

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE ALASKA STATE MEDICAL BOARD**

IN THE MATTER OF:)	
)	OAH No. 07-0367-MED
ERIK PETER KOHLER, M.D.)	Board No. 2800-05-056
_____)	2800-07-037

DECISION AND ORDER

I. Introduction

The Division of Corporations, Business and Professional Licensing ("division") filed an amended accusation requesting the imposition of a disciplinary sanction against Eric P. Kohler, MD, on the grounds that he secured his medical license through deceit, fraud or intentional misrepresentation; that he engaged in unprofessional conduct by misrepresenting, concealing or failing to disclose material information to initially obtain and to renew his medical license; and that he failed to submit a medical malpractice report to the Alaska State Medical Board ("Board") within the time required. Dr. Kohler requested a hearing. The case was referred to the Office of Administrative Hearings and the assigned administrative law judge conducted a hearing on January 24-28, 2008.

Based on the record and hearing testimony, pursuant to AS 08.64.331(a), Dr. Kohler is hereby reprimanded and a civil fine of \$2,500 is imposed.

II. Findings of Fact

Dr. Kohler is a neurosurgeon certified by the American Board of Neurological Surgery and is licensed to practice medicine in California (1986), Washington (1991) and Alaska (2003).¹ He initially obtained a temporary permit to practice medicine in Alaska on September 4, 2003,² and the Alaska State Medical Board subsequently issued him Medical License No. 5237 on December 11, 2003.³ His license was renewed in 2004 and again on December 29, 2006; it will lapse on December 31, 2008, unless renewed.⁴ Dr. Kohler has not previously had any adverse Board actions, disciplinary actions or sanctions imposed against him.⁵

¹ Exh. 20 at p. 000128.

² Exh. 23.

³ Exh. 25.

⁴ Exh.24.

⁵ Exh. K.

A. Washington

Since 1994, licensing and disciplinary matters relating to the practice of medicine in Washington have been controlled by the Washington Medical Quality Assurance Commission ("commission").⁶

When the Washington commission receives a complaint about a licensee, it assigns a case number then submits the complaint to a review panel to determine whether it should be referred for an investigation or closed with no action.⁷ If it does not rise to the "threshold" level of concern for an investigation or the commission does not have jurisdiction, such as with a billing dispute, the complaint is closed with no action.⁸ If it is determined to warrant an investigation, the complaint is sent to the investigations unit and an investigation is opened.⁹

1. Case no. 97-08-0045MD

On June 11, 1999, an insurance carrier reported to the Washington commission a medical malpractice settlement made on Dr. Kohler's behalf.¹⁰ After an initial review, the report was referred to the investigations unit for an investigation and assigned to Health Care Investigator Bonita James.¹¹

On June 16, 1999, James H. Smith, Chief Investigator, sent a letter to Dr. Kohler notifying him that the commission had received a report concerning an allegation of unprofessional conduct and on that basis had opened file number 97-08-0045MD.¹² Mr. Smith informed Dr. Kohler that the commission "is the agency within State government with legislated authority to investigate reports of unprofessional conduct . . ." and that "a preliminary investigation to gather the facts" would be conducted by an investigator.¹³ Dr. Kohler was invited to submit a written statement about the report to the commission.¹⁴

⁶ Testimony of Maryella Jansen, Deputy Executive Director, Health Professionals Section 5.

⁷ The process has changed somewhat in the last few years, but complaints in Washington have always been reviewed by a medical consultant or a panel of several medical professionals before being referred to the investigations unit. Testimony of Bonita James.

⁸ *Id.*

⁹ *Id.*

¹⁰ Exh. 1.

¹¹ Exh. 2.

¹² Exh. 3.

¹³ *Id.*

¹⁴ *Id.* Apparently Dr. Kohler was initially informed about the report in 1997. See Exhs. 1-6.

Two days later, on June 18, 1999, Bonita James, the assigned investigator, sent a certified letter to Dr. Kohler in case number 97-08-0045MD. She informed him the commission is empowered to determine whether the allegations were substantiated and to take “disciplinary or corrective action if warranted.”¹⁵ Ms. James' letter requested that Dr. Kohler provide a written statement explaining the factual background of the case. Further, the letter stated: "Please be advised that this is a preliminary investigation only and that no charges have been issued in connection with this investigation."¹⁶ Dr. Kohler received the letter and signed the green card receipt for it.¹⁷

On July 8, 1999, Dr. Kohler authored a written response to Ms. James' letter and sent it to her at the Department of Health, Medical Quality Assurance Commission, Medical Investigations Unit in Olympia, Washington.¹⁸ In a two-page narrative, Dr. Kohler described the patient involved in the 1993 case and Dr. Kohler’s diagnosis and treatment of her. He said the patient had sued him and he felt "responsible for not being more assiduous on paperwork, and not being more insistent with a difficult patient personality." Dr. Kohler said the incident caused him to change how paper reports were handled within his office and with the radiology department, and he said that "after a lot of research, we are installing an electronic medical record and scheduler that provides further back-up to ensure this never happens again."¹⁹

On July 22, 1999, Ms. James wrote a "Closing Memorandum" to Chief Investigator Smith reciting the substance of the complaint and Dr. Kohler's response.²⁰ On August 27, 1999, then-Program Manager Maryella Jansen wrote to Dr. Kohler and informed him that "after careful consideration of the records and information obtained during its investigation . . . the commission . . . has determined to close this case no cause for action [sic] because risk is minimal and not likely to recur."²¹ The letter further informed Dr. Kohler that the case could be reconsidered if additional information was received "that warrants further investigation."²²

¹⁵ See Exh. 4. The Washington commission initially sends two letters to respondents about newly opened cases. The first, known as the “notice letter,” is sent by the chief investigator; it informs a respondent that an investigation has been opened. The second letter, sent by certified mail and known as the “cooperation letter,” is written by the assigned investigator and informs the respondent how to participate in the process.

