STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Petitioner,

vs. Case No. 17-4337PL

RAQUEL C. SKIDMORE, M. D.,

Respondent.
_______________________________/

RECOMMENDED ORDER

On February 20, 2018, Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings conducted a hearing pursuant to section 120.57(1), Florida Statutes (2017), in Panama City, Florida.

APPEARANCES

For Petitioner: Louise Wilhite-St Laurent, Esquire
Ross Daniel Vickers, Esquire
Department of Health
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Tallahassee, Florida 32399-3265

For Respondent: Alvin Lee Peters, Esquire
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Panama City, Florida 32401

STATEMENT OF THE ISSUES

The issues to be decided are whether Respondent violated sections 456.072(1)(a), (n), and (w), and 458.331(1)(g), (k), (q), and (v), Florida Statutes (2015), as alleged in the

Administrative Complaint; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On May 30, 2017, Petitioner, the Department of Health (Petitioner, the Department, or DOH), filed an Administrative Complaint against Respondent, Dr. Raquel Skidmore, alleging that she violated sections 456.072(1)(a), (n), and (w), and 458.331(1)(g), (k), (q), and (v). On June 20, 2017, Respondent filed an Answer and Request for § 120.57(1) Hearing, and on August 2, 2017, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The hearing was originally scheduled to take place on September 22, 2017. At the request of both parties, the hearing was rescheduled for October 30, 2017. On October 11, 2017, Petitioner filed an Opposed Motion to Disqualify Counsel for Respondent on the Basis of Conflict of Interest and Request for Hearing. At the time, Respondent was represented by Billy-Joe Hoot Crawford. While the motion indicated that it was opposed, on October 16, 2017, Respondent filed a Motion to Withdraw as Counsel and Motion for Protective Order, by which Mr. Crawford sought to withdraw as counsel for Respondent, agreeing that Mr. Crawford played an integral role in the factual circumstances underlying Petitioner's complaint, and was therefore not in a

position to continue as counsel of record. The motion also requested that Respondent be afforded 30 days to retain other counsel, and that the then-scheduled depositions and pre-hearing conference be delayed pending the appearance of new counsel. Petitioner immediately canceled the scheduled depositions, and on October 17, 2017, an Order Canceling Hearing was issued, directing the parties to file a status report no later than November 17, 2017.

Alvin Peters, Esquire, entered an appearance as counsel for Respondent on November 14, 2017, and consistent with the Joint Status Report filed by the parties, the hearing was rescheduled for February 20, 2018, and proceeded as scheduled. The parties filed a Joint Pre-hearing Stipulation that contained facts to which the parties stipulated no proof would be required at hearing. Those facts have been incorporated into the Findings of Fact below. At hearing, Joint Exhibits numbered 1 through 28 were admitted into evidence. Petitioner presented the testimony of patient R.S., Caitlyn Clark, Andre Moore, and Courtney Coppola. Respondent testified on her own behalf and presented the testimony of Billy-Joe Hoot Crawford, and patients P.P., S.N.C., and T.S. Respondent's Exhibits 1 and 2 were also admitted.

The Transcript of the hearing was filed with the Division of Administrative Hearings on March 22, 2018. Petitioner and

Respondent’s Proposed Recommended Orders were filed on April 2 and 3, respectively, and have been considered in the preparation of this Recommended Order. All references to the Florida Statutes are to the 2015 codification, unless otherwise indicated.

FINDINGS OF FACT

The Findings of Fact below are based upon the testimony and documentary evidence presented at hearing, the demeanor and credibility of the witnesses, and on the entire record of this proceeding.

1. Petitioner is the state agency charged with regulating the practice of medicine pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.

2. Respondent is a licensed medical doctor holding DOH license number ACN 244.

3. Respondent holds a temporary certification to practice medicine only in areas of critical need (ACN) approved pursuant to section 458.315.

4. Respondent is the owner of and only physician practicing at Gulf Coast Holistic and Primary Care, Inc., a Department-approved ACN facility. Her current primary practice address is 219 Forest Park Circle, Panama City, Florida 32405.

Medical Marijuana Regulation in Florida

5. As a preliminary matter, this case is not about the wisdom of the policy decision to allow patients access to medical marijuana in the State of Florida, the efficacy of its use, or the nature of the regulatory scheme to implement the medical marijuana program. Rather, this case involves Respondent's actions in ordering medical marijuana and whether those actions comported with Florida law as it existed at the time.

6. Generally, at all times relevant to these proceedings, cannabis or marijuana was a Schedule I controlled substance pursuant to section 893.03(1)(c)7., Florida Statutes, meaning that it is a drug with a high potential for abuse and had no accepted medical use in treatment of patients.

7. In 2014, the Florida Legislature created section 381.986, Florida Statutes (2014), which legalized the use of low-THC cannabis for medical use under limited and strictly regulated circumstances. In sum, low-THC cannabis would be available to patients suffering from cancer or a medical condition causing seizures or persistent muscle spasms that would benefit from the administration of low-THC cannabis. The 2014 version of the law is sometimes referred to as "Charlotte's Web."

