STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE, Petitioner, vs. LOWELL ANTHONY ADKINS, M.D., Respondent.	)	Case No. 11-0052PL

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on August 15-16, 2011, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Shirley L. Bates, Esquire
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For Respondent: Jeffrey A Shaffer, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a physician, failed to adhere to the applicable level of care in prescribing controlled substances; failed to follow standards

for the use of controlled substances for the treatment of pain; and failed to keep legible medical records justifying the course of a patient's treatment; if so, whether Petitioner should impose discipline on Respondent's medical license within the applicable penalty guidelines or take some other action.

PRELIMINARY STATEMENT

On January 5, 2011, under a Motion to Re-Open Case, Petitioner Department of Health requested that the Division of Administrative Hearings ("DOAH") conduct a hearing to determine whether Respondent Lowell Anthony Adkins, M.D., had committed the offenses charged in an Amended Administrative Complaint, which was dated September 24, 2010. The Department alleged that Dr. Adkins had prescribed narcotic analgesics to a young man in violation of the applicable standard of care, and contrary to the practice standards governing the use of controlled substances to control pain. In addition, the Department charged Dr. Adkins with having failed to maintain legible medical records justifying the course of the patient's treatment.

An Administrative Law Judge was assigned to preside in the matter, and he scheduled the final hearing for April 19 and 20, 2011. On the Department's motion, the final hearing was continued, to August 15 and 16, 2011. The final hearing took place on those dates, as scheduled, with both parties present and represented by counsel.

The following persons testified at the hearing: J.D. and his mother T.R.; Marc R. Gerber, M.D.; Robert J. Friedman, M.D.; and Dr. Adkins. Joint Exhibits 1 through 4 and 8 through 16 were received in evidence without objection.

The final hearing transcript, comprising three volumes, was filed on September 1, 2011. A joint motion requesting that the deadline for filing proposed recommended orders be enlarged to October 7, 2011, was granted. Each party timely filed a Proposed Recommended Order, and these have been carefully considered.

FINDINGS OF FACT

1. At all times relevant to this case, Respondent Lowell Anthony Adkins, M.D., was licensed to practice medicine in the state of Florida. Dr. Adkins is a family practitioner who has a clinical interest in pain management.

2. Petitioner Department of Health (the "Department") has regulatory jurisdiction over licensed physicians such as Dr. Adkins. In particular, the Department is authorized to file and prosecute an administrative complaint against a physician, as it has done in this instance, when a panel of the Board of Medicine has found that probable cause exists to suspect that the physician has committed a disciplinable offense.

3. Here, the Department alleges that Dr. Adkins committed three such offenses——namely, failure to adhere to the applicable

level of care in prescribing controlled substances; failure to follow standards for the use of controlled substances for the treatment of pain; and failure to keep legible medical records justifying the course of treatment——in connection with the care he provided to J.D., a young adult (early twenties) whom Dr. Adkins saw on about a half-dozen occasions between September 2007 and March 2008.

4. The events giving rise to this dispute began on September 19, 2007, when J.D. was first seen by Dr. Adkins. J.D. presented with complaints of chronic pain in both knees, which were swollen, and a history of juvenile arthritis. Until recently before this visit, J.D. had been treated for several months by a Dr. Gelinas, who had prescribed Vicodin to alleviate the pain. J.D. told Dr. Adkins that the Vicodin had made him nauseous and failed to control his pain. He also reported that nonsteroidal anti-inflammatory drugs ("NSAIDs") caused him to have nosebleeds.

5. Dr. Adkins took J.D.'s medical history and performed a physical examination. J.D. characterized the degree of pain he was experiencing as severe (grading it as 8 on a scale of 1 to 10 with 10 being the worst), which was an exaggeration intended to deceive the doctor (although he did in fact have some pain). As part of his ruse, which fooled Dr. Adkins, J.D. purposely faked the range of motion tests to give the impression that the

condition of his knees was worse than it actually was. J.D. was not candid with Dr. Adkins in providing information about his symptoms because——unknown to Dr. Adkins at the time, who reasonably assumed that his patient's statements for purposes of medical diagnosis or treatment were reliable[1]——J.D. was addicted to narcotic pain medication and wanted a prescription to feed this addiction.