¹⁶ Exh. 4 at 2.

¹⁷ Exh. 4 at 3.

¹⁸ Exh. 5.

¹⁹ Exh. 5 at 2.

²⁰ Exh. 6.

²¹ Exh. 8.

²² *Id.*

2. Case no. 01-07-0027MD

Two years later, on July 10, 2001, the Washington commission's initial review panel evaluated another complaint regarding Dr. Kohler. This complaint, assigned case number 01-07-0027MD, asserted unprofessional conduct, primarily on the part of Dr. Kohler's office manager.²³ On August 17, 2001, Program Manager Maryella Jansen sent Dr. Kohler a letter indicating that the report of unprofessional conduct did not meet the criteria established for cases which are to be investigated and, as a result, the case had been closed.²⁴

3. Case no. 2003-07-0064MD²⁵

On July 29, 2003, the commission's initial assessment panel reviewed a complaint asserting that Dr. Kohler had "botched" her spine surgery.²⁶ The complaint was referred to the investigations unit and assigned to Bonita James.²⁷ On August 1, 2003, the chief investigator notified Dr. Kohler that the commission had received a report alleging unprofessional conduct and had opened case number 2003-07-0064MD to consider the report.²⁸ The letter further informed Dr. Kohler that "a preliminary investigation to gather the facts will be conducted by an investigator from the Department of Health, Medical Assessment and Medical Investigations Unit. The investigator will contact you as soon as possible during the investigation if a statement or other information from you is required."²⁹

On August 12, 2003, Investigator Bonita James sent a notification letter to Dr. Kohler by certified mail. As with the 1997 complaint, Ms. James' letter to Dr. Kohler stated "please be advised that this is a preliminary investigation only and that no charges have been issued in connection with this investigation."³⁰ The certified mail receipt (green card) was signed by an individual named Kathy Pearson on August 13, 2003.³¹

On September 15, 2003, Dr. Kohler submitted a response to Ms. James' letter concerning the complaint and included a copy of the patient's medical records. Dr. Kohler discussed the

²³ Exh. 9.

²⁴ Exh. 10.

²⁵ As of 2003, the commission case numbers begin with the four digit year instead of two digits, as in prior file numbers.

²⁶ Exh. 12.

²⁷ Exh. 13.

²⁸ Exh. 14.

²⁹ *Id.*

³⁰ Exh. 15 at 2.

³¹ Exh. 15 at 3.

patient's diagnosis and treatment in a two-page, single-spaced letter.³² Upon review of all the information that had been received, the commission determined that the allegations of "medical negligence and patient abandonment" did not warrant disciplinary action and, on February 5, 2004, informed Dr. Kohler that the commission had "completed its investigation"³³

B. Alaska

On June 5, 2003, Dr. Kohler submitted an application to the Alaska State Medical Board for a license to practice medicine in this state.³⁴ On September 4, 2003, while Dr. Kohler's initial application was being processed, he was issued Temporary Permit No. 2784 to practice medicine.³⁵

In the section of Dr. Kohler's application entitled "Part IV, "Disciplinary History," Question 32a states, "Have you ever been under investigation by any medical licensing jurisdiction or authority?" Dr. Kohler checked the box for "No" in answer to this question.³⁶

Dr. Kohler certified the truthfulness of his answers in the initial application. In "Part VI, Sworn Statement," the following paragraphs provide:

I hereby certify that I am the person hearing named subscribing to this application. I have read the complete application, and I know the full content thereof.

I declare, under penalty of perjury, that all of the information contained herein and evidence or other credentials submitted here with our true and correct.

. . . .

I understand that any falsification or misrepresentation of any item or response in this application, or any attachment hereto or falsification or misrepresentation of credentials to support this application, is sufficient grounds for denying, provoking, or otherwise disciplining a license or permit to practice medicine in the state of Alaska.^[37]

³² Exh. 16.

³³ Exh. 19.

³⁴ Exh. 20.

³⁵ Exhs. 22-23.

³⁶ Exh. 20 at 000132.

³⁷ Exh. 20 at 000135.

