BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON MEDICAL BOARD

IN THE MATTER OF:	) **PROPOSED ORDER**
	)
ERIC ALAN DOVER, M.D.	) OAH Case No: 1001461
License No. MD16996	)

HISTORY OF THE CASE

On October 30, 2009, the Oregon Medical Board (Board) issued a Complaint and Notice of Proposed Disciplinary Action[1] to Eric Alan Dover, MD (Licensee). On November 16, 2009, Licensee requested a hearing.

On January 5, 2010, the Board referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Rick Barber was assigned to preside at hearing. A prehearing conference was convened on April 1, 2010 where, among other matters, a hearing date was selected. A second prehearing was held on August 30, 2010, to address the Board's request for a protective order. The protective order was signed on August 30, 2010.

Hearing was held on September 21 and 22, 2010, in the Board offices in Portland, Oregon. Licensee appeared and was represented by his attorney, Paul Loney. The Board was represented by Senior Assistant Attorney General Warren Foote. The Board called the following witnesses: Licensee, Patient A (complainant), James Calvert, MD, and Investigator Jay Drum. Licensee testified in his own behalf and called former Voter Power employee Alisa Wall as a witness. The record closed on September 22, 2010.

ISSUES

1. Whether Licensee engaged in one or more acts of unprofessional or dishonorable conduct, thereby violating ORS 677.190(1)(a);

2. Whether Licensee engaged in gross or repeated negligence in the practice of medicine, thereby violating ORS 677.190(13);[2]

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[1] An Amended Complaint was filed on December 18, 2009. (Doc. P4). On September 21, 2010, the Board orally amended the Amended Complaint to address a change in subsection numbers of the statutes involved. Licensee claimed surprise, but elected to proceed to hearing on the orally amended complaint rather than resetting the hearing.

[2] The oral amendments involved the statutes cited in Issues 2 and 3.

3. Whether Licensee violated a Board order by refusing to be evaluated at The Center for Personalized Education for Physicians (CPEP), thereby violating ORS 677.190(17).

4. If Licensee is found to have violated any or all of the above, whether license revocation, payment of a $10,000 civil penalty, and payment of costs are the appropriate sanctions.

EVIDENTIARY RULINGS

Exhibits A1 through A20, offered by the Board, were admitted into evidence. Exhibits A19 and A20 were admitted over Licensee's objection. Exhibits L1 through L23, L26, L27 and L29 were admitted into evidence.[3]

Licensee also objected to Pleading Documents P10 through P17, documents concerning the protective order. Those documents are not evidence and are included only to show the procedural history of the case. Because the protective order is part of the procedural history of the case, the objection was overruled.

FINDINGS OF FACT

1. Licensee is a practicing family physician, formerly Board certified. He has a clinic in Portland, called "Portland Health Care." He has an undergraduate degree in biomedical sciences from UC-Riverside, and a medical degree from UCLA. He did a residency at Harbor-UCLA Hospital in Los Angeles and practiced family medicine in San Luis Obispo, California and Salem, Oregon, before opening his practice in Portland. At the time the complaint was filed against him, Licensee spent 80 percent of his time in his practice in Portland, and 20 percent as an independent contractor for Voter Power clinics, certifying clients for the Oregon Medical Marijuana Program (OMMP). (Ex. A4 at 1-2; test. of Licensee).

2. Voter Power had a clinic in Medford that Licensee worked at between January 2004 and June 2008. (Test. of Licensee). Patients paid a fee to Voter Power, filled out forms to demonstrate that they had one or more of the qualifying conditions for the OMMP, and provided their medical records. Voter Power prepared a packet for each patient that would be taken in to Licensee. Licensee met with the patient and determined whether the patient could be certified for the OMMP. (Test. of Licensee, Patient A, Wall).

3. Patient A is a male, born in 1950. He visited the Voter Power clinic on January 4, 2008 to obtain certification for medical marijuana. He was told about the benefits of marijuana by a retired physician friend. (Test. of Patient A). Patient A has gout, which was diagnosed in 2001, and he has had intermittent problems with the condition ever since. His physician prescribed allopurinol, a gout medication, but Patient A had a reaction to the medicine and quit taking it after only two pills. Patient A has never had knee surgery. (Test. of Patient A; Ex. A18).

[3] The numeric gaps in the "L" documents were due to the party's numbering system; there are no excluded L documents.

4. Patient B is a male, born in 1959. He has had surgery on both knees to repair the ACL joints, and has orthopedic screws in each of his knees to help maintain the surgical result. He was seen at Voter Power on January 4, 2008, seeking OMMP certification for chronic pain. (Ex. A11). Licensee recorded Patient B's medical history and findings on documents with Patient A's contact information, and again on documents with Patient B's contact information. (Ex. A10 at 6; Ex. A11 at 15).

5. Patient C is a male, born in 1955. On May 10, 2006, he returned to the Voter Power clinic to recertify for the OMMP. Patient C has had AIDS for 17 years, and has Hepatitis C and hypertension as well. Patient C also has psychological diagnoses, including PTSD, depression and a history of polysubstance abuse. He was seeking OMMP recertification for severe nausea and loss of appetite. Licensee's physical examination of Patient C, noted on a preprinted form, consists of 22 circled plus signs and an indication that the lungs and chest are "clear;" the abdominal/gastrointestinal areas is "benign;" neurological was "intact;" and skeletal was "WNL." On the form, Licensee also listed the medications and a list of diagnoses reported by Patient C. (Ex. A15 at 72).

6. Patient D is a female, born in 1959. She came to the Voter Power clinic on May 6, 2008, seeking OMMP certification for chronic pain and muscle spasms due to multiple sclerosis (MS) and fibromyalgia. Licensee's physical examination records, on the preprinted form, eleven circled plus signs, an indication of neurological "weakness," and a list of medications and diagnoses. (Ex. A16 at 210).

