

KANSAS

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GUIDELINES FOR THE IMPOSITION OF DISCIPLINARY SANCTIONS

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**BOARD OF HEALING ARTS OF THE
STATE OF KANSAS**

GUIDELINES FOR THE IMPOSITION OF DISCIPLINARY SANCTIONS

Table of Contents

Section I.	Introduction	2
Section II.	Instructions for Applying Sanctioning Grid and Explanations of Case Types.....	3
1.	Professional Competency.....	4
2.	Misconduct.....	6
3.	Criminal Conduct.....	7
4.	Sexual Misconduct.....	8
5.	Billing and Transactions	10
6.	Advertising.....	11
7.	Impairment.....	12
8.	Administrative Requirements	12
9.	Inappropriate Prescribing.....	13
10.	Patient Records	14
Section III.	Aggravating/Mitigating Factors.....	14
Section IV.	Definitions	16
Section V.	Sanctioning Grid	17
Section VI.	Adoption	23

Section I: Introduction

A licensee of the healing arts holds a respected and elevated position in society, with responsibility not only to patients, but also to the public, to colleagues, to the profession, to self, and to the health care system in general. The mission of the Board of Healing Arts is to protect the public by authorizing only those persons who meet and maintain certain qualifications to engage in the health care professions regulated by the Board, and to protect the integrity of the professions. This mission is served by creating a regulatory environment that allows competent and honorable practitioners to practice their art and science, by disciplining those who engage in professional incompetence, unprofessional conduct or other proscribed conduct, and by imposing sanctions that appropriately protect the public from immediate harm, remediate and rehabilitate when possible, or punish when necessary, but ordering the least restrictive discipline necessary to meet the proper sanctioning goals.

Inappropriate sanctions can undermine the goals of discipline. Sanctions that are too lenient or that do not adequately address the underlying causes for the violations do not deter and may result in decreased public confidence in the system. Sanctions that are too restrictive may also result in decreased confidence in the system, and may result in fewer reports of violations and create a more litigious environment. As a result, these guidelines do not establish a precise formula for calculating sanctions.

The Board recognizes the value of a predictable and consistent pattern of disciplinary sanctions. These sanctioning guidelines are intended to lend credibility to the disciplinary process, aid the Board in efficiently achieving its ultimate goal of protecting the public, and give guidance to licensees and their counsel when faced with allegations of misconduct. This theoretical framework applies in any matter when approving a Consent Order or issuing an Initial or Final Order, announcing the appropriate mitigating and aggravating factors the Board will consider in determining the level of discipline and establishing a graduated scale for multiple and repeated misconduct.

The healing arts act and related regulations both prescribe and proscribe conduct that might be grouped in general categories of administrative requirements, misconduct that is harmful to the health care system in general, failure to perform a duty regarding patient care, and other misconduct that may result in patient harm. Patient harm may be economic harm, delay of appropriate treatment, or adverse patient outcomes. These guidelines attempt to take into consideration all of these legitimate interests when determining the imposition of disciplinary action.

When the Board finds that a licensee has engaged in conduct constituting grounds for disciplinary action, the range of disciplinary authority that is available is quite broad, and includes no discipline, fine, public censure, limitation, suspension, revocation, or denial of an application. In determining which of these sanctions should be imposed, the Board should consider the goal for imposing discipline. The purpose might either be remedial, to protect the public from immediate harm, or punitive.

[The Board is also given authority under 2008 HB 2620, Sec. 1 to enter into a written agreement for a professional development plan, make written recommendations, or issue a written letter of concern to a licensee as a non-disciplinary resolution in certain instances. Those non-disciplinary resolutions are distinguished from disciplinary actions in that they do not impose a fine, censure, limitation, suspension or revocation, and do not affect the scope or duration or effectiveness of a license.]

In general, a limitation may achieve a remedial purpose by imposing conditions, such as completion of continuing education courses pertaining to professional boundaries, monitoring patient records or billing practices; required practice monitoring; evaluation for impairment from psychiatric, medical or substance abuse; clinical skills assessments and training programs; or monitoring contracts with the appropriate impaired provider program. A limitation might also protect the public from harm by imposing restrictions on the scope of license, such as reducing the type of services that may be provided, or the setting in which those services may be provided.

Suspension, revocation and denial of an application might be appropriate to achieve a remedial purpose, protection, or punishment. Removing a licensee from practice protects the public from future misconduct. Additionally, removing or preventing a person from practice is appropriate when the misconduct demonstrates that the licensee lacks the necessary competence or professionalism to merit the privilege of licensure. Censure and fine are purely punitive.

These guidelines do not have the force and effect of law, and they do not create binding precedent. By adopting this policy statement, the Board does not limit itself to any form of disciplinary order and it may consider its entire range of authority. The Board may depart from this policy as it desires and without giving notice.

These guidelines are intended to supplement rather than replace the policies that have been previously adopted by the Board regarding disciplinary actions. When misconduct is addressed by those policies, those policies should be followed. Additionally, these guidelines are in addition to other provisions of law that might apply in a specific situation, including the authority of the Board to assess costs in a proceeding.

Finally, these guidelines must be reviewed regularly and updated as statutes and rules change, and when experience suggests the need for modification.

Section II: Instructions for Applying Sanctioning Grid and Explanations of case types

For purposes of these guidelines, the Board has grouped statutes and regulations under specific categories of misconduct. Descriptions in each of the categories are not intended to create grounds for discipline independent of the statutes and regulations. The following comments guide determination when applying the presumed sanctions identified in the Sanctioning Grid (Section V).