8. Section 381.986(2) contained the requirements that a physician had to meet to be qualified to order low-THC cannabis for his or her patients. A physician had to take an eight-hour

course provided by the Florida Medical Association (FMA); register as the ordering physician in the compassionate use registry; and document the dose, route of administration, and planned duration of use by the patient. A physician also had to submit a treatment plan for the patient to the University of Florida. Further, registered physicians could only order low-THC cannabis for Florida residents.

9. In 2016, the Florida Legislature amended section 381.986, effective March 2016, to include use of full-THC medical cannabis, sometimes referred to as medical marijuana, for terminal conditions. In November 2016, Amendment 2 passed, which created Article X, section 29 of the Florida Constitution, providing for the production, possession, and use of medical marijuana in Florida. During the 2017 Special Session, section 381.986 was amended to implement Amendment 2. Ch. 17-232, §§ 1, 3, 18, Laws of Fla. None of the amendments, which were passed in 2016 and 2017, were in place during the period relevant to this case.

10. The first course offered by the FMA pursuant to section 381.986 was available on November 4, 2014. The substance of the course covered the requirements of section 381.986 and the lawful ordering of low-THC cannabis.

11. The Office of Compassionate Use within the Department first allowed physicians to register as ordering physicians on July 1, 2016.

12. On September 8, 2015, Respondent sent an email from her DOH email address to her personal email address with a hyperlink to the FMA course. Instead of taking the course at that time, which she knew to be the required course for ordering low-THC cannabis, Respondent instead took a free online course from an entity called NetCE, entitled "Medical Marijuana and Other Cannabinoids."

13. Respondent did not complete the required FMA course until August 25, 2016. She is presently an authorized ordering physician.

Respondent's Care and Treatment of R.S.

14. Patient R.S. is a 66-year-old retired physician assistant, who resides in Minnesota. R.S. practiced as a physician assistant for approximately 40 years in Minnesota. For about four years, R.S. spent his winters in the Panama City area.

15. R.S. suffers from a variety of medical conditions, including Stage IV metastatic renal cell carcinoma. When R.S. first presented to Respondent the fall of 2015, he had stopped all treatments for his cancer because he could not tolerate the chemotherapies or the immunotherapy prescribed for him.

16. While wintering in Panama City, R.S. took his dog to a dog park and got to know some people who went there regularly. When some of those people learned that he had metastatic cancer, one person asked him if he had tried medical marijuana, and he told her that it was not then legal in Minnesota. R.S. was told that Dr. Skidmore could provide legal medical marijuana to him.

17. At the time that R.S. presented to Respondent for treatment, it was not lawful to order, prescribe, or dispense medical marijuana in the State of Florida.

18. R.S. called Respondent's office to obtain an appointment. At the time of his call, he told the receptionist that he had heard Respondent could give him a prescription for medical marijuana. R.S. knew his cancer was incurable, but given his inability to tolerate conventional treatment, he was hoping that the medical marijuana might help reduce the size of his tumors and lengthen his life.

19. R.S. first presented to Respondent on September 28, 2015. He provided to Respondent medical records from his local oncologist, which confirmed his diagnosis of terminal cancer, and contained his most recent laboratory results.

20. Respondent took R.S.'s blood pressure and pulse, and most likely checked his respiration. She listened to his heart and chest with a stethoscope. She did not perform a review of systems, which is review of the patient from the head working

down through the different systems of the body. As a physician assistant, R.S. was familiar with the components of a review of systems, and described them in detail at hearing. He testified that Respondent did not check his eyes, feel his lymph nodes, palpate his abdomen, or check his reflexes.

21. R.S. testified that Respondent did not ask him about any history of depression, did not ask him to provide any additional medical records, and did not tell him she wanted to see more lab work than what he had provided to her. R.S. believes that Respondent may have mentioned meditation, which he was already doing, but did not recommend yoga, essential oils, or any modifications in his diet. Had she suggested them, he would have tried them. His testimony is credited. She also did not attempt to place Respondent in a federally-approved experimental marijuana therapy program.

22. Respondent testified and her medical records indicate that she ordered labs for R.S. R.S. testified that no labs were ordered. The medical records indicate that labs were ordered, but do not indicate what tests were actually ordered, an omission that she blamed on her medical assistant. She testified in deposition that she ordered a lipid panel, Vitamin D panel, thyroid panel, and urine panel. The lab tests that R.S. provided to her from his oncologist contained none of these. R.S. never had the tests Respondent claims she ordered because Respondent

never actually ordered them. The one treatment that Respondent performed was a form of acupuncture at this first visit.

23. R.S. paid $140 in cash for his first visit to Respondent. R.S. was a cash-pay patient because medical marijuana was not a benefit under his existing insurance plan.

24. Respondent advised R.S. that he would need to be seen three times over a 90-day period in order to obtain medical marijuana.

25. R.S. returned to Respondent on October 19, 2015. R.S. paid $90 for this visit. As with the first visit, Respondent performed only a very limited physical examination, taking his blood pressure, pulse, respiration, and listening to his chest. While the electronic medical records for this visit indicate that labs were pending, none were actually ordered. Despite not having any lab results, the records state “will recommend medicinal marijuana after receiving previous records.”

26. R.S.’s third visit was January 15, 2016. As with the previous visits, Respondent performed only a perfunctory examination, and the charge for this visit was $90.