In addition to Dr. Kohler's sworn certification statement, below the signature line of the application, the following warning is found: "Alaska Statute 11.56.210 states that any person who knowingly or intentionally furnishes false or fraudulent information in this application is subject to imprisonment for not more than one year, a fine of not more than \$5,000, or both."³⁸ On June 2, 2003, Dr. Kohler signed and dated Part VI of the initial application and had his signature notarized by an individual in the state of Washington.³⁹

The division relied on the statements in Dr. Kohler's application for a license to practice medicine in Alaska and on December 11, 2003, issued Medical License No. 5237 to him.⁴⁰

On December 22, 2004, Dr. Kohler submitted a 2004-2006 Biennial License Renewal application to renew his license to practice medicine by way of the Online Renewal system.⁴¹ The seventh question in the section entitled "Professional Fitness Questions" asks, "Have you been the subject of an investigation by any licensing jurisdiction or are you currently under investigation by any licensing jurisdiction?" Dr. Kohler answered "No" to the question.⁴²

The division relied on Dr. Kohler's statements in his online renewal application to renew his license to practice medicine in Alaska and issued a renewed medical license to him on December 22, 2004.⁴³

In mid-2005, Dr. Kohler learned that Dr. Ann Marie Yost, a coworker from Washington who was planning to work with Dr. Kohler in Anchorage, was having difficulty with obtaining a medical license here in Alaska.⁴⁴ Apparently she had answered "No" to the question whether she had ever been investigated by a licensing authority, when, in fact, the Washington commission had at one time opened an investigation in response to a patient complaint. The Washington case was quickly closed with no action, but when the division learned about it, her "No" answer to the application question was deemed to be in error.⁴⁵ In an effort to assist Dr. Yost with her application for licensure, on June 15, 2005, Dr. Kohler wrote an email message to Dr. David Head, who was at the time the Chair of the Alaska State Medical Board. Dr. Kohler advocated for Dr. Yost, but at the same time, he indicated:

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Exh. 40 at A000117.

⁴¹ Exh. 24.

⁴² *Id.*

⁴³ Exh. 25.

⁴⁴ *See* Exh. A at 000118-119.

⁴⁵ *Id.*

. . . I too have been asked by the Washington State Board of Medical Quality Assurance questions about at least one patient that I can remember. I did not consider that an investigation and did not report it on my Alaska application either, as it involved a similar patient situation and the issue was dropped by the Board.^[46]

Dr. Head wrote back to Dr. Kohler, explaining that he could not comment on individual cases and forwarded Dr. Kohler's email to Leslie Gallant, the Board's executive administrator.⁴⁷ Upon receiving the series of email messages between the doctors, the division opened an investigation on Dr. Kohler, contacted investigators for the Washington Medical Quality Assurance Commission, and received documentation from the commission which revealed that Dr. Kohler had been investigated in two matters: case no. 97-08-0045MD and case no. 2003-07-0064MD.⁴⁸

On December 26, 2006, Dr. Kohler attempted to renew his license for 2007-2008 by way of the Online Renewal system, as he had done for the 2004-2006 renewal period. This time, however, Dr. Kohler answered "Yes" to two questions in the application, so the online application process was terminated automatically and he was prevented from completing the renewal online. He contacted the division and spoke with a licensing examiner, who sent him an email message indicating that the online renewal system cannot be used when a physician answers "Yes" to any question on the online renewal application.⁴⁹

On December 27, 2006, Dr. Kohler printed the online renewal application, attached a written statement explaining his "Yes" answers and mailed the documents by express mail to the licensing examiner.⁵⁰ The first question Dr. Kohler answered "Yes" to is Question 5, which asks, "Have you been the subject of an investigation by any licensing jurisdiction or are you currently under investigation by any licensing jurisdiction or is any such action pending?"⁵¹ In his letter, Dr. Kohler said he was currently under investigation in Alaska "for answering a

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Exh. A at 000122.

⁴⁹ Exh. 26.

⁵⁰ Exhs. 26-28.

⁵¹ Exh. 27 at A000180.

question on my original Alaska Medical license 3 ½ years ago incorrectly.”⁵² He went on to say that “to the best of my knowledge I had not [been investigated], so I answered no.”⁵³

Similarly, Dr. Kohler answered “Yes” to Question 11, which asks, “Has a medical malpractice claim been resolved or a civil action been terminated in which damages have been paid or are to be paid by you or on your behalf to a claimant or plaintiff, whether by judgment or under settlement?” Dr. Kohler’s explanatory letter indicated that in November 2006, *Clark v. Kohler*, case no. 209847, had settled out of court in Snohomish County, Washington, and stated that he had asked his attorney to forward the relevant documents to the Board.⁵⁴

Dr. Kohler’s letter further addressed the issue of the Washington cases filed against him. He explained that he had reported the Washington investigations to the Alaska Board in 2005 after hearing that his friend, Dr. Ann Marie Yost, had been fined under similar circumstances. He added that after learned Dr. Yost had been fined:

. . . I notified the Alaska State Medical Board that I too had often discussed cases with the Washington State Board of Quality Assurance and was never aware that some of those interactions could have risen to the level of an investigation. The Alaska investigators check [sic] and found that two such contacts had been labeled as investigations, and wanted to fine me and have me sign a document saying I had lied.

I wrote a letter objecting and explaining my understanding that the Washington State Board had always explained their role was as Ombudsman to facilitate information flow, not to be legal prosecutors. They did not explain that some of their contacts could rise to the level of "investigation" while most were simply to settle misunderstandings.

One of my "investigations" was the fact that 13 years ago I had a malpractice case settle out of court. It was reported to the state, but they had to investigate anyway, thus I was investigated. The second was a patient complaint that was checked out and found to be groundless and dropped. But it had been classified as an investigation rather than simply a request for information.

The Alaska Medical Board investigators did send a letter back saying that they would drop the first charge of missing the fact that

⁵² Exh. 25 at 000182.

