

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

In the Matter of:)	
)	
WILLIAM M. SYKES)	
)	
Applicant.)	OAH No. 08-0475-MED
_____)	Agency No. 2800-07-029

DECISION AND ORDER

I. Introduction

William M. Sykes, M.D., a Hawaii physician who was once licensed in Alaska but permitted his licensure to lapse, applied for new license in March of 2007.¹ The State Medical Board first considered the matter in its October 2007 meeting. Because Dr. Sykes had not given a complete answer to a question on the application about his states of licensure, the Board voted to offer him a “restricted license” conditioned on payment of a \$3500 fine and acceptance of a reprimand.² Dr. Sykes declined the offer. In light of his refusal, the Board voted in its April 2008 meeting to deny licensure.

The Board’s staff communicated the Board’s action to Dr. Sykes on May 8, 2008. As is his statutory right, Dr. Sykes requested an administrative hearing eleven days thereafter. Owing to an oversight of some kind, the matter was not referred to the Office of Administrative Hearings (OAH) until September 10, 2008.³ OAH offered the parties an expedited hearing to bring the matter back before the Board at its October 2008 meeting. The parties elected instead to present the case at a hearing on November 21, 2008.

At the hearing, the parties agreed that the case should be framed by an Amended Statement of Issues filed November 18, 2008.⁴ All exhibits offered by either party (Division’s A – N and Sykes’s 1 – 3) were admitted without objection. Dr. Sykes testified, as did the Board’s Executive Director, Leslie Gallant, and the investigator assigned to the Board, Colleen Nelson.

¹ The application is at Exhibit A, pp. 29-38.

² Ex. A, p. 21.

³ Because of the delay in referral, it was not possible to process the case within 120 days of the hearing request as envisioned by AS 44.64.060. The case was fully processed within 90 days of referral.

⁴ Paragraph 7, line 24 of the Amended Statement of Issues was corrected by agreement to replace “\$2,500” with “\$3,500.”

By stipulation, the Second Amended Statement of Issues (Nov. 21, 2008) is to be disregarded.

This is the decision based on the evidence taken at the hearing, which presented a slightly different and fuller picture of the circumstances than had previously been available to the Board. This decision concludes that by failing to complete his application for licensure accurately, Dr. Sykes engaged in unprofessional conduct as defined in a Board regulation, and that accordingly he is subject to refusal of a license or, if he is offered and accepts a license, to discipline. It substantially affirms the choice offered to Dr. Sykes in October of 2007, but with a downward adjustment of the civil fine proposed at that time to achieve a better fit with the sanctions imposed in similar cases against other physicians.

II. Facts

William Sykes is a fellowship-trained psychiatrist now practicing in Hawaii. He concentrates his clinical practice primarily in child and adolescent psychiatry. He also serves on the faculty of the University of Hawaii. Now in his sixties, he enjoys taking *locum tenens* positions in other states on occasion. In 2007, he and his wife decided it would be fun and helpful to provide vacation coverage for Alaska psychiatrists, and he submitted an application for licensure by credentials to the Alaska State Medical Board. There was demand in Alaska for his assistance; indeed, before or shortly after he submitted his application, he had an opportunity to take a *locum tenens* assignment in Fairbanks.⁵

Dr. Sykes filled out his application on March 9, 2007. Item 18 of the application for licensure by credentials made the following request:

18. Professional Licensure

Please list all states or territories . . . or other countries in which you hold or have **ever** held medical licenses. Include instructional or training permits. Failure to disclose all licenses may result in disciplinary sanctions or denial.^[6]

In the lines below this request, Dr. Sykes listed information about licenses in Hawaii, Colorado, Montana, and Nebraska. Elsewhere on the same application (at item 11), he also disclosed that he had held a license in Alaska in the 1990s, providing its number.⁷ Finally, more or less contemporaneously with the application and prior to any prompting from licensing staff, Dr.

⁵ Direct testimony of Dr. Sykes.

⁶ Ex. A, p. 31 (bold and underlining in original).

⁷ *Id.* at p. 29.

Sykes caused the Michigan Board of Medicine to submit a verification of licensure to Alaska.⁸ In total, therefore, Dr. Sykes affirmatively provided information, on his own initiative, regarding six states of licensure in connection with his 2007 application.⁹

The disclosure of six states was not a complete disclosure of the information sought in item 18. Dr. Sykes had also held licenses in six other states: South Dakota, Iowa, Wisconsin, California, Idaho, and Washington.

