

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

Petitioner,

Case No. 13-4280PL

vs.

PETER V. CHOY, M.D.,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on January 14 and 15, 2014, in Miami, Florida.

APPEARANCES

For Petitioner: Daniel Hernandez, Esquire
R. Shaffer Claridge, Esquire
Christopher Hudtwalcker, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Amy W. Schrader, Esquire
GrayRobinson, P.A.
301 South Bronough Street, Suite 600
Post Office Box 11189
Tallahassee, Florida 32302-3189

Jay A. Ziskind, Esquire
Jay A. Ziskind, P.A.
3471 Main Highway, No. 517
Miami, Florida 31333

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent: (1) made deceptive, untrue, or fraudulent representations in or related to the practice of medicine; (2) failed to keep appropriate medical records with respect to Patient T.G.; (3) fell below the minimum acceptable standard of care in his treatment of T.G.; (4) misrepresented or concealed a material fact during the course of the disciplinary process; and/or (5) improperly interfered with Petitioner's investigation. If so, it will be necessary to determine whether Petitioner should impose discipline on Respondent's medical license within the applicable penalty guidelines, or take some other action.

PRELIMINARY STATEMENT

On October 31, 2013, Petitioner Department of Health (the "Department") issued a five-count Second Amended Administrative Complaint against Respondent Peter V. Choy, M.D. ("Dr. Choy"). The Department alleged that Dr. Choy had committed medical malpractice in connection with his treatment of T.G., a patient who died in 2010 from complications arising from pancreatic cancer; that he had secretly altered T.G.'s medical records in an effort to fabricate evidence that would bolster his defense against the malpractice charge; that he had failed to maintain medical records justifying the course of T.G.'s treatment; and that he had interfered with the Department's investigation by

concealing or misrepresenting material facts. Dr. Choy denied the charges and timely requested a formal hearing. On November 1, 2013, the Department referred the matter to the Division of Administrative Hearings, where an Administrative Law Judge was assigned to preside in the matter.

The final hearing took place on January 14 and 15, 2014. Both parties were represented by counsel. The Department's witnesses were: Robert Scott Radin, a Department investigator; Dr. Choy's office manager, Cristina Garcia; Patient T.G.'s daughter and son; and Dr. Choy. The Department also presented expert testimony in the form of Dr. Francisco Calimano's deposition. Dr. Choy testified on his own behalf and called Cristina Garcia as his only other witness. In addition, Dr. Choy presented Dr. Luis Caceres's deposition testimony.

Joint Exhibits 1 (with the exception of Bates numbers 789-882) through 15, 18, and 19 were admitted into evidence, as were Respondent's Exhibits 1 through 5 and 7. The record was held open for receipt of telephone records, which had been subpoenaed from XO Communications Services, LLC, evidencing calls to and from Dr. Choy's office between June 18 and June 23, 2008.

The three-volume final hearing transcript was filed on February 3, 2014. Respondent filed the telephone records on March 7, 2014, and on March 11 the parties filed a Joint Post-hearing Stipulation as to their contents. An unopposed motion

requesting that the deadline for filing proposed recommended orders be extended to March 24, 2014, was granted. Both parties timely filed proposed recommended orders, which have been considered.

Unless otherwise indicated, a citation to the Florida Statutes or Florida Administrative Code refers to the version in effect at the time of the event or conduct whose occurrence triggered the statute or rule's operation.

FINDINGS OF FACT

1. At all times relevant to this case, Dr. Choy was licensed to practice medicine in the state of Florida, having been issued license number ME 74815.

2. The Department has regulatory jurisdiction over licensed physicians such as Dr. Choy. 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 has charged Dr. Choy with medical malpractice, which is a disciplinable offense pursuant to section 458.331(1)(t)1, Florida Statutes, both for allegedly failing to inform his patient, T.G., that a CT scan performed in June 2008 revealed the presence of a potentially malignant tumor

in her pancreas, and for failing to refer T.G. to a specialist for further investigation of this finding. The Department alleges, as well, that, after an attorney representing T.G.'s family contacted Dr. Choy following T.G.'s death in 2010, Dr. Choy altered his medical records to make it appear as though he not only had informed T.G., in and after June 2008, that she might have pancreatic cancer, but also had urged her repeatedly to see a specialist. Based on these allegations,^{1/} the Department has charged Dr. Choy with: *one*, making deceptive, untrue, or fraudulent representations in the practice of medicine, an offense under section 458.331(1)(k); *two*, failing to keep legally sufficient medical records in compliance with Florida Administrative Code Rule 64B8-9.003, an offense under section 458.331(1)(m); and, *three*, misrepresenting or concealing material facts during, and improperly interfering with, a disciplinary proceeding, which are separate offenses under sections 458.331(1)(gg) and 458.331(1)(hh), respectively.