6. Dr. Adkins wrote a prescription authorizing J.D. to obtain 60 tablets of Oxycodone having a dosage of 15 milligrams ("mg") apiece. Because Oxycodone is a narcotic pain reliever, Dr. Adkins required J.D. to sign a Medication Contract, which enumerated J.D.'s responsibilities regarding the proper use of the controlled substances he was being prescribed. The terms and conditions of the contract included the following:

> 1. The physicians and staff of Lowell Adkins M.D.P.A. will be the ONLY physicians that will be writing for these medications and I will not seek these medications from other physicians, INCLUDING EMERGENCY ROOM PHYSICIANS.
>
> 2. . . . I will take the medications as prescribed and not take more on a daily basis unless approved by my physician.

7. At the initial visit on September 19, 2007, J.D. also signed a release authorizing Dr. Gelinas to provide copies of J.D.'s medical records to Dr. Adkins, which was done.
Dr. Gelinas's handwritten chart is largely illegible, but it

shows that J.D. carried a diagnosis of arthralgia (joint pain) based on the problems he was having with his knees. In addition, the records included the radiologist's report regarding an MRI of J.D.'s right knee, which had been examined on July 31, 2007. The MRI report gives as J.D.'s diagnosis: "History of juvenile rheumatoid arthritis since age 12. Complaints of pain, crepitus, locking, and instability." The study did not discover any significant damage or disease, except for a "tiny incipient Baker's cyst."

8. For the next half-year, J.D. saw Dr. Adkins on a monthly basis. J.D. continued to complain of chronic pain and repeatedly reported that the pain medication Dr. Adkins was prescribing was not adequately controlling his pain. For much of this time, J.D. held two jobs, working full-time as a small-engine mechanic until being laid off in December 2007, and moonlighting in a sporting goods store, which became his only source of income after the loss of his regular job. These jobs required J.D. to be physically active, and Dr. Adkins periodically increased the dosage of the pain medication he was prescribing, so that J.D. could function at work. Dr. Adkins ordered X-rays of J.D.'s knees as well, but J.D. declined to get them.

9. While under Dr. Adkins's care, J.D. suffered at least two traumatic injuries requiring treatment for acute pain. In

October 2007, J.D. injured his shoulder at work and went to an urgent care center for treatment. The doctor prescribed Oxycodone to control the pain associated with this injury. J.D. told Dr. Adkins that he had hurt his shoulder but did not let Dr. Adkins know that he had obtained a prescription for Oxycodone from another physician, in violation of the Medication Contract he had entered into.

10. On or about December 29, 2007, J.D. suffered a serious and painful injury to his finger at work. For this he went to the emergency room, accompanied by his mother who told the ER doctor that J.D. was addicted to, and abusing, narcotic pain medication. Despite the objection of J.D.'s mother, the ER doctor prescribed Oxycodone for pain. Thereafter, J.D. visited a workers' compensation physician for treatment of this same injury, and he was again prescribed Oxycodone. J.D. informed Dr. Adkins of the injury to his finger but not these prescriptions, which represented additional breaches of the Medication Contract.[2]

11. A couple of months before the trip to the ER described above, J.D.'s mother ("T.R.") had attempted to stop Dr. Adkins from prescribing Oxycodone to J.D., raising similar concerns about J.D.'s alleged drug abuse. On November 26, 2007, she had dropped by Dr. Adkins's office to report to him that J.D. was crushing and snorting his pain medication. Dr. Adkins was not

immediately available, so T.R. left her business card and requested that Dr. Adkins call her, which he did later that evening. Upon hearing T.R.'s concerns, Dr. Adkins requested that she arrange to accompany J.D. on his next office visit, so that the three of them could discuss the situation together.

12. T.R. did show up for J.D.'s next doctor's appointment, on December 14, 2007. J.D., however, had not invited her, and he became very angry when, upon arriving at Dr. Adkins's office, he found his mother already waiting there. The two argued loudly in the reception area, causing a scene. J.D. refused to allow his mother to come into the examination room with him and Dr. Adkins. Consequently, Dr. Adkins met separately with J.D. and T.R.