27. At this third visit, Respondent told R.S. that he had complied with the requirements in Florida to be seen for 90 days, and that she would send in her assistant with the paperwork R.S. would need to obtain medical marijuana from a dispensary in Pensacola.

28. Respondent did not advise R.S. that medical marijuana, as described in the certificate, was not lawful in Florida at that time, and that he could be arrested if he purchased it in Florida. She did not advise him that he was ineligible for low-THC cannabis when it became available because he was not a resident of Florida. Respondent did not discuss the risks and benefits of medical marijuana.

29. Respondent then provided to R.S., through her receptionist/medical assistant Caitlyn Clark, a document that she referred to as a "certificate" or a "recommendation." The certificate, discussed in more detail below, appears to be a prescription for medical marijuana. It was not for low-THC cannabis. As R.S. described the document, it looked like a prescription to him, just not on a prescription pad. R.S. was required to pay $250 for this certificate, which was in addition to the visit fee of $90.

30. Respondent provided this certificate despite the fact that, according to her records, R.S. had not completed the labs she claimed to have ordered for him, and did not comply with any recommendations for modification of his diet, or use of essential oils, yoga, or meditation. His electronic medical record for this visit included a plan of "1000 mg of canabis [sic] extract oil daily."

31. In addition to the certificate, R.S. received from Ms. Clark a flyer from an entity called Cannabis Therapy Solutions, with the names of Joe and Sonja Salmons and their telephone numbers. While R.S. received the flyer from Ms. Clark, copies of the flyers were also available on the tables in the reception area of the office. R.S. believed, based on the information given to him from Respondent and Ms. Clark, that he was being referred to Cannabis Therapy Solutions to obtain the medical marijuana, which he believed was prescribed for him through the use of the certificate.

32. R.S. called the numbers on the flyer and was unable to reach anyone. One number was disconnected, and the messages he left on the other number were never returned.

33. When R.S. was unable to reach the Salmons at the numbers listed on the flyer he received at Respondent's office, he did some research on the Internet. Through this research, he learned for the first time that medical marijuana could not yet be obtained legally in Florida. R.S. felt that he had been "taken" by Respondent, and wanted to get his money back.

34. R.S. returned to Respondent's office in February 2016, and demanded a refund of the money he had paid. He told Respondent that he was unable to reach the Salmons, and had learned that medical marijuana was not yet legally available in Florida. Respondent told him that she was only trying to help

him. She also tried to contact the Salmons, and was unsuccessful in doing so.

35. Respondent’s staff initially offered to refund the $250 R.S. had paid for the certificate, but only if he returned it. R.S. refused to do so, and stated that it was his only proof to present to the Florida Board of Medicine.

36. R.S. admitted at hearing that he was angry and loud when he visited the office to demand his money. He was intentionally loud because he wanted the patients in the waiting area to hear what was going on. While he was loud, he was not violent, and Ms. Clark testified that she did not feel threatened by him. It was only after he stated that Respondent would have to deal with the state licensing board that he was refunded all of the money he had paid to Respondent’s office.

37. R.S. became a participant in the medical marijuana program eventually authorized in his home state of Minnesota. It has not provided the results for which he was hoping, in that his tumors have increased in size and number.

“The Certificate”

38. The certificate that Respondent issued to R.S. was on 8 1/2 by 11 inch paper. It was printed on security paper, meaning that when copied, the document is reproduced with the word “void” printed all over it. The document had Respondent’s office name, address, and telephone and fax numbers at the top,

along with Respondent's name, DEA number, and Florida medical license number. It lists R.S.'s name, patient number, and address, along with the date the document was issued to him. At the bottom of the document, there is a blank to fill in how many refills are allowed, and a statement "to insure brand name dispensing, prescriber must write medically necessary on the prescription."

39. Immediately below the patient name and address, the document reads:

> **RX** Allowed Quantity: 1-2 gm/d THCa-THC: CBD concentration in ratio of 1:1 or 1:2 via oral ingestion or vaporization, include plant vaporization.
>
> Max allowance 2 gm/d

40. In the center of the document is the following statement:

> I certify that I have personally examined the above named Patient, and have confirmed that they [sic] are currently suffering from a previously diagnosed medical condition. I have reviewed the patient's medical history and previously tried medication(s) and/or treatment(s).
>
> Based on this review, I feel cannabis is medically necessary for the safety and well-being of this patient. Under Florida law, the medical use of cannabis is permissible provided that it's [sic] use is medically necessary. See Jenks v. State, 566 So. 2d (1St DCA 1991).
>
> In making my recommendation, I followed standardized best practices and certify that there exists competent and sound peer-reviews

> [sic] scientific evidence to support my opinion that there exists no safer alternative than cannabis to treat the patient's medical condition(s). In addition, I have advised the patient about the risks and benefits of the medical use of cannabis, before authorizing them [sic] to engage in the medical use of cannabis.
>
> This patient hereby gives permission for representatives of GreenLife Medical Systems to discuss the nature if [sic] their [sic] condition(s) and the information contained within this document for verification purposes. This is a non-transferable document. This document is the property of the physician indicated on this document and be [sic] revoked at any time without notice.
>
> Void after expiration, if altered or misused.

41. The certificate that R.S. received was signed by both Respondent and R.S. The copy the Department obtained from Respondent is not signed.