4. The events giving rise to this dispute began on May 13, 2008, when Dr. Choy's longtime patient, T.G., presented with complaints of left lower quadrant pain and a change in bowel habits. T.G., who was then 77, had a number of medical conditions for which she had been seeing Dr. Choy, including diabetes, hypertension, depression, heart disease, and arthritis. Reviewing the results of blood work ordered the

previous month, Dr. Choy diagnosed T.G. with anemia and ordered another blood test to determine if the condition persisted. In addition, Dr. Choy ordered a CT scan of T.G.'s abdomen and pelvis.

5. T.G. went to the lab to have blood drawn on May 13. The next day, Dr. Choy received the test results, which showed that T.G. remained anemic. Dr. Choy suspected that T.G. might have colon cancer. He made a note on the lab report that T.G. should be prescribed a medication for her anemia and that she needed to "be referred to a GI specialist for eval[uation]." Following the customary procedure in Dr. Choy's office, an employee called T.G. on May 19 to inform her of these instructions and wrote "5/19 done" at the top of the lab report.

6. T.G. underwent the CT scan of her abdomen and pelvis on June 17, 2008. The radiologist's three-page report was faxed to Dr. Choy on June 19. On the first page of the report, which discusses the abdominal scan, it is stated that "[t]here is a large lobulated malignant tumor mass in the tail of the pancreas" On the next page, the third of four enumerated impressions based on the abdominal CT scan reads: "Large malignant tumor mass tail of the pancreas as described." Also on page 2, following the report of the abdominal procedure, is the interpretation of the pelvic CT scan, which resulted in a finding of diverticulosis but was otherwise negative.

7. Dr. Choy reviewed the report and wrote "ok" on page 1, next to the first impression from the abdominal scan, which was: "Old healed calcified granulomatous disease right lower lobe." On page 2, adjacent to the impressions from the pelvic scan, Dr. Choy wrote the following note:^{2/}

CT PELVIS WITH ORAL CONTRAST ONLY:

INDICATION: Pain.

Continued serial axial CT scan of the pelvis with oral contrast demonstrates no presacral masses. No iliac adenopathy is seen. No inguinal or femoral adenopathy or mass is noted. The bowel shows no obstructive process. No bowel masses are seen. Cecum and terminal ileum are unremarkable in appearance. Sigmoid colon shows scattered diverticula without evidence of any acute process. No genital masses are seen in the pelvis. Uterus is unremarkable. The urinary bladder is smooth and contains no filling defects. No iliac adenopathy is seen. No inguinal or femoral adenopathy or mass is noted. No free air or ascites is seen in the pelvis. Bones show no lytic or blastic destructive lesions.

IMPRESSION:

1. Diverticulosis of the sigmoid colon.
2. Otherwise negative CT scan of the pelvis.

Printed: 06/19/08

Diverticulosis
- High Fiber diet
- No seeds in Food
- Metformin & my
help

Page 2 of 3

Mercy Health System -- 3663 South Miami Avenue -- Miami, Florida 33133 -- (305) 285 - 2131

8. At some point after Dr. Choy wrote the foregoing note, the report was scanned into his office's electronic medical records system. Also, a hard copy of the report of T.G.'s CT scan was placed in a traditional patient chart, as was done with all lab reports that Dr. Choy's office received.

9. On June 19, 2008, someone from Dr. Choy's office called T.G. at 3:34 p.m. and spoke with her (or someone in her home) for nearly five minutes. Dr. Choy testified that he personally placed this call, a claim the Department disputes. The identity

of the caller is immaterial, however, because the main purpose of the call was, most likely, to schedule an appointment for T.G., so that Dr. Choy could go over the recent blood work and CT scan with T.G. in person. T.G. was not told during this phone call about the tumor that had been observed in her pancreas, but she was probably given Dr. Choy's recommendations for managing diverticulosis, as indicated by a handwritten note at the top of page 2 of the CT scan report, which says, "6/19/08 Done."