13. T.R. told Dr. Adkins that J.D. was on probation as a result of drug-related charges and that he was participating in a Drug Court program, but she apparently provided no paperwork to substantiate these assertions. Dr. Adkins had not been aware that J.D. might be in trouble with the law, and he was somewhat surprised by the news because ordinarily the authorities contact him when a patient of his has been arrested for unlawful possession or use of prescription medication. T.R. further claimed that J.D. had been snorting his medication, although she had not actually seen him do so.

14. T.R.'s concerns upset Dr. Adkins, and when he met with J.D. alone, he lectured him on the need for strict compliance with the Medication Contract. Dr. Adkins told J.D. that he would be discharged from Dr. Adkins's practice if J.D. ever snorted the medication again. Dr. Adkins ordered a urine toxicology screen and required J.D. to be tested. J.D. complied, and the drug screen was negative for illegal substances. Dr. Adkins agreed to continue treating J.D. with narcotic analgesics.

15. When J.D. lost his full-time job in December 2007, he lost his health insurance. After that, J.D. paid out-of-pocket for his doctor's appointments. Following a visit on March 19, 2008, however, J.D. stopped seeing Dr. Adkins.

16. In summary, Dr. Adkins prescribed Oxycodone to J.D. in the following dosages and amounts, on the dates shown below:

Date	Dosage	Amount
09/19/07	15 mg	60 tablets
10/19/07	30 mg	90 tablets
11/16/07	30 mg	120 tablets
12/14/07	30 mg	120 tablets
01/14/08	30 mg	150 tablets
02/22/08	30 mg	150 tablets
03/19/08	30 mg	180 tablets

17. The Department's expert witness, Marc R. Gerber, M.D., testified at hearing that the foregoing amounts and dosages of opioids, which Dr. Adkins prescribed to J.D., did not violate

the standard of care. T. 165. The undersigned finds this to be true, based on Dr. Gerber's testimony.

18. In its Amended Administrative Complaint, the Department alleged that Dr. Adkins had practiced below the requisite level of care in prescribing narcotic pain medication to J.D.——and thus violated section 458.326(3), Florida Statutes[3]——in one or more of the following ways:

> a) By failing to diagnose Patient J.D. with intractable pain; and/or
>
> b) By failing to refer Patient J.D. to a Psychiatric-addiction specialist, especially after he was informed by Patient's mother that he was, allegedly, an addict; and/or
>
> c) By failing to refer Patient J.D. to an orthopedic specialist to have the pain in his knee evaluated; and/or
>
> d) By prescribing excessive narcotics for Patient J.D.'s alleged pain condition prior to exploring the effectiveness of other NSAIDs; and/or
>
> e) By failing to refer Patient J.D. to a rheumatoid arthritis specialist and/or by failing to verify the complaints of pain from juvenile rheumatoid arthritis with blood tests.

19. Although Dr. Gerber clearly expressed concerns about Dr. Adkins's treatment of J.D., his testimony ultimately failed to establish, unequivocally, that any of the acts or omissions enumerated above constituted an unambiguous violation of the applicable standard of care. As mentioned, Dr. Gerber

specifically refuted the allegation that Dr. Adkins had prescribed "excessive narcotics," as charged in subparagraph d). He further testified that, in his opinion, Dr. Adkins had not violated section 458.326, <u>see</u> T. 164——a blanket statement that casts doubt on <u>all</u> of the standard-of-care violations that the Department has alleged.

20. Dr. Gerber testified that he "had no problem with respect to how J.D. presented to Dr. Adkins and the treatment Dr. Adkins had rendered to J.D. through December." T. 161. This testimony, given by the Department's expert, precludes the undersigned from finding without hesitation that the acts and omissions described in subparagraphs a), c), and e) above violated the standard of care.

21. As for subparagraph b), Dr. Gerber stopped well short of stating that the standard of care required Dr. Adkins to refer J.D. to an addiction specialist. To the contrary, he expressed the opinion that, at the time (i.e., 2007-2008), the decision whether to make such a referral was left to the physician's discretion. T. 124, 153. The most Dr. Gerber could say on this point was that, in his view, one "hundred percent of pain specialist [sic] would . . . <u>possibly</u> refer out to an addiction specialist." T. 155 (emphasis added). This testimony is insufficiently convincing to establish clearly that

Dr. Adkins's "failure" to refer J.D. to an addiction specialist violated the standard of care.

