

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 11-0546PL
)
ALBERT ZAMEK, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on June 8, 2011, by video teleconference at sites in Tallahassee and Port St. Lucie, Florida.

APPEARANCES

For Petitioner: Shirley L. Bates, Esquire
Sharmin R. Hibbert, Esquire
Department of Health
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Tallahassee, Florida 32399-3265

For Respondent: Mark Bakay, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the allegations contained in the Administrative Complaint, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On December 27, 2006, Petitioner, Department of Health, Board of Medicine, filed an Administrative Complaint against Respondent, Dr. Albert Zamek. Respondent timely requested a formal hearing to contest the allegations, and, on September 5, 2007, the matter was referred to the Division of Administrative Hearings ("DOAH") and assigned DOAH Case No. 07-4014PL.

On November 7, 2007, the parties filed a Motion to Relinquish Jurisdiction on the basis that a settlement had been reached. On the same date, Administrative Law Judge Larry J. Sartin entered an Order Closing File, with leave to re-open the case in the event the Board of Medicine declined to approve the settlement. The Board of Medicine ultimately rejected the settlement agreement on November 30, 2007.

On October 29, 2010, Petitioner filed a two-count Second Amended Administrative Complaint against Respondent, which alleged that he violated section 458.331(1)(k), Florida Statutes, and section 458.331(1)(m), Florida Statutes. Pursuant to a motion filed by Respondent, this matter was re-opened on February 1, 2011, and assigned DOAH Case No. 11-0546PL.

As noted above, the final hearing in this matter was held before the undersigned on June 8, 2011. During the final hearing, Petitioner presented the testimony of Dr. David Nehme; J.D.; and Respondent, Dr. Albert Zamek. Petitioner introduced three exhibits into evidence, numbered 1-3. Respondent testified on his own behalf and requested leave to submit a late-filed exhibit, which the undersigned granted. On June 9, 2011, Respondent submitted a four-page exhibit that has been admitted as Respondent's Exhibit 1.

The final hearing Transcript was filed with DOAH on July 1, 2011. On the same date, both parties filed proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged misconduct.

FINDINGS OF FACT

A. The Parties

1. Respondent, Albert Zamek, M.D. is, and was at all times material to this matter, a physician licensed to practice medicine in Florida, having been issued license number ME62525 on or about July 15, 1992.

2. Petitioner Department of Health has regulatory jurisdiction over licensed physicians such as Dr. Zamek. In

particular, Petitioner is authorized to file and prosecute an administrative complaint, as it has done in this instance, when a panel of the Board of Medicine has found probable cause exists to suspect that the physician has committed one or more disciplinable offenses.

B. The Events of February 2005

3. The events giving rise to this dispute began on Saturday, February 19, 2005, when J.D.—Petitioner's principal witness in this proceeding—received treatment for kidney stones at an emergency room in Port St. Lucie, Florida. At the conclusion of her emergency room visit, J.D. was referred to Drs. John and David Nehme, both of whom specialize in urology, for a follow-up appointment.

4. On February 21, 2005, J.D. spoke with a member of Dr. David Nehme's staff and received an appointment for February 25. J.D. was further advised during the conversation that Dr. Nehme practiced from two locations—one in Port St. Lucie and the other in Stuart—and that J.D.'s appointment would be at the Stuart office.

5. On the day of her appointment, J.D. mistakenly reported to Dr. Nehme's Port St. Lucie office location. At that time, Dr. Nehme was renting a portion of his St. Lucie office to Dr. Zamek.

6. As J.D. approached the office, she observed a sign posted on the front door that bore the names of Drs. David and John Nehme. The sign also read, underneath the Nehmes' names, "Executive Health Care, Albert Zamek."

7. At the time of her appointment on February 25, 2005, J.D. had never met Dr. David Nehme, Dr. John Nehme, or Dr. Zamek.

8. Upon entering the office, J.D. noticed that no receptionist or other clerical person was present. After J.D. announced her presence, an unknown male wearing casual attire—identified by J.D. during the final hearing in this matter as Dr. Zamek—emerged and apologized for the absence of office staff.

9. At that point, J.D. advised that she was a new patient and that she had an appointment to see Dr. David Nehme. No formal introduction was made, and Respondent simply handed J.D. a set of intake forms and asked her to fill them out.

