

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

In the Matter of:	)	
	)	
JAMES C. COOPER, M.D.,	)	
	)	
Respondent.	)	OAH No. 10-0148-MED
_____	)	Board Case No 2850-10-004

**DECISION**

**I. Introduction**

James C. Cooper, M.D., a psychiatrist licensed in several states, applied to this Board for licensure by credential to practice medicine in April 2008.<sup>1</sup> The Board denied Dr. Cooper's application but offered him a license subject to a civil fine and written reprimand. Dr. Cooper declined. As is his right, Dr. Cooper has appealed the Board's denial. A formal telephonic hearing on appeal took place August 3, 2010 and August 24, 2010.

Concurrent with the Alaska proceeding, Dr. Cooper had a disciplinary action moving forward before the Maine Board of Licensure in Medicine (Maine Board) for alleged unprofessional conduct while he held a temporary license. He had also appealed the Maine Board's denial of his request for permanent licensure.

The record closed in the Alaska hearing but subsequently reopened for the limited purpose of obtaining clarification on the status of Dr. Cooper's Maine license.<sup>2</sup> When the Maine Board's order<sup>3</sup> disciplining Dr. Cooper and denying him a permanent license was issued, the parties were asked to address the preclusive effect of the Maine order on the Alaska proceeding.<sup>4</sup> Having heard from both parties this matter is now ripe for decision.

The Administrative Procedure Act (APA)<sup>5</sup> and the statutes and regulations governing physician licensure guide this case.<sup>6</sup> The Board may deny a license for the same reason it may impose a disciplinary sanction.<sup>7</sup> In general, Dr. Cooper has the burden to prove that he is

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<sup>1</sup> Agency Record (AR) at 84 – 93.

<sup>2</sup> Order Requesting Update dated October 14, 2010.

<sup>3</sup> *In re Cooper M.D.*, Maine Bd. Of Licensure in Medicine, CR-09003/10-135 (November 9, 2010) (Maine Decision) (Attachment A).

<sup>4</sup> Notice of Request for Additional Briefing dated November 12, 2010.

<sup>5</sup> The APA, found in AS 44.62, is made applicable by AS 44.62.330(a)(5).

<sup>6</sup> See AS 08.01, AS 08.64, and 12 AAC 40.

<sup>7</sup> AS 08.64.240(b).

entitled to the relief he seeks,<sup>8</sup> which in this case is the issuance of a license not conditioned on any sanctions. 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.<sup>9</sup> The particular matters identified in the revised statement of issues and addressed at hearing falls into two categories: 1) conduct or behavior that is disciplinable under AS 08.64.326(a), and 2) conduct or behavior that is the subject of an unresolved proceeding in another state.<sup>10</sup>

First, the division contends that Dr. Cooper’s omitting a material fact on his application is unprofessional conduct under 12 AAC 40.967(a)(A) and therefore disciplinable under AS 08.64.326(a)(9). The evidence taken at the August hearing presented a slightly different and more accurate picture of the circumstances than had previously been available to the Board. The hearing established that some of the information provided to the Board was incorrect or unsubstantiated. However, the evidence that was correct and substantiated supports a finding that it is more likely true than not true that Dr. Copper omitted material information when he failed to answer “Yes” to question 26a but he did not omit material information when he answered “No” question 27a.

Second, the division contends that denial is appropriate under 12AAC 40.017 because Dr. Cooper was the subject of an unresolved action in another state.<sup>11</sup> The Maine action arose after Dr. Cooper submitted his application for licensure in Alaska. Throughout the Alaska hearing, the Maine licensing action was of nominal importance to the division and the division’s case focused on whether Dr. Cooper provided truthful information on his application. However, once the Maine Board adjudicated issuing its final order denying Dr. Cooper’s application for licensure, the Maine action gained in importance. Under AS 08.34.326(a)(13) denial of a license by another jurisdiction is disciplinable.<sup>12</sup>

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<sup>8</sup> AS 44.62.460(e)(2).