In applying the Sanctioning Grid, the **Presumed Sanction (Grid column 5)** should be the starting point for the conduct described. When licensee is found to have committed multiple

categories of offenses, consider whether the offenses are multiple ways of describing the same conduct or are separate occurrences and events. If the offenses are separate and are best described in different categories, the sanctions for each offense should be added together. If the instances of misconduct are similar sanctions, treat as multiple instances of same category and modify the decision to use the **Presumed Sanction for Multiple Instances (Grid column 5)**. If multiple categories of offenses might apply to the same instance or transaction, use only most severe sanction. Mitigating and aggravating factors should then be applied, with the resulting sanction being within the **Range when Presumed Sanction is Modified by Aggravating / Mitigating Factors (Grid column 6)**. The mitigating and aggravating factors upon which the Board relies to modify the presumed sanction should be identified in the Board's findings and conclusions.

1. Professional Competency

Sanctioning Grid Categories:

- A. Competency of Practice - Licensee; Lacks skill and judgment; engages in gross negligence
- B. Competency of Practice - Licensee; Willfully fails to exercise appropriate professional judgment or fails to utilize skill to a degree showing a lack of general competence
- C. Competency of Practice - Licensee; Generally competent but has failed to use skill or judgment
- D. Competency of Practice - Supervision; supervision is non-existent or is a sham relationship
- E. Competency of Practice - Supervision; incompetent acts of supervised person; fails to meet regulatory requirements

Statutes and regulations:

- K.S.A. 65-2836(w) (Failure to report adverse judgment)
- K.S.A. 65-2836(bb) (Failure to adequately supervise a physician assistant)
- K.S.A. 65-2837(a)(1) - (3) (Professional incompetency defined)
- K.S.A. 65-2837(b)(14) (Aiding and abetting unlicensed or incompetent practice)
- K.S.A. 65-2837(b)(19) (Fee splitting)
- K.S.A. 65-2837(b)(24) (Repeated failure to adhere to standard of practice)
- K.S.A. 65-2837(b)(26) (Inappropriately delegating responsibility)
- K.S.A. 65-2837(b)(30) (Failure to properly supervise)
- K.S.A. 65-2837(b)(33) [2008 HB 2620] (Violating patient trust for personal gain)
- K.A.R. 100-22-7 (Improper orders to dispense medical devices)
- K.A.R. 100-25-5 (Office-based practice requirements)
- K.A. R. 100-27-1 (Standards for supervising light-based services)

Comments

The Kansas Supreme Court stated in *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447 (1968), "[n]o conduct or practice could be more devastating to the health and welfare of a patient or the public than incompetency" This category of grounds for disciplinary action relates to the demonstrated professional skill of the licensee, and to the licensee's responsibility for services performed by others.

A licensee's professional incompetence may be established directly or indirectly. Direct indicia includes the failure to adhere to the applicable standard of care to a degree constituting gross negligence in a single instance, or to a degree constituting ordinary negligence in multiple instances or in repeated instances, or engaging in other conduct that manifests incompetency. Indirect indicia include actions taken by hospital or other peer review groups for similar conduct, or malpractice settlements or judgments. Whether directly or indirectly established, the sanction should focus on the practitioner's professional level of skill possessed and utilized in practice as indicated by demonstrated abilities and exercise of professional judgment.

A licensee is also responsible to the patient and the public when delegating to others the authority to perform professional services. This responsibility is generally described in terms of standards for supervision or delegation. Those standards are generally stated at K.S.A. 65-28,127. Additional standards pertaining to specific professions appear throughout the statutes and regulations.

While actual patient injury is not an element of professional incompetency, the reasonable likelihood of harm and the licensee's ability and willingness to acknowledge and overcome deficiencies should be large factors in determining the sanctions to be imposed based upon a finding of professional incompetence.

a. Licensee's Professional Incompetence

Traditionally the Board has imposed limitations on practice and other remedial means to address incompetence when the licensee appears cooperative. When a person does not appear to have the skills or the desire to remediate deficiencies, or when the public health and safety is in jeopardy, more severe disciplinary sanctions are necessary. An order imposing remedial steps that does not include limitation on or separation from practice is only appropriate when the practitioner acknowledges the deficiency and there are grounds to believe that the licensee will be able to overcome that deficiency.

In instances where the Board finds that the licensee appears to lack the skill or knowledge necessary to provide services in a practice area, the Board should consider seeking an evaluation of practice skills, and if deficiencies are discovered then it may serve as a basis for remedial steps.

When the Board finds that the licensee lacks the skill or knowledge in a specific practice area so that further evaluation is not needed and that the licensee is otherwise generally competent, separating the licensee from the practice area of deficiency should be imposed until the licensee can demonstrate competency. Some authority to provide services might be appropriate under supervision during the learning process.

A licensee that is found to lack general skill or knowledge should be removed from practice until that skill and knowledge is regained. Some authority to provide services might be appropriate under supervision during the learning process.

If the licensee has the requisite knowledge and skill, but fails to use necessary professional judgment, the Board faces a more difficult task of remediation. Separation from practice, in whole or in part, might become necessary in order to prevent harm to patients.

b. Professional Incompetence of Supervised Persons

Practitioners generally may delegate to others the authority to provide professional services. The person to whom that authority is delegated might be licensed or registered in another health profession, or might have no credential at all. In a civil action for damages, a practitioner who delegates this authority to another person may be liable for damages resulting from the services performed by that other person, even though the practitioner did not personally engage in wrongdoing. In contrast, professional responsibility is not merely based upon vicarious liability. Rather, a licensee is subject to discipline for delegating inappropriately or for the failure to supervise adequately. Generally the disciplinary sanction for failing to delegate or supervise appropriately is punitive rather than remedial.