⁵³ *Id.*

⁵⁴ *Id.*

I technically was "investigated" for the malpractice settlement after I reported to the Washington State Board, but they still wanted to fine me and report me to the National Data Bank for not realizing that a patient complaint, that was checked out and cleared, did get classified as an investigation. They gave me the option of signing an admission of guilt, or of requesting an administrative judge to decide if this was a case of semantics or cases of decite [sic]. I requested the hearing but have not heard any further responses from the board as of yet.^[55]

The division relied upon Dr. Kohler's statements in his 2007-2008 Biennial License Renewal application to renew his license to practice medicine in Alaska and issued a renewed medical license to him on December 29, 2006.⁵⁶

In August 2007, after a routine compliance check of malpractice settlements for licensed physicians, the division discovered Dr. Kohler had not provided a report required by AS 08.64.345 and 12 AAC 40.930 in the case of *Clark v. Kohler*, case no. 209847, the medical malpractice case he had previously disclosed to the Board in his initial application and on his 2007-2008 renewal form. The actual settlement documents indicate that the malpractice action settled on October 26, 2006, and was dismissed by the court on November 9, 2006.⁵⁷ Dr. Kohler filed the report required by AS 08.64.345 and 12 AAC 40.930 on January 3, 2008, thirteen months late.⁵⁸

III. Discussion

The division alleges that Dr. Kohler initially obtained his license to practice medicine in the state of Alaska and subsequently renewed his license through deceit, fraud or intentional misrepresentation, thereby violating AS 08.64.326(a)(1) (Counts I and II); that he engaged in unprofessional conduct by misrepresenting, concealing or failing to disclose material information to obtain his medical license and to renew his medical license, thereby violating AS 08.64.326(a)(7) and AS 08.64.326(a)(9) (Counts III and IV); and that he failed to submit a medical malpractice report to the Alaska State Medical Board within the time required, thereby violating AS 08.64.345, AS 08.64.326(a)(7), and 12 AAC 40.930 (Count V). Based on these

⁵⁵ Exh. 27 at A000182-183.

⁵⁶ Exh. 40 at A000117.

⁵⁷ Exh. N.

⁵⁸ Exh. 42.

allegations, the division requests that the Board impose a disciplinary sanction on Dr. Kohler's medical license consisting of a reprimand and a civil fine of \$3,000.

The requirements of the Administrative Procedure Act apply to this proceeding.⁵⁹ Pursuant to AS 44.62.460(e)(1), "the petitioner has the burden of proof by a preponderance of the evidence if an accusation has been filed under AS 44.62.360 or if the renewal of a right, authority, license, or privilege has been denied." The evidentiary standard "preponderance of the evidence" means that something is more likely than not true, or, in other words, that there is a greater than 50% chance that it is true.⁶⁰

A. Reasons For Disciplinary Sanctions Exist

1. Intentional misrepresentation (AS 08.64.326(a)(1))

Alaska Statute 08.64.326(a)(1) provides that the Board may impose a disciplinary sanction if it finds after a hearing that a licensee "secured a license through deceit, fraud, or intentional misrepresentation." The intentionality element refers to the individual's "knowledge of the untrue character of his representation."⁶¹ It is not necessary to prove the maker had the specific "'intent to deceive'; rather, it requires the maker to have reason to expect that the other's conduct will be influenced."⁶² Intent is a question of fact that may be proven by inference through circumstantial evidence.⁶³

Dr. Kohler answered "No" to Question 32a, "Have you ever been the subject of an investigation by any licensing jurisdiction or are you currently under investigation by any licensing jurisdiction" on both his initial application for licensure and subsequently on his renewal application. The division argues that Dr. Kohler's responses to Question 32a were intentional misrepresentations that warrant disciplinary action because he failed to reveal the existence of the 1997 Washington investigation on his initial application (Count I) and he failed to reveal both the 1997 and 2003 Washington investigations on his December 2004 renewal (Count II).

⁵⁹ AS 08.01.010.

⁶⁰ See *Dairy Queen of Fairbanks v. Travelers Indemnity Co. of America*, 748 P.2d 1169, 1170-1172 (Alaska 1998).

⁶¹ *Lightle v. State of Alaska, Real Estate Commission*, 146 P.3d 980, 983 (Alaska 2006).

⁶² *Id.* at 984.

⁶³ *In Re Muir*, OAH No. 04-0286-MED (Alaska State Medical Board, January 12, 2006); see also *Crittell v. Bingo*, 36 P.3d 634, 654 at n.21 (Alaska 2001).

Dr. Kohler claims that the two Washington actions were not really investigations, but even if they were, he did not know they were investigations and thus did not have any intent to deceive the Board. Dr. Kohler proposes that he receive a small fine and a non-reprimand letter of caution.