7. Patient E is a female born in 1955, who suffers from MS. She was seeking recertification for OMMP due to chronic pain. Licensee's physical examination records, on the preprinted form, eleven circled plus signs, and a list of medications and diagnoses. (Ex. A16 at 513).

8. Patient A and Patient B visited the Voter Power clinic on January 4, 2008, but did not know each other at that time. Both filled out the OMMP paperwork to seek authorization for medical marijuana, and handed the paperwork to Voter Power staff. Either the staff or Licensee switched the files, sending Patient A's file (with his name and contact information at the top) in to Licensee with Patient B. Licensee wrote Patient B's physical findings and information (48 years of age, bilateral knee condition with hardware surgically implanted) on Patient A's forms. (Test. of Patient A; Ex. A1 at 7-9).

9. When Patient A was seen by Licensee, Licensee spent eight minutes with him and did not do a physical examination. Patient A had removed his left shoe and sock because he wanted Licensee to look at his left foot, where his gout symptoms were bothering him the most. Licensee reviewed his records but did not look at the left foot. He told Patient A he did not have enough information to justify OMMP certification, and sent the patient to a nearby clinic for x-rays. (Test. of Patient A). When he wrote the x-ray order, Licensee requested a right foot x-ray, not a left foot x-ray. (Ex. A1 at 6). Patient A had been treated since 2001 for gout, and provided the records to Licensee for his review. (Test. of Patient A, Ex. A18).

10. On the form entitled "Documentation of Review of Medical Records, Patient History, Treatment Plan" Licensee indicated he reviewed Patient A's records (by writing "yes"), and placed a check mark next to "Discussed risks/benefits of medical marijuana with patient". Licensee partially circled "6-12 months" to answer the question of "Next doctor visit" and signed the form. (*Id.* at 7). With Patient A and the other patients, Licensee did not think there were any risks to the patient because of the benefits of using medical marijuana. (Test. of Licensee).

11. On the SOAP[4] page, Licensee wrote the physical findings for Patient B on Patient A's forms. (*Id.* at 8). On the "Physical Examination" page, Licensee circled several "plus" marks on the page; indicated his lungs and chest were "clear;" indicated his abdominal exam was "benign;" his neurological exam was "intact;" and Licensee recorded that Patient A had bilateral knee scars with bad to severe crepitus and a past medical history of knee surgeries and "extensive OA" (osteoarthritis). (*Id.* at 9). Those findings were for Patient B and did not match Patient A's medical history. (Test. of Patient A).

12. In October 2008, Licensee recalled some of the information he reviewed in Patient A's file:

> He had 2 or 3 documented cases of acute gouty attacks that he went to Urgent Cares for treatment from what I recall from the records he brought in[.]

(Ex. A4 at 1). Patient A provided approximately 24 pages of documents to Licensee, including the application forms. (Test. of Patient A; Ex. A18).

13. After obtaining the x-rays from the clinic, Patient A returned to Voter Power and saw Licensee for an additional five minutes. Licensee refused to certify Patient A for the OMMP at that time, and asked Voter Power to refund his money. (Test. of Patient A, Licensee).

14. After returning home that evening, Patient A's wife answered a phone call from Patient B, who informed her that his medical records from Voter Power had Patient A's name and contact information at the top, explaining how he knew to call Patient A's home. Patient A talked to Patient B, verified the story, and decided to go back down to Voter Power the next morning to find out how the records had been mixed up. When Patient A went back to Voter Power the next day, he wanted to talk to Licensee, but Licensee refused to talk to him. Voter Power staff sent Patient A home without answering his questions. (Test. of Patient A).

15. After Patient A returned home, he received another call from Voter Power and was told that he was being certified for the OMMP, and to come back to the clinic. When Patient A returned to the clinic, he was given further paperwork to fill out. At that point, the director of Voter Power realized that Patient A's documents contained Patient B's medical information. She grabbed the paperwork out of Patient A's hands and shredded it. Patient A again asked if he could speak with Licensee, but was refused. (Test. of Patient A).

16. On January 27, 2008, Patient A sought treatment from Darryl George, DO, to be evaluated for certification for the OMMP card. Dr. George examined Patient A, certified him for

[4] SOAP is an acronym for "Symptoms (or Subjective), Objective, Assessment, and Plan.

the OMMP, and then wrote a letter to the Board to report Patient A's experiences with Licensee and the Voter Power clinic. (Ex. A16). The letter was written approximately one week after Patient A filed his complaint with the Board. (Ex. A1).

17. After the Board received the complaint from Patient A and the letter from Dr. George, it opened an investigation of Licensee. The initial letters to Licensee were mistakenly sent to him at the Voter Power address rather than at his Portland office address. (Test. of Drum). Licensee responded:

> My name is Dr. Eric Dover. I am a Family Physician. 80% of my work is obligated to a clinical practice where I see patients at a reduced rate who are either uninsured or have high deductibles associated with their insurance policies. The other 20% of my work time is spent helping an organization called Voter Power where I work as an independent contractor. Here I evaluate patients regarding their qualifications for a Medical Marijuana Card. I take this situation very seriously. I would not be involved with this if I did not feel it was beneficial to patients. The readily available medical literature substantiates marijuana's benefits.
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> [Patient A] was seen by myself at Voter Power. [He] came there seeking a medical marijuana card for gout. I don't know if he indicated that in his letter to the Board? [He] supposedly stated that I gave him back the wrong records. This would be impossible.

(Ex. A2).