10. T.G. returned to Dr. Choy's office on June 30, 2008. Unfortunately, there is no reliable contemporaneous record of what Dr. Choy communicated to T.G., if anything, about the finding of a tumor in her pancreas. Dr. Choy testified that he did not use words such as "cancer" or "mass" in front of T.G., both to avoid upsetting her and because he is a "soft person" who "hate[s] to give people bad news." Dr. Choy thinks that he might have told T.G. there was a "spot" on her pancreas (although he is not sure he used that term), and he clearly recalls having advised T.G. to "see a specialist" because—he recalls telling her—although he "didn't know what it was," it "could be bad."

11. The Department disputes that Dr. Choy said even that much. In support of its position that Dr. Choy failed to disclose to T.G. the radiologist's finding of a pancreatic

tumor, the Department focuses on Dr. Choy's electronic medical records, in which—as originally prepared—he made no mention of a pancreatic mass. For example, at the time of T.G.'s June 30, 2008, visit, Dr. Choy wrote that the patient did not have "[a]bdominal [sic] pain," and he typed the following notes regarding his impressions and diagnoses:

ZZ-Dr Peter V Choy; Z-VP EKG; Anemia Iron Deficiency - 2809 repeat Test if no Improvement we will refer pt to GI evaluation;Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019; Hypertensive Heart Disease without HF 402.90; Hypothyroidism-2449; Declining Function-7993; Depression-311; Vertigo-7804

This record, made at or around the time of the June 30, 2008, visit, is silent about the potentially malignant tumor that had recently been seen in T.G.'s pancreas.

12. Dr. Choy testified that his contemporaneous records are not silent as to the pancreatic mass because when he saw T.G. on June 30, 2008, he wrote an additional note on the hard copy of the CT scan report, creating the following:^{3/}

CT PELVIS WITH ORAL CONTRAST ONLY:

INDICATION: Pain.

Continued serial axial CT scan of the pelvis with oral contrast demonstrates no presacral masses. No iliac adenopathy is seen. No inguinal or femoral adenopathy or mass is noted. The bowel shows no obstructive process. No bowel masses are seen. Cecum and terminal ileum are unremarkable in appearance. Sigmoid colon shows scattered diverticula without evidence of any acute process. No genital masses are seen in the pelvis. Uterus is unremarkable. The urinary bladder is smooth and contains no filling defects. No iliac adenopathy is seen. No inguinal or femoral adenopathy or mass is noted. No free air or ascites is seen in the pelvis. Bones show no lytic or blastic destructive lesions.

IMPRESSION:

1. Diverticulosis of the sigmoid colon.
2. Otherwise negative CT scan of the pelvis.

- Possible malignant Tm. Tmf of An.
 - Diverticulosis
 - High Fiber diet
 - No seeds in Food.
 - Metronidazole
 help

Printed: 06/19/08

Page 2 of 3

Mercy Health System ~ 3663 South Miami Avenue ~ Miami, Florida 33133 ~ (305) 285 - 2131

That Dr. Choy inserted the reference to a pancreatic tumor after June 19, 2008, is proved by the existence of the digital copy of the CT scan report—converted via scanner from paper to electronic file that day—which does not contain the reference. Because Dr. Choy did not put a date on the subsequent note, however, his testimony is the only evidence that it was made on June 30, 2008. The Department contends that Dr. Choy's testimony in this regard is not credible. The undersigned agrees with the Department.

13. There are a number of reasons for rejecting Dr. Choy's testimony. To begin, Dr. Choy's account requires one to imagine that, when making his original notes, Dr. Choy jotted down a treatment plan for diverticulosis while simultaneously failing to acknowledge the ominous finding of a pancreatic tumor,

despite being aware of the potentially terminal condition. Further, Dr. Choy would have the undersigned believe that, just as he was soft-pedaling the CT scan results in conversation with T.G., he was writing "malignant tumor" on the report—using the type of words he (credibly) denies uttering in T.G.'s presence. The reference to the pancreatic tumor looks out of place, moreover, in the section of the report discussing the pelvic scan, which did not find the mass, atop the previous notes relating to diverticulosis, which the pelvic scan did reveal. Finally, there is the undisputed fact, which will be discussed in depth below, that Dr. Choy altered many other medical records after questions were raised concerning his treatment of T.G.—and particularly about whether he had told her she might have pancreatic cancer. In sum, the undersigned does not credit the annotated CT scan report as evidence tending to establish that Dr. Choy notified T.G. in June 2008 that there was a suspicious mass in her pancreas.