All of these omitted licenses had lapsed nine or more years previously.¹⁰ Dr. Sykes had no disciplinary history in any of the omitted states.¹¹ Indeed, Dr. Sykes had never practiced in any of the omitted states; he had collected the licenses between 1975 and 1995, when it was easier to obtain licenses by reciprocity than it is today, on the notion that he and his wife might someday want to work in those states.¹²

The licensing staff learned of five of the additional states of licensure through the AMA Physician Profile. The profile, which all applicants must authorize the Board to receive, is an imperfect, voluntary data-gathering system that usually picks up a physician's states of licensure, among other things. For Dr. Sykes, the profile was missing his lapsed license in California; this last state eventually came to light through a review of Dr. Sykes's old licensing file from his previous license in Alaska.¹³

On April 6, 2007, the licensing staff notified Dr. Sykes by form letter that it would require license verifications from several additional states.¹⁴ Most of these arrived in late May and early June.¹⁵ On August 2, 2007, after the application was deemed complete, the staff wrote Dr. Sykes and told him it had determined he had failed to report seven states of medical

⁸ Ex. A at 83. The received stamp on the verification and the intake sheet at Ex. A, p. 25 show that this verification came in before the staff had knowledge of the Michigan licensure from any other source, and thus certainly before the staff could have requested it themselves. On cross-examination, Ms. Gallant effectively confirmed that Dr. Sykes must have independently caused this item to be submitted.

A close review of the record suggests that the Washington verification (Ex. A, pp. 85-86, mailed in Washington just four days after the Alaska staff would have first learned that Washington was a relevant state) might have been in the same category as the Michigan verification, but the parties did not explore this possibility in testimony. Accordingly, Dr. Sykes did not prove that he disclosed his prior Washington licensure.

⁹ Dr. Sykes had written "see CV" above item 18, but the CV he attached to his application (Ex. A, pp. 61-65) did not add any states that were not among the six that had been otherwise disclosed. Note that the CV at Ex. A, pp. 40-44 is a later version prepared after he had been re-licensed in several northwestern states; it post-dated and was not attached to the application.

¹⁰ See Ex. A at 85, 87, 89, 91, 94, 148.

¹¹ *Id.*; cross examination of Ms. Gallant.

¹² Direct testimony and supplemental testimony of Dr. Sykes; see also Ex. A at 85, 87, 89, 91, 94, 148.

¹³ Direct testimony of Ms. Gallant.

¹⁴ Ex. A, p. 110.

¹⁵ Ex. A at 87 (South Dakota, May 22), 89 (Idaho, May 21), 91 (Wisconsin, May 18), 94 (Iowa, June 11).

licensure.¹⁶ (The seven states encompassed the six missing states listed above plus Michigan, which the staff viewed as an undisclosed state because it did not appear on the application.) The staff told Dr. Sykes that he could rescind his application or, if he decided to pursue it and receive an Alaska license, he could enter into an agreement with the Board to accept a reprimand and a \$3500 fine.¹⁷ At a subsequent meeting, the Alaska State Medical Board voted 5 – 1 to confirm the latter offer to Dr. Sykes.¹⁸ Dr. Sykes declined; the Board then denied him licensure, and this appeal followed.

Before turning to the legal ramifications of Dr. Sykes's conduct, it will be helpful to return briefly to the explanation for his mistake and the circumstances that surrounded it. Dr. Sykes admits that he filled out his application erroneously.¹⁹ He says that he mistakenly thought he needed only to list his licensing history in the states where he had practiced.²⁰ His record was clean in all of the omitted states, and there was no advantage to him in concealing his prior licensure in any of them. Taken as a whole, the evidence shows that Dr. Sykes made his error through carelessness and inattention to detail—essentially, through not bothering to read the question—rather than through any desire to misrepresent his past.²¹

At about the same time he applied in Alaska, Dr. Sykes applied for new licenses in Idaho and Washington, and he made the same error on those applications. Neither of those states chose to discipline him for the omission.²² When they discovered the omission, Washington and Idaho notified him by means of a form and required him to acknowledge the mistake.²³ Dr. Sykes's Alaska application was still pending at the time. He did not amend his Alaska application to add the missing states. The lack of amendment does not necessarily reflect poorly on Dr. Sykes, however, since Alaska had notified him very early in the process (April 6, three weeks after receiving his application) that it had discovered missing states on its own.²⁴

¹⁶ Ex. F., p. 25.

¹⁷ *Id.*

¹⁸ Ex. A, p. 21.

¹⁹ Direct testimony of Dr. Sykes.