18. Based upon Patient A's complaint, which included the mixed up documents between Patients A and B, the Board's investigator determined that Licensee was incorrect about the possibility of a records mixup and that the matter should be forwarded to the Medical Director to see if further action was needed. (Ex. A3). The Director asked the investigator to request more files from Licensee, and Licensee responded to that request on October 1, 2008. After reluctantly agreeing to provide additional files, Licensee stated:

> After reviewing the Investigating Committee's backgrounds, I don't feel comfortable with their knowledge regarding the treatment of gout. Nor do I feel comfortable with their knowledge of medical marijuana and the treatment of chronic pain or other medical problems. I do know that none of these members treat chronic pain and that two of them are involved in specialties that leave legions of chronic pain sufferers in their wake.

(Ex. A4 at 2).

19. At the Board's request, Family Practice physician James Calvert MD reviewed Licensee's charts from his Portland office and from Voter Power. Included among the files were the records of Patients A, B, C, D and E, all from Voter Power clinics. In all five cases, Dr. Calvert concluded that the physical examinations and histories were superficial, and the medical

decision-making did not meet the standard of care. (Ex. A5). Dr. Calvert has worked as an independent contractor in clinics before, and certifies some of his patients to receive medical marijuana under the OMMP. He has a special relationship with HIV patients, and has certified several of them to receive medical marijuana under the OMMP. (Test. of Calvert).

20. Dr. Calvert reviewed Patient A's records and concluded that the x-rays requested by Licensee showed lucencies consistent with gout. He noted that Patient A's records were confused with Patient B's records ("an unfortunate but an understandable error"), and was critical of the assessment done by Licensee in the cases.[5] Dr. Calvert wrote:

> The physical exams contain no detail and the medical histories are overly brief. There is no evidence in either case of medical decision making regarding the risks and benefits of use of marijuana or any rationale as to why the certification might make sense in their cases. * * * It seems to me that when Dr. Dover indicates that he had no evidence [that Patient A] had gout when he did in fact have that evidence, and that he did a physical examination on a patient when according to the patient he did not, and then when he made an error in his record keeping he denied doing so rather than trying to figure out what went wrong, his care is characterized by gross negligence.

(Ex. A5 at 3).

21. Dr. Calvert reviewed Licensee's records concerning Patient C and ultimately agreed with Licensee's recertification decision. However, he noted that C's records also contained evidence of "significant psychiatric disease," including PTSD, depression, suicidal ideations and gestures, and a history of polysubstance abuse. Concluding that Patient C's case was "extremely complicated, with numerous co-morbidities," Dr. Calvert noted that:

> The medical decision-making is substantially below the standard of care for any physician seeing such a complicated patient.

(*Id.*).

22. Dr. Calvert reviewed Licensee's records concerning Patient D. He concluded that Licensee's analysis was superficial, with medical decision-making not well documented. He did not consider the records to be up to a professional standard. (*Id.* at 4).

23. Dr. Calvert reviewed Licensee's records concerning Patient E. He agreed with Licensee's diagnosis of MS, but concluded:

> The evaluation performed by Dr. Dover is superficial, mostly using preprinted forms that simply require a + mark or a circle to document the physical. His diagnosis of MS is confirmed[.]

[5] The confusion in the records leads to documents with Patient A's personal information and Patient B's medical information, so both patients are involved.

Dr. Calvert's written comments summarized the problems he found in all five cases. (*Id.*).

24. On June 4, 2009, Licensee was interviewed by the Board's Investigative Committee. Included on the committee was Gary LeClair, MD. (Ex. A6 at 2). Licensee insisted, at hearing, that the doctor's name was "St. Clair." (Test. of Licensee).

25. As part of the initial notice in the case, the Board required Licensee to attend an evaluation with CPEP within 90 days. On December 3, 2009, Licensee sent a letter refusing to attend:

> I will not be attending the CPEP evaluation. This is not because I feel I have any deficits as a physician, in fact it is quite the contrary. I personally feel I'm probably one of the best doctors you actually have in this state. No, the reason I won't attend is because I feel that it is money down the toilet. Why would I spend $10,000 plus for this program and $30,000 to $50,000 plus for a lawyer for your "hearing" when I have a strong feeling your minds are already made up in my situation. If I thought I had a snowballs chance in hell that all the money I would spend would make a difference then I would go for it, but from the Medical Boards actions and statements it's obvious it won't.
>
> Why do I feel this way? **First, you have broken my confidentiality on three separate occasions,** but this doesn't seem to matter. If I broke a patient's confidentiality once, let alone three times, you all would have me on the ropes, but for you it doesn't seem to matter whose confidentiality is broken nor how. We'll eventually find out if it does or doesn't matter.
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> **Second, my lawyer * * * has made three separate requests for medical records related to your allegations of me regarding my encounter with [Patient A], yet nothing has been sent nor have you even acknowledged these requests with a letter.** Dr. St. Claire tried to cancel the Investigative Committees questioning of me some 5 months ago because I had not received the records. The committee decided to continue. They then read from a computer screen a statement supposedly from another physician's note stated that [Patient A] stated that I had counseled him on a concealed weapons permit at our encounter. This is ludicrous. I have never seen a copy of that supposed physicians chart note. They asked numerous questions about my encounter with [Patient A]. **I had not seen his records for 11/2 years and still haven't.** When I last saw them was the day he took off with his, another individual's and the non profit's records. Yet, I'm supposed to answer questions about a situation that has a tremendous effect upon my and thousands of others lives. **Why should I continue with this absurd process when I can't get records regarding it? That is why I will not continue your process until all information you have is divulged to me. Is this the way democracy works in Oregon?**
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> This only touches the surface of why I mistrust your governmental body. This is why I will not throw away financial resources that are extremely important to my

family and me at this juncture. Now my families near term financial situation will be dependent upon decisions made by a prejudiced and misinformed group of individuals. You don't think I know this is political? I am in trouble with the Medical Board because I was willing to sign a statement for individuals that stated that medical marijuana may be beneficial for their medical condition. My signature means nothing more or less. I was willing to do this for patients because they have the **State Right** to obtain this important medication and their doctors are either prejudiced against it, ignorant of it, are afraid to sign to statement or are not allowed by the institutions they work for to sign it. It used to be the physicians could say that they were afraid of the Feds if they signed the Physician's Statement. Bush did nothing to any physician in any state who signed it and Obama has stated that the Feds will state hands off. **So now the only governmental agency to fear is you – the Oregon Medical Board.**