2. General Misconduct

Sanctioning Grid Categories:

- A. Misconduct - Potentially harmful to patients or other providers, or actually misleads board or is disruptive to board processes
- B. Misconduct - No likelihood for physical or emotional harm to patients but discredits profession or has potential to mislead the board or the public
- C. Misconduct - No likelihood of physical or emotional harm but may cause economic loss to patients
- D. Misconduct - parallel actions by other states or by facilities

Statutes:

- K.S.A. 65-2836(a) (Fraud in application for license)
- K.S.A. 65-2836(b) (Unprofessional, dishonorable, incompetent practice)
- K.S.A. 65-2836(f) (Violation of act, pharmacy or KDHE statutes or regulations)
- K.S.A. 65-2836(g) (Invading branch of healing arts without license)
- K.S.A. 65-2836(h) (Practice under false name)
- K.S.A. 65-2836(j) (Discipline by another state)
- K.S.A. 65-2836(k) (Violation of Board regulation or order)
- K.S.A. 65-2836(l) (Failure to report knowledge of violation)
- K.S.A. 65-2836(n) (Cheated on licensure exam)
- K.S.A. 65-2836(q) (Violated federal controlled substance law)
- K.S.A. 65-2836(r) (Failure to furnish Board information legally requested)
- K.S.A. 65-2836(s) (Sanctions by peer review group)
- K.S.A. 65-2836(t) (Failure to report discipline by other state or peer group)
- K.S.A. 65-2836(u) (Surrender of license or authority in another state or forum)
- K.S.A. 65-2836(v) (Failure to report surrender of license or authority)
- K.S.A. 65-2836(x) (Failure to report adverse judgment)
- K.S.A. 65-2836(aa) (Submitting fraudulent claim, bill or statement)

- K.S.A. 65-2837(b)(3) (Treating without patient consent)
- K.S.A. 65-2837(b)(9) (Wrongful participation in exclusion of licensee from medical staff)
- K.S.A. 65-2837(b)(6) (Betrayal of confidential information)
- K.S.A. 65-2837(b)(10) (Failure to effectuate advanced directive)
- K.S.A. 65-2837(b)(12) (Conduct likely to deceive or harm public)
- K.S.A. 65-2837(b)(15) (Allowing another to use license)
- K.S.A. 65-2837(b)(18) (Obtaining fee by fraud, deceit or misrepresentation)
- K.S.A. 65-2837(b)(21) (Performing tests, exams, services without legitimate purpose)
- K.S.A. 65-2837(b)(27) (Experimental treatments)
- K.S.A. 65-2837(b)(31) (Unlawful abortion of viable fetus)
- K.S.A. 65-2837(b)(32) (Billing for pathology labs not personally performed)

Comments

Misconduct is that which is recognized to be unsafe or improper by the ethical and competent members of the profession. The term also includes general conduct that is dishonorable or unprofessional and that is not addressed in other categories within these guidelines, and includes acts prohibited by policies expressed in legislation. Conduct is deemed misconduct because it fails to conform to the standards that are recognized as necessary for the public's protection. The essence of professionalism is embodied in the human qualities of integrity, respect and compassion. Professionalism includes altruism, accountability, excellence, duty, service, honor, integrity and respect for others. Misconduct which is corrupt, dishonest or unethical is reprehensible. Such misconduct not only potentially causes patient harm, but such misconduct also undermines the public perception of the profession. Discipline for such misconduct is generally punitive in nature.

3. Criminal Conduct

Sanctioning Grid Categories:

- A. Criminal conduct - Felony conviction
- B. Criminal conduct - conviction of Class A misdemeanor relating to professional practice; or crimes of dishonesty, against persons, moral turpitude
- C. Criminal conduct - conviction of Class A misdemeanor not related to professional practice, not against persons, and not a crime of dishonesty or moral turpitude

Statutes:

- K.S.A. 65-2836(c) (Conviction of felony or Class A Misdemeanor)
- K.S.A. 65-2836(cc) (Assisted suicide)
- K.S.A. 65-2837(b)(5) (Performing criminal abortion)

Comments

Conduct which is criminal, or is deemed criminal, may form the basis for imposing discipline against a licensee because such misconduct reflects upon the licensee's fitness and qualifications to practice in the healthcare field and detracts from the trust the public must be able to give healthcare professionals. A licensee who has exhibited dishonesty, poor moral character, a lack of integrity and/or an inability or unwillingness to follow the law has demonstrated an unfitness

to practice and may be subject to discipline against his or her professional license. Honesty and integrity are deeply ingrained in the practice of the various healthcare professions. This category of misconduct should be deemed serious because of its potential for public harm and the ill repute that it brings upon the profession as a whole. This type of conduct should be addressed with discipline that is intended to be punitive.

When a licensee has been convicted of a felony, in addition to the general aggravating and mitigating circumstances that apply to all categories of misconduct the Board must consider K.S.A. 65-2836(c). That section requires the Board to revoke or deny an application “unless a 2/3 majority of the board members present and voting determine by clear and convincing evidence that such licensee will not pose a threat to the public in such person's capacity as a licensee and that such person has been sufficiently rehabilitated to warrant the public trust.”

4. Sexual Misconduct

Sanctioning Grid Categories:

- A. Sexual misconduct - abuse or exploitation of a patient or surrogate
- B. Sexual misconduct - impropriety involving patient or surrogate
- C. Sexual misconduct - sexual harassment associated with professional practice

Statute

K.S.A. 65-2836(b)(16) (Sexual abuse, misconduct or exploitation related to practice)

Comments

The Board has a zero-tolerance policy when sexual misconduct involves a minor. In all situations a finding of sexual misconduct involving minors and related to professional practice should result in revocation of a license. These guidelines and comments apply to sexual misconduct with adults.

The professional boundary required between physician and patient is based upon the fiduciary relationship in which the patient entrusts his or her welfare to the physician, reflects the physician's respect for the patient.¹ That boundary, once crossed, severely impacts the patient's wellbeing on an individual basis, and causes distrust to other professional relationships in general. Sexual misconduct is a harmful example of a boundary violation, occurring in multiple contexts and involving a wide range of behaviors. These guidelines cannot foresee all the possible scenarios of misconduct. Sexual misconduct includes sexual impropriety towards a patient, sexual conduct towards patients, sexual harassment in the workplace, facilitating a hostile work environment, sexual conduct between supervisors and subordinates, the commission of sexual assault and other sexual crimes.