At the time he submitted his initial application for a medical license in June 2003, Dr. Kohler had been the subject of an investigation by the Washington Medical Quality Assurance Commission in case number 97-08-0045MD, even though the investigation ended in 1999 with no disciplinary action taken against his license. The case arose automatically because a medical malpractice settlement was reported to the Washington commission⁶⁴ – not a serious matter, given that the claim had already settled and payment had been made, but it was clearly an investigation nonetheless. Similarly, by the time he submitted his 2004-2006 renewal application, Dr. Kohler had also been the subject of a second investigation begun in August 2003, case number 2003-07-0064MD. Again, no disciplinary action was taken against his license as a result of this second investigation, but the complaint alleged that Dr. Kohler had “botched” the patient’s surgery, a claim of medical malpractice that potentially could have led to disciplinary sanctions against his Washington license. In both cases, a certified letter to Dr. Kohler referred to “this investigation.” Further, all three witnesses from the Washington commission – Maryella Jansen, the Deputy Executive Director, Health Professionals Section 5, James H. Smith, Chief Investigator, and Bonita James, Health Care Investigator – testified that Dr. Kohler was under investigation in case numbers 97-08-0045MD and 2003-07-0064MD.

Therefore, the preponderance of the evidence is that Dr. Kohler had been the subject of an investigation in Washington case number 97-08-0045MD at the time he submitted his initial application to practice medicine in 2003, and when he submitted his 2004-2004 renewal application, he had been the subject of two investigations: the 1997 matter and case number 2003-07-0064MD.

Dr. Kohler claims he did not intentionally withhold from Alaska’s medical Board information about the Washington investigations. He argues he answered "No" to the question based upon his reasonable belief that he had never been under investigation by any medical licensing authority. Dr. Kohler asserts that since the State of Alaska application did not define

⁶⁴ Medical malpractice payments automatically trigger an investigation in the state of Washington. Testimony of Bonita James.

the term "investigation," he did not interpret the question on the Board's application as requesting information on any and all contacts from a state licensing agency or authority, regardless of whether they resulted in formal proceedings.

Dr. Kohler acknowledges that he had previously been “contacted” by the Washington Medical Quality Assurance Commission prior to 2003, but he maintains he believed the contacts were about patient complaints, not licensing matters. He explained that the commission follows a multi-level approach when it receives a patient complaint, dismissing some reports that do not meet a threshold level of seriousness, yet referring other complaints to the investigations unit, which could also dismiss the complaint without bringing formal proceedings against the physician. Thus, he argues not all of the inquiries from the Washington commission necessarily constitute an "investigation." Dr. Kohler asserts that the current name of the commission itself invites misunderstandings because the phrase “quality assurance commission” suggests that it deals with patient complaints and standard of care issues rather than licensing and disciplinary matters.

Dr. Kohler finally asserts that even to the extent his responses were false or misleading, he did not intend to deceive the Board. He believes the fact that he self-reported his Washington investigations to the former Board chair in an email message regarding Dr. Ann Marie Yost should have a mitigating effect on any sanction the Board may decide to impose.

The words from Question 32a “ever been under investigation” are not ambiguous. The question does not seek to determine whether discipline was ultimately imposed, rather, whether the applicant has ever been the subject of an investigation. Dr. Kohler’s claim he did not know the Washington contacts were investigations is not credible and his answers to Question 32a were not reasonable, given that two investigations had previously been initiated against him in Washington. The commission’s written correspondence to Dr. Kohler clearly informed him – on several occasions – that investigations had been opened, were being processed by the investigations unit, and had subsequently been closed with no action required.⁶⁵ Further, Dr. Kohler replied to the commission’s inquiry in both cases, thereby eliminating any question whether he was aware of the investigations or actually received the letters.⁶⁶

⁶⁵ See Exhs. 3-8; 14-19.

⁶⁶ See Exhs. 3 & 16.

Dr. Kohler's insistence that he did not report the two Washington investigations because he did not believe he had been investigated in that state is perplexing. Dr. Kohler also testified he did not report the two Washington investigations because he did not believe a physician had to report investigations that did not lead to disciplinary action. These statements are mutually exclusive: if Dr. Kohler did not realize he had been the subject of two investigations in Washington, he would have had no reason to wonder whether he had to report those same investigations; it would not have occurred to him.

It is not reasonable to interpret a question seeking information about "investigations" as a mandate to report only those investigations that led to disciplinary action. If that were the case, then questions seeking disciplinary actions would elicit the same information and a separate question about investigations would be unnecessary.

Dr. Kohler claims his lack of intent to deceive the Board is evidenced by the fact that in his 2003 application he did disclose the underlying medical malpractice case that gave rise to the first investigation.⁶⁷ This argument is unconvincing – the requirement to report medical malpractice litigation is a separate and distinct obligation on an application for a medical license. It is mistaken to argue that an applicant who reveals a medical malpractice action should be seen as being forthright about an investigation, when the specific question about investigations is answered in the negative.

Dr. Kohler knew of the Washington investigations and chose not to disclose them to Alaska's medical Board in his initial 2003 application for licensure and his 2004-2006 renewal application. Thus, Dr. Kohler's answer to Question 32a on his initial application in 2003 was false and misleading even though the Washington investigation was closed and did not lead to any disciplinary action, because he had been the subject of an investigation there. Similarly, Dr. Kohler's answer to Question 32a on his 2004-2006 renewal application was false and misleading because by that time he had been the subject of two prior investigations in Washington.

Even if Dr. Kohler's motivation was not consciously dishonest, misrepresentation was made with the intent of inducing reliance by Alaska's medical Board and for the purpose of obtaining a license. Under the law discussed at the beginning of this section, this is sufficient to constitute "intentional misrepresentation."

⁶⁷ See Exh. 20 at 000131.