* * * * *

At this point, the best light I see the Medical Board in is that you are incompetent. At worst I see you as corrupt, running this government body with your own political agenda. What I have seen so far is a "witch hunt." What I expect in the future is a kangaroo court followed by a lynch mob if I continued down the road you have set in place for me. Why waste my time, energy and money on that losing hand? Now, I am no longer playing defense. I am now on offense. Nobody is going to get away with smearing my name in the community and undermining my family's economic future when I have done nothing wrong. In fact I have done everything right. Get ready for this to go very public because you actually work for the public. They need to find out how you are undermining their rights in this State.

* * * * *

(Ex. A8; emphasis in original). The Board sent documents to Licensee during the 90 day period in which he could have complied with the request for an evaluation at CPEP, but Licensee did not comply with the order after receiving the documents. (Test. of Licensee).

26. Alisa Wall was an employee of Voter Power at the time when Patient A and B were there in January 2008. Wall testified that she saw Patient A write his name on the form after he had seen Licensee. Wall then testified she did not see Patient A write his name on the form after he had seen Licensee. (Test. of Wall).

27. In preparation for the hearing, Licensee sent written requests on his medical office letterhead to several pharmacies in Southern Oregon, asking for a list of medications that Patient A purchased. (Ex. L1-L22). Licensee did not ask for permission from Patient A before seeking those records. (Test. of Licensee).

28. Patient A received prescriptions for allopurinol and colchicine from Walgreens Pharmacy in Medford on December 12, 2007. (Ex. A19). He took two allopurinol tablets but

had a reaction to the medication and stopped taking it. (Test. of Patient A). In the bottle of allopurinol brought by Patient A to the hearing, there were 28 of 30 tablets remaining. (Count by Attorney Loney).

CONCLUSIONS OF LAW

1. Licensee engaged in one or more acts of unprofessional or dishonorable conduct, thereby violating ORS 677.190(1)(a);

2. Licensee engaged in gross or repeated negligence in the practice of medicine, thereby violating ORS 677.190(13);[6]

3. Licensee violated a Board order by refusing to be evaluated at The Center for Personalized Education for Physicians (CPEP), thereby violating ORS 677.190(17).

4. The appropriate sanctions in this case are set forth below.

OPINION

The Board alleges several acts of unprofessional conduct and gross negligence in Licensee's treatment of five patients at the Voter Power clinic. In addition, the Board contends that Licensee violated a Board order by refusing to be evaluated at CPEP. All of the charges against Licensee arise from ORS 677.190, which states in part:

> **Grounds for suspending, revoking or refusing to grant license, registration or certification; alternative medicine not unprofessional conduct.** The Oregon Medical Board may refuse to grant, or may suspend or revoke a license to practice for any of the following reasons:
>
> (1)(a) Unprofessional or dishonorable conduct.
>
> * * * * *
>
> (13) Gross negligence or repeated negligence in the practice of medicine or podiatry.
>
> * * * * *
>
> (17) Willfully violating any provision of this chapter or any rule adopted by the board, board order, or failing to comply with a board request pursuant to ORS 677.320.

A different statute contains the definition of unprofessional or dishonorable conduct:

[6] The oral amendments involved the statutes in Issues 2 and 3.

(4) "Unprofessional or dishonorable conduct" means *conduct unbecoming a person licensed to practice medicine* or podiatry, or detrimental to the best interests of the public, and includes:

(a) Any conduct or practice contrary to recognized standards of ethics of the medical or podiatric profession or any conduct or practice which does or might constitute a danger to the health or safety of a patient or the public or *any conduct, practice or condition which does or might adversely affect a physician's or podiatric physician and surgeon's ability safely and skillfully to practice medicine or podiatry*[.]

ORS 677.188 (emphasis added).

As the proponent of the position that Licensee has violated the rules noticed above, the Board has the burden of presenting evidence in support of its position. ORS 183.450(2). The Board must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987). In this case, the Board has carried its burden.

Procedural Matters

Before addressing the merits of the case, several procedural matters that were raised during and before the hearing must be addressed. Those matters include: 1) allegations of bias or prejudice; 2) the motion for a protective order; 3) a motion to strike/dismiss a portion of the case; and 4) how much weight to give hearsay evidence. In addition, I will address Licensee's argument that Dr. Calvert was not an appropriate peer reviewer in the case, as well as the credibility of witnesses.

Allegations of Bias or Prejudice.[7] It is important at the outset to identify, as the Board did in closing argument, what this case is *not* about. Licensee worked as an independent contractor for Voter Power, and certified patients for the OMMP. He argued in his testimony and in his correspondence that the Board's real reason for attempting to discipline him stemmed from his belief that medical marijuana was a legal and underutilized medication.

Under Licensee's theory, he is "one of the best doctors you actually have in this state," and a "compassionate, well informed physician," but the Board is a "lynch mob" who is out to "hang" him because of his involvement with certifying patients for the OMMP. (Ex. A8). However, leaving aside Licensee's considerations of his own prowess, the record does not support that the Board is prejudiced against doctors involved in certifying patients for the OMMP.

[7] Although not stated in so many words, I interpret Licensee's belief that the Board is pursuing this case because of his involvement with the OMMP as an allegation of prejudice or bias.