Sexual misconduct can occur in circumstances involving two consenting adults. For instance, sexual conduct towards current patients is generally considered misconduct. Sexual conduct towards former patients is misconduct when the licensee exploits knowledge or information

¹ Glen O. Gabbard, M.D. and Carol Nadelson, M.D., *Professional Boundaries in the Physician-Patient Relationship*, Journal of the American Medical Association, May 10, 1995; Vol. 273, No. 18, pg. 1445

obtained from the previous physician-patient relationship. Sexual or romantic relationships between physicians and their patients may exploit the vulnerability of the patient and may obscure the physician's objective judgment concerning the patient's health care. Sexual misconduct between a physician and a patient is never diagnostic or therapeutic. Romantic or intimate relationships may impede the physician's ability to confront the patient about noncompliance with treatment or to bring up unpleasant medical information. Physicians must set aside their own needs or interests in the service of addressing the patient's needs. The physician-patient relationship depends upon the ability of the patient to have absolute confidence and trust in the physician, and a patient has the right to believe that a physician is dedicated solely to the patient's best interests.

Sexual impropriety may include, but not limited to, sexually suggestive behavior, gestures, expressions, statements, and it may include failing to respect a patient's privacy such as in the following examples:

- a.) failing to employ disrobing or draping practices that respect the patient's privacy;
- b.) examination or touching of a patient's genital region without donning gloves;
- c.) inappropriate comments to a patient about the patient's body, sexual orientation, or potential sexual performance during the examination;
- d.) soliciting a date or romantic relationship;
- e.) performing an intimate examination without clinical justification; and
- f.) requesting personal information from the patient not clinically indicated

Sexual conduct may include, but not limited to, physical contact such as:

- a.) genital to genital contact;
- b.) oral to genital contact;
- c.) anal to genital contact;
- d.) kissing;
- e.) touching breasts, genitals, or other body part without clinical justification;
- f.) encouraging patient to masturbate in presence of physician;
- g.) physician masturbation in presence of patient; and
- h.) offering clinical services or prescriptions in exchange for sexual favors.

Sexual harassment, sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature is misconduct because of its potential to interfere with the licensee's work and/or creates a hostile work environment. Sexual relationships between supervisors and subordinates are concerning because of the inherent inequalities in the relationship and such relationships that may affect patient care.

This category of misconduct should be deemed serious because in addition to the potential for patient harm, such relationships erode the public's trust and confidence in the health care profession and damages the credibility of the healing arts professions. Upon a finding of sexual misconduct, the Board should take appropriate measures to impose a sanction and/or monitoring requirements that address the severity of the misconduct and the potential risk to patients.

In addition to the general aggravating and mitigating circumstances that apply to all categories of misconduct, the Board may consider the following factors:

- (1) Psychiatric, psychological, neurological or cognitive impairment and the severity of such;
- (2) Whether there were contributory factors (i.e. professional burnout leading to depression);
- (3) The licensee's opportunity and risk of re-offending;
- (4) The licensee's likelihood of successful rehabilitation;
- (5) The presence of compulsive sexual behavior;
- (6) The context in which the misconduct took place;
- (7) Patient consent may be taken into account in determining the appropriate discipline;
- (8) Degree of dependence in the physician-patient relationship;
- (9) Patient age (minor);
- (10) Vulnerability of patient;
- (11) Number of times misconduct occurred;
- (12) Number of patients involved;
- (13) The degree of exploitation;
- (14) Patient harm;
- (15) Duration of the professional relationship;
- (16) Nature of the medical services provided; and
- (17) Lapse of time between termination of physician-patient relationship and sexual involvement; and
- (18) Whether the practitioner had an impairment that was the cause of his actions.

Some examples of limitations that may be imposed upon a licensee's license when suggested by the sanctioning grid are as follows:

- a.) Requiring a supervisory physician;
- b.) Requiring a chaperones to be in attendance during the examination and/or treatment;
- c.) Limitations recommended by an evaluator;
- d.) Monitoring by the appropriate impaired provider program; and
- e.) Continuing education course in boundary issues.

5. Billing / Business Transactions

Sanctioning Grid Categories:

- A. Billing/Business Transactions - involving exploitation of patient or fraud of others
- B. Billing/Business Transactions - otherwise wrongful

Statutes and Regulations:

- K.S.A. 65-2837(b)(22) (Excessive fee)
- K.S.A. 65-2837(b)(29) (Referring patients to entity in which licensee has significant ownership)
- K.A.R. 100-22-3 (Business transactions with patients)

Comments

Billing and business transactions with patients includes misconduct such as charging excessive fees for services, fee-splitting, failing to disclose to the patient a financial interest, and entering into business transactions with patients separate from the practice of the healing arts. Public policy dictates that a practitioner should not charge or collect an excessive fee. Public policy also prohibits fee splitting because the licensee's decision to provide, or not to provide, services

may be influenced by the fact that he must split his fees. Such arrangements may also cause non-licensed professionals to recommend the services of a particular licensee out of self-interest, rather than the actual competence of the licensee. It is believed that the public is best served by recommendations that are uninfluenced by financial considerations.

Additionally, engaging in the sale of non-health related goods by practitioners with their patients erodes the primary obligation of the practitioners to serve the interests of their patients above their own financial interests. The interest of the patient is paramount. Failure to perform these duties regarding patient care has the potential to cause patient harm.

6. Advertising

Sanctioning Grid Category:

A. Advertising -involving false or prohibited statements, exploitation, economic injury, or giving false hope

Statutes and Regulations:

K.S.A. 65-2836(d) (Fraudulent or false advertising)

K.S.A. 65-2837(b)(1) (Fraudulent or false advertising)

K.S.A. 65-2837(b)(2) (Representing permanent cure for incurable disease or injury)

K.S.A. 65-2837(b)(4) (Falsely advertising entitlement to practice branch of healing arts)

K.S.A. 65-2837(b)(7) (Advertising professional superiority)

K.S.A. 65-2837(b)(8) (Advertising guarantee)

K.S.A. 65-2837(b)(13) (Misrepresenting skill of licensee or of treatment)

K.S.A. 65-2837(b)(17) (False, fraudulent or deceptive statement on a document)

K.A.R. 100-22-4 (Description of specialty certification)

K.A.R. 100-18-1 (Free offers)

Comments

Advertising is commercial speech protected by the First Amendment. The constitution does not protect false, deceptive or misleading speech, such as representing false credentials, bait and switch advertising, or guarantees of a cure for a manifestly incurable disease. This constitutional protection does extend to puffing, which expresses an opinion that is not made as a representation of fact. When a licensee is found to have advertised using a factual representation that violates the statutes and regulations, the sanction should achieve correction, deterrence from future violations, and a punitive element.