<sup>9</sup> AS 44.62.370(a)(2).

<sup>10</sup> AS 08.64.240(b) (Board may deny an application for conduct that would be disciplinable under AS 08.64.326(a); 12 AAC 40.017 (Board may deny an application if the applicant is the subject of an unresolved action in another state).

<sup>11</sup> AS 08.64.240(b).

<sup>12</sup> AS 08.64.326(a)(13) provides that the Board may impose discipline if it finds that the applicant: has had a license or certificate to practice medicine in another state or territory of the United States, or a province or territory of Canada, denied, suspended, revoked, surrendered while under investigation for an alleged violation, restricted, limited, conditioned, or placed on probation unless the denial, suspension, revocation, or other action was caused by the failure of the licensee to pay fees to that state, territory, or province.

In response, the division asserted as additional grounds for denial AS 08.64.326(a)(13) and that Dr. Cooper's behavior in Maine is unprofessional conduct under 12 AAC 40.967(14) and (15). As discussed in part II C below, the division's failure to submit a second revised statement of issues does not deprive Dr. Cooper of due process.

When compared to other applicants' omissions on their applications, Dr. Cooper's failure to accurately answer question 26a, if considered in isolation, would subject him to refusal of a license or, if the Board offers and he accepts a license, to discipline affirming the choice offered to Dr. Cooper in July 2009. However, Dr. Cooper's failure to correctly answer must be viewed in conjunction with denial of his license by the Maine Board which, by statute, constitutes a *prima facie* case that his Maine application license was denied and the grounds for denial.<sup>13</sup>

Because this is an application for licensure and not a disciplinary action, the Board may apply its discretion in considering whether this is an appropriate case in which to impose terms and conditions on initial licensure as a means of enabling a new applicant with a history of unprofessional conduct and prior disciplinary action to practice in Alaska. This decision concludes that it is not and therefore, refusal of Dr. Cooper's application for licensure is the best course. Moreover, Dr. Cooper has not requested a license subject to conditions nor has he presented evidence of conditions that would address the Board's concerns.

## **II. Facts<sup>14</sup>**

Dr. Cooper is a psychiatrist who seeks licensure by credential in Alaska. He has served in the military twice, most recently from September 2002 through December 2005 when he was honorably discharged with the rank of Colonel.<sup>15</sup> Now in his mid-sixties, Dr. Cooper occasionally takes *locum tenens* positions throughout the United States. He receives his assignments through a private company.

In his thirty years of practice, Dr. Cooper has been the subject of Board action in three states: Alaska, Maine, and Idaho. The relevant facts are easier to understand if discussed state by state. The first section discusses the relevant facts regarding Dr. Cooper's Alaska application

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<sup>13</sup> AS 08.64.326(b) provides:

In a case involving (a)(13) of this section, the final findings of fact, conclusions of law and order of the authority that suspended or revoked a license or certificate constitutes a *prima facie* case that the license or certificate was suspended or revoked and the grounds under which the suspension or revocation was granted.

<sup>14</sup> The division did not present any witnesses to rebut Dr. Cooper's testimony or challenge to the accuracy of the division's exhibits. Accordingly, the facts are based on the agency record, the few additional exhibits submitted at the time of hearing and post-hearing, and Dr. Cooper's testimony.

<sup>15</sup> Cooper Testimony.

for licensure. This Board's initial denial was based on Dr. Cooper's failure to self report events at Lakenheath, England and the resultant letter of reprimand (LOR). The second section discusses the Maine licensing action. The third section addresses Dr. Cooper's disciplinary proceeding in Idaho and the Idaho Supreme Court's decision concluding that the Idaho State Board of Medicine (Idaho Board) violated Dr. Cooper's due process and that substantial evidence did not support the Idaho Board's findings.