Every one of the experts involved in the case was familiar with, and actually certified patients for, the OMMP. Licensee did so through the Voter Power clinic and, presumably, in his private practice in Portland. Dr. George, the physician who later treated Patient A, and may have encouraged Patient A to file the complaint with the Board, certified Patient A for OMMP. Dr. Calvert, the family practitioner who reviewed Licensee's records and testified as an expert for the Board, also certifies patients for OMMP, including several certifications among HIV patients, a group for which he has a special affinity.

Even the five cases relied upon in the Board's allegations against Licensee show that certification for OMMP is not the issue. In four cases, Licensee certified the patient for OMMP and in one case he refused to certify the patient.

In short, this case is not about whether physicians should certify patients for medical marijuana, nor is it a vendetta against Licensee for his involvement with the program. Licensee has failed to show any bias or prejudice on the Board's part.

Motion for Protective Order. As noted above, the Board sought a Protective Order in the case and Licensee objected to its issuance, claiming there was no authority for such an order. A prehearing conference was held on August 30, 2010, to address the arguments. Before the conference, the Board filed a reply to Licensee's argument, including copies of a Craigslist "blog" discussing the Board's complaint against Licensee and releasing information about the patients whose records are part of the Board's allegations against Licensee.

Based upon ORS 676.175(4), which I concluded Licensee (or his designee) was violating,[8] I signed the Protective Order on August 30, 2010. (Doc. P17).[9]

Motion to Strike 3.1.b of the complaint. During the hearing, Licensee moved to dismiss or strike a section of the complaint concerning the physical examination and chart notes of Patient A. Licensee contends that there is no actual documentation of Patient A's visit to Voter Power, because the findings on his forms are actually the physical findings of Patient B. Consequently, he argues, Dr. Calvert never evaluated the Voter Power chart for Patient A, making his opinion (that Licensee violated the standard of care in A's case) without foundation.

The Board countered by listing several pieces of evidence that show what occurred when Licensee met with Patient A, and contended there is no basis to strike the complaint when there is evidence on both sides. I took Licensee's motion under advisement.

The lack of actual documentation of what Licensee wrote on Patient A's forms (other than the ones incorrectly containing B's information) presents a problem of evidence that will be addressed in greater detail below. It is not a basis, in my opinion, for a procedural dismissal of

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[8] Although Licensee argued that there was no proof he was the source of the Craigslist blog, the content and the occasional use of the personal pronoun "I" convinced me that he was the source. Licensee's comment in Exhibit A8 that the case was about to go "very public" strengthens my belief.

[9] Licensee argued at hearing that the order of pleading documents makes it appear that I had his objections to the Protective Order (dated August 30) at the time I signed the Protective Order. Licensee correctly notes that his objections to the form of the order were received after I had signed the order.

the charge. The evidence, or lack of evidence, will be weighed accordingly, but the motion is denied.

Hearsay Evidence. Licensee objected to evidence presented by Investigator Jay Drum, concerning his phone conversation with Patient B, and objected to Patient A's testimony about his wife's telephone conversation with Patient B. The Board responded that hearsay is admissible in administrative hearings. I allowed the testimony into the record with the understanding that I would apply the court's standards for evaluating that evidence under *Reguero v. Teacher Standards and Practices,* 312 Or 402, 417-21 (1991). In *Reguero,* the court looked at several factors when evaluating what weight to give to hearsay evidence:

> "[T]he alternative to relying on hearsay evidence; the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy; the state of the supporting or opposing evidence, if any; the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements; and the consequences of the decision either way."

312 Or at 418. I will apply those standards to the hearsay objections made by Licensee.

Patient A's wife. Patient A testified that his wife received a phone call from Patient B, who was calling because Patient A's personal information was on Patient B's medical documents. Patient A's wife did not testify but was present and willing to testify, if necessary. Licensee decided not to cross-examine her. I give full weight to Patient A's testimony about his wife's phone conversation, which is elsewhere established in the record.

The other declarant, Patient B, was not present but his reported comment (A's name and number were on B's medical records) is equally supported by the presence of those documents in the record. There is no reason to disregard the testimony of Patient A (about the conversation between his wife and Patient B), or to give it lesser weight.

Drum's conversation with Patient B. Drum testified about his phone conversation with Patient B, when Patient B explained the mix-up in the records. Again, there is other evidence showing Patient A's name and Patient B's physical findings on the same document. The testimony is corroborated in the record and is not so important that Licensee's rights are at risk by its introduction into evidence. The hearsay objections were overruled, and full weight will be given to the evidence.

Peer Review Qualifications. Licensee contends that Dr. Calvert, the expert retained by the Board, was not an appropriate peer reviewer to offer an opinion on the standard of care. Licensee offers arguments in support of this contention, but no evidence.

Licensee contends that there are many doctors who perform independent contractor duties in medical marijuana clinics in Oregon and in other states. He contends, relying on *Spray v. Board of Medical Examiners,* 50 Or App 311 (1981), that only a physician with the exact same experience as Licensee would be qualified to testify on the standard of care.

I disagree. Under Licensee's analysis, only a physician working as an independent contractor in a medical marijuana clinic would have the proper experience to comment on Licensee's practices. The court in *Spray*, the case upon which Licensee relies, presents the reasons why Licensee's argument must fail in this case.

Although the Petitioner in *Spray* used what the court called a "machine gun attack" on the Board in that case, raising many issues, the court's conclusion on two of the issues guide my analysis in this case:

> *We begin our analysis with a self-evident proposition: What is inappropriate or unnecessary medical treatment will vary from case to case.* * * * Only expert testimony elicited on a case by case basis can determine whether the treatment in a particular case was inappropriate and/or unnecessary. *We think it follows that the use of expert testimony to determine the standards of treatment that would be adhered to by the members of the medical community in any given case is implicit in the statutory standard before us.*

50 Or App at 318 (emphasis added). The first point is clear: whether a physician violates the standard of care is going to be decided on a case-by-case basis.