Advertisements that are intended to give the public hope for a cure of an incurable disease; create unreasonable expectations; offer products, devices or services that have no scientific basis; or rely upon science or logic that is not consistent with the education and training of the profession for which the licensee is licensed tend to exploit patients, at a minimum cause financial injury, and potentially lead a person to forego more appropriate care thus leading to harm.

Advertisements that include factual representations that are not likely to lead a patient to physical or economic injury, but which reasonably might lead to confusion on the part of the public are less serious, but must be addressed to protect the public.

Inadvertent mistakes or omissions may be considered as mitigating factors.

7. Impairment / Fitness to Practice

Sanctioning Grid Categories:

- A. Impairment - Non-cooperative, unable to remediate
- B. Impairment - Appears remediable but disciplinary order needed
- C. Impairment - No disciplinary order needed

Statutes

- K.S.A. 65-2836(e) (Impaired by alcohol or drugs)
- K.S.A. 65-2836(i) (Inability to practice by reason of impairment)
- K.S.A. 65-2836(o) (Mentally ill, disabled, not guilty based upon mental disease)

Comments

Impairments include drug abuse, alcohol abuse, and mental or physical conditions that impede the licensee's ability to practice with reasonable skill and safety. In addition to the general aggravating and mitigating circumstances that apply to all categories of misconduct, the Board may also consider whether the practitioner has insight into the impairment. The Board has traditionally taken the view that a practitioner, who has sought help for impairment and has actively taken steps to adequately address the issue, is less of a concern than an impaired practitioner who refuses to seek help or take steps to address the problem. The goal is to facilitate efforts to rehabilitate those impaired. In the process of rehabilitation, measures including separation from practice are often necessary to protect the public.

In situations where the practitioner is cooperative and seeks rehabilitation, it is the policy of the Board that referral to a facility or organization for evaluation, treatment or monitoring regarding the impairment shall not be considered disciplinary action solely on the basis of a person being impaired. Board action based upon a finding of impairment shall not be considered a limitation constituting disciplinary action solely on the basis of an agreement between the Board and a person if the agreement imposes a condition or completion of some act unless the agreement constitutes a restriction upon the duration, extent, or scope of the full authority to practice the profession that the person would otherwise enjoy. When a licensee is found to be impaired and is not cooperative, or when uninterrupted practice endangers the public, then disciplinary action becomes necessary.

8. Administrative Requirements

Sanctioning Grid Categories:

- A. Administrative Requirements - Intentional or wanton, but not disruptive to regulation of the profession
- B. Administrative Requirements - Negligent failure to adhere

Statutes and Regulations:

- K.S.A. 65-2836(m) (Required disclosures for breast abnormality)
- K.S.A. 65-2836(y) (Failure to maintain liability insurance)
- K.S.A. 65-2836(z) (Failure to pay stabilization fund surcharges)
- K.A.R. 100-22-2 (Disclosure of professional activities for exempt license)
- K.A.R. 100-22-6 (Posting notice at practice location)

Comments

Violations of administrative requirements include conduct such as failure to maintain malpractice insurance and pay premium surcharges, failure to inform a patient in writing of abnormality in breast tissue for which surgery is the recommended treatment, failure to comply with the office based surgery regulations, failure to identify professional activities for exempt licenses and failure to post the prescribed notice to the public in the office. The level of sanctioning should depend upon the licensee's state of mind.

9. Inappropriate Prescribing

Sanctioning Grid Categories:

- A. Inappropriate Prescribing - no legitimate medical purpose
- B. Inappropriate Prescribing - willfully or negligently failed to follow requirements

Statutes and Regulations:

- K.S.A. 65-2836(p) (Controlled substances for other than medically accepted or lawful purpose)
- K.S.A. 65-2837(b)(11) (Amphetamine law)
- K.S.A. 65-2837(b)(23) (Excessive or improper or not in course of regular practice)
- K.S.A. 65-2837(b)(28) (Anabolic steroids or human growth hormone)
- K.S.A. 65-2837a (Amphetamine law)
- K.A.R. 100-22-8a (Lipodissolve)

Comments

Inappropriate Prescribing includes such misconduct as the failure to follow required procedures that have been established to ensure prescriptions are legitimate, prescribing to family or friends who suffer from addiction or misuse, diversion for self use, and criminal trafficking in dangerous drugs. This category of misconduct should be deemed serious because of its potential for public harm and its abuse of the unique privilege to prescribe drugs, including controlled substances. Allegations of inappropriate prescribing practices should be distinguished from proper pain management that follows the Board's pain management guidelines. Also, prescription orders that are believed to not meet the standard of care should be considered as professional incompetence unless there are specific facts that establish unethical or unlawful conduct.

In addition to the general aggravating circumstances that apply to all categories of misconduct, the Board should consider whether the misconduct resulted from the negligent failure to follow required procedures but otherwise occurred within lawful and ethical medical care, or whether

the physician willfully failed to do so, or whether the physician prescribed outside of the legitimate physician-patient relationship.