A. *Alaska Application for Licensure*

In 2008, Dr. Cooper agreed to take a *locum tenens* position in child psychiatry in Alaska for three months.<sup>16</sup> The division received Dr. Cooper's application for permanent licensure April 28, 2008.

The application asks a series of questions intended to provide a picture of an applicant's disciplinary history. It cautions:

**IMPORTANT! PLEASE READ  
BEFORE ANSWERING THE DISCIPLINARY HISTORY QUESTIONS 24 through 37.**

For the purposes of this application, the word "discipline" is used. There are many forms of disciplinary actions that may be imposed by organizations, schools, programs, licensing authorities, and other agencies. Such disciplinary actions may include but not be limited to: Suspension, Surrender, Revocation, Probation, Academic Probation, Reprimand, Censure, Restricted License, Limited License, Conditioned License, or Letters of Counseling, Concern, Advice, Warning, Caution, Admonishment, Reprimand, etc. Please include non-reported disciplinary actions.

**When in doubt, disclose.<sup>17</sup>**

Dr. Cooper answered in the negative to all questions except the one asking if he had ever been under investigation by any medical licensing jurisdiction or authority and, as asked for on the application, provided a written explanation for his "Yes" answer. His explanation focused on the Idaho licensing action that the Idaho Supreme Court dismissed for lack of due process and substantial evidence.<sup>18</sup>

Included in the series of questions on his application answered in the negative were:

26a Relating to the practice of medicine, has there ever been a finding of, or have you ever been found guilty of, professional misconduct, unprofessional conduct, incompetence, or negligence by any jurisdiction of the United States, including military, or any international jurisdiction?

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<sup>16</sup> Cooper Testimony.

<sup>17</sup> AR at 89 (emphasis in original).

<sup>18</sup> See Part II C.

...

27a Relating to the practice of medicine, have you ever had charges filed against you alleging professional misconduct, unprofessional conduct, incompetence, or negligence by any jurisdiction of the United States, including military, or any international jurisdiction?

...

28a Has any hospital or other health care facility disciplined, restricted or terminated your professional training, employment or privileges (except for late medical records)?

...

31a Have you ever had a license to practice medicine disciplined by any authority including a state medical board or a military authority(except for late medical records)?<sup>19</sup>

As part of the application process, the division began to gather information including verifications of hospital privileges. All were positive except the one completed by Dr. David L. Kutz, Lt. Col., USAF.<sup>20</sup> Dr. Kutz indicated that he would not readmit Dr. Cooper to his medical staff and that the hospital took disciplinary action against Dr. Cooper. Dr. Kutz revealed that Dr. Cooper received a letter of reprimand (LOR) for conduct unbecoming an officer under the Uniform Code Military of Justice (UCMJ). The unbecoming conduct was sexual comments and questions from Dr. Cooper to female patients in the course of their treatment that they found offensive or uncomfortable. The division sent Dr. Kutz an email seeking further explanation and verification of his responses.<sup>21</sup> The record contains no further contact with or communication from Dr. Kutz.

The LOR was received from a nonmedical professional, Mark T. Mathews, Brig. Gen. USAF, for violating Article 133, UCMJ. The command directed investigation (CDI) resulting in the LOR was initiated after the Brigadier General received a written complaint from a female patient regarding comments made while undergoing evaluation or treatment by Dr. Cooper. The CDI found several other female patients with similar complaints.

The division presented Dr. Cooper's application to the Board at its January 2009 meeting but it was not complete. The Board next considered Dr. Cooper's application at the July 2009 Board meeting. At this meeting, the division presented to the Board a cover memo along with

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<sup>19</sup> AR at 90.

<sup>20</sup> AR at 107 – 109; 254 – 268.

<sup>21</sup> AR at 181.

the completed application and unrequested documents provided by Dr. Cooper. The division's cover memo reminded the Board that:

the issues regarding Dr. Cooper concerned inappropriate behavior toward female patients as well as a benchmark Supreme Court decision in the state of Idaho where he was accused of having an inappropriate relationship with a female patient. The court decision found that the Idaho Board had not established a 'pattern' of behavior since there was only one victim.

