# 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

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**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 when the licensee: (1) seeks to establish continued competency for renewal of licensure, (2) has been absent from clinical practice for a substantial period of time, (3) has failed to adhere to the standard of care not rising to the level of professional incompetency, and (4) has engaged in an act or practice that is likely to result in future violations of the healing arts act. Those non-disciplinary resolutions are distinguished from disciplinary actions in that they do not impose a fine, censure, probation, limitation, suspension or revocation, and do not affect the scope or duration or effectiveness of a license.]

In general, a probation may achieve a remedial purpose by imposing conditions, such as completion of continuing education courses pertaining to professional boundaries, supervision, 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 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)(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 devises)
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 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

[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

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 chaperone 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)(19) (Fee splitting)
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.

Kansas case law prohibits the corporate practice of medicine. The core of that doctrine is that a general business entity may not engage in a learned profession, such as that of physicians, chiropractors, attorneys and dentists, either through employment of or by contract with one of those licensed professionals. Thus, Licensees are not allowed to form a general corporation (Inc.)(including "S" and "C" corporations) for the purpose of practicing their learned profession.

One exception to the corporate practice of medicine doctrine is when the entity is otherwise permitted by state statute to engage in the profession. For example, a hospital is licensed to provide medical services, and thus may employ physicians. Another exception applies to licensees who form professional associations or professional L.L.C.s which are owned by qualified persons. Qualified persons are those licensed to practice the professional services offered by the business entity.

A business entity organized as an incorporation (Inc.) that engages in the corporate practice of medicine may be found in violation of K.S.A. 65-2867, which prohibits a person other than one who is licensed under the healing arts act from opening and maintaining a location for the practice of the healing arts. The practitioner that is employed or contracts with an incorporation (Inc.) may be disciplined for violation of K.S.A. 65-2837(b)(19), "Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations or associations." As such, a licensee may not split his or her fees for professional services rendered with a general incorporation (Inc.) or any other unlicensed person.

### 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.S.A. 65-2885 (Use of title by licensee)
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;<br>2. Punish gross neg | 30-89 day suspension, limitation, and probation | Revocation | Revocation / Probation | 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<br>2. Punish<br>3. Remediate | 30-89 day suspension; limitation, and probation; and $500 - $2499 fine | Suspension > 90 days; limitation, and probation; | 30-89 day suspension / Censure | Revocation |
| 1C | Competency of Practice - Licensee; generally competent but neglegently has failed to use skill or judgment | 1. Punish<br>2. Rehabilitation | Probation and $500 - $2499 fine | Probation and $2500-$5000 fine | Revocation / Probation | 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<br>2. Punish | 30-89 day suspension, probation or $2500 - $5000 fine | Suspension > 90 days, limitation, and probation | 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<br>2. Punish | Censure and $500 - $2499 Fine | Suspension < 30 days and probation | Suspension > 90 days / $500 - $2499 fine or Censure | 30-89 days suspension and probation |
| 2A | Misconduct - Potentially harmful to patients or other providers, or actually misleads board or is disruptive to board processes | 1. Protect Public;<br>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 and $2500 - $5000 Fine / Censure and 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 and Fine < $500 for each instance of conduct | Revocation |
| 2D | Misconduct - parallel actions by other states or by facilities | 1. Protect Public<br>2. Rehabilitate<br>3. Punish | Parallel other state sanction | Parallel other state sanction | Revocation / Fine < $500 | Parallel other state sanction |

| 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) |
|---|---|---|---|---|---|---|
| 3A | Criminal conduct - Felony conviction | 1. Protect Public<br>2. Punish | By statute: revocation | Revocation | Revocation / Censure | Revocation |
| 3B | Criminal conduct - conviction of Class A misdemeanor relating to professional practice, or crimes of dishonesty, against persons, or moral turpitude | 1. Protect Public<br>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 a patient | 1. Protect Public<br>2. Punish | Revocation | Revocation | Revocation / 90+ days supsension | Revocation |
| 4B | Sexual misconduct - impropriety involving patient | 1. Protect Public<br>2. Rehabilitate<br>3. Punish | 30- 89 day suspension, limitation, and probation | Revocation | Revocation / Limitation and probation | Revocation |
| 4C | Sexual misconduct - sexual harassment associated with professional practice | 1. Protect Public<br>2. Rehabilitate<br>3. Punish | 30-89 days suspension and probation | 30-89 day suspension, probation, and $2500 - $5000 fine | Suspension > 90 days, probation, and $1 - $499 fine | Suspension > 90 days, probation 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<br>2. Punish | 30 - 89 day suspension, probation, and $500 - $2499 fine | 30-89 suspension and probation | Revocation / Probation | Suspension > 90 days, probation, and $2500 - $5000 fine |
| 5B | Billing/Business Transactions - otherwise wrongful | 1. Rehabilitate<br>2. Punish<br>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 / Probation and Censure | Suspension > 90 days, probation, 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 probation | Revoke / Suspension - Indefinite | Revoke / Suspension - Indefinite | Revocation |
| 7B | Impairment - appears remediable but disciplinary order needed | 1. Punish<br>2. Protect Public | Limitation and probation | N/A | Indefinite suspension / limitation, and probation | 30-89 day suspension, limitation and probation |
| 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, limitation and probation |

| 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 |
|---|---|---|---|---|---|---|
| 8B | Administrative Requirements - negligent failure to adhere | 1. Punish<br>2. 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<br>2. Punish | Suspension > 90 days and $2500 - $5000 Fine | Suspension > 90 days, limitation, probation and $2500 - $5000 fine | Revocation / Suspension < 30 days | Revocation |
| 9B | Inappropriate Prescribing - willfully or negligently failed to follow requirements | 1. Rehabilitate<br>2. Protect Public | $2500 - $5000 Fine and Censure | $2500 - $5000 fine, limitation, and probation | 30-89 days suspension; $2500 - $5000 Fine / Censure | 30-89 day suspension, limitation and probation |
| 10A | Patient Records - deceptively altered or intentionally failed to create documentation | 1. Punish<br>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 | Probation and < $500 fine | Probation and < $500 fine for each instance | Suspension < 30 days and probation / Censure | 30-89 days suspension and probation |
| 10C | Patient Records - fail to maintain confidentiality | 1. Protect Public<br>2. Punish | $2500 - $5000 fine and probation | Suspension < 30 days and probation | Suspension > 90 days and $2500 - $5000 Fine / Censure and Fine < $500 | Revocation |
| 10D | Patient Records - fail to disclose as required without just cause | 1. Protect Public<br>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 a Cancelled License," as revised April 25, 2008

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 26th day of AUGUST, 2008.

John D. Confer
Executive Director