician's ability to practice safely. Practitioners are often reluctant to disclose these issues for fear of professional ramifications. Such fear of disclosure may often lead them to delay or avoid obtaining treatment. This is especially true for those in medical school and post graduate training programs. The BOM will not intrude upon a physician's privacy unless the illness in question affects their ability to practice with reasonable skill and safety. The Board is not interested in the disclosure of conditions such as episodic anxiety or depression as long as the conditions are treated and/or do not pose a danger to patients. Speaking to physician health is Section 458.331(1)(s), F.S.:

> (s) Being unable to practice medicine with reasonable skill and safety to patients by reason of Illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition. In enforcing this paragraph, the department shall have, upon a finding of the State Surgeon General or the State Surgeon General's designee that probable cause exists to believe that the licensee is unable to practice medicine because of the reasons stated in this paragraph, the authority to issue an order to compel a licensee to submit to a mental or physical examination by physicians designated by the department. If a licensee refuses to comply with such order, the department's order directing such examination may be enforced by filing a petition for enforcement in the circuit court where the licensee resides or does business. The licensee against whom the petition is filed may not be named or identified by initials in any public court records or documents, and the proceedings shall be closed to the public. The department shall be entitled to the summary procedure provided in s. 51.011. A licensee or certificate holder affected under this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that he or she can resume the competent practice of medicine with reasonable skill and safety to patients.

Complaints against impaired physicians are often filed by peers, patients, staff, and co-workers. Impairment commonly relates to the illicit use of medications (typically controlled substances) through diversionary tactics or obfuscation and alcohol abuse. Surprisingly common are stories where the physician is impaired in the work setting. Sometimes physicians self-report impairment to the BOM.

Impaired physicians in Florida may be referred to the Florida Professionals Resource Network (PRN) for comprehensive evaluation, and outpatient and/or inpatient intervention as may be indicated. This commonly involves the commitment to a monitoring contract where the physician is required to submit to random testing for illicit substances, and to continue in various therapeutic programs designed for their benefit (e.g. outpatient counseling, AA meetings, etc.). PRN works closely with the BOM supporting the recovery of these physicians. Successful participation in monitoring contracts, along with the support and approval of PRN, facilitates the physician returning to the safe practice of medicine.

The University of Florida School of Medicine CARES program (Comprehensive Assessment and Remedial Education Services) is the program to which practitioners may be referred when there is concern over their knowledge, decision-making abilities, patient communication skills and level of psychological functioning.

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Professional Boundaries

Florida law recognizes that the physician-patient relationship is not equal, with the physician in a powerful position of control and influence over the patient as provided in Section 458.331(1)(j), F.S.:

> (j) Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.

And Section 456.072(1)(v), F.S.:

> (v) Engaging or attempting to engage in sexual misconduct as defined and prohibited in s. 456.063(1).

In addition to a Letter of Concern or Reprimand, fines, court costs, CMEs, etc., physicians may be placed on probation, required to have chaperones, restricted from caring for certain patients, or have their license suspended or revoked.

Violation of Any Order of the Board

Physicians often do not realize that failing to satisfy Board order is in and of itself a violation, further compounding the time, energy, expense, and stress involved in resolving BOM actions. Section 458.331, F.S.:

> (x) Violating a lawful order of the board or department previously entered in a disciplinary hearing or failing to comply with a lawfully issued subpoena of the department.

Best recommendation is to timely pay the fines, costs and complete the required CME, lectures, or other discipline imposed. While Board actions can certainly be formally appealed, practitioners would be well served to engage the services of experienced legal counsel for advice and guidance.

Repercussions of Board Actions

Physicians innocently believe that most actions by the BOM are isolated, easily and quickly addressed, and have little impact on their careers. Nothing could be further from the truth. Already discussed above are examples of the many statutes governing the practice of medicine, and the fact that most jurisdictions are interconnected sharing records of actions taken against physicians. Board actions in one jurisdiction are available to boards in other states, and greatly influence their decisions when licensing or imposing discipline on a practitioner. Both of the following examples from physicians who applied for a Florida license reflect this reality.

Example 1: Training Discipline

An applicant had been placed on probation in 2001 during their residency training. He completed his training without further issue in a timely manner. In 2007, he applied for a fellowship in a second state. The probation during training was omitted on the medical license application. This was discovered and resulted in discipline imposed by the second state. The applicant was issued a three-year probationary (restricted) license. The first state, learning of the second state's action, also placed this applicant on a three-year probation. Accordingly, these actions were reported to the NPDB. Learning of the restricted licenses, the practitioner's specialty board revoked their board certification (many specialty boards require an unrestricted license to retain board certification status). It took three years for the physician to satisfy the dual probations, receive re-issued unrestricted licenses, and yet another year following that for the specialty board to reinstate his board certification status in 2012.

Example 2: Reckless Driving

In 2002 a practitioner plead guilty in court to reckless driving. Later that year she was found guilty of misdemeanor harassment and placed on civil probation for a year. In 2004,

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she applied to the Medical Board in State #1 for a residency training license. The two convictions were not disclosed in the application. In 2007 she applied for a license in State #2. The two convictions were disclosed in this application. An unrestricted medical license was issued. In 2008 she was reprimanded by State #1's Medical Board for not disclosing these convictions. She appropriately disclosed the new reprimand to the Medical Board of State #2, where she currently had an unrestricted license. In 2009, State #2 reciprocally reprimanded her. In 2010 she applied to State #3 for a medical license, disclosing all prior actions. An unrestricted license was issued. In 2015, while still in State #3, she pled guilty to a charge of misdemeanor disorderly conduct. She reported this to the Medical Board of State #3, which took no action. In 2016 she applied for a medical license in State #4, disclosing all of the above. She was required to be evaluated by a physician health program. State #4 issued her a probationary license, contingent on her completing CME, based on the omissions in 2004 and subsequent actions by State #1.

As these examples illustrate, repercussions quickly cascade and often are wide reaching, following physicians long into their careers. Physicians may find their clinical privileges restricted, suspended, or revoked, removal from insurance panels, employment contracts may not be renewed or a disciplined physician may be dismissed "for cause." Exclusion from Medicaid, Medicare and other federal programs is possible as is relinquishment of their DEA registration.

The lessons here are to pay meticulous attention to licensure applications, providing truthful, complete, transparent information, and to take any notification or communication from the Board of Medicine or Department of Health seriously, not hesitating to obtain expert guidance on how best to respond and navigate the potentially ensuing regulatory action. Part III will contain real examples of cases that appeared before the BOM and the specific discipline imposed. of cases that appeared before the BOM and the specific discipline imposed.

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Next Week

Part III: Examples of Real Cases