2. Failure to provide medical malpractice report (AS 08.64.326(a)(7))

AS 08.64.345 provides that:

[a] person licensed under this chapter shall report in writing to the board concerning the outcome of each medical malpractice claim or civil action in which damages have been or are to be paid by or on behalf of the licensee to the claimant or plaintiff, whether by judgment or under a settlement. This report shall be made within 30 days after resolution of the claim or termination of the civil action.

The Board has adopted a regulation implementing AS 08.64.345 and providing for the specific form and contents of the mandatory report. The regulation, 12 AAC 40.930, requires that:

a) A person licensed under this chapter shall submit to the board a signed, notarized report on a form provided by the department, explaining the outcome of each malpractice claim or action against the licensee in which damages have been or are to be paid, whether by judgment or settlement. Reports shall be submitted to the board within 30 days of the date of the resolution of the claim or action.

(b) Malpractice reports shall include the (1) name and address of the licensee; (2) telephone number of the licensee; (3) date of the occurrence; (4) summary of the alleged malpractice; (5) summary of the licensee's response to the allegations; (6) case, claim, or court number of the malpractice claim or action; if a court action was not filed, the medical record or chart number, and the location of the records relating to the alleged malpractice; (7) amount of the award or settlement paid or to be paid by or on behalf of the licensee; (8) date of award or settlement; (9) following type of resolution of the claim or action: (A) court or jury award; (B) settlement following initiation of civil court action; (C) settlement before the initiation of civil court action; (D) other private compromise.

(c) Failure to submit a malpractice report required by this section constitutes unprofessional conduct under 12 AAC 40.967 and is subject to disciplinary action by the board.

The division alleges that Dr. Kohler failed to provide a medical malpractice report as required by AS 08 64.345 and 12 AAC 40.930. It is undisputed that Dr. Kohler reported the

underlying medical malpractice case in his 2003 initial application for licensure,⁶⁸ and also gave additional information in the letter he attached at that time.⁶⁹ When Dr. Kohler submitted his 2007-2008 renewal application on December 26, 2006, he reported that the case had settled but he did not provide a settlement date. Later documents indicate the case settled October 26, 2006 and was dismissed by the court on November 9, 2006.⁷⁰

AS 08.64.345 requires that a licensee "shall report" the outcome of the medical malpractice claim "within 30 days after resolution of the claim or termination of the civil action." Dr. Kohler was thus required to report the outcome of *Clark v. Kohler* no later than December 9, 2006, 30 days after the court dismissed the litigation. Dr. Kohler notified the Board in writing on December 26, 2006, 15 days after the expiration of the time limit.

The preponderance of the evidence is that Dr. Kohler did violate AS 08.64.345 by reporting the settlement 15 days later than required. But given that he was only 15 days late, it was a minor occurrence. On the other hand, the preponderance of the evidence is that Dr. Kohler did violate 12 AAC 40.930, the regulation requiring that the information provided be on a specific form, with specific contents. Dr. Kohler did eventually provide the actual form, but not until 13 months after it was required to be filed.

3. Unprofessional conduct (AS 08.64.326(a)(9))

Unprofessional conduct constitutes separate grounds for imposition of a disciplinary sanction. Under AS 08.64.326(a)(9), the Board may impose a disciplinary sanction if a licensee "engaged in unprofessional conduct." The Board has defined unprofessional conduct, generally, as "an act or omission by an applicant...that does not conform to the generally accepted standards of practice for the profession."⁷¹ The Board has identified a variety of specific acts that constitute unprofessional conduct, among them "misrepresenting, concealing, or failing to disclose material information" to obtain or renew a license or permit under AS 08.64."⁷² Failure to submit a required medical malpractice report also constitutes unprofessional conduct under 12 AAC 40.967.⁷³

⁶⁸ See Exh. 40 at A000228 (case number 5).

⁶⁹ See Exh. 40 at A000236 (patient "MC").

⁷⁰ Exh. N.

⁷¹ 12 AAC 40.967.

⁷² 12 AAC 40.967(2)(A) & (B).

⁷³ 12 AAC 40.930(c).

The information Dr. Kohler failed to disclose was material because the Board has specifically and unequivocally asked for it. The division has proven by a preponderance of the evidence that Dr. Kohler violated AS 08.64.326(a)(9) by intentionally misrepresenting and failing to disclose material information in order to obtain his license (Count III), and in order to renew his license (Count IV). Also, the division proved by a preponderance of the evidence that he failed to report resolution of a malpractice action in the required time under AS 08.64.345 and 12 AAC 40.930 (Count V). Therefore, by definition, these actions constitute three distinct incidents of “unprofessional conduct” and subject Dr. Kohler to disciplinary sanctions.

B. The Board Has Statutory Authority, in its Discretion, to Impose a Sanction

The imposition of a disciplinary sanction, and the nature of the sanction imposed, if any, are within the discretion of the Board.⁷⁴ The available disciplinary sanctions, which may be imposed singly or in combination, include permanent revocation, suspension, censure, letter of reprimand, probation (with associated requirements), limitations or conditions on the license, or a civil fine.⁷⁵ In determining whether imposition of a disciplinary sanction is appropriate, and the nature of the sanction, if any, the Board must be consistent.⁷⁶ To maintain consistency, significantly different outcomes in cases involving similar situations must be explained.⁷⁷ The Board may consider the record as a whole in determining what weight to give to any of the findings of fact, and may exercise its discretion accordingly. In making its decision, the Board should consider any relevant facts, including: (1) the nature and circumstances of the conduct authorizing the imposition of a disciplinary sanction; (2) the licensee's experience and professional record; and (3) any other relevant information.⁷⁸

1. Prior cases

The Board has issued a set of guidelines for the division to use in negotiating memoranda of agreement with applicants or licensees who have failed to disclose material information.⁷⁹

⁷⁴ See *Wendte v. State, Board of Real Estate Appraisers*, 70 P.3d 1089, 1093 (Alaska 2002).