The quotation also alludes to the second point of guidance from *Spray*—that evidence of the standard of care in the medical community is established through the use of expert testimony.

Citing *Spray*, Licensee wants to narrowly construe what "medical community" means, to include only those physicians who work as independent contractors in medical marijuana clinics. However, the *Spray* court stated:

> It is to be determined through the testimony of qualified physicians as to just what is the norm of treatment in the medical community in the particular case and whether the course of treatment actually followed deviates from the norm to the extent that the physician involved may be said to have used "inappropriate or unnecessary treatment."

Id., at 319. It stands to reason, therefore, that nature of the medical community is also an issue to be established by expert testimony.

Therefore, if Licensee contends that there is a special "community" of independent contractor physicians who work in medical marijuana clinics certifying patients for OMMP (or similar programs in other states), he was required to bring one or more of those experts to the hearing to explain what the standard of care should be. However, Licensee brought no expert witnesses to the hearing.

Whether the Board's expert is a "qualified physician" is a question of fact to be determined from the evidence of the case. Here, where Dr. Calvert has the same specialty as Licensee (family practice), practices in a Southern Oregon community similar to where Licensee did his Voter Power examinations (Klamath Falls to Medford), and has experience as an

independent contractor and at certifying patients for the OMMP, I conclude that he is sufficiently within the "medical community" and is able to comment as an expert on Licensee's practices.

In fact, because the issues in the case actually concern the completeness of Licensee's physical examinations and chart notes, this case could probably have been reviewed by physicians of many specialties and sub-specialties.

Credibility. A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

> A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

The determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002).

Alisa Wall. Licensee presented Ms. Wall's testimony in what was clearly an effort to discredit Patient A's testimony. Wall, formerly a Voter Power employee, testified that Patient A was causing a scene at the Voter Power clinic; that he grabbed documents that were not his; and that he then (after the examination was completed) wrote his name on the documents.

Ms. Wall's testimony was internally inconsistent. At one point, to emphasize how sure she was that Patient A had caused the scene, she testified that she watched him sign and fill out the documents after the examination. Later, however, she admitted that she had *not* seen him write on the documents at any time.

This testimony, and the fact that it was offered by Licensee, is troubling. Assuming for the moment that Wall was correct—that Patient A caused a scene, grabbed someone else's documents and wrote his name on them—the act would make no sense. In addition, questions for Licensee and the clinic would only increase. If Patient A was able to write his name and address on Patient B's documents at that late date, it would mean that Licensee was performing his medical examination of the patients without even their names in the file.

While it is unclear whether Ms. Wall was fabricating her testimony to support Licensee or to try to protect the Voter Power clinic, I conclude that her testimony is unreliable and I give it no weight.

Licensee. Another dispute in the evidence arises when comparing Licensee's testimony with Patient A's testimony. Licensee testified that he would spend approximately 30 minutes with each OMMP certification patient at Voter Power. Patient A testified that he spent eight minutes with Licensee on the first visit, then five minutes more once he returned from the x-ray clinic. Licensee testified that he performed a physical examination; Patient A testified Licensee

did not perform a physical examination. Licensee testified that Patient A only had a couple of documents, none showing gout. Patient A testified that he had several pages of documents that he gave to Licensee.

Interestingly, Licensee commented on the documents he received from Patient A in a letter written in 2008. He stated:

> He had *2 or 3 documented cases of acute gouty attacks* that he went to Urgent Cares for treatment from what I recall from the records he brought in[.]

(Ex. A4 at 1). This letter impeaches his later testimony that there was insufficient evidence of gout, and at the very least calls his memory into question.

The evidence establishes that Licensee talked with Patient A about his gout condition, as shown by A's visit to the x-ray clinic. However, there is nothing in the record to show that an actual physical examination took place. The only records with Patient A's name on them contain the physical history of Patient B, and the references on the physical examination page are, as Dr. Calvert said, cryptic and superficial.

In this case, I accept Patient A's testimony over Licensee's, primarily because Patient A only had one meeting with the doctor but Licensee had multiple meetings with other patients at the clinic. Simply put, given Licensee's written comments in 2008 and the non-existence of any contemporaneous chart notes with any detail, I do not trust Licensee's memory.

Licensee and Wall went to great lengths to impeach Patient A. However, Patient A testified directly and consistently. For instance, he testified he had taken two allopurinol pills and then stopped taking them. Licensee did not believe Patient A, and went so far as to violate Patient A's privacy rights by sending requests for Patient A's personal pharmacy records. At hearing, Patient A presented his bottle of allopurinol—with two pills missing. Patient A was credible. Licensee's testimony, on the other hand, was not.

On the Merits

As noted, the Board's allegations focus on alleged violations of the standard of care—as both unprofessional conduct and repeated negligence—and Licensee's refusal to comply with the Board's order concerning the CPEP evaluation. The Board relies upon Dr. Calvert's review and analysis in support of the standard of care issues.

It was clear from the testimony that Licensee and the Board have differing views of what the relationship is when Licensee would see a patient at the Voter Power clinic. The Board and Dr. Calvert see a doctor-patient relationship. Licensee claims he is not the patient's physician, and that he is just an independent contractor certifying that the person coming into the clinic has one of the qualifying conditions for the OMMP. I agree with the Board.

Licensee acknowledged that he was chosen for the clinic contract because he is a physician. A medical doctor or an osteopath can certify the persons coming in to the clinic. A

lawyer or a nurse or an architect cannot. Licensee is able to do the certification process precisely because he is a medical doctor—and when he is doing that process, he is a medical doctor and the person he is seeing is his patient. Licensee owed the same standard of care to that patient that he did to the one coming into his clinic in Portland.