²⁰ *Id.*

²¹ Such inattention appears to occur with surprising frequency on applications for licensure by physicians. *See* Exhibit J (at least 16 MDs applying for licensure in Alaska in 2007 omitted licenses from their list in item 18 despite having no blemish on their record in the omitted jurisdictions).

²² Direct testimony of Dr. Sykes; *cf. also* Ex. 1, pp. 1, 3 (Idaho and Washington likewise elected not to discipline based on Alaska nondisclosure as reported to them by Alaska).

²³ Direct testimony of Dr. Sykes.

²⁴ Ex. A, p. 110. The application had been received on March 13, 2007. Ex. A, p. 29.

III. Discussion

This case is governed by the Administrative Procedure Act (APA)²⁵ and by the statutes and regulations governing physician licensure.²⁶ In general, Dr. Sykes has the burden to prove that he is entitled to the relief he seeks,²⁷ which in this case is the issuance of a license not conditioned on any sanctions. As was its obligation under the APA, the Division of Corporations, Business and Professional Licensing has identified the “particular matters that have come to the attention of the [division] . . . that would authorize a denial” of this relief.²⁸

A. *Legal Standard Violated*

The division has alleged, in essence, two types of violations. First, it contends that Dr. Sykes failed to disclose material information to obtain a license, and that this failure represented “unprofessional conduct” under the Board’s regulation defining that term. This is the basis for adverse action on Dr. Sykes’s application that the Executive Director and her counsel emphasized at the hearing.²⁹ Nominally, the division has asserted a second and more serious type of violation, contending that the Dr. Sykes “secured a license through deceit, fraud, or intentional misrepresentation.”³⁰ The two allegations are reviewed below.

1. Unprofessional Conduct

Alaska Statute 08.64.240(b) authorizes the Board to refuse a license for the same reasons it may impose disciplinary sanctions on individuals it has already licensed. Alaska Statute 08.64.326(a)(7) authorizes the Board to impose discipline for failure to comply with a regulation the Board has adopted. In 12 AAC 40.967(2), the Board has by regulation declared that “failing to disclose material information to . . . obtain a license” is “unprofessional conduct.”³¹

²⁵ The APA, found in AS 44.62, is made applicable by AS 44.62.330(a)(5).

²⁶ See AS 08.01, AS 08.64, and 12 AAC 40.

²⁷ AS 44.62.460(e)(2).

²⁸ AS 44.62.370(a)(2).

²⁹ Hearing digital file 3 at 5:20 – 6:50 (Executive Director); file 2 at 15:30 and following (counsel).

³⁰ See Amended Statement of Issues, ¶ 12 (alleging AS 08.64.326(1) as a ground for denial; the quoted language in the text is from AS 08.64.326(1)).

³¹ 12 AAC 40.967 does not, in so many words, say that medical licensees *may not engage in* unprofessional conduct; it is written in the form of a definition. The Board has long interpreted section 967 as a direct prohibition, however, such that the conduct it describes is conduct a licensee may not engage in. An example is the Board’s memorandum of agreement in *In re McCallum*, Case No. 2850.06.01 (Alaska State Medical Board, adopted April 24, 2006) (Ex. M), in which the Board imposed a sanction solely on the basis of unprofessional conduct under 12 AAC 40.967(2)(A) that was not committed in connection with patient care. The only standard that Dr. McCallum could have violated in that case to justify a sanction was 12 AAC 40.967(2)(A) itself.

There is a statute, AS 08.64.326(a)(9), that directly makes some unprofessional conduct sanctionable, but it covers only unprofessional conduct in connection with “the delivery of professional services to patients.” It does not cover the full range of conduct described in 12 AAC 40.967. Its companion provision, AS 08.64.326(a)(7),

There is no dispute that Dr. Sykes failed to disclose information that was requested from him in his license application. The undisclosed information is “material” for two reasons. First, it is material because the Board expressly asked for it.³² Second, it is material because, in licensing physicians based on their credentials and record in other states, the Board plainly needs to know where those credentials exist in order to be sure it has a full picture of the physician’s licensing and disciplinary history. The fact that a physician may not have practiced in another jurisdiction does not make a license held in that jurisdiction immaterial. It is possible to incur discipline—indeed, quite serious discipline—without practicing in a jurisdiction.³³

Through counsel, Dr. Sykes contends that since his error was careless rather than intentional, he did not fail to disclose material information “to” obtain a license. In other words, he suggests that the word “to” in 12 AAC 40.967(2) implies that the failure to disclose must have a purpose, and thus be deliberate. This is not a correct reading of the regulation. 12 AAC 40.967(2) provides that “misrepresenting, concealing, or failing to disclose material information to . . . obtain a license” is unprofessional. If “failing to disclose” had to be purposeful, it would be indistinguishable from “concealing” and the extra phrase “failing to disclose” would serve no purpose. The fact that the Board included “failing to disclose” in the sentence indicates that the Board intended to address nondisclosures that did not rise to the level of “concealing.” This has been the Board’s consistent reading of the regulation when applying it in the past,³⁴ and it should not be read differently in Dr. Sykes’s case. The word “to” in the regulation means only that the nondisclosure needs to be in connection with obtaining a license.