14. The next time T.G. saw Dr. Choy was September 3, 2008. The entries that he made in the patient's electronic medical record for this visit were, originally, silent about the possibility that T.G. might have cancer of the pancreas. He noted that T.G. was "[d]oing well with no change in clinical status" although she reported "[a]domenal [sic] [p]ain," which she had not complained about on June 30, 2008. Dr. Choy

recorded T.G.'s various diagnoses in the electronic patient chart, making no mention of the pancreatic mass.

15. This pattern was repeated during the several visits which followed, on January 19, 2009; February 11, 2010; and March 31, 2010. Dr. Choy's contemporaneous records of these visits say nothing about T.G.'s pancreatic tumor or his efforts, if any, to follow the condition.

16. When T.G. returned to Dr. Choy's office on June 24, 2010, she complained of abdominal pain and abnormal weight loss. Dr. Choy reviewed T.G.'s blood tests, which indicated that she was again anemic and might have liver disease. Concerned, and having forgotten the 2008 scan, Dr. Choy ordered additional blood tests and a CT scan of T.G.'s abdomen and pelvis.

17. After leaving Dr. Choy's office, T.G. went to the lab, where her blood was collected on June 24. The test results, which were reported on June 28, 2010, showed that her platelets were low, suggesting a blood disorder. For that reason, Dr. Choy referred T.G. to Dr. Luis Villa, a hematologist and oncologist whom T.G. had wanted to see.

18. Dr. Villa saw T.G. on July 1, 2010. In a letter to Dr. Choy that he prepared on the same day, Dr. Villa advised that T.G. "look[ed] great; certainly, younger than her stated age." Dr. Villa believed that laboratory data for T.G. were suggestive of chronic liver disease, and he recommended that

Dr. Choy order additional tests. Dr. Villa informed Dr. Choy that he had "reassured [T.G.] that there is nothing acute here that necessitate[s] immediate attention."

19. On July 7, 2010, T.G. returned to Dr. Choy's office for a follow-up visit. During this visit, Dr. Choy noted Dr. Villa's recommendation and recorded (for the first time) a differential diagnosis of "potential malignancy," to be ruled out. Dr. Choy ordered more tests, including an abdominal CT scan.

20. T.G. underwent a CT scan on July 15, 2010, her second, two years after the previous scan had first detected a pancreatic mass. A report of the results of this CT scan was delivered to Dr. Choy's office on July 16, 2010. The report indicated that T.G. had "a large mass at the level of the pancreatic tail."

21. T.G. had an appointment to see Dr. Choy for a follow-up examination on July 19, 2010. That morning, however, T.G.'s son, being worried about how weak T.G. suddenly had become, took her directly to the hospital, without stopping at Dr. Choy's office. Dr. Choy signed the order to admit T.G. to Mercy Hospital, where she was received on July 19 at 1:11 p.m. carrying a diagnosis of pancreatic cancer with possible metastasis to the liver. Although Dr. Choy did not see T.G. in his office that day, as expected, a record of the upcoming visit

was created in Dr. Choy's electronic medical records system. Somehow, a record of the canceled visit was thereafter transmitted to T.G.'s HMO as if Dr. Choy had seen T.G. in his office as scheduled, making it appear that he had performed an examination which in fact had not occurred.

22. The Department alleges that Dr. Choy submitted a false insurance claim in connection with the canceled appointment. This contention is rejected as unproved. There is no persuasive evidence that Dr. Choy received any payment for the July 19th appointment which, as it happened, T.G. could not keep, and more important, the evidence is insufficient to establish, clearly and convincingly, that Dr. Choy intended to deceive the HMO. The simplest and likeliest explanation for the July 19th office-visit note is that, owing to the unexpected change of plans, someone got the paperwork confused and made a mistake.

23. The day after she was admitted to Mercy Hospital, T.G. underwent a liver biopsy, which revealed a "metastatic tumor of pancreatic origin."

24. Sometime in July 2010, after the pathology report confirmed T.G.'s diagnosis, T.G.'s family requested that Dr. Choy's office provide them with copies of T.G.'s medical records. Dr. Choy's staff complied with this request, printing the electronic medical records on July 27, 2010, and delivering them to a family member. The set of records provided at this

time went back only as far as January 19, 2009, and thus omitted the notes for T.G.'s appointments with Dr. Choy in 2008.