10. Patient Records

Sanctioning Grid Categories:

- A. Patient Records - deceptively altered or intentionally failed to create documentation
- B. Patient Records - poor documentation, negligently failed to meet requirements
- C. Patient Records - fail to maintain confidentiality
- D. Patient Records - fail to disclose as required without just cause

Statutes and Regulations:

- K.S.A. 65-2837(b)(6) (Willful betrayal of confidential information)
- K.S.A. 65-2837(b)(20) (Failure to transfer records to another licensee)
- K.S.A. 65-2837(b)(25) (Failure to keep records)
- K.A.R. 100-22-1 (Failure to release records)

Comments

Failure to adequately maintain patient records includes misconduct such as the failure to adequately document evaluation and/or treatment of the patient, failure to adequately maintain or store the records, and failure to allow the patient or the patient's authorized representative access to the records. The purposes for maintaining patient records include: (1) to furnish documentary evidence of the patient's history, symptoms and treatment; (2) to serve as a basis for review, study and evaluation of the care rendered; (3) to ensure that the records provide meaningful health care information to other practitioners should the patient have his or her care transferred to another provider; and (4) to assist in protecting the legal interests of the patient, and responsible practitioner.

There is also a general policy in favor of allowing patients and/or their authorized representative access to the patient records. The interest of the patient is paramount. Failure to perform these duties regarding patient care has the potential to cause patient harm. In addition to the general aggravating and mitigating circumstances that apply to all categories of misconduct, the Board may also consider the pervasiveness of such misconduct with regard to the licensee's practice in determining the appropriate remedy.

Section III: *Aggravating and Mitigating Factors - policy considerations*

After it has been established that a violation has occurred, then the Board should consider the facts and circumstances unique to the case to determine whether the presumptive sanction is appropriate in light of any aggravating and/or mitigating factors. Aggravating factors may justify more restrictive or severe discipline. Mitigating factors may justify less severe or restrictive discipline. It is important to note that all factors will not necessarily be given equal weight.

Any of the following factors that the Board considers should be identified in the order, along with a general statement describing how the factor modifies the presumptive sanction:

Factors relevant to the misconduct committed:

- a.) Nature and gravity of the allegations;
- b.) Age or vulnerability of patient;
- c.) Capacity or vulnerability of patient or victim of licensee's misconduct;
- d.) Number/frequency of act;
- e.) Injury caused by misconduct;
- f.) Frequency of commission of acts;
- g.) Potential for injury ensuing from act;
- h.) Consensus about blameworthiness of conduct;
- i.) Abuse of trust;
- j.) Consent of patient;
- k.) Intentional vs. inadvertent;
- l.) Motivation of criminal, immoral, dishonest or personal gain; and
- m.) Length of time that has elapsed since misconduct.

Factors relevant to the licensee:

- a.) Age;
- b.) Experience in practice;
- c.) Past disciplinary record;
- d.) Previous character
- e.) Mental or physical health; and
- f.) Personal circumstances.

Factors relevant to the disciplinary process:

- a.) Admission of key facts;
- b.) Full and free disclosure to the Board;
- c.) Voluntary restitution or other actions taken to remedy the misconduct;
- d.) Bad faith obstruction of disciplinary process or proceedings;
- e.) False evidence, false statements, other deceptive practices during disciplinary process or proceedings;
- f.) Remorse and/or consciousness of wrongfulness of conduct;
- g.) Impact on patient; and
- h.) Public's perception of protection.

General aggravating and mitigating circumstances:

- a.) Licensee's knowledge, intent, degree of negligence;
- b.) Presence of other violations;
- c.) Present moral fitness of the petitioner;
- d.) Potential for successful rehabilitation;
- e.) Petitioner's present competence in medical skills;
- f.) Dishonest / Selfish motives;
- g.) Pattern of misconduct;
- h.) Illegal conduct;
- i.) Heinousness of actions;

- j.) Ill repute upon profession;
- k.) Personal problems (if there is a nexus to violation);
- l.) Emotional problems (if there is a nexus to violation);
- m.) Isolated incident unlikely to reoccur; and
- n.) Public's perception of protection

Section IV: *Definitions*

For the purposes of these guidelines, the following terms are defined as follows:

"Injury" - harm to a patient, the public, or the profession, which results from a licensee's acts or omissions.

"Potential for Injury" - harm to a patient, the public, or the profession that is reasonably foreseeable at the time of the licensee's acts or omissions, but for some intervening factor or event, would probably have resulted from the licensee's acts or omissions.

"Intent" - the conscious objective or purpose to accomplish a particular result.

"Knowledge" - the conscious awareness of the nature of the conduct, but without the conscious objective or purpose to accomplish a particular result.

"Negligence" - failure to exercise the standard of care that a reasonably prudent licensee would have exercised in a similar situation.

"Ordinary negligence" - the failure to use ordinary care in the licensee's practice.

"Gross negligence" - a conscious, wanton act or omission in reckless disregard for the foreseeable outcome.

"Inadvertence" - an accidental oversight through unintentional neglect.

Section V: Sanctioning Grid

Category of Offense	Description	Sanctioning Goals (In Order of Priority)	Presumed Sanction (Prior to Adjustment for Aggravating / Mitigating factors)	Presumed Sanction for Multiple Instances - Same category of offense * (Prior to Adjustment for Aggravating / Mitigating factors)	Range when Presumed Sanction is Modified by Aggravating / Mitigating Factors (Highest / Lowest)	Presumed Sanction as Modified for Prior Board Actions (Prior to Adjustment for Aggravating / Mitigating factors)
1A	Competency of Practice - Licensee; Lacks skill and judgment; gross negligence	1. Protect public/Remediate if possible; 2. Punish gross neg	30-89 day suspension; and Limitation: Scope of Practice and Conditions	Revocation	Revocation / Limitation: Conditions	Revocation
1B	Competency of Practice - Licensee; willfully fails to exercise appropriate professional judgment or fails to utilize skill to a degree showing a lack of general competence	1. Protect public 2. Punish 3. Remediate	30-89 day suspension; Limitations in scope of practice and Conditions; and \$500 - \$2499 fine	Suspension > 90 days; Limitation: Scope of Practice and Conditions;	30-89 day suspension / Censure	Revocation
1C	Competency of Practice - Licensee; generally competent but negligently has failed to use skill or judgment	1. Punish 2. Rehabilitation	Limitation: Conditions; and \$500 - \$2499 fine	Limitation: Conditions; and \$2500 - \$5000 fine	Revocation / Limitation: Conditions	Revocation
1D	Competency of Practice - Supervision- incompetent acts of supervised person; supervision is non-existent or is sham relationship; or potential for physical or emotional harm to patients	1. Protect Public 2. Punish	30-89 day suspension; and Limitation on scope of practice or \$2500 - \$5000 fine	Suspension > 90 days; Limitation: Scope of Practice and Conditions;	Revoke / \$500 - \$2499 Fine	Revocation