42. Respondent testified that she did not want the references to prescriptions to be on the certificates, but was told by the printer she used that the only security paper available was preprinted with that information. This claim is not credible. Much of what is contained on the document is preprinted. Had Respondent objected to the use of the word "prescription" on the document, she could have directed that the references to it be redacted or blacked out. She did not do so.

43. Respondent testified that she issued only three of these certificates, which she referred to as "recommendations."[1/]

Ms. Clark, testified that during her employment from May 2015 to April 2016, about 15 certificates were distributed to patients. Ms. Clark testified that the certificates were kept in a folder separate from the patient's medical records. When Respondent directed that a patient was to receive a certificate, Ms. Clark would type in the patient's name, patient ID, address and the date issued. She would print it out, making no changes to the allowed quantity, maximum allowance, or any other language in the certificate. Ms. Clark's testimony is credited.

44. The certificate given to R.S. does not indicate that R.S. would receive medical marijuana by extract oil, as noted in Respondent's medical records for R.S. nor does it include a route of administration or planned duration for the substance prescribed.

45. The markings and appearance of the certificate are consistent with what a reasonable person would expect to see on a prescription. Here, R.S. did not expect that it would be filled by a pharmacy. Instead, R.S. expected that it would be filled at a dispensary authorized to dispense medical marijuana. At that time, no such dispensary existed.

46. The certificate was given to R.S. simultaneously with the flyer for Cannabis Therapy Solutions. In her deposition, Respondent stated that Joe and Sonja Salmons came to her office and said that they were able to grow a medical grade cannabis

with CBD, as well as a concentrated oil, and that they were located in Pensacola. From the more persuasive evidence presented it is found that the coupling of the certificate with the flyer for Cannabis Therapy Solutions was intentional. Respondent only stopped providing certificates to patients when she learned that they could no longer obtain marijuana from the Pensacola dispensary.

47. It is also found that the certificate provided to R.S. and described above is a prescription.

DOH's Complaint and Investigation

48. While Respondent returned all of R.S.'s money, he nonetheless felt that Respondent's actions were fraudulent. On February 24, 2016, R.S. filed a complaint with the Department, and provided a copy of the certificate he received, as well as a copy of the flyer from Cannabis Therapy Solutions.

49. As a part of its investigation, the Department requested that R.S. provide a copy of his medical records from Respondent. R.S. wrote back, advising that when he requested his records in March 2016, Ms. Clark provided him with the clinical records he had brought with him from his oncologist on his first visit, and advised him that Respondent did not do patient care records on cash-pay patients.

50. At hearing, Ms. Clark testified that Respondent uses electronic medical records for insurance patients and handwritten

records for cash-paying patients. To her knowledge, cash-paying patients never had electronic medical records.

A. Respondent's Medical Records for R.S.

51. On April 11, 2016, the Department issued a subpoena to Respondent, requesting all medical records for R.S. for a stated time period. Respondent received the subpoena on April 13, 2016.

52. The records that Respondent supplied in response to the Department's subpoena include forms filled out by R.S., prior medical records from R.S.'s oncologist, and electronic medical records from Respondent's office.

53. Curiously, the office note for R.S.'s visit September 28, 2015, visit is electronically signed by Respondent on April 18, 2016. The record for the October 19, 2015, visit is electronically signed April 19, 2016, and the record for the January 15, 2016, visit is electronically signed by Respondent on April 19, 2016.

54. Also included with the medical records provided to the Department is an "addendum" that references an encounter date of January 15, 2016. In the body of the note, Respondent references R.S.'s visit to the office on February 17, 2016, when he demanded a refund of his money. Respondent described R.S. as having a "violent attitude," and noted that he was asked to return the "recommendation" and refused to do so. This note was electronically entered on April 19, 2016, and, similar to the

other medical records from Respondent's office, electronically signed April 20, 2016, within a week after receiving the subpoena from the Department and months after R.S.'s last visit to the practice.

55. Respondent is not charged with falsifying medical records. However, the evidence related to the electronic medical records is relevant in assessing Respondent's credibility with respect to her claims that she completed a full examination of R.S., ordered labs for him, and made several recommendations for alternative treatments that she claims he failed to follow.

56. It is found that Respondent did not complete a full examination for Respondent; did not complete a review of systems; did not order labs for him to complete; did not recommend the alternative treatments, such as yoga, essential oils, or meditation; and did not recommend that he modify his diet.

B. The Advice upon Which Respondent Allegedly Relied

57. The certificate that Respondent provided to R.S., as well as other patients, included a partial citation to Jenks v. State, 582 So. 2d 676 (Fla. 1st DCA 1991). Jenks stands for the premise that the common law defense of medical necessity is still recognized in Florida with respect to criminal prosecutions for possession and use of marijuana where the following elements are established: 1) that the defendant did not intentionally bring about the circumstances which precipitated the unlawful act;

2) that the defendant could not accomplish the same objective using a less offensive alternative available to the defendant; and 3) that the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid it. 582 So. 2d at 679.

58. Respondent relies on the medical necessity defense as justification for her issuance of the certificates, such as the one R.S. received. However, the genesis of her reliance on this defense remains a mystery.