25. On August 8, 2010, T.G. passed away due to liver disease and acute renal failure.

26. On August 19, 2010, Dr. Choy received a letter from an attorney representing T.G.'s family, which requested copies of T.G.'s records. At this point, Dr. Choy feared that T.G.'s family would bring a medical malpractice lawsuit against him, and he "panicked" because he had never been sued before and did not have liability insurance. On reviewing the records, Dr. Choy concluded that some of the language was "ugly" and "didn't look right" as written. Wanting to make the records "as presentable as possible" for the lawyer, Dr. Choy decided to edit the electronic text. He then proceeded to delete some entries and add others without identifying any of the alterations.

27. As a comparison of the original text to the revised text clearly reveals, Dr. Choy's self-confessed concern was obviously owing to the remarkable absence of any notes in the medical records pertaining to the possibility that T.G. might have pancreatic cancer as stated in the radiologist's report interpreting the June 2008 CT scan. This is apparent from the fact that, without significant exception, the sole purpose of the alterations is plainly to correct that particular, glaring

deficiency. The covertly amended records convey the impression that Dr. Choy timely informed T.G. of the CT scan results and repeatedly urged her to see a specialist to investigate the findings further. Indeed, if one were unaware of the original, unaltered records, his review of the revised records would provide little or no cause to criticize Dr. Choy's handling of T.G.'s case. The inevitable inference is that Dr. Choy knew the original records would be persuasive, if not conclusive, evidence of his failure to inform T.G. of her potentially fatal condition, in violation of the standard of care, so he secretly (or so he thought) doctored the records to turn them into evidence that he had *satisfied* the standard of care.

28. To see just how incriminating the alterations are, it is helpful to place the original and revised texts, respectively, side-by-side, as below. In the following table, the language printed in boldface identifies deletions from the original, contemporaneous record and additions to the much-later revised record (misspellings in original):

Visit Date	Contemporaneous Record	Revised Record
6/30/08	ZZ-Dr Peter V Choy; Z-VP EKG; Anemia Iron Deficiency - 2809 repeat Test if no Improvement we will refer pt to GI evaluation;Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019;	ZZ-Dr Peter V Choy; Z-VP EKG; Anemia Iron Deficiency - 2809 And abdominal pain with and abnormal CT scan. We will refer pt to GI evaluation for possible GI malignancy of the Pancreas ;Diabetes w/ unspecified complication-

	Hypertensive Heart Disease without HF 402.90; Hypothyroidism-2449; Declining Function-7993; Depression-311; Vertigo-7804	250.90; Hyperlipidemia-2724; Hypertension-4019; Hypertensive Heart Disease without HF 402.90; Hypothyroidism-2449; Declining Function-7993; Depression-311; Vertigo-7804
9/03/08	A- Medically Stable; ZZ- Dr Peter V Choy; Z-VP EKG; Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019; Hypertensive Heart Disease without HF 402.90; Hypothyroidism-2449; Declining Function-7993; Depression-311; Vertigo-7804	-; Abdominal Pain Unknown ET - 78900; Anemia - 2859 Pt was advice again to see a GI Dr. The possibility of a Ca of the pancreas was discuss with the pt; ZZ-Dr Peter V Choy; Z-VP EKG; Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019; Hypertensive Heart Disease without HF 402.90; Hypothyroidism-2449; Declining Function-7993; Depression-311; Vertigo-7804
1/19/2009	Malaise and Fatigue and Other -780.79; Declining Function-7993; Dizziness and Giddiness - 780.4;Diabetes mellitus Uncontrolled-25002; ZZ- m Resently admitted to BH with CHF Possible angina Pectoris before admittion Dr. Peter V Choy; Z-VP EKG; Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019; Hypertensive Heart Disease without HF 402.90; Hypothyroidism-2449; Declining Function-7993; Depression-311; Vertigo-7804; Congestive Heart Failure-428.0	Malaise and Fatigue and Other -780.79; Declining Function-7993; Dizziness and Giddiness - 780.4;Diabetes mellitus Uncontrolled-25002; ZZ- m Resently admitted to BH with CHF Possible angina Pectoris before admittion Weight Loss Abnormal- 783.21; Abdominal Pain Unknown ET - 78900 Possible ca of the Pancreas; ZZ-Dr. Peter V Choy; Z-VP EKG; Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019; Hypertensive Heart Disease without HF 402.90; Hypothyroidism-2449; Declining Function-7993;