Because Dr. Sykes failed to disclose material information in connection with his 2007 license application, he committed unprofessional conduct and is subject to license denial under AS 08.64.240(b) and AS 08.64.326(a)(7).

2. No Basis to Find Any License Was Secured Through Deceit, Fraud, or Intentional Misrepresentation

brings in the remainder of 12 AAC 40.967 only if the regulation is read as a substantive standard that someone can “fail[] to comply with.”

The Board’s interpretation of 12 AAC 40.967 as a substantive standard listing conduct that licensees may not engage in is reasonable. Professionals would naturally expect that if the Board regulating their profession defines conduct as “unprofessional,” they are prohibited from engaging in it. Moreover, unless 12 AAC 40.967 is read as a prohibition, there are substantial portions of it that would be superfluous.

³² See *In re Kohler*, OAH No. 07-0367-MED (Alaska State Medical Board, adopted July 24, 2008), Decision and Order at 16 (information was material because Board “specifically and unequivocally asked for it”).

³³ E.g., *In re Biglow*, Case No. 2800.05.029 (Alaska State Medical Board, adopted July 21, 2005), Memorandum of Agreement at 4-5, 9 (suspension for conduct while not practicing).

³⁴ See, e.g., *In re McCallum*, *supra*, MOA at 2.

The division's Amended Statement of Issues alleges that Dr. Sykes's license application may be denied pursuant to AS 08.64.326(a)(1).³⁵ It is not clear that the division is serious about this allegation, as it did not seek to argue or support the allegation at the hearing. Moreover, the cited subparagraph of the statute was not a ground the Board itself relied upon in its initial action on Dr. Sykes's application.³⁶ Nonetheless, since the allegation appears in the document formally framing the issues for hearing, it will be addressed briefly here.

Alaska Statute 08.64.326(a)(1) provides for a disciplinary sanction if "the board finds" that a medical licensee "secured a license through deceit, fraud, or intentional misrepresentation." The omissions on Dr. Sykes's application at issue in this case came about through carelessness and inattention, rather than through intent to mislead. The Board did not make this finding in its initial action on Dr. Sykes's application, and it will not make the finding now.³⁷

B. Number of Omissions

There is no dispute that as of March 9, 2007, the date he applied for a new license from this Board, Dr. Sykes had held medical licenses in twelve states: Alaska, California, Colorado, Hawaii, Idaho, Iowa, Michigan, Montana, Nebraska, South Dakota, Washington, and Wisconsin. In the numbered list that followed item 18 on the application, he listed four: Colorado, Hawaii, Michigan, and Nebraska. Eight were missing from that list. The staff implicitly acknowledges that Dr. Sykes should be credited with one additional disclosure—Alaska—presumably because at item 11 on the same application he had quite specifically disclosed his prior Alaska license; his only error was the purely clerical one of not listing it again at item 18.

There is disagreement about the state of Michigan, with the staff contending that Dr. Sykes did not disclose his prior licensure there and Dr. Sykes taking the view that he did. Dr. Sykes did not list Michigan within the four corners of his application. The CV he attached to the application did not mention it either (as is typical for CVs, it listed only current professional licenses), but the CV did show that he had served as a resident for two years in Michigan, something he could not have done without a medical permit or license there. More significantly, Dr. Sykes took the affirmative step, before the staff had discovered any of his omissions and well

³⁵ Amended Statement of Issues, ¶ 12.

³⁶ Ex. A, p. 23 (no citation to AS 08.64.326(a)(1)).

³⁷ Pursuant to a vote of the Board exercising the option in AS 44.64.060(e)(5), the language of this paragraph has been modified from the original language proposed by the administrative law judge. At the direction of the Board, the decision has been reprinted using the Board's language.

before any action could have been expected on his application, of having Michigan send a verification of licensure to the Alaska State Medical Board.³⁸ This was the functional equivalent of amending his application on his own initiative to correct the error. Dr. Sykes should be credited with disclosing his prior licensure in Michigan.