59. In Respondent's written response to the Department's investigation, she does not mention seeking the advice of counsel. Instead, she stated:

> As soon as I open [sic] my practice, I had a visit from a company in Pensacola, that showed me some documents about the medical necessity regulation for medical marijuana and how it was helping so many patients with cancer. One of my patients with cancer, said he was going to wait until it gets legalized and died waiting. The second patient requested the recommendation, and is in remission as we speak.

60. At hearing, however, Respondent testified that she relied on the advice that she received from her lawyer, Billy-Joe Hoot Crawford, about the applicability of the medical necessity defense. Mr. Crawford is a criminal defense lawyer in the Panama City area. His experience in representing individuals in the professional license regulatory area is scant, by his own admission.

61. Both Respondent and Mr. Crawford testified that they met when attending a meeting of people who were working on medical marijuana issues. Both testified that Mr. Crawford provided some advice to Respondent regarding the medical necessity defense. Both testified that Respondent did not pay for the advice. From there, however, their testimony diverges.

62. Mr. Crawford testified that he could not remember the names of the people who attended the meetings, other than Dr. Skidmore. Despite his inability to remember their names, he believed that the group had people in each field necessary to "set up business" should medical marijuana become legal. He believed that there were a couple of meetings before Respondent attended one, but once she did, he met with her in conjunction with the meetings. Mr. Crawford testified that he met with Respondent approximately a dozen times. He said that their discussions were most likely after the meetings, because to discuss issues related to her patients in front of others would not be appropriate.

63. Respondent testified that she met with Mr. Crawford once at a meeting of people discussing the legalization of marijuana, and that he gave her advice in the meeting itself. Her ex-husband also spoke to him on the phone once, to ask for some clarification regarding his advice.

64. Mr. Crawford also testified that he traveled to Orlando to speak to a physician (unnamed), who was recommending marijuana

to her patients, and got a copy of what she was using to bring back and provide to Respondent. Respondent testified that she wrote down "word for word" what he had told her that she needed to include in the recommendation and soon thereafter stated that he gave her a sample to use that was not on security paper.

65. Respondent claims that the reference to GreenLife Medical Systems (GreenLife) was on the sample she received from Mr. Crawford, and that she did not know what GreenLife was. Mr. Crawford testified that while he knew about GreenLife before giving Respondent advice, he did not have a reference to GreenLife on the recommendation he provided.

66. Most importantly, Mr. Crawford testified that he advised Respondent that she needed to tell her patients that they could be arrested if they were caught with medical marijuana and that he fully expected them to be. He also advised her that if any of her patients were arrested for possessing marijuana pursuant to her recommendation, then he would represent them for free.

67. Respondent, however, did not remember the conversation that way. She stated, "in my mind, I remember he said, if, not when. 'If' was if they get in trouble, we give them free legal help." She did not advise R.S. that he could be arrested, and when asked at hearing whether it concerned her that her patients might be arrested from what she was doing, her response was, "Yes. But life goes first in my priority algorithm." She repeated this

theme, saying, "my algorithm of priority, health and life go on top. On top of money. I'm sorry, but on top of law." Indeed, she confessed that she did not read all of the Jenks case, because she found it boring.

68. What is clear from the evidence is that, while Mr. Crawford provided some advice to Respondent regarding the medical necessity defense, he did not provide any advice concerning the impact her actions could have on her license to practice medicine. Equally clear is that Respondent did not seek that advice.[2/]

69. Respondent's contention that she accepted Mr. Crawford's advice without question and did not concern herself with the technicalities is not credible. At deposition, Respondent was questioned about her blog posts, media interviews, and Facebook posts. What emerges from these documents and from her testimony is a woman who was quite aware of the status of medical marijuana, both in Florida and elsewhere. In fact, a blog she wrote in October 2014 details the requirements of the regulatory scheme for ordering low-THC marijuana. The blog includes the statement, "[a]ll physicians that plan to prescribe medical marijuana are required to keep strict documentation of all prescriptions and treatment plans and submit them quarterly to the University of Florida College of Pharmacy to maintain proper control." The reality is that she knew the regulatory scheme to order medical

marijuana, with all of its technicalities. She simply chose not to wait for the new law to be implemented.

70. Assuming that Respondent truly believed that the medical necessity defense outlined in Jenks would protect her patients, she did not act to satisfy the three elements required for the defense. First, while the medical necessity defense might protect her patients if arrested, nothing in Jenks negates the regulatory scheme in chapters 456 and 458, or addresses a physician's ability to prescribe medical marijuana. Second, the evidence indicated that R.S. did not follow through with the recommendations that Respondent claimed would benefit him before providing him with the prescription for medical marijuana. Under these circumstances, ordering medical marijuana would not be the last resort contemplated under Jenks.

71. Most disturbing is the fact that a patient was required to pay $250 for a "recommendation" that the patient obtain a substance that could not be legally provided, with no assurance that he or she would receive anything to address their suffering. While Respondent claimed repeatedly that her goal was to help people, charging for this "recommendation" looks more like exploiting the hopes of those who are desperate for relief for Respondent's financial gain, and providing nothing to actually ease her patients' pain.

C. Respondent's Practice Address

72. Respondent's address of record, and primary practice address on file with the Department between August 11, 2014, and August 19, 2017, was 756 Harrison Avenue, Panama City, Florida 32401.