	associatted with Actos	Depression-311; Vertigo-7804; Congestive Heart Failure-428.0
2/11/10	A- Medically Stable; ZZ- Dr Peter V Choy; Z-VP EKG; Trigger finger on the right great finger.; Contusion Foot-924.20; Back Pain Lower-7242 and in the thoracic area;Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019;; Congestive Heart Failure-428.0; Hypothryoidism-2449; Back Pain Lower-7242; Neuropathy Peripheral-3569	Trigger finger on the right great finger.; Contusion Foot-924.20; Back Pain Lower-7242 and in the thoracic area;Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019;; Congestive Heart Failure-428.0; Hypothryoidism-2449; Back Pain Lower-7242; Neuropathy Peripheral-3569
3/31/10	A- Medically Stable; ZZ- Dr Peter V Choy; Z-VP EKG; Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019;; Hypothryoidism-2449; Back Pain Lower-7242; Neuropathy Peripheral-3569; Hypertensive Heart Disease with HF 402.91	Dr Peter V Choy; Z-VP EKG; Weight Loss Abnormal-783.21 Again case was discuss with the Pt and she was advice of the abnormal finding; Diabetes w/ unspecified complication-250.90; Hyperlipidemia-2724; Hypertension-4019;; Hypothryoidism-2449; Back Pain Lower-7242; Neuropathy Peripheral-3569; Hypertensive Heart Disease with HF 402.91

29. The alterations are clear and convincing proof of the material fact that Dr. Choy did not tell T.G. that the June 19, 2008, CT scan report stated she had a "[l]arge malignant tumor mass" in her pancreas, for a simple reason: he was unaware that a tumor mass was described in the report. This latter fact is evident from Dr. Choy's alarm, in August 2010, about the deficiencies in the records. Why, only then, did Dr. Choy

realize that the records "didn't look right?" What did Dr. Choy know, without question, in August 2010, that he might not have known earlier? The answer, of course, is that in August 2010 Dr. Choy knew that the 2008 CT scan report disclosed the existence of a large mass in T.G.'s pancreas, a grave finding that should have been conspicuously noted in T.G.'s medical records.

30. Dr. Choy's admission that the records looked "ugly" to him in August 2010 is revealing because, in fact, the records look bad *only* in the light of the 2008 CT scan results; but for that report, they would appear to be at least adequate, notwithstanding a few typographical errors. The bottom line is that if the CT scan report had contained no references to a pancreatic mass, then T.G.'s original medical records would have looked alright.

31. The undersigned readily infers, therefore, without hesitation, that T.G.'s medical records looked fine to Dr. Choy when he originally wrote them because, when he originally wrote them, he was unaware that the 2008 CT scan report described a tumor mass in T.G.'s pancreas. Only later, after learning the full contents of the 2008 CT scan report, did the incriminating nature of the contemporaneous medical records become clear to Dr. Choy, who then, in his panic, made the costly mistake of tampering with the evidence.

32. Dr. Choy's failure to read the 2008 CT scan report closely enough to take notice of its critical finding regarding T.G.'s pancreas, whatever the cause of *that* failure was, is sufficient to explain his failure to tell T.G. that she might have pancreatic cancer. Simply put, Dr. Choy did not tell T.G. about the pancreatic mass because he did not know of its existence.

33. The parties stipulated that the minimum standard of care required that, within a reasonable time after June 19, 2008, Dr. Choy both: (1) notify T.G. that the results of the June 2008 CT scan suggested she had a mass in her pancreas; and (2) refer T.G. to an appropriate specialist for further evaluation and treatment of the pancreatic mass. Being unaware of the finding regarding a pancreatic mass, Dr. Choy did neither. Thus, his treatment of T.G. fell below the standard of care.

34. T.G.'s family ultimately elected not to sue Dr. Choy, but in July 2011, T.G.'s son filed a complaint with the Department alleging that Dr. Choy had provided T.G. with substandard care. This consumer complaint set in motion the investigation which led to the instant proceeding.

35. In connection with its investigation, the Department requested a copy of all T.G.'s electronic medical records from Dr. Choy going back to T.G.'s first visit in 1999. These

medical records were printed from Dr. Choy's office computer system on July 27, 2011, and delivered to the Department in August 2011.

36. On August 23, 2011, a Department investigator interviewed Dr. Choy regarding his care of T.G. The investigator—who was in possession not only of the recently produced records, but also copies of the records Dr. Choy's office had provided to T.G.'s family back in July 2010, before Dr. Choy had tampered with the electronic documents—asked Dr. Choy to explain why there were two different versions of the office notes for T.G.'s January 19, 2009, visit. After some initial hesitation, Dr. Choy admitted that he had altered the records to reinforce his case after learning he might be sued for malpractice.