Violations of the Standard of Care. The Board alleges that Licensee's records for the patients seen at the Voter Power clinic do not meet the standard of care expected of a physician, relying primarily upon the report and testimony of Dr. Calvert. Dr. Calvert testified that the "plus minus" system used on the forms at Voter Power was insufficient to explain to any reader what exactly Licensee found in his examination of the patient. Dr. Calvert referred to Licensee's notes as "superficial," "cursory," and "cryptic" in places.[10] He testified that the standard of care was the same for an independent contractor physician as it would be for any other physician.

Dr. Calvert places little emphasis upon the clearest example of a mistake—the fact that Patient A's personal information and Patient B's medical information ended up on the same documents. However, that episode (and the conflict in testimony between Patient A and Licensee about it) actually illustrates why record-keeping is important, and why a physician must be thorough in describing the actions being taken. In essence, there is nothing in the documents to show that Licensee actually saw Patient A, much less examined him.

Although the records of five different patients were reviewed by the Board as the basis for this action, the allegations are very similar in all five cases. In all five, Licensee used preprinted physical examination forms, SOAP forms, and "Documentation of Review" forms. On all of those documents, says Dr. Calvert, Licensee's reported information failed to meet the standard of care.

On the physical exam form, Licensee's comments consisted of circles around plus signs and cryptic and unexplained comments. For instance, he wrote "weakness" in the neurological section of Patient D's form, but did not explain the nature or the extent of the weakness. With terms such as "benign" and "NA," Dr. Calvert was unable to tell what actual findings Licensee had made. Two of the patients' forms had eleven circles; one had 22 circles around plus signs.

On one SOAP form, Licensee examined Patient B but used the paperwork signed by Patient A. The record indicates that Licensee performed a physical examination on Patient B without verifying that the information at the top of the page (Patient A's information) was accurate. I accept Patient A's testimony that he had filled the paperwork out before the examination, but even if I did not accept that testimony it would mean that Licensee performed a physical examination without *any* identifying information at the top of the page.

Licensee argues that Dr. Calvert's conclusion of unprofessional conduct in Patient A's case is incorrect because the record does not contain his actual forms. Although Licensee's argument is buttressed only by the apparent destruction of Patient A's application and documents

[10] Licensee demanded that Dr. Calvert define his terms superficial, cursory and cryptic, arguing that those words did not appear in any rule or statute. However, Dr. Calvert's analysis is not a *legal* analysis but one of the standard of care. Dr. Calvert's definitions of the terms were roughly the same as a dictionary would provide, and were entirely proper to use in his description of the patient notes.

by Voter Power, I conclude it would not be appropriate to find unprofessional conduct for the same documents for Patients A and B. Therefore, I find the Board has established four (rather than five) counts of unprofessional conduct arising from the way Licensee recorded his findings of the patients.

However, as to repeated negligence I find that the Board has established all five counts. In addition to the record-keeping inadequacies, which were both unprofessional and negligent, it is very appropriate to find two counts of negligence in the mistakes made with the files of Patient A and B. Patient B's forms have Patient A's personal data on the top, and Patient A's forms have Patient B's medical data on the bottom.

Willful violation of a Board order. Licensee was ordered to attend an evaluation at CPEP, and he was given a period of time within which to set the appointment and be evaluated. On December 9, 2009, Licensee wrote to the Board and refused to attend the evaluation. In the letter, he claimed to be one of the best doctors in the State of Oregon and accused the Board of being out to "lynch" him. Licensee threatened the Board, and expressed his anger at the Board's failure to provide records that he was seeking. (Ex. A8).

Leaving aside the content of the letter for a moment, the Board has proved that Licensee violated its order by refusing to attend the CPEP evaluation. Licensee violated ORS 677.190(17). The question that remains is whether any of Licensee's purported reasons for not attending would excuse his actions.

Licensee's primary argument at hearing for not attending the CPEP evaluation was that the Board had failed to provide medical documents to Licensee or his attorney. Licensee argued that he did not have to obey the Board's order if the Board had not provided the documents. However, the record fails to show how that delay would excuse Licensee from following the Board's order in this case.[11] Licensee cites no rule, statute, or case law in support of his decision to defy the Board.

More importantly, the content of the refusal letter shows that there were other reasons for his refusal:

- Licensee believed that the money spent to be evaluated and attend CPEP would be "money down the toilet" because the Board already had its mind made up about his professional fate;
- Licensee believed his confidentiality had been violated by the Board because the Board erroneously sent letters to him, "personal and confidential," at the Voter Power address rather than at his clinic;
- Licensee believed the order was "political." "You don't think I know this is political? I am in trouble with the Medical Board because I was willing to sign a statement for individuals that stated that medical marijuana may be beneficial for their medical condition."

[11] The Board correctly points out, and Licensee admits, that he received the documents within the 90 days he had to schedule the CPEP evaluation. He could have changed his mind after receiving the documents, but did not.

- Licensee considered the Board to be "incompetent" at best, and "corrupt" at worst, engaging in a "witch hunt" followed by a "kangaroo court" followed by a "lynch mob."

(Ex. A8).

None of Licensee's reasons, even if true, justify his refusal to attend the evaluation that the Board requested. The Board has established that Licensee violated ORS 677.190(17).