73. Between June 2016 and August 2016, Respondent relocated her practice to 105 Jazz Drive, Panama City, Florida 32405. The Department did not send a warning letter to Respondent regarding her address update. However, section 456.035 states that it is Respondent's responsibility, not the Department's, to ensure that her practice address on file with the Department is up-to-date. This is especially so where a physician's eligibility to practice is predicated on practicing in an area designated as an ACN.

74. Section 456.042 requires that practitioner profiles, which would include a physician's practice location, must be updated within 15 days of the change. This requirement is specifically referenced in bold type on license renewal notices, including notices filled out by Respondent in 2012, 2014, and 2016, and included in her licensure file.

75. On May 22, 2013, Respondent sought and received approval for Gulf Coast to be a designated ACN facility at 756 Harrison Avenue, in Panama City, Florida. On May 16, 2016, she sought and received approval for Gulf Coast to be a designated ACN facility at 105 Jazz Drive, also in Panama City.

This approval however, is for the entity, not an individual licensee, and does not automatically update an individual licensee's primary practice address.

76. Between August 11, 2014, and August 19, 2017, Respondent's address of record and primary practice address on file with the Department was 756 Harrison Avenue, Panama City, Florida 32401. Sometime between June and August 2016, Respondent relocated her practice to 105 Jazz Drive, Panama City, Florida.

77. Respondent did not update her practitioner profile with the practice address at 105 Jazz Drive. That address never appeared as her primary practice location in her practitioner profile.

78. When Andre Moore, the Department investigator assigned to investigate R.S.'s complaint, went to interview Respondent, he went to her address of record, which was the Harrison Avenue address. When he arrived, he found a sign on the door stating that the practice had moved to 105 Jazz Drive. Mr. Moore went to the Jazz Drive location and interviewed Respondent there. At that time, Mr. Moore told Respondent that she needed to update her address.

79. Normally, physicians can update their practice location address online using the Department's web-based system. Physicians who hold an ACN license, however, must update their addresses in writing because verification that the new practice

address qualifies as an ACN is required before an ACN can practice in the new location. All licensees, including Respondent, can update their mailing address online.

80. Respondent had completed updates of her practice address before by sending a letter and a fax, so she was familiar with the process. The Department's internal licensure database does not show any attempts made by Respondent between June and August 2016 to access the web-based system or otherwise update her practice address to 105 Jazz Drive. A search of the Department's licensure information on Respondent, viewing every address change request, indicates that she did not update either her mailing address or her practice location address to list 105 Jazz Drive.

81. On or about August 19, 2017, Respondent updated her mailing address online to 219 Forest Park Circle, Panama City, Florida 32405. The Department received a request from Respondent by mail on or about September 5, 2017, to update her practice location to the Forest Park Circle address.

82. Respondent claims that she tried multiple times to update her address with no success, and when she called the Department, she was told by an unidentified male to just wait and update her address when she renewed her license. This claim is clearly contradicted by Florida law and by multiple notices for renewal that Respondent had received and returned previously. It

is found that Respondent did not update her practice address as required with respect to the 105 Jazz Drive address.

CONCLUSIONS OF LAW

83. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to section 120.57(1), Florida Statutes (2017).

84. This is a proceeding whereby the Department seeks to revoke Respondent's license to practice medicine. The Department has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida:

> 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 lacking in confusion as to the facts at 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is

ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

85. Moreover, disciplinary provisions, such as sections 456.072 and 458.331, must be strictly construed in favor of the licensee. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 782, 784 (Fla. 1st DCA 1988).

86. Before addressing the specific charges in the Administrative Complaint, Respondent's global defense that she was entitled to rely on counsel's advice regarding the medical necessity defense must be addressed. First, while Respondent did receive advice regarding the medical necessity defense and its application to both her and her patients should they be charged with a crime, no evidence was presented to establish that she sought or received any advice regarding the potential impact on her license and whether the medical necessity defense would be recognized in that regulatory structure.

87. As noted in the Findings of Fact, the medical necessity defense is a defense to be used in a criminal proceeding. It does not apply in a license disciplinary proceeding. Even assuming its applicability, the elements have not been established in this case. Here, Respondent intentionally created the circumstances that precipitated the unlawful act, by seeing patients knowing that their goal was to receive a prescription

for an unlawful substance. She could have treated those patients with lawful alternatives, ones that she claimed she recommended, but prescribed medical marijuana knowing that these other alternatives had not been pursued.

88. Respondent cites several other cases in support of her claims of medical necessity and a physician's First Amendment right to recommend marijuana to her patients. Sowell v. State, 738 So. 2d 333 (Fla. 1st DCA 1998), cert. discharged, 734 So. 2d 421 (Fla. 1999), also involved the application of the medical necessity defense, and simply holds that a defendant in a criminal proceeding charged with cultivating marijuana should have been able to present the defense.[3/] It has no application here.