Dr. Sykes contends that he similarly ought to be credited with disclosing five additional states (Idaho, Iowa, South Dakota, Washington, and Wisconsin) that came to light through his AMA profile.³⁹ His reasoning is that the AMA profile was released to the staff only at his direction,⁴⁰ and thus it was he who corrected his nondisclosure. His view is not persuasive.

Any applicant for licensure by credentials must ask the AMA to send his profile, which is a compendium of many types of information that regulatory agencies or others may voluntarily have reported to the organization. The profile functions to some extent as a check on a wide range of information that applicants submit, but it is an imperfect and sometimes incomplete record.⁴¹ In this case, there is no evidence that Dr. Sykes had specific knowledge of what was and was not in his own profile. Thus, the routine and required act of authorizing access to his profile cannot fairly be viewed as an effort to disclose some of the particular licenses he had left off his application. It is an act different in character from the act of specifically reaching out to Michigan and asking that particular jurisdiction to send his licensing history to Alaska.

Dr. Sykes appears to contend that he should be credited with disclosing his California licensure because he had disclosed it 13 years earlier in a prior application to Alaska.⁴² This might be a fair argument if Dr. Sykes's 2007 application had attached or referenced his prior application, but it did not. Relying on the board staff to think of searching a 13-year-old archive in the hope of ferreting out relevant information is not an acceptable way to "disclose" a license as required in item 18.

In sum, Dr. Sykes omitted to disclose six prior states of medical licensure in connection with his 2007 application.

³⁸ Ex. A, p. 83. Michigan mailed the verification on March 20, 2007 (Ex. A, p. 84), which indicates that Dr. Sykes must have requested the form some time prior to that. As of March 20, the Alaska staff had had Dr. Sykes's application in hand for only a week.

³⁹ See Ex. B, pp. 3-7.

⁴⁰ 12 AAC 40.010(b)(2)(F) makes the applicant responsible for requesting the AMA to send the profile directly to the Division of Corporations, Business and Professional Licensing.

⁴¹ Direct testimony of Ms. Gallant. In this case, the profile omitted one state of prior licensure (California). It contained other errors: for example, the date of licensure in Michigan was incorrect (*compare* Ex. A, p. 151 *with* Ex. B, p. 5), and the original date of licensure in Alaska was not correct (*compare* Ex. A, p. 129 *with* Ex. B, p. 4).

⁴² See Ex. A, p. 138.

C. Range of Board's Discretion

The legislature has provided that the Board “may refuse to grant a license to any applicant for the same reasons that it may impose disciplinary sanctions.”⁴³ This means that the Board may, but is not required to, refuse licensure to an applicant who has committed unprofessional conduct. The Board has long interpreted this range of authority to encompass the intermediate act of offering a license conditioned upon submission to a disciplinary sanction that the Board is authorized to impose on licensees.⁴⁴ Since the Board ordinarily can impose discipline only on “licensees,”⁴⁵ if the person to whom a license is offered on this basis declines to accept the license with the discipline, the Board’s action becomes a license denial.

In administering this authority, the Board is required to “be consistent.”⁴⁶ This does not mean that the Board cannot change its policy over time, but if the Board decides upon “a significant departure from earlier decisions . . . involving similar situations,” it must explain the departure.⁴⁷

This Board has authority to administer a range of disciplinary sanctions, including reprimand, censure, probation, license limitations or conditions, and civil fines. The maximum fine is \$25,000.⁴⁸

D. Gravity of Violation and Comparison to Other Board Actions

Failure to disclose states of licensure undermines the Board and its staff in performing an important function. To protect the citizens of Alaska, the Board needs to make its licensing decisions with full knowledge of any negative events regarding their licenses or permits in other jurisdictions. An essential tool in developing this knowledge is to have a complete list of those jurisdictions. While the staff may be able to identify other licenses from the AMA profile, from prior applications the applicant may have submitted, or from other collateral sources, these means are imperfect and licenses may be missed. The Board should be able to rely on applicants to give complete and accurate answers on their applications, including a complete list of their licenses.

⁴³ AS 08.64.240(b).

⁴⁴ See, e.g., *In re Denney*, No. 2852-97-001 (Alaska State Medical Board, adopted August 26, 1998) (license granted if applicant accepts reprimand and fine); *In re Steinhilber*, No. 2850-97-019 (Alaska State Medical Board, adopted August 27, 1998) (same).

⁴⁵ AS 08.64.331(a).

⁴⁶ AS 08.64.331(f); see also AS 08.01.075(f).

⁴⁷ *Id.*

⁴⁸ AS 08.64.331(a).