Following the events in Idaho, Dr. Cooper went on to return to the military and serve in Lakenheath hospital in the UK. There, numerous complaints were filed against him resulting in an investigation by the hospital. Ultimately Dr. Cooper received a 'letter of reprimand, unfavorable information file' due to inappropriate comments made to female patients.<sup>22</sup>

As discussed in part C below, the description of the Idaho decision was not accurate. However, the Board did not base its denial on the Idaho action. Rather, the Board concluded that Dr. Cooper had failed to disclose material information on his application regarding events that occurred while he was in the military and that this was unprofessional conduct. It offered Dr. Cooper a consent agreement whereby Dr. Cooper would receive a license conditioned upon his admission to certain facts, payment of a \$1,000 fine and acceptance of a reprimand.<sup>23</sup> He declined, the Board denied his application, and this appeal followed.

The consent agreement alleged that Dr. Cooper had incorrectly answered questions 28a and 31a. The division later revised its statement of issues, dropping its allegation as to question 31a and asserting that Dr. Cooper incorrectly answered questions 26a, 27a, and 28a. The division also claimed Dr. Cooper had committed unprofessional conduct when he suggested the division reject his application as incomplete after the Board denied it.<sup>24</sup> However, as the case unfolded and additional evidence was placed in the record, the division limited its reason for denial to Dr. Cooper's failure to provide material information in response to questions 26a and 27a and because of the unresolved licensing action before the Maine Board.

Dr. Cooper argued that he was under no obligation to disclose a LOR received under the UCMJ for conduct unbecoming an officer in response to questions 26a or 27a because, in his opinion, the CDI lacked medical significance. Dr. Cooper reasoned:

- The LOR is not required to be reported to the National Practitioner Data Bank;<sup>25</sup>

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<sup>22</sup> AR at 33.

<sup>23</sup> AR at 18 – 24, 33.

<sup>24</sup> Division's Revised Statement of Issues.

<sup>25</sup> Exhibit C-5 through C- 6; Cooper Testimony.

- The LOR was issued as the result of a CDI that was performed by a dentist, not a peer;
- The CDI was a farce and lacked due process because he was never interviewed nor asked to testify;<sup>26</sup>
- The Brig. Gen. can initiate a CDI for anything because there are no minimum criteria;
- The only explanation for the CDI was that it was a witch hunt based on jealousy and intended to sabotage his military career;<sup>27</sup>
- Because of the CDI, the credentialing committee at Lakenheath conducted its own investigation and found no wrongdoing. Therefore, Dr. Cooper testified that he has “a clean record because no one with any medical standing or credibility has reported me.”

As explained by Dr. Cooper, if someone had complained that he spat on the sidewalk, and if the commanding officer was so inclined, the commanding officer could initiate a CDI. Therefore, it was of no value to this Board.

B. *The Maine Board of Licensure in Medicine’s Denial of Dr. Cooper’s Application*

The conduct giving rise to the Maine action and the eventual denial of his application for permanent licensure occurred on November 21, 2008 while Dr. Cooper was in a *locum tenens* position treating a minor patient pseudonymed “CR”.<sup>28</sup> The alleged conduct included telling the patient and his mother that unless she hospitalized the patient Dr. Cooper would report the mother to the authorities for neglect and, when she failed to follow his recommendation, reporting her to the authorities.<sup>29</sup> Dr. Cooper challenged the denial and wrote that he was looking forward to having a “chance to confront [the mother].”<sup>30</sup> He characterized CR as “very suicidal” and the mother as “angry and uncooperative.”<sup>31</sup>

On October 12, 2010, the Maine Board held a hearing to resolve: 1) whether Dr. Cooper’s actions subjected him to disciplinary sanctions and 2) whether the Maine Board should reverse its preliminary decision to deny Dr. Cooper’s application for permanent licensure. On November 9, 2010, after weighing the credibility of the witnesses and the evidence, the Maine Board found that Dr. Cooper failed to properly evaluate, ascertain, document, or communicate his concerns regarding the patient.<sup>32</sup> It also found his behavior caused harm to and had a

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<sup>26</sup> Cooper testimony; AR at 143 – 149.