89. Respondent also cites to Conant v. Walters, 309 F.3d 629 (9th Cir. 2002), for the premise that the Board of Medicine may not abridge Respondent's First Amendment rights to speak to her patients about the benefits of medical marijuana. Conant addresses a federal injunction issued by the Ninth Circuit that enjoined the enforcement of professional licensure proceedings where the sole basis for the government's action was the physician's professional "recommendation" of the use of medical marijuana. The Ninth Circuit specifically stated that the injunction was not intended to limit the government's ability to investigate doctors who aid and abet the actual distribution and

possession of marijuana. The focus of the case was on the government's ability to prosecute a physician for communicating a sincerely held medical judgment that involved the use of marijuana. In this case, none of the charges against Respondent seek to punish her for discussing the possible benefits of medical marijuana. Each of the charges, discussed individually below, requires more than expression of opinion, or counseling, on the possible benefits of medical marijuana use. Conant does not apply to bar the prosecution in this proceeding.

90. Counts I, II, and III of the Administrative Complaint charged Respondent with violating section 458.331(1)(v), (q), and (k), respectively. Section 458.331(1) states, in pertinent part:

> (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.
>
> * * *
>
> (q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs,

> including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.
>
> * * *
>
> (v) Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform.

91. With respect to Count I, the Department alleged that Respondent violated section 458.331(1)(v) by: a) providing a prescription for cannabis to R.S., and/or b) offering R.S. the opportunity to obtain cannabis.

92. Respondent argues that she cannot be found guilty of Count I because the document that she provided to R.S., which she refers to as a certificate or a recommendation, does not qualify as a prescription as defined in section 465.003(14), Florida Statutes, which provides in part:

> "Prescription" includes any order for drugs or medicinal supplies written or transmitted by any means of communication by a duly licensed practitioner authorized by the laws of the state to prescribe such drugs or medicinal supplies and intended to be dispensed by a pharmacist.

93. It is noted that the definition uses the word "includes," and does not, on its face, provide that all

prescriptions must include every element listed. It does not state that all prescriptions must be as described. Section 465.003 uses the term "means" in 17 out of the 20 definitions listed, as opposed to the term "includes" used in the remaining three definitions. Moreover, section 465.003 limits the scope of the definitions provided by the phrase "as used in this chapter." The reference to a prescription being dispensed by a pharmacist in section 465.003(14) makes perfect sense, considering that chapter 465 governs the practice of pharmacy.

94. The Administrative Complaint does not reference chapter 465, and this case does not address the regulation of pharmacists. Had the Legislature intended the definition in section 465.003 to apply to provisions involving all health care professionals, it could have included the definition in section 456.001. It did not do so.

95. The document that Respondent provided to patients, which she referred to as a certificate, had all of the traditional markings of a prescription. It included her name, medical license number, and DEA number; the accepted abbreviation for the word prescription; the drug to be prescribed and the dosage to be dispensed; a place to indicate the number of refills to be permitted; a place for the physician's signature; and the phrase, "to insure brand name dispensing, prescriber must write medically necessary on the prescription." Any person receiving the

certificate would reasonably believe that he or she had been given a prescription.

96. Moreover, it is noted that when R.S. called the office initially, he told the receptionist that he had heard that Respondent could provide a prescription for medical marijuana; the information that led him to her office was that she would prescribe it; and while R.S. knew that he could not go to a pharmacy to fill it, he referred to the certificate as a prescription. As R.S., a retired physician assistant, stated, it looked like a prescription to him, just not on a prescription pad. The Department has demonstrated by clear and convincing evidence that the certificate was created to look like a prescription, and is a prescription.

97. Respondent provided this prescription at a time when she knew that it was not lawful to do so, and by so doing, practiced beyond the scope permitted by law. Count I has been established by clear and convincing evidence.

98. Even if it were found that the certificate which Respondent provided is not a prescription, the Department demonstrated by clear and convincing evidence that Respondent offered R.S. the opportunity to obtain cannabis. She led him to believe that the certification that she provided could be taken to a dispensary and filled. She provided what R.S. was led to believe was a necessary component to obtaining medical marijuana,

along with directions for reaching a dispensary to fill the prescription. Thus, the Department has proven Count I by clear and convincing evidence.

99. Count II charges Respondent with violating section 458.331(1)(q), which prohibits prescribing a legend drug, including a controlled substance, other than in the course of the physician's professional practice. Section 458.331(1)(q) contains a presumption that "it shall be legally presumed that prescribing controlled substances inappropriately or in excessive or inappropriate quantities is not in the course of the physician's professional practice, without regard to his or her intent."

100. Here, Respondent provided a prescription to R.S. at a time when she knew that she had not taken the course to become an authorized ordering physician, and at a time when she knew that medical marijuana could not lawfully be ordered in Florida in any form. To prescribe medical marijuana under these circumstances was inappropriate. The Department has proven that Respondent violated section 458.331(1)(q) by clear and convincing evidence.

101. Count III charges Respondent with violating section 458.331(1)(k), which prohibits 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.

102. The Administrative Complaint alleges that Respondent violated section 458.331(1)(k) by: 1) representing to R.S. that she could provide a lawful prescription for cannabis to him; 2) providing a prescription for cannabis to R.S.; 3) offering R.S. the opportunity to obtain cannabis; and/or 4) employing a trick or scheme to gain financially from providing R.S. an unlawful prescription for cannabis.