Misstatements and nondisclosures on applications fall into two broad categories: those done deliberately to mislead or hide information from the Board, and those that occur through inattention. All else being equal, the former are plainly more serious than the latter.

A policy the Board adopted in 2001 reflects this distinction.⁴⁹ In that year, the Board reviewed the various circumstances in which physicians were sometimes failing to list all their states of licensure. The Board decided that if a physician omitted even one state which later proved to have disciplinary or investigatory history—that is, where there was a potential motive to conceal the state—an investigation would be required. As to “clean states,” however, the approach would be different. “Clean states” were those in which there was in fact no disciplinary or investigatory history,⁵⁰ and hence no motive to conceal. For omission to list licenses in “clean states,” the Board would be willing to let staff handle up to two such omissions through a nondisciplinary warning letter. Applicants who left out three or more “clean” states would be assessed “a ‘mild’ fine for each state not disclosed.”⁵¹ The Board did not vote to adopt an amount for this “mild” fine, but contemporaneous discussion recorded in the minutes indicates that at least some of the members at that time envisioned a fine of \$500 per undisclosed state.⁵² Though not a regulation and not binding on the Board,⁵³ the policy has been used since 2001 to guide the staff’s handling of warning letters and settlement proposals with applicants who have omitted licenses from their applications.

Apart from the 2001 policy guideline, the Board has formally addressed the issue of sanctioning nondisclosures in two ways over the last decade. First, the Board has entered into a number of memoranda of agreement (“MOAs”) with physicians found to have left items off their applications. Second, it has issued several full-dress decisions after a hearing. Of the two, the full-dress decisions are the more significant, in that they represent a fully considered Board action with all relevant facts described in detail. The MOAs are negotiated settlements, with less complete exposition of the facts and potentially with unstated elements that were negotiated but left out of the record.

⁴⁹ Ex. H, p. 2.

⁵⁰ Direct testimony of Ms. Gallant.

⁵¹ Ex. H, p. 2.

⁵² *Id.*

⁵³ Both counsel in this case agree that the informal policy does not bind the Board. *Cf.* note 54 below.

A selection of recent MOAs involving nondisclosure is summarized below:

<u>Case</u>	<u>Date</u>	<u>Misconduct</u>	<u>Sanction</u>
<i>Wise</i> 2800-05-008	2005	Applicant omitted to disclose 6-month suspension imposed in medical school and affirmatively denied having been disciplined.	License retained with: 1. Reprimand 2. \$2000 fine
<i>Garfield</i> 2800-05-075	2005	Applicant omitted 3 jurisdictions of licensure. Omission apparently not deliberate.	License issued with: 1. Reprimand 2. \$500 fine
<i>McCallum</i> 2850-06-001	2006	Applicant omitted 4 jurisdictions of licensure. Omission apparently not deliberate.	License issued with: 1. Reprimand 2. \$2000 fine
<i>Nguyen/Sirois</i> 2800-07-001	2007	Applicant omitted to disclose an investigation in another state and affirmatively denied having been under investigation. Undisclosed investigation was minor.	License issued with: 1. Reprimand 2. \$1000 fine
<i>Youngberg</i> 2850-06-007	2007	Applicant omitted to disclose a pending investigation in another state and affirmatively denied having been under investigation. Applicant was later cleared in the investigation.	License issued with: 1. Reprimand 2. \$1000 fine
<i>Scherr</i> 2850-07-003	2007	Applicant omitted to disclose discipline imposed 15 years previously and affirmatively denied having been disciplined. Undisclosed discipline was minor.	License issued with: 1. Reprimand 2. \$1000 fine
<i>Okeke</i> 2800-07-021	2007	Applicant omitted to disclose discipline imposed 8 years previously and affirmatively denied having been disciplined. Undisclosed discipline was minor.	License issued with: 1. Reprimand 2. \$1000 fine
<i>Stiles</i> 2852-05-002	2007	Applicant omitted to disclose discipline imposed 2 years previously and affirmatively denied having been disciplined. Undisclosed discipline was minor.	License issued with: 1. Reprimand 2. \$1000 fine
<i>Zaremba</i> 2801-07-001	2007	Applicant omitted to disclose discipline imposed 14 years previously, omitted to disclose a prior mental condition impairing practice, and affirmatively denied having been disciplined or having had an impairment.	License issued with: 1. Reprimand 2. \$4000 fine

Over the last ten years, the Board has issued the following full-dress decisions in nondisclosure cases:

<u>Case</u>	<u>Date</u>	<u>Misconduct</u>	<u>Sanction</u>
<i>Denny</i> 2852-97-001	1998	“Actively misrepresenting the non-existence of an investigation” (p. 12).	License offered with: 1. Reprimand 2. \$500 fine
<i>Steinhilber</i> 2850-97-019	1998	Intentional misrepresentations: In part to conceal an investigation in another state, applicant (1) omitted 6 licenses, including the one connected with the investigation; (2) omitted the investigation; and (3) omitted a denial of hospital privileges.	License offered with: 1. Reprimand 2. \$1500 fine
<i>Lucero</i> 2850-98-012	1999	Intentional misrepresentations on <i>two</i> Alaska applications by denying a disciplinary suspension that occurred 4 years previously.	License offered with: 1. Reprimand 2. \$3000 fine
<i>Muir</i> 04-0286-MED 2850-04-006	2006	Deliberate concealment of nine investigations in another state. Investigations and underlying malpractice claims, had they been disclosed, would have raised “concerns.”	License denied
<i>Kohler</i> 07-0367-MED 2800-07-037	2008	Deliberate concealment of two investigations in another state, one past and one pending, on two Alaska applications; late reporting of malpractice settlement.	License retained with: 1. Reprimand 2. \$2500 fine

Several themes emerge from a review of these nine MOAs and five decisions:

1. The Board generally has not refused or revoked licenses outright on the basis of misrepresentations or nondisclosures on applications, even when the misrepresentation or nondisclosure involved deliberate deception. The single exception (*Muir*) involved deliberate concealment of nine investigations that, collectively, would have raised a significant licensing issue.
2. Apart from the single denial, the Board has uniformly issued a reprimand and a fine in misrepresentation and nondisclosure cases.
3. The highest fine the Board has imposed for negligent nondisclosure on an application, with no motive for concealment, is \$2000.
4. The Board has not insisted on a flat penalty of \$500 per undisclosed state or item, but instead has evaluated the circumstances more broadly.

The case most closely paralleling this one in number of undisclosed licenses is *Steinhilber*, a full-dress decision from 1998. That case, like this one, involved six undisclosed states of licensure. The Board imposed a civil fine of \$1500. Notably, however, the \$1500 fine in *Steinhilber* was imposed not only for the six missed licenses but for two other significant nondisclosures, and all of the nondisclosures were part of a deliberate plan of concealment. The overall misconduct being sanctioned, therefore, was significantly more serious than that of Dr. Sykes. On the other hand, since *Steinhilber* was decided inflation has advanced a total of 33 percent,⁵⁴ so that \$1500 in 1998 dollars represents about \$2000 in 2008. In addition, over the succeeding decade the Board has arguably moved toward a slightly firmer sanctioning regime regarding inaccuracies on applications.

The recent *Kohler* case involved a similar number of omissions as this one (two nondisclosures on two applications, for a total of four, plus one independent reporting failure). The Board imposed a civil fine of \$2500. In *Kohler*, however, there was a finding of deliberate concealment, whereas Dr. Sykes's case involves a single instance of carelessness.

E. Selection of Sanction

This case is much less severe than the deliberate concealment of nine investigations in *Muir*, which resulted in flat denial of a license. The conduct at issue here is at a level that the Board has consistently been willing to punish with a reprimand and a fine, if the applicant is willing to accept the license under those conditions.

This case involves a single act of carelessness but a fairly gross one, with many licenses left off the application. A comparison with *Kohler* (four deliberate acts plus one small careless one) ought to yield a somewhat lower penalty than the \$2500 imposed in that case; based on that comparison alone, one might select a fine of between one and two thousand dollars. The MOA in *Garfield* (one careless act with 3 missed licenses, \$500) might suggest a fine here of up to \$1000. The MOA in *McCallum* (one careless act with 4 missed licenses, \$2000) might suggest a fine in this case as high as \$3000.⁵⁵ Counterbalancing *McCallum*, however, is *Wise*, where a

⁵⁴ See <http://data.bls.gov/cgi-bin/cpicalc.pl> (U.S. Bureau of Labor Statistics Inflation Calculator).

⁵⁵ *McCallum*, which is the one decision or MOA that seems to fall precisely in line with the approach the staff advocates of assessing a flat penalty of \$500 per missed state, is something of an outlier in this comparison. Because *McCallum* is an MOA, we know little about the circumstances that may have led to a sterner penalty in that case than in most other nondisclosure cases.