⁷⁵ AS 08.64.331(a).

⁷⁶ AS 08.64.331(f).

⁷⁷ *Id.*

⁷⁸ See generally 12 AAC 40.055(b), 12 AAC 40.967.

⁷⁹ In January 2001, the Board added to its guidelines a sanction for failure to report a medical malpractice settlement: reprimand and a civil fine of \$1,000 per violation. In April 2005, the Board added CME requirements to its guidelines and, where a maximum fine was listed as \$10,000, increased the amount of \$25,000. Exh. 33 at C000393-395.

These guidelines were discussed at the hearing.⁸⁰ For failure to disclose material, factual information in an initial application for licensure or in an application for renewal, the Board's guidelines recommend a letter of reprimand and a civil fine of up to \$2,000 for each violation, commensurate with the severity of the violation.⁸¹ For failure to disclose a medical malpractice settlement in accordance with AS 08.64.130 and AS 08.64.345, the Board's guidelines recommend a letter of reprimand and a civil fine of up to \$1,000 for each violation, commensurate with the severity of the violation.⁸²

During the 10-year period from 1998 through 2007, the Board has considered 51 cases involving an individual's failure to disclose material information (other than failure to meet CME requirements).⁸³ Of those 51 cases, most of which involve a Board-approved memorandum of agreement, 29 are applicable here because they specifically relate to failure to disclose an investigation or failure to disclose a medical malpractice settlement: the majority of those individuals (22) received a reprimand and a civil fine of \$1,000 for each violation;⁸⁴ two of the applicants were denied a license;⁸⁵ the Board varied the sanctions somewhat in four cases;⁸⁶

⁸⁰ These guidelines do not hold the force of law, as acknowledged by the division, because they have not been adopted by regulation. However, the Board has at times referred the division to those guidelines for the staff's use in preparing negotiated memoranda of agreement. Testimony of Leslie Gallant.

⁸¹ Exh. 38 at C000425.

⁸² *Id.* Although these figures appear to be the maximum fines, the Board may impose higher amounts for more serious violations.

⁸³ Exh. G. This exhibit is the printed version of the Board's online summary of its prior actions. The list is found on the Board's website: <http://www.dced.state.ak.us/occ/pmed4.htm>.

⁸⁴ *Id.* *In Re Ryan*, No. 2850-98-04 (April 23, 1998); *In Re Croy*, No. 2850-97-011 (July 20, 1998) (application originally denied then granted with discipline); *In Re E. Cole* (August 26, 1998) (application originally denied then granted with discipline); *In Re Ruben* (October 2, 1998) (application originally denied then granted with discipline); *In Re DaSilva*, No. 2852-99-1 (April 27, 2000); *In Re Romeu*, No. 2850-00-13 (October 27, 2000); *In Re Hopson*, No. 2850-00-017 (January 19, 2001); *In Re Allen*, No. 2850-01-006 (April 9, 2001); *In Re Barton*, No. 2800-01-017 (January 17, 2002) (malpractice settlement); *In Re Beal*, No. 2800-99-098 (August 28, 2002) (malpractice settlement); *In Re Azure*, No. 2856-02-001 (October 24, 2002); *In Re Ling*, No. 2800-02-061 (April 03, 2003) (malpractice settlement); *In Re Boesch*, No. 2800-03-018 (August 7, 2003) (malpractice settlement); *In Re Khabir*, No. 2800-02-060 (October 24, 2003) (malpractice settlement); *In Re Frankham*, No. 2850-04-002 (July 15, 2004); *In Re Yost*, No. 2800-05-003 (April 21, 2005); *In Re Strobbe*, No. 2852-05-001 (January 12, 2006); *In Re Pae*, No. 2850-06-004 (October 12, 2006); *In Re Zajac*, No. 2800-06-007 (October 13, 2006); *In Re Chicola*, No. 2800-07-001 (January 26, 2007) (malpractice settlement); *In Re Sirois*, No. 2800-07-011 (April 12, 2007); *In Re Youngberg*, No. 2850-06-007 (April 12, 2007).

⁸⁵ *In Re St. John* (October 26, 2001) (multiple investigations and disciplinary history); *In Re Muir*, No. 2850-04-006 (January 12, 2006) (decision and order following an administrative hearing).

⁸⁶ *In Re Denney*, No. 2850-97-003 (August 26, 1998) (application initially denied then granted after administrative hearing; fined \$500) (former colleague initiated investigation following an employment dispute); *In Re Steinhilber*, No. 2850-97-019 (August 27, 1998) (application initially denied then granted following hearing; fined \$1500) (failed to disclose licensure in several other states, an investigation and the revocation of hospital privileges); *In Re Pulliam*, No. 2850-00-002 (May 4, 2000) (censure only; investigation was for false advertising based on incorrect newspaper advertisement); *In Re Jensen*, No. 2803-07-001 (July 19, 2007) (failed to disclose investigation and

and the fine is unknown in one of them.⁸⁷ The detailed facts of those actions are not part of the record here. The present case is somewhat different in its context, in that the misrepresentation came to light subsequent to licensure and was, in part, self-reported.