Category of Offense	Description	Sanctioning Goals (In Order of Priority)	Presumed Sanction (Prior to Adjustment for Aggravating / Mitigating factors)	Presumed Sanction for Multiple Instances - Same category of offense * (Prior to Adjustment for Aggravating / Mitigating factors)	Range when Presumed Sanction is Modified by Aggravating / Mitigating Factors (Highest / Lowest)	Presumed Sanction as Modified for Prior Board Actions (Prior to Adjustment for Aggravating / Mitigating factors)
1E	Competency of Practice - Supervision - incompetent acts of supervised person; Fails to meet technical regulatory requirements	1. Protect Public 2. Punish	Censure and \$500 - \$2499 Fine	Suspension < 30 days; and Limitation	Suspension > 90 days/ \$500 - \$2499 Fine or Censure	30-89 day suspension; and Limitation
2A	Misconduct - Potentially harmful to patients or other providers, or actually misleads board or is disruptive to board processes	1. Protect Public; 2. Punish	30-89 day suspension	Suspension > 90 days; and \$2500 - \$5000 Fine	Revocation / \$500 - \$2499 Fine	Revocation
2B	Misconduct - No likelihood for physical or emotional harm to patients but discredits profession or has potential to mislead the board or the public	Punishment	30-89 day suspension and \$500 - \$2499 Fine	30-89 suspension and \$500 - \$2499 Fine	Suspension >90 days, \$2500 - \$5000 Fine / Censure, Fine < \$500	Revocation
2C	Misconduct - No likelihood of physical or emotional harm but may cause economic loss to patients	Protect Public	1-29 day suspension; and Fine < \$500	1-29 day suspension; and Fine < \$500	30-89 day suspension / Fine < \$500 for each instance of conduct	Revocation
2D	Misconduct - parallel actions by other states or by facilities	1. Protect Public 2. Rehabilitate 3. Punish	Parallel other state sanction	Parallel other state sanction	Revocation / Fine < \$500	Parallel other state sanction
3A	Criminal conduct - Felony conviction	1. Protect Public 2. Punish	By statute: revocation	Revocation	Censure	Revocation

Category of Offense	Description	Sanctioning Goals (In Order of Priority)	Presumed Sanction (Prior to Adjustment for Aggravating / Mitigating factors)	Presumed Sanction for Multiple Instances - Same category of offense * (Prior to Adjustment for Aggravating / Mitigating factors)	Range when Presumed Sanction is Modified by Aggravating / Mitigating Factors (Highest / Lowest)	Presumed Sanction as Modified for Prior Board Actions (Prior to Adjustment for Aggravating / Mitigating factors)
3B	Criminal conduct - conviction of Class A misdemeanor relating to professional practice, or crimes of dishonesty, against persons, or moral turpitude	1. Protect Public 2. Punish	Suspension < 30 days; and \$500 - \$2499 Fine	30-89 day suspension; and \$2500 - \$5000 Fine	Revocation / \$500 - \$2499 Fine	Revocation
3C	Criminal conduct - conviction of Class A misdemeanor not related to professional practice, not against persons, and not a crime of dishonesty or moral turpitude	Punishment	\$500 - \$2499 Fine and Censure	30-89 day suspension	Suspension > 90 days / Censure	30-89 day suspension and \$500-\$2499 Fine
4A	Sexual misconduct - abuse or exploitation of an adult patient	1. Protect Public 2. Punish	Revocation	Revocation	Revocation / 90+ days suspension	Revocation
4B	Sexual misconduct - impropriety involving an adult patient	1. Protect Public 2. Rehabilitate 3. Punish	30 - 89 day suspension and Limitation: Scope of Practice and Conditions	Revocation	Revocation / Limitation - Cond and Scope	Revocation
4C	Sexual misconduct - sexual harassment associated with professional practice	1. Protect Public 2. Rehabilitate 3. Punish	30-89 days suspension and Limitation: Conditions	30-89 day suspension; and Limitation: Conditions; and \$2500 - \$5000 Fine	Suspension > 90 days / Limitation: Conditions and \$1 - \$499 Fine	Revocation Suspension > 90 days; Limitation: Conditions; and \$2500 - \$5000 Fine