22. The essence of Dr. Gerber's opinion on the standard of care was captured in the following remarks, which he made on cross-examination in the course of explaining his opinion that Dr. Adkins had not violated section 458.326:

> We wouldn't even be here if there wasn't the issue [that is, J.D.'s addiction] brought to his [Dr. Adkins's] attention [by T.R.] and the negative urine screen. . . . [T]here are not major issues early on and I never said that there were. I had concerns but this whole case and the whole issue, standard of care, revolves around what was not done when significant issues [relating to J.D.'s addiction] were made available. That's really what I feel comfortable giving my opinion on is what happened after November."

T. 163. Dr. Gerber then identified three steps that, in his opinion, Dr. Adkins should have taken "after November" to satisfy the standard of care: (1) order a urine toxicology test; (2) talk with the patient and his mother; and (3) "possibly change the medication regimen." T. 167-68. Although the Department did not allege that Dr. Adkins had violated the standard of care by failing to take any of these measures, the evidence shows that Dr. Adkins did, in fact, perform the first two. The third is plainly too indefinite on its face to qualify as a standard of care.

23. The Department's other expert, James F. Schaus, M.D., who testified via videotaped deposition, was, like Dr. Gerber, unable to unambiguously declare that Dr. Adkins's treatment of J.D. had fallen below the applicable standard of care. On this subject he hedged:

> I found some problems in the case that could or could not be deviations from the standard of care, but it certainly raised some concerns on my part. . . .
>
> * * *
>
> Standard of care is to me a black and white, you know, question, and there's many shades of gray, like any case. And in this case, there are shades of gray when it comes to standard of care. As I said earlier, I found a few things that could be potential deficiencies in his care that may or may not come to the level of a deviation of the standard of care. <u>And I'm not prepared to say definitively that he did deviate from the standard of care.</u> But I do identify those concerns, those various concerns.

J.F.S. 11, 13 (emphasis added). Dr. Schaus's testimony is insufficient to support a finding, based on clear and convincing evidence, that Dr. Adkins's treatment of J.D. fell below the applicable level of care, skill, and treatment.

24. The remaining charges against Dr. Adkins are based on alleged deficiencies in the medical record of J.D.'s treatment. In Count Two of the Amended Administrative Complaint, the Department has charged Dr. Adkins with violating, in one or more

of the following ways, the administrative rule which sets forth standards for prescribing narcotic pain medications:

> a) By prescribing controlled substances for pain control, to wit: oxycodone and carisprodol, to Patient J.D. without documenting the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases or conditions, the effect of the pain on physical and psychological function, and any history of substance abuse; and/or
>
> b) By prescribing controlled substances for pain control, to wit: oxycodone and carisprodol, to Patient J.D. without documenting one or more recognized medical indications for the use of a controlled substance.

25. As will be discussed below, the provisions of the rule that articulated standards for documenting a pain-management patient's evaluation, which are the provisions that Dr. Adkins is alleged to have violated, were aspirational rather than prescriptive at the time of the alleged violations, enumerating matters that a physician should include in the medical record as opposed to mandating what must be done. Nevertheless, even though the chart that Dr. Adkins prepared contemporaneously was written in his own hand and is difficult to decipher, the undersigned finds upon review of the medical record that Dr. Adkins substantially followed the rule's guidelines.

26. To be sure, Dr. Adkins's handwriting is hard to read. This, coupled with Dr. Adkins's use of abbreviations and other

types of informal shorthand when making his notes, prevents the undersigned from forming a full understanding of everything in the medical record. The undersigned can make out enough words, however, to appreciate that Dr. Adkins documented the nature of J.D.'s pain, current and past treatment for pain, and various diseases or conditions that had caused, or were causing, pain, e.g., swollen knees, a rotator cuff injury, and the avulsion of J.D.'s finger. The Department has failed to prove, with clear and convincing evidence, that Dr. Adkins's documentation of his evaluation of J.D. fell short of the guidelines.