<sup>27</sup> AR at 79.

<sup>28</sup> Exhibit I.

<sup>29</sup> Exhibit I; Maine Decision

<sup>30</sup> Maine Decision at 4 quoting Cooper Letter to Maine Board (Maine Board’s emphasis omitted).

<sup>31</sup> Cooper Testimony; Cooper’s First Post Hearing Brief at 1 (Received November 12, 2010).

<sup>32</sup> Maine Decision at 5 (the Maine Board lists 11 acts or omissions concerning his minor patient).

negative impact upon the therapeutic relationship that Dr. Cooper was supposed to have with the patient.<sup>33</sup> Finally, the Maine Board concluded that if the patient was as seriously ill as Dr. Cooper believed, he should have involuntarily committed CR. Based on these findings, the Maine Board concluded that Dr. Cooper's conduct was unprofessional as defined by 32 M.R.S. §3282-A(2)(F).<sup>34</sup>

The Maine Board reasoned:

that [the mother's] and Dr. Burk's<sup>35</sup> testimony was credible. Dr. Cooper's request to hospitalize CR was not unreasonable except in conjunction with his threat to report the mother to DHHS. However, coupled with Dr. Cooper's hyperbole that this was the worst case that he had seen in thirty years, involuntary commitment of CR should most likely have taken place. The failure to communicate with the mother in an effective manner but instead to use the threat of social services reporting to try to manipulate the situation in the child's presence constituted unprofessional communication with the patient and the mother, especially since Dr. Cooper could have raised the issue of DHHS in private with the mother when CR was in the bathroom.

Dr. Cooper also was arrogant and disparaged both the mother and Dr. Burk's honest attempts to try to provide information requested by the Board. Dr. Cooper further did not take responsibility for any of the negative results of the November 21, 2008 session. He also demonstrated his lack of insight in at least two instances. First, when he remarkably appeared to take credit for CR's noted improvement at CR's subsequent session with another psychiatrist. Second, when Dr. Cooper testified that his primary regret regarding CR was that he did not hug CR at the session.<sup>36</sup>

The Maine Board reprimanded Dr. Cooper and denied his application for permanent licensure.

Dr. Cooper does challenge some of the factual findings by the Maine Board but he focuses much of his objection to the Maine Decision on the qualification of the expert witness, the Maine Board's decision to give more weight to the complainant's testimony, and the Maine Board's ability to assess the propriety of his actions as a *locum tenens*.

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<sup>33</sup> *Id.*

<sup>34</sup> Unprofessional conduct. A licensee is considered to have engaged in unprofessional conduct if the licensee violates a standard of professional behavior, including engaging in disruptive behavior, that has been established in the practice for which the licensee is licensed. For purposes of this paragraph, 'disruptive behavior' means aberrant behavior that interferes with or is likely to interfere with the delivery of care. . . .

<http://www.mainelegislature.org/legis/statutes/32/title32sec3282-A.html>.

<sup>35</sup> Judy A. Burk, M.D., is a psychiatrist with 21 years of experience who rendered her expert opinion at the Maine hearing that Dr. Cooper violated 11 standards of practice according to the Standards of the American Psychiatric Association. Maine Decision at 4.

<sup>36</sup> Maine Decision at 6 (footnote added).