10. After completing the forms, J.D. followed Dr. Zamek (who was now wearing a lab coat, but with no name embroidered on it) to an examination room. Dr. Zamek proceeded to ask J.D. what had happened, how she was feeling, and if she was experiencing any pain. While answering Dr. Zamek's questions, J.D. mentioned that blood had been visible in her urine during the emergency room visit and that she "would like it checked."

Dr. Zamek replied that he was unable to do so because of the absence of support staff that day.

11. As the examination progressed, Dr. Zamek took J.D.'s blood pressure, listened to her breathing, and checked her lower back for pain. While Dr. Zamek did so, J.D. asked him—due to the lack of an introduction and any form of identification on the lab coat—if he was a doctor or a physician's assistant. Dr. Zamek responded that he was a doctor, at which time J.D. inquired if he was John or David—an obvious reference to Drs. John and David Nehme. At that point, Dr. Zamek (whose first name is Albert) falsely stated, "John," which then prompted J.D. to ask if David was his father. Once again, Dr. Zamek falsely replied, "David is my uncle."

12. After the examination was complete, J.D. asked if she could schedule a follow-up appointment so that her urine could be tested. Dr. Zamek, who does not specialize in urology, told J.D. to return on Tuesday, March 1, 2011, but did not provide her with an appointment card.

13. Upon returning home, J.D. examined her notes and discovered that she had mistakenly reported to Dr. David Nehme's office in Port St. Lucie, instead of his office location in Stuart where her appointment was scheduled. J.D. ultimately discovered that the February 25, 2005, examination had been performed by Dr. Zamek.

14. Dr. Zamek did not create any medical records in connection with his February 25, 2005, examination of J.D.

C. Ultimate Findings of Fact

15. Petitioner has established by clear and convincing evidence that during his February 25, 2005, examination of J.D.,¹ Dr. Zamek misled J.D. regarding his identity, and therefore made deceptive and/or untrue representations in or relating to the practice of medicine, in violation of section 458.331(1)(k).

16. Petitioner has also established by clear and convincing evidence that Dr. Zamek failed to create any medical records with respect to the February 25, 2005, examination of J.D., and is therefore in violation of section 458.331(1)(m).

CONCLUSIONS OF LAW

A. Jurisdiction

17. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. The Burden and Standard of Proof

18. This is a disciplinary proceeding in which Petitioner seeks to suspend Respondent's license. Accordingly, Petitioner must prove the allegations in the Second Amended Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc.,

670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); § 458.331(3), Fla. Stat.

19. Clear and convincing evidence:

[R]equires 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. Petitioner's Authority to Impose Discipline;
The Charges Against Respondent

20. Section 458.331(2), Florida Statutes, authorizes the Board of Medicine to impose penalties ranging from the issuance of a letter of concern to revocation of a physician's license to practice medicine in Florida if a physician commits one or more acts specified therein.

21. In its Second Amended Administrative Complaint, Petitioner alleges that Dr. Zamek has committed two acts proscribed by section 458.331(1). Specifically, in Count I, Petitioner alleges that Dr. Zamek violated section 458.331(1)(k), which prohibits a physician from making deceptive, untrue, or fraudulent representations in the practice of medicine. In Count II, Petitioner contends that Dr. Zamek failed to create medical records in connection with his

examination of J.D., and therefore violated section 458.331(1) (m) .

22. Whether Dr. Zamek violated these statutes is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995) .

D. Count I: Section 458.331(1) (k)

23. As noted above, Petitioner alleges in Count I of the Second Administrative Complaint that Respondent violated section 458.331(1) (k), which provides:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(k) Making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine.

24. In turn, "practice of medicine" is defined as "the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition." § 458.305(3), Fla. Stat.

25. Although Dr. Zamek argues that the evidence was insufficient to demonstrate that he conducted the examination of J.D.—a position the undersigned rejects—Dr. Zamek contends in the alternative that even if a false name was given, such an act

was not in or related to the practice of medicine. In support of this argument, Dr. Zamek cites Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990), in which the court held that false representations made by a physician while applying for staff privileges at various hospitals did not violate the statutory prohibition against "making deceptive, untrue, or fraudulent representations in the practice of medicine." For two reasons, however, the undersigned concludes that Elmariah is not controlling in the instant matter. First, in contrast to Elmariah, Dr. Zamek's false statements were made during a physical examination of J.D., during which Dr. Zamek took a patient history, asked diagnostic questions, checked J.D.'s blood pressure, and physically touched J.D. to determine if she felt any pain near her kidneys. Second, Dr. Zamek fails to recognize that Elmariah was applying the 1983 version of section 458.331(1)(k)—at that time designated as section 458.331(1)(l)—which was later modified in 1986 to expand the range of punishable misconduct. In particular, the statute was amended to add the following language, which is underlined for emphasis: "Making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine." § 458.331(1)(k), Fla. Stat. Indeed, the court in Elmariah suggested that that result

could have been different had the amended version of the statute been applicable:

Although we would not presume to interpret a statute not presently before us, we note that the added language (emphasized) should give pause to those who might assume that actions similar to appellant's remain unpunishable.

Id. at 165, n.1.

26. Based on the findings of fact contained herein, Petitioner has adduced clear and convincing evidence that Dr. Zamek is guilty of making deceptive and/or untrue statements in or relating to the practice or medicine. In particular, the evidence demonstrates that Dr. Zamek, during his February 25, 2005, physical examination of J.D., falsely identified himself as "John" and further stated, again falsely, that David was "his uncle." Such statements led J.D. to erroneously believe that she was being examined by Dr. John Nehme, a physician who practiced with Dr. David Nehme. As such, Dr. Zamek is guilty of Count I of the Second Amended Administrative Complaint.²

E. Count II: Section 458.331(1) (m)

27. Next, Petitioner alleges that Dr. Zamek failed to create any medical records in connection with his examination of J.D., and therefore violated section 458.331(1) (m), which provides that a physician is subject to discipline for:

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.

28. In his Proposed Recommended Order, Dr. Zamek argues that because Petitioner has alleged in the Second Amended Administrative Complaint that he is merely guilty of failing to create records—as opposed to failing to retain possession of records—he cannot be found in violation of section 458.331(1)(m).

29. In support of this argument, Dr. Zamek cites Trevisani v. Department of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005), which involved a situation in which a physician was charged with a violation of section 458.331(1)(m) on the basis that he failed to create certain medical records. Although the Department of Health argued that the administrative complaint could also be read to encompass an alternative theory that the physician failed to retain possession of the documents, the ALJ rejected that interpretation and confined the Department to the argument that the physician had failed to create certain records. Id. at

1108. During the final hearing, the ALJ accepted the physician's testimony that he created the records, notwithstanding the fact that the records could not be located. Based upon that finding, the ALJ dismissed the count charging the physician with violating section 458.331(1) (m). Id. The Board of Medicine subsequently rejected the ALJ's finding in that regard and concluded that the physician was charged not only with the failure to create certain medical records, but also with failure to retain possession of those documents. Id. at 1108-09. As such, the Board found the physician guilty of violating 458.331(1) (m) and imposed discipline. On appeal, however, the First District reversed, holding:

A physician may not be disciplined for an offense not charged in the complaint. In this case, the complaint charged Appellant with failing to properly document certain records and failing to create or complete certain documents. The complaint did make reference to section 458.331(1) (m), Florida Statutes, but it did not contain any specific factual allegations that Appellant failed to retain possession of the medical records. The single reference to the statute without supporting factual allegations was not sufficient to place Appellant on notice of the charges against him Accordingly, we reverse the final order with directions to dismiss the complaint against Appellant.

Id. at 1109.

30. Contrary to Dr. Zamek's suggestion, Trevisani does not stand for the proposition that a violation of section

458.331(1)(m) is limited to situations where a physician fails to retain possession of records that were previously created. Instead, Trevisani simply holds that if the Department of Health confines itself to a theory of failure to create records (based upon the manner in which the administrative complaint is drafted), a physician cannot be found guilty of violating section 458.331(1)(m) where the ALJ finds, based upon competent evidence, that the physician in fact created the records.

31. Unlike Trevisani, Petitioner in the instant matter is not attempting to advance an alternative theory not alleged in the Second Amended Administrative Complaint. On the contrary, Petitioner has plainly alleged in the charging document—and argues in its Proposed Recommended Order—that Dr. Zamek violated section 458.331(1)(m) based upon a failure to create records. Further, in contrast to Trevisani, this is not a situation where the undersigned has made a finding that the records were created. Indeed, Dr. Zamek admitted during his direct examination by counsel for Petitioner—testimony that the undersigned has accepted—that no records were created.