The Sanctions

As previously noted, the Board seeks to revoke Licensee's medical license, to impose a $10,000 civil penalty, and to require him to pay the costs of the litigation. The Board's authority to impose sanctions is found in ORS 677.205, which states in part:

> **Grounds for discipline; action by board; penalties.** (1) The Oregon Medical Board may discipline as provided in this section any person licensed, registered or certified under this chapter who has:
>
> (a) Admitted the facts of a complaint filed in accordance with ORS 677.200 (1) alleging facts which establish that such person is in violation of one or more of the grounds for suspension or revocation of a license as set forth in ORS 677.190;
>
> (b) *Been found to be in violation of one or more of the grounds for disciplinary action* of a licensee as set forth in this chapter;
>
> * * * * *
>
> (2) In disciplining a licensee as authorized by subsection (1) of this section, *the board may use any or all of the following methods*:
>
> (a) Suspend judgment.
>
> (b) Place the licensee on probation.
>
> (c) Suspend the license.
>
> (d) Revoke the license.
>
> (e) Place limitations on the license.
>
> (f) Take such other disciplinary action as the board in its discretion finds proper, including assessment of the costs of the disciplinary proceedings as a civil penalty or assessment of a civil penalty not to exceed $10,000, or both.
>
> * * * * *

(4) If the board places any licensee on probation as set forth in subsection (2)(b) of this section, the board may determine, and may at any time modify, the conditions of the probation and may include among them any reasonable condition for the purpose of protection of the public or for the purpose of the rehabilitation of the probationer, or both. Upon expiration of the term of probation, further proceedings shall be abated if the licensee has complied with the terms of the probation.

(5) If a license issued under this chapter is suspended, the holder of the license may not practice during the term of suspension. Upon the expiration of the term of suspension, the license shall be reinstated by the board if the conditions for which the license was suspended no longer exist.

(Emphasis added). Every one of the sanctions the Board seeks to impose is within its authority under this statute.

Proposed Sanctions. The Board's assessment of a civil penalty and the requirement to pay costs of the hearing and investigation are reasonable and appropriate, and are accepted without further comment. My comments are reserved for the Board's desire to revoke Licensee's license.

The Board has the authority to revoke his license based upon the violations it has proved in this case. However, I propose a different set of sanctions that contain the possibility of restoring Licensee to the practice of medicine but allow the Board to revoke his license if he fails to make appropriate changes.

The record shows that Licensee failed to meet the standard of care in the way he performed and charted the examinations at the Voter Power clinic. However, the record also shows that no such problems arose from his practice in Portland, leading me to conclude that he is capable of meeting the standard of care if willing to do so. The Board should discipline Licensee for his violations, but should consider a plan to allow him to keep his license.

Quite frankly, certain factors that might lead the Board to reject my proposal (discussed in detail below) were evident throughout the record of this case. Licensee is arrogant, he is angry at the Board, and he tends to see conspiracies where none have been shown to exist. Licensee can see no wrong in himself, and cannot admit he is wrong. (His testimony insisting that Dr. LeClair's name was really St. Claire, despite evidence to the contrary, is a minor example of this trait. Another is his belief that a record mix-up at the clinic would be "impossible."). Thus, the question exists whether Licensee would be willing to abide by the proposal even if the Board agreed. Nevertheless, I propose the following:

- That Licensee's license be revoked, but that revocation be held in abeyance;
- That Licensee be suspended from the practice of medicine for two years, to begin from the date of a Final Order in this case;

- That Licensee be required to undergo an evaluation at CPEP and to follow all requirements set by that program, at his own cost, and that the two year suspension be extended, if necessary, until he has so complied;
- That Licensee agree to any further educational or practice-oriented training that the Board requires;
- That Licensee pay a civil penalty of $10,000; and
- That Licensee pay the costs of the investigation and hearing, in an amount to be determined in the Final Order of this proceeding;
- That the revocation be imposed without further need for hearing if Licensee fails to follow through on any part of this discipline, and that it be withdrawn following successful completion of the discipline.

This proposal gives Licensee the opportunity to rebuild his relationship with the Board and to gain and apply the skills necessary to meet the standard of care. It would place the onus of his professional future on him. If he refuses to follow through, the revocation could be re-imposed. If he is successful, his patients and his family would benefit from his success.

ORDER

I propose the Oregon Medical Board issue the following order:

That Licensee engaged in unprofessional conduct and repeated negligence, and that he violated a Board order by refusing the CPEP evaluation. Licensee should be disciplined in the manner set forth above.

Rick Barber
Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS TO PROPOSED ORDER

This proposed order is the Administrative Law Judge's recommendation to the Oregon Medical Board (OMB). If you disagree with any part of this recommendation, you may make written objections, called "exceptions," to the recommendation and present written argument in support of your exceptions. Exceptions and argument must be filed with the Oregon Medical Board not later than 10 days following the date of service of the proposed order at the following address: Oregon Medical Board, 1500 SW First St., Suite 620, Portland, OR 97201.

a. The exceptions shall be confined to factual and legal issues which are essential to the ultimate and just determination of the proceeding, and shall be based only on grounds that:

1) A necessary finding of fact is omitted, erroneous, or unsupported by the preponderance of the evidence in the record;

2) A necessary legal conclusion is omitted or is contrary to law or the BME's rules or written policies;

3) Prejudicial procedural error occurred.

b. The exceptions shall be numbered and shall specify the disputed findings, opinions or conclusions, identified by page and line number of the proposed order. The nature of the suggested error shall be specified and the alternative or corrective language provided.

c. If you file timely written exceptions with the BME, the BME may also consider oral argument on exceptions. If you wish to present oral argument to the BME, you must specifically request oral argument in your written exceptions. The BME will consider oral argument only on those points raised in the written exceptions.

FINAL ORDER

After considering all the evidence, the proposed order and timely filed exceptions, if any, the OMB will issue the final order in this case. This final order may adopt the proposed order prepared by the Administrative Law Judge as the final order or modify the proposed order and issue the modified order as the final order (*see* OAR 137-003-0655).

APPEAL

If you wish to appeal the final order, you must file a petition for review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* ORS 183.480 et seq.

CERTIFICATE OF MAILING

On November 3, 2010, I mailed the foregoing Proposed Order issued on this date in OAH Case No. 1001461.

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Certified Mail Receipt #7009 2250 0001 6584 7097

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