Category of Offense	Description	Sanctioning Goals (In Order of Priority)	Presumed Sanction (Prior to Adjustment for Aggravating / Mitigating factors)	Presumed Sanction for Multiple Instances - Same category of offense * (Prior to Adjustment for Aggravating / Mitigating factors)	Range when Presumed Sanction is Modified by Aggravating / Mitigating Factors (Highest / Lowest)	Presumed Sanction as Modified for Prior Board Actions (Prior to Adjustment for Aggravating / Mitigating factors)
5A	Billing/Business Transactions - involving exploitation of patient or fraud of others	1. Protect Public 2. Punish	30-89 day suspension; Limitation: Conditions; and \$500-2499 Fine	30-89 day suspension and Limitation: Conditions	Revocation / Limitation - Cond	Suspension > 90 days; Limitation: Conditions; and \$2500 - \$5000 Fine
5B	Billing/Business Transactions - otherwise wrongful	1. Rehabilitate 2. Punish 3. Protect Public	1-29 day suspension; and \$500 - \$2499 Fine	30-89 day suspension and Fine < \$500 for each instance of conduct	Suspension > 90 days / Limitation: Conditions and Censure	Suspension > 90 days; Limitation: Conditions; and \$2500- \$5000 Fine
6	Advertising - involving misleading, false or prohibited statements, exploitation, economic injury, or giving false hope	Protect Public	\$500 - \$5000 Fine and Censure	\$2500 - \$5000 Fine for each instance of conduct and Censure	Suspension < 30 days / Censure	Suspension > 90 days and \$2500 - \$5000 Fine for each instance of conduct
7A	Impairment - non cooperative, unable to remediate	Protect Public	Suspension - Indefinite and Limitation: Conditions	Revoke / Suspension - Indefinite	Revoke / Suspension - Indefinite	Revocation
7B	Impairment - appears remediable but disciplinary order needed	1. Protect Public 2. Rehabilitate	Limitation: Scope of Practice and Conditions	NA	Indefinite suspension / Limitation: Scope of Practice and Conditions	30-89 day suspension and Limitation: Scope of Practice and Conditions
7C	Impairment - without other violations, non-disciplinary order	1. Rehabilitate 2. Protect Public	NA	NA	NA	Disciplinary order, Category 7A or 7B

Category of Offense	Description	Sanctioning Goals (In Order of Priority)	Presumed Sanction (Prior to Adjustment for Aggravating / Mitigating factors)	Presumed Sanction for Multiple Instances - Same category of offense * (Prior to Adjustment for Aggravating / Mitigating factors)	Range when Presumed Sanction is Modified by Aggravating / Mitigating Factors (Highest / Lowest)	Presumed Sanction as Modified for Prior Board Actions (Prior to Adjustment for Aggravating / Mitigating factors)
8A	Administrative Requirements - Intentional or wanton, potentially disruptive to regulation of the profession	Punishment	\$2500-\$5000 Fine and Censure	Suspension < 30 days and Fine < \$500 for each instance	30-89 day suspension; \$2500 - \$5000 Fine / Censure and Fine < \$500	Suspension > 90 days and Limitation: Scope of Practice and Conditions
8B	Administrative Requirements - negligent failure to adhere	Rehabilitate	Fine < \$500 and Censure	\$500 - \$2499 Fine and Censure	Suspension < 30 days / Censure	Suspension < 30 days and Fine < \$500
9A	Inappropriate Prescribing - no legitimate medical purpose	1. Protect Public 2. Punish	Suspension > 90 days and \$2500 - \$5000 Fine	Suspension > 90 days; Limitation: Scope of Practice and Conditions; and \$2500 - \$5000 Fine	Revocation / Suspension < 30 days	Revocation 30-89 day suspension and Limitation in the scope of practice and Conditions
9B	Inappropriate Prescribing - willfully or negligently failed to follow requirements	1. Rehabilitate 2. Protect Public	\$2500 - \$5000 Fine and Censure	\$2500 - \$5000 Fine and Limitation in the scope of practice and Conditions	30-89 days suspension; \$2500 - \$5000 Fine / Censure	Revocation 30-89 day suspension and Limitation in the scope of practice and Conditions
10A	Patient Records - deceptively altered or intentionally failed to create documentation	1. Punish 2. Protect Public	30-89 day suspension and \$500 - \$2499 Fine	30-89 day suspension and \$2500 - \$5000 Fine for each instance	Revocation / \$2500 - \$5000 Fine for each instance	Revocation
10B	Patient Records - poor documentation, negligently failed to meet requirements	Rehabilitate	Limitation: Conditions and Fine < \$500	Limitation: Conditions and Fine < \$500 for each instance	Suspension < 30 days and Limitation: Conditions / Censure	30-89 day suspension and Limitation: Conditions

Category of Offense	Description	Sanctioning Goals (In Order of Priority)	Presumed Sanction (Prior to Adjustment for Aggravating / Mitigating factors)	Presumed Sanction for Multiple Instances - Same category of offense * (Prior to Adjustment for Aggravating / Mitigating factors)	Range when Presumed Sanction is Modified by Aggravating / Mitigating Factors (Highest / Lowest)	Presumed Sanction as Modified for Prior Board Actions (Prior to Adjustment for Aggravating / Mitigating factors)
10C	Patient Records - fail to maintain confidentiality	1. Protect Public 2. Punish	\$2500 - \$5000 Fine and Limitation: Conditions	Suspension < 30 days and Limitation: Conditions	Suspension > 90 days, \$2500 - \$5000 Fine / Censure, Fine < \$500	Revocation
10D	Patient Records - fail to disclose as required without just cause	1. Protect Public 2. Punish	\$500 - \$2499	\$500 - \$2499	30-89 day suspension / Censure	30-89 day suspension and \$500-\$2499 Fine for each instance

Section VI: Adoption

Adoption of these Guidelines for the Imposition of Disciplinary Sanctions supersedes the following Policy Statement:

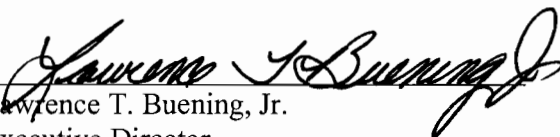
Policy Statement 01-01: Designation of Certain Agency Actions as Non-Disciplinary

The following Policy Statements are not superseded by adoption of these guidelines:

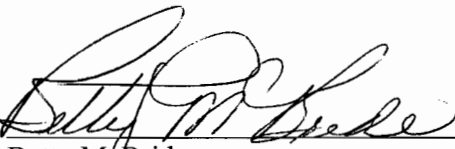
Policy Statement 04-01: "Guidelines for Imposing Fines Relating to Practice on an Expired License," as revised June 8, 2007

Policy Statement 05-04: "Guidelines for Imposing Penalties for Deficient Continuing Education Units Following Audit," as revised December 7, 2007

APPROVED by the Kansas State Board of Healing Arts this 25th day of April, 2008.



Lawrence T. Buening, Jr.
Executive Director



Betty McBride
President