103. The Department proved the allegations in Count III by clear and convincing evidence. Respondent made representations to R.S., in response to his request for a cannabis prescription, that the state required that he see her three times over a 90-day period for a condition that the state recognizes for the need of medical marijuana. Such a statement clearly implies that she could provide a lawful prescription to R.S., and she provided such a prescription, albeit unlawfully. Respondent also offered the opportunity to obtain cannabis, by providing not only the prescription, but the flyer advertising a means by which to have the prescription filled. Finally, Respondent profited from requiring patients to see her three times, and then charging an additional $250 for the certificate itself. The fact that R.S. was refunded his money is irrelevant: he received his refund only after becoming disruptive in her office and threatening to report her to the Board of Medicine. It was clearly her intention to charge patients for what was essentially a meaningless piece of

paper. The Department has proven Count III by clear and convincing evidence.

104. Counts IV and V charge Respondent with violating sections 456.072(1)(a) and (n), respectively. Section 456.072(1) provides, in pertinent part:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
> (a) Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.
>
> * * *
>
> (n) Exercising influence on a patient or client for the purpose of financial gain of the licensee or a third party.

105. The factual basis alleged for violating section 456.072(1)(a) are the same as the first three bases alleged in Count III with respect to section 458.331(1)(k), and discussed above. For the reasons already discussed, the Department has proven Count IV by clear and convincing evidence. Because the factual basis supporting the allegation is virtually identical to Count III, Count IV will not receive additional consideration in terms of determining the appropriate penalty.

106. Count V alleges that Respondent exercised undue influence for the purpose of financial gain by providing an unlawful prescription for cannabis for remuneration. The Department proved Count V by clear convincing evidence.

107. Count VI charges a violation of section 348.331(1)(g), by failing to perform a statutory or legal obligation placed upon a licensed physician. In support of this allegation, the Administrative Complaint states:

> 46. At the time Respondent issued the prescription to Patient R.S., Section 381.986, Florida Statutes (2015), controlled the regulation of cannabis or marijuana for medical purposes in the State of Florida.
> 47. Respondent violated Section 458.331(1)(g), Florida Statutes (2015), by violating Section 381.986, Florida Statutes (2015), in one or more of the following ways:
>
> a. By failing to submit a lawful order for "Low-THC cannabis" to Patient R.S.;
>
> b. By failing to complete an 8 hour course and subsequent examination offered by the Florida Medical Association or the Florida Osteopathic Medical Association prior to prescribing cannabis to Patient R.S.;
>
> c. By failing to be authorized or qualified to order "Low-THC cannabis" or any other type of cannabis in the state of Florida, at the time she prescribed cannabis to Patient R.S.;
>
> d. By failing to register as the ordering licensee for Patient R.S. in the compassionate use registry maintained by the Department; and/or
>
> e. By failing to include a route of administration or planned duration for the substance she prescribed to Patient R.S.

108. The Department proved the allegations in Count VI, with respect to paragraph b. There was no obligation for Respondent to prescribe any form of cannabis at all, and at the time these events took place, it was not possible to do so. While she could have, and should have, taken the required course work at the time

she prescribed to R.S., she could not lawfully register as an ordering physician until July 2016, several months after R.S. saw her.

109. Finally, Count VII charges Respondent with violating section 456.072(1)(w), for failing to timely update her Department practitioner profile with her primary practice address. This count has been demonstrated by clear and convincing evidence.

110. The Board of Medicine has adopted disciplinary guidelines to provide notice to practitioners and the public alike of the penalties typically imposed for violations of sections 456.072 and 458.331. Fla. Admin. Code R. 64B8-8.001 (effective January 1, 2015). The rule also provides aggravating and mitigating factors to be considered should an administrative law judge recommend a penalty outside the guidelines. The testimony of the three patients who testified in mitigation at hearing has been considered, as well.

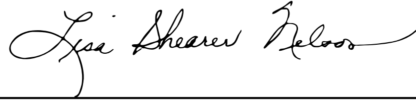
111. The undersigned has reviewed the disciplinary guidelines and has not applied any aggravating or mitigating factors, because the recommended penalty is within the permissible range of penalties identified in the guidelines.

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 Respondent guilty of violating sections

456.072(1)(a), (n), and (w), and 458.331(1)(g), (k), (q), and (v), Florida Statutes (2015). It is further recommended that Respondent's license be revoked.

DONE AND ENTERED this 30th day of April, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2018.

ENDNOTES

1/ This "recommendation" cost R.S. $250 in addition to the cost of his office visit. One has to wonder why Respondent thought the "recommendation" warranted an additional charge, and whether she would use the same rationale to justify a charge to recommend that a patient do things like, bedrest, eat less, exercise more, drink less caffeine, and the like. Clearly, such a practice would be unacceptable.

2/ It is noted that the United States Supreme Court has taken a contrary view on the federal level. See United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001), in which the Court held that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act, stating that while the statute does not explicitly abrogate the defense, its provisions leave no doubt that the defense is unavailable. 532 U.S. at 491.

[3/] In the lawyer discipline arena, counsel who gave similar advice to clients and provided them with an "Official Legal Certification" purportedly authorizing them to grow and use marijuana, without adequately advising that the doctrine of medical necessity is an affirmative defense that does not come into play until after the client is arrested, charged, and prosecuted, was recently disbarred. The Florida Bar v. Christenson, 233 So. 1019 (Fla. 2018).

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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.