37. During the course of discovery in this proceeding, the Department asked Dr. Choy whether he had made any other changes to T.G.'s records besides the ones previously identified. Dr. Choy compared the printouts of T.G.'s untampered-with records given to the family in July 2010, which covered office visits from January 19, 2009, forward, to the fabricated versions provided to the Department in August 2011, and was unable to identify any additional changes.

38. Neither the Department nor Dr. Choy was able to retrieve copies of T.G.'s original electronic records for the

office visits prior to January 19, 2009, because Dr. Choy had overwritten the computer files when he altered the documents in August 2010. Consequently, the Department retained a forensic computer expert, who managed to recover the authentic records from a backup. Armed at last with a full set of T.G.'s medical records as they had looked on the dates Dr. Choy saw T.G., the parties were finally able to identify the changes Dr. Choy subsequently made to the office notes for the visits of June 30 and September 3, 2008.

Ultimate Factual Determinations

39. The Department has established by clear and convincing evidence that Dr. Choy made deceptive, untrue, or fraudulent representations in the practice of medicine. He did so by deliberately altering T.G.'s medical records with the intention of fabricating evidence to support his claim that he had timely informed T.G. about the mass in her pancreas, when in fact the authentic, contemporaneous records make no mention of the pancreatic mass. Dr. Choy is therefore guilty of the offense defined in section 458.331(1)(k), Florida Statutes.

40. The Department has established by clear and convincing evidence that Dr. Choy failed to identify, as such, any of the material, after-the-fact revisions he made to T.G.'s medical records, so that the office notes appeared to be contemporaneous accounts of the patient's course of treatment, when in fact they

were not, in violation of Florida Administrative Code Rule 64B8-9.003(4). Dr. Choy is therefore guilty of the offense defined in section 458.331(1)(m).

41. The Department has established by clear and convincing evidence that Dr. Choy committed medical malpractice in his treatment of T.G., by failing to timely inform her of the pancreatic mass seen in the CT scan in June 2008, and by failing to timely refer T.G. to a specialist for further investigation of the mass. Dr. Choy is guilty of the offense defined in section 458.331(1)(t)1.

42. The Department has established by clear and convincing evidence that Dr. Choy concealed the material fact that he had altered the original, contemporaneous records of T.G.'s care and treatment when he knowingly produced T.G.'s revised medical records to the Department in August 2011 without disclosing that the records were not what they purported to be. Dr. Choy is guilty of the offense defined in section 458.331(1)(gg).

43. The Department failed to prove that Dr. Choy interfered with its investigation. Dr. Choy was reasonably cooperative throughout the investigation, during the course of which, however, he committed the additional offense of concealing a material fact from the Department, for which he will be disciplined. Dr. Choy is therefore not guilty of the offense defined in section 458.331(1)(hh).

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

45. 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. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Dr. Choy 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 Reg., Bd. of Med., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

46. 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).

47. The Department charged Dr. Choy under section 458.331, Florida Statutes, which provides in pertinent part as follows:

(1) The following acts shall constitute grounds for . . . disciplinary action[:]

* * *

(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.

* * *

(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.

* * *

(t)1. Committing medical malpractice[, which is] defined in s. 456.50 [to mean] "the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure."

* * *

(gg) Misrepresenting or concealing a material fact at any time during any phase of a licensing or disciplinary process or procedure.

* * *

(hh) Improperly interfering with an investigation or with any disciplinary proceeding.

48. Florida Administrative Code Rule 64B8-9.003 provides in relevant part as follows:

(4) All entries made into the medical records shall be accurately dated and timed. Late entries are permitted, but must be clearly and accurately noted as late entries and dated and timed accurately when they are entered into the record. However, office records do not need to be timed, just dated.

49. 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) (statutes imposing a penalty must never be extended by construction).

50. The undersigned has determined, as a matter of ultimate fact, that the Department established Dr. Choy's guilt by clear and convincing evidence as to all of the charges except the allegation that he interfered with an investigation or disciplinary proceeding. The undersigned further concludes that the plain language of the particular statutory and rule provisions under which Dr. Choy was charged can be applied to the historical events at hand without a simultaneous examination of extrinsic evidence or resort to principles of interpretation. It is therefore unnecessary to make additional legal conclusions with regard to these charges.