32. Based upon the findings of fact herein, Petitioner has demonstrated by clear and convincing evidence that Dr. Zamek failed to create any medical records in connection with the February 25, 2005, examination of J.D. Accordingly, Dr. Zamek is guilty of violating section 458.331(1)(m). See Dep't of

Health, Bd. of Med. v. Dozier, Case No. 07-1962PL, 2007 Fla. Div. Adm. Hear. LEXIS 519, *27 (Fla. DOAH Sept. 20, 2007) (finding violation of section 458.331(1)(m) where physician "fail[ed] to document an adequate history"); Dep't of Health, Bd. of Med. v. Waters, Case No. 04-0400PL, 2005 Fla. Div. Adm. Hear. LEXIS 1257, *68-70 (Fla. DOAH Aug. 30, 2005) (concluding that physician violated 458.331(1)(m) by failing to create records that appropriately documented physical exams, patient history, and treatment plans).

F. Penalty

33. In determining the appropriate punitive action to recommend in this case, it is necessary to consult the Board of Medicine's disciplinary guidelines, which impose restrictions and limitations on the exercise of the Board's disciplinary authority under section 458.331. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

34. The Board's guidelines for a violation of section 458.331 are enumerated in Florida Administrative Code Rule 64B8-8.001. As it relates to Dr. Zamek's violation of section 458.331(1)(k), rule 64B8-8.001(2)(k) provides for a penalty range of probation to revocation and a fine of \$1,000 to \$10,000. With respect to Dr. Zamek's violation of section 458.331(1)(m), rule 64B8-8.001(2)(m) calls for penalty ranging

from a reprimand up to a two-year suspension followed by probation, as well as a fine of \$1,000 to \$10,000.

35. Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigation circumstances may be taken into account:

- (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.

36. In its Proposed Recommended Order, Petitioner suggests that the appropriate penalty is the issuance of a Letter of Concern, a fine of \$5,000, and a suspension of Respondent's

license "until he has been evaluated by PRN and comes before the board with a recommendation from PRN that he is safe to practice." In addition, Petitioner requests that Respondent be required to attend six hours of continuing medical education in ethics, a recordkeeping course, and pay the costs of prosecution.

37. With two exceptions, the undersigned is in agreement with Petitioner's recommendations. First, the undersigned is unable to reconcile Petitioner's assertion—that Dr. Zamek is presently unfit to practice medicine in the absence of a PRN evaluation—with its decision to wait over three years to refer the matter back to DOAH after the Board of Medicine rejected a settlement agreement between the parties. As such, the undersigned is not inclined to recommend that Dr. Zamek's license be suspended pending a PRN evaluation.

38. Second, with respect to Petitioner's request for the costs of prosecution, even if Petitioner had presented any evidence as to the amount (which it did not), it appears that the issue of costs must be handled by the Board of Medicine. See § 456.072(4), Fla. Stat. ("In addition to any other discipline imposed through final order . . . the board, or the department when there is no board, shall assess costs related to . . . prosecution of the case The board, or the department when there is no board, shall determine the amount of

costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto") (emphasis added).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Board of Medicine:

1. Finding that Respondent violated section 458.331(1)(k), Florida Statutes, as charged in Count I of the Second Amended Administrative Complaint;

2. Finding that Respondent violated section 458.331(1)(m), Florida Statutes, as charged in Count II;

3. Issuing a Letter of Concern;

4. Imposing a fine of \$5,000;

5. Requiring Respondent to attend six hours of continuing medical education in ethics; and

6. Requiring Respondent to attend the course "Quality Medical Record Keeping for Health Care Professionals."

DONE AND ENTERED this 28th day of July, 2011, in
Tallahassee, Leon County, Florida.



EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of July, 2011.

ENDNOTES

¹ The finding that Dr. Zamek examined J.D. on February 25, 2005, is based solely on the testimony of J.D, which the undersigned credits over that of Dr. Zamek's.

² In Department of Health, Board of Medicine v. Cohen, DOAH Case No. 10-3101, 2010 Fla. Div. Adm. Hear. LEXIS 105 (Fla. DOAH Sept. 14, 2010), it was determined that the physician's mere act of checking a person's blood pressure (at the conclusion of which the physician committed a sexual assault upon the patient) constituted the practice of medicine, thereby authorizing the imposition of discipline for the physician's misconduct.

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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.