2. A civil fine and reprimand are warranted

An applicant's obligation to provide accurate information to a licensing authority is non-delegable.⁸⁸ The individual's personal accountability is indicated by the certification above a signature and by requiring the signature to be sworn. As a practical matter, the division may not have the resources to investigate all of the representations in thousands of new and renewal applications it receives each year in processing licenses, and it must rely on their accuracy.

The agency may justifiably rely on an applicant's verification under oath that his answers to questions in the application are truthful and complete. The applicant has a responsibility to provide information requested in a license application regardless of whether the information sought may be obtained by the licensing agency through inquiry to other public entities. An applicant for a medical license in Alaska, therefore, has an unavoidable personal legal obligation to truthfully answer questions in a license application.

Truthfulness is an essential foundation of the practice of medicine. Physicians are held to high personal and professional standards because of the public trust that is placed in them. Members of the public, and by extension, the Board, must be able to rely on a physician's truthfulness and candor in order to be assured that the public trust is not violated. The preponderance of the evidence in this appeal is that Dr. Kohler intentionally misrepresented whether he had ever been the subject of an investigation by any licensing jurisdiction. As revealed in the hearing testimony, any untruthfulness in an application for a license to practice medicine in the state of Alaska immediately brings the entire application into question, even though the underlying violations appear to be relatively minor.

The division has proven a total of six violations in this case, two incidents of failure to disclose and one incident of failure to provide, all of which result in three occurrences of unprofessional conduct. The Board does not ordinarily sanction separately for unprofessional

disciplinary history; also practiced medicine without a license for five weeks while substituting for another physician; fined \$2,500).

⁸⁷ *In Re Davoli*, No. 2850-00-002 (April 27, 2000) (sanction is listed as reprimand and civil fine).

⁸⁸ *See Matter of Moser*, Case No. 04-0294-REC (June 14, 2005 Decision).

conduct when it is just another manifestation of the same actions, so for practical purposes, three violations remain.

The Board's guidelines would suggest a fine in the total amount of up to \$5,000, consisting of two fines of \$2,000 each for failing to disclose material information in his initial application for licensure and in his renewal, plus \$1,000 for failing to disclose a medical malpractice settlement in accordance with statutes and regulations. However, the higher fine amounts should relate to the more egregious violations. Dr. Kohler's actions, while serious, did not involve patient care or issues regarding drug prescriptions or physician impairment. While the misrepresentations were intentional, Dr. Kohler did self-report his omission regarding one of the two investigations. The context of this self-report (his email to Dr. Head) indicates that, albeit unreasonably, he did not perceive his conduct to be deceptive. Also, while Dr. Kohler's medical malpractice settlement report was 13 months late – submitted on the required form on January 3, 2008 – he first informed the Board in his renewal application dated December 27, 2006, that the malpractice action had, indeed, reached a settlement the previous month. Thus, based on the court documents, Dr. Kohler was literally only two weeks late in notifying the Board of the malpractice settlement.

Therefore, Dr. Kohler should be fined \$1,000 each for the two incidents of failure to disclose prior investigations and \$500 for his failure to provide a medical malpractice report, for a total fine of \$2,500. Dr. Kohler's request for a non-reprimand letter of caution is not supportable. A reprimand is appropriate because it reflects the serious consequences of a licensee's lapse in truthfulness. Also, the Board consistently reprimands individuals who have failed to disclose material information.

IV. Conclusion

The division has proven by a preponderance of the evidence that Dr. Kohler's applications for a medical license contained intentional misrepresentations; that he engaged in unprofessional conduct by failing to disclose material information to initially obtain and thereafter to renew his medical license; and that he failed to submit a required medical

malpractice report to the Alaska State Medical Board within the time required. Under AS 08.64.33, a reprimand and a civil fine of \$2,500 are appropriate and are consistent with the Board's prior actions regarding similar allegations.

V. Order

Pursuant to AS 08.64.331(a), Dr. Kohler is hereby reprimanded and a civil fine of \$2,500 is imposed.

DATED this 25th day of June, 2008.

By: Signed
Kay L. Howard
Administrative Law Judge

Non-Adoption Options

1. The undersigned, in accordance with AS 44.64.060, declines to adopt this Decision and Order, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2008.

By: _____
Signature

Name

Title

2. The undersigned, in accordance with AS 44.64.060 (e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

REPRIMAND: In Alaska, the Board expects that applicants will be forthright in their responses to questions relating to their investigative history. The issuance of a license to practice medicine in Alaska is based in part on the veracity of the applicant, and without full and truthful disclosure, it is not possible for the Board to adequately perform its function of protecting public safety. Your failure to truthfully answer questions pertaining to your investigative history on both your initial application and your renewal application detracts from your professionalism. You are expected to be totally forthcoming in all your future dealings with this board in relation to your practice of medicine in Alaska.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 24th day of July, 2008.

By: Signed
Signature
Jean M. Tisgonis, M.D.
Name
Chair

[This document has been modified to conform to technical standards for publication.]