27. In Count Three of the Amended Administrative Complaint, the Department has alleged that Dr. Adkins violated the statute governing medical recordkeeping in one or more of the following ways:

> a) By failing to keep legible medical records documenting the reasons for prescribing oxycodone and carisprodal for Patient J.D.; and/or
>
> b) By failing to keep medical records which legibly recorded the patient history, examination results, test results, and drugs prescribed for Patient J.D.; and/or
>
> c) By failing to keep medical records which justify the course of treatment for Patient J.D.

28. Having reviewed the medical record, the undersigned finds the evidence insufficient to prove, clearly and convincingly, that Dr. Adkins failed to justify the course of

treatment for Patient J.D. The chart is barely legible, however, and in this regard Dr. Adkins has committed a disciplinable offense; the chart itself is clear and convincing proof of guilt.

CONCLUSIONS OF LAW

29. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes (2010).

30. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Florida Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Dr. Adkins by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

31. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

32. The Department is prosecuting Dr. Adkins under section 458.331, Florida Statutes (2007), which provided in pertinent part as follows:

> (1) The following acts shall constitute grounds for . . . disciplinary action[:]
>
> * * *
>
> (m) Failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and

professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

* * *

(nn) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

33. Under the authority of section 458.331(1)(nn), the Department charged Dr. Adkins, in Count One, with violating section 458.326; and, in Count Two, with violating Florida Administrative Code Rule 64B8-9.013(3)(a)(2003).

34. In the years 2007-2008, section 458.326 provided as follows:

(1) For the purposes of this section, the term "intractable pain" means pain for which, in the generally accepted course of medical practice, the cause cannot be removed and otherwise treated.
(2) Intractable pain must be diagnosed by a physician licensed under this chapter and qualified by experience to render such diagnosis.
(3) Notwithstanding any other provision of law, a physician may prescribe or administer any controlled substance under Schedules II-V, as provided for in s. 893.03, to a person for the treatment of intractable pain, provided the physician does so in accordance with that level of care, skill, and treatment recognized by a reasonably prudent physician under similar conditions and circumstances.

> (4) Nothing in this section shall be construed to condone, authorize, or approve mercy killing or euthanasia, and no treatment authorized by this section may be used for such purpose.

35. Based on the findings of fact set forth above, including the findings regarding the sufficiency and weight of the evidence, it is concluded that Dr. Adkins was not shown to have violated section 458.326.

36. At the time of the events at issue, rule 64B8-9.013(3)(a) provided as follows:

> Evaluation of the Patient. A complete medical history and physical examination must be conducted and documented in the medical record. The medical record should document the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases or conditions, the effect of the pain on physical and psychological function, and history of substance abuse. The medical record also should document the presence of one or more recognized medical indications for the use of a controlled substance.

(Emphasis added.) The undersigned notes that the Board of Medicine amended this rule in 2010, changing the words "should" (which are underlined in the quotation above) to "shall." See Fla. Admin. Code R. 64B8-9.013(3)(a)(2010).

37. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of

Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011)(statues imposing a penalty must never be extended by construction).

38. The provisions of the rule that Dr. Adkins is alleged to have violated appear to be precatory rather than prescriptive in nature. This is because the word "should" usually prefaces an expectation instead of a command, at least in formal speech. In stark contrast, the amended rule, which took effect after the events in question and thus is inapplicable here, clearly and unambiguously mandates actions that the physician "shall" take with regard to documentation. Consequently, whereas a failure to obey the current version of the rule clearly would be a disciplinable offense, it is not obvious that a doctor can be punished for failing to do that which, under the earlier version, he merely "should" have done. Given that the rule must be construed in favor of the licensee, the undersigned seriously

doubts whether the allegations in Count Two of the Amended Administrative Complaint, even if proved, would constitute a disciplinable offense.

39. It is not necessary to decide this case on that basis, however, because the allegations were not proved. Based on the findings of fact set forth above, including the findings regarding the sufficiency and weight of the evidence, it is concluded that Dr. Adkins was not shown to have violated rule 64B8-9.013(3)(a).