51. In determining the weight to be given to the undisputed fact that Dr. Choy deliberately altered T.G.'s medical records in his ill-advised attempt to manufacture exculpatory evidence when faced with the threat of a malpractice lawsuit, and that he knowingly furnished these false records to the Department without disclosing that he had tampered with them so as to take advantage of the contemporaneous character which gives such documents evidentiary value, the undersigned took account of the rule that when a party is found to have knowingly altered or fabricated documents to create a false basis for his legal position, the inevitable conclusion is that he has something to hide and is conscious of guilt. Tramel v. Bass, 672 So. 2d 78, 85 n.7 (Fla. 1st DCA 1996), rev. denied, 680 So. 2d 426 (Fla. 1996) (citing Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450, 453 (2d Cir.), modified, 103 F.2d 430 (2d Cir. 1939)); see also Knight Ridder v. Dade Aviation Consultants, 808 So. 2d 1268, 1270 (Fla. 3d DCA 2002) (attempts to create false basis for legal position provide affirmative evidence of actual criminal responsibility); Walker v. State, 495 So. 2d 1240, 1241 (Fla. 5th DCA 1986) (false exculpatory statements are admissible as substantive evidence tending to affirmatively show consciousness of guilt).

52. The Board of Medicine imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in

Florida Administrative Code Rule 64B8-8.001. For a first-time offender found guilty of the offense defined in section 458.331(1)(k), the prescribed penalty range is "[f]rom probation, and 50 to 100 hours of community service; to revocation or denial, and an administrative fine from \$1,000.00 to \$10,000.00." Fla. Admin. Code R. 64B8-8.001(2)(k).

53. For a first-time offender found guilty of the offense defined in section 458.331(1)(m), the prescribed penalty range is "[f]rom a reprimand to denial or two (2) years suspension followed by probation, 50 to 100 hours of community service, and an administrative fine from \$1,000.00 to \$10,000.00." Fla. Admin. Code R. 64B8-8.001(2)(m).

54. For a first-time offender found guilty of the offense defined in section 458.331(1)(t)1, the prescribed penalty range is "[f]rom one (1) year probation to revocation or denial and an administrative fine from \$1,000.00 to \$10,000.00." Fla. Admin. Code R. 64B8-8.001(2)(t).

55. For a first-time offender found guilty of the offense defined in section 458.331(1)(gg), the prescribed penalty range is "[f]rom suspension, to be followed by a period of probation, 50 to 100 hours of community service, to denial or revocation of license and an administrative fine from \$1,000.00 to \$5,000.00." Fla. Admin. Code R. 64B8-8.001(2)(gg).

56. 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.

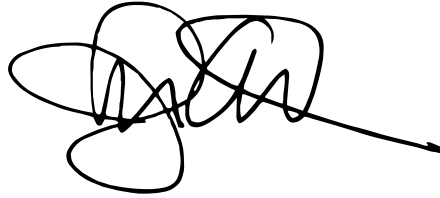
57. The undersigned does not find cause to deviate from the guidelines and therefore recommends that the Board of Medicine impose a penalty that falls within the recommended ranges.

58. The Department proposes that Dr. Choy's license be revoked and that he be required to pay an administrative fine of \$40,000. The undersigned agrees that revocation is appropriate under the facts and circumstances of this case, but recommends that the fine not exceed \$4,000.

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. Choy guilty of the offenses described in sections 458.331(1)(k), 458.331(1)(m), 458.331(1)(t)1, and 458.331(1)(gg), Florida Statutes. It is further RECOMMENDED that the Board of Medicine revoke Dr. Choy's medical license and impose an administrative fine of \$4,000.

DONE AND ENTERED this 15th day of April, 2014, in
Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of April, 2014.

ENDNOTES

^{1/} The Department also accused Dr. Choy of having submitted a false claim to Medicare for services he did not actually provide.

^{2/} The note says:

Diverticulosis
- High fiber diet
- No seeds in food
- Metamucil may help

^{3/} As augmented, the note says:

- Possible malignant [tumor] tail of [pancreas]
- Diverticulosis
- High fiber diet
- No seeds in food
- Metamucil may help

COPIES FURNISHED:

Daniel Hernandez, Esquire
R. Shaffer Claridge, Esquire
Christopher Hudtwalcker, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Amy W. Schrader, Esquire
GrayRobinson, P.A.
301 South Bronough Street, Suite 600
Post Office Box 11189
Tallahassee, Florida 32302-3189

Jay A. Ziskind, Esquire
Jay A. Ziskind, P.A.
3471 Main Highway, No. 517
Miami, Florida 31333

Allison M. Dudley, Executive Director
Board of Medicine
Department of Health
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701

Jennifer A. Tschetter, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

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.