C. *Dr. Cooper's Idaho Disciplinary Proceeding and Its Subsequent Dismissal by the Idaho Supreme Court*

The Idaho Disciplinary proceeding is significant in Dr. Cooper's appeal because the memorandum presented to the Board by the division to refresh the Board's recollection of Dr. Cooper's application contained an inaccurate description of the Court's decision and demonstrates the importance of due process. The division represented that the Idaho Court dismissed the disciplinary action because "the Idaho Board had not established a 'pattern' of behavior since there was only one victim."<sup>37</sup> A search of the Idaho Court decision reveals that the decision does not discuss a "pattern" of behavior nor does it refer to the complainant as a "victim."<sup>38</sup>

As described by the Idaho Court, Dr. Cooper was charged with one specific act, a sexual encounter with a patient on or around November 1995. However, during the Idaho revocation proceeding, testimony was elicited that went beyond the narrow charge of a sexual encounter and focused on whether Dr. Cooper had "a long-term inappropriate relationship with one J.H. that included improper discussion of sex during medication therapy for ADD and ADHD, inappropriate use of therapeutic relationship to pursue sexual objections, and inappropriate personal contact."<sup>39</sup> Based on this testimony the Idaho Board concluded that Dr. Cooper instigated and continued an improper relationship with his patient and that he inappropriately promoted feelings of sexual attraction. It found this conduct violated the standard of care owing to Dr. Cooper's patient and that he became a real or imagined lover to his patient. However, neither of these violations were ever charged.

The Idaho Supreme Court invalidated these findings. The failure to amend the charges, the Idaho Court concluded, did not provide Dr. Cooper "with specific notice of all charges brought against him for which he was disciplined" and, accordingly this violated Dr. Cooper's due process rights.<sup>40</sup> The Idaho Court also concluded that the Idaho Board's finding that Dr. Cooper had a sexual encounter with a patient was not supported by substantial evidence.<sup>41</sup> Because of these deficiencies, the Idaho Court ordered the matter dismissed.

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<sup>37</sup> AR at 33.

<sup>38</sup> *Cooper v. Idaho State Board of Medicine*, 4 P.3d 561 (Idaho 2000). A word search of the decision revealed that the Idaho Court never used the words "pattern" or "victim" in this decision.

<sup>39</sup> *Id.* at 567.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

It is important to note that the findings and conclusions that formed the basis of the Idaho Board's revocation were based, in part, on Dr. Cooper's failure to present evidence that his sexual discussions with J.H. was appropriate treatment. Presumably, had Dr. Cooper known of the expanded charges, he could have offered evidence to rebut them.

### III. Discussion

#### A. *Legal Standard*

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 08.54.326(a) identifies 13 grounds for discipline. Therefore, if Dr. Cooper has committed any action that would be grounds for discipline, the Board may refuse to grant him a license. It is Dr. Cooper's burden to establish that he has not committed a disciplinable offense or if he has, that, the Board should still grant him a license.<sup>42</sup>

The division has identified two types of disciplinable conduct or events. First, it contends that Dr. Cooper failed to disclose material information to obtain a license, and that this failure is "unprofessional conduct" under the Board's regulation defining that term.<sup>43</sup> This was the primary basis for denial that the division emphasized at the hearing.<sup>44</sup>

The division's second reason for denial, the Maine proceeding, became more important as it progressed through adjudication resulting in a final order imposing disciplining and ultimately denying Dr. Cooper's application for a permanent license.<sup>45</sup> Originally, the division asserted in its revised statement of issues that the unresolved Maine proceeding supported denial under 12 AAC 40.017.<sup>46</sup> Once the Maine Board issued its final decision, the division now cites to AS 08.64.326(a)(13) as the basis for denial.<sup>47</sup> Each contention is discussed below.

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<sup>42</sup> AS 44.62.460(e)(2).

<sup>43</sup> AS 08.64.326(a)(9); 12 AAC 40.967.

<sup>44</sup> Revised Statement of Issues. The division did not call any witnesses. Rather, it relied upon the written record and Dr. Cooper's