40. Finally, there is the question of whether Dr. Adkins kept adequate medical records. Rule 64B8-9.003 (2006) is instructive, and it provides in pertinent part as follows:

> (2) A licensed physician shall maintain patient medical records in English, in a legible manner and with sufficient detail to clearly demonstrate why the course of treatment was undertaken.
>
> (3) The medical record shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient.

41. Based on the findings of fact set forth above, including the findings regarding the sufficiency and weight of the evidence, it is concluded that Dr. Adkins was shown to have created a medical record that is not capable of being fully understood by anyone other than Dr. Adkins. His making of an illegible chart amounts to a disciplinable offense.

42. The Board of Medicine imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B8-8.001 (2007). The range of penalties for a first offense involving section 458.331(1)(m) is set forth in rule 64B8-8.001(2) as follows:

> From a reprimand to denial or two (2) years suspension followed by probation, and an administrative fine from $1,000.00 to $10,000.00.

43. Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances are to be taken into account:

> (3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:
> (a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;
> (b) Legal status at the time of the offense: no restraints, or legal constraints;

> (c) The number of counts or separate offenses established;
> (d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
> (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
> (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
> (g) The involvement in any violation of Section 458.331, F.S., of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure.
> (h) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.
> (i) Any other relevant mitigating factors.

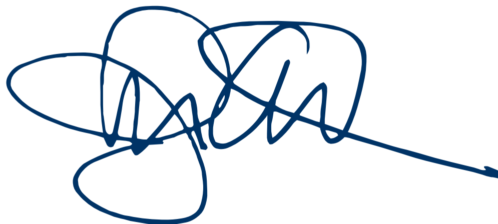
44. Subparagraphs (a), (b), (d), (e), and (f), set forth relevant mitigating factors in this case. This is because Dr. Adkins's illegible medical record did not expose J.D. to injury; Dr. Adkins was not practicing under any legal constraints; this is Dr. Adkins's first offense——his disciplinary history is otherwise clear; and Dr. Adkins did not realize any untoward pecuniary benefit or gain in connection with the offense.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final

order finding Dr. Adkins not guilty of the charges set forth in the Counts One and Two of the Amended Administrative Complaint; finding Dr. Adkins guilty of the charge set forth in Count Three, namely failing to keep legible medical records, an offense defined in section 458.331(1)(m); and imposing the following penalties: reprimand, administrative fine in the amount of $1,000, and obligation to complete the Medical Records course.

DONE AND ENTERED this 26th day of October, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 2011.

ENDNOTES

[1]/ The Department argues that Dr. Adkins should have been highly skeptical about the truth of J.D.'s statements because, it contends (with insufficient evidential support), young men pose

a greater risk than other types of patients of abusing or diverting narcotic analgesics. The undersigned credits Dr. Adkins's testimony that he had believed J.D. was being honest in describing his experience of pain and finds, as a matter of fact, that it was reasonable for Dr. Adkins to do so. Although the undersigned has resolved this particular dispute of fact in Dr. Adkins's favor based upon the evidence presented, it is interesting to note that the law regards declarations such as J.D.'s to Dr. Adkins as inherently reliable——and thus admissible for the truth of the matters asserted under an exception to the hearsay rule. See § 90.803(4), Fla. Stat. Professor Ehrhardt explains the rationale behind this exception as follows: "When a person consults a doctor for the purpose of obtaining treatment, he or she has a strong motivation to be truthful because of the desire for effective treatment. The diagnosis or treatment depends in part on what the patient tells the doctor." C. Ehrhardt, Florida Evidence § 803.4, 860 (2009 Edition). A standard of care requiring doctors automatically to distrust some patients' declarations (namely those of young men) that would be admissible over a hearsay objection in a civil or criminal proceeding would be somewhat anomalous.

[2]/ J.D. was, as well, regularly seeing another physician (besides Dr. Adkins and the acute care doctors) from whom he obtained prescriptions for pain medication in contravention of the Medication Contract. He did not tell Dr. Adkins about this, either.

[3]/ This statute is quoted in the text at paragraph 34, infra.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.