It has been suggested by a member of the Board that the Board "has guidelines that call for a civil fine of \$500 for each state not listed and that is what the board needs to follow." Ex. A, p. 21. The Board actually does not seem ever to have voted to adopt so rigid a guideline. Although it has discussed the \$500 figure, its 2001 resolution on the subject called only for an unspecified "mild" fine. Ex. H, p. 2. In any event, since the Board has not gone

single deliberate concealment of a very serious matter brought a fine of only \$2000; the single careless act in this case seems somewhat less troubling than the conduct in *Wise*. All things considered, a fine of \$1500, at the midpoint of the range of penalties suggested by the *Kohler* comparison alone, provides a reasonable fit with most recent Board sanctions.

The staff advocates that Dr. Sykes's license simply be denied, without an offer of licensure conditioned on acceptance of sanctions. They reason that Dr. Sykes has already been offered the latter option and has declined it, and hence all that remains is denial.

The staff's approach would be ill-advised in this case, for two reasons. First, the offer previously made to Dr. Sykes involved a fine more onerous than the one selected here. Dr. Sykes should be given the opportunity to consider whether to proceed with licensure under the lesser sanction. Second, even if the offer made by way of informal settlement were the same as the option found appropriate after a formal hearing, the option should nonetheless be extended a second time after hearing. This is because a person subject to discipline has a right to test the Board's initial determination through a hearing, and should not be forced to gamble before exercising that right.

If Dr. Sykes does not, within the time set by the Board, accept licensure with the sanction imposed by the Board, this decision will function in all respects as a license denial, reportable under AS 08.64.340 and any other applicable provisions of law or agreements.

Dr. Sykes advocates that if discipline is imposed, the only discipline should be a fine and that there should be no reprimand. This is plainly inconsistent with the Board's past practice; the Board has been entirely uniform in issuing reprimands in nondisclosure cases serious enough for assessment of a fine.⁵⁶ Reprimands are the lowest level of discipline the legislature has given the Board authority to impose. They have the benefit of making a clear record of what the licensee is being disciplined for and of making it plain to the licensee what he or she must do differently in the future.

through the process of noticing and adopting a regulation, it may not be permissible for the Board to apply a uniform \$500-per-omission fine as something it "needs to follow" without case-by-case review of the circumstances. *Cf., e.g., Noey v. Department of Environmental Conservation*, 737 P.2d 796, 806 (Alaska 1987) (in subdivision approvals, it was "arbitrary" for agency to use fixed minimum lot size that had been stated as an informal rule but had not been promulgated as a regulation).

⁵⁶ The Board could depart from this practice, but if it decided to do so it would need to provide a written explanation for the change.

IV. Conclusion

By failing to complete his application for licensure accurately, Dr. Sykes has engaged in unprofessional conduct as defined in 12 AAC 40.967(2) and is subject to refusal of a license pursuant to AS 08.64.240(b) or, if he accepts a license, to discipline pursuant to AS 08.64.326(a)(7). The Board offers Dr. Sykes an unrestricted license to practice medicine in Alaska, to be issued only upon receipt, no later than sixty days from the effective date of this decision, of a civil fine of \$1500.00 in cash, certified check, or money order payable to "State of Alaska." Upon issuance of a license, the following reprimand shall be placed in the license file of Dr. Sykes:

The Board hereby reprimands you, William M. Sykes, M.D., for failing to disclose relevant information requested on your medical license application. The medical licensing process relies heavily on the accuracy of the applicant's responses. It is the Board's expectation that applicants for licensure in Alaska will take adequate care to ensure that their responses to application questions are correct and thorough. It was your obligation to make a complete and timely disclosure of all jurisdictions in which you had held licenses, and in neglecting to do so you fell below the professional standard the Board expects of you.

If Dr. Sykes does not make the payment specified above, this decision shall function as a license denial and will be reportable as such under any laws or agreements requiring that license denials be reported. The time set for payment of the civil fine will be tolled⁵⁷ if a timely appeal is pending to a court having jurisdiction over the matter.

These provisions shall become effective if adopted by the Alaska State Medical Board below.

DATED this 29th day of January, 2009.⁵⁸

By: Signed
Christopher Kennedy
Administrative Law Judge

⁵⁷ This means that the 60-day period will not run while an appeal is actually pending. Unless superseded by a court order, any unexpired portion will begin running again when the appeal closes.

⁵⁸ The original proposed decision under AS 44.64.060 was dated December 4, 2008. Cf. note 37, *supra*.

Adoption with Revised Sanction

The Alaska State Medical Board, 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:

The civil fine of \$1500.00 is reduced to \$1000.00.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 29th day of January, 2009.

By: Signed
Signature
Jean M.W. Tsigonis, M.D.
Name
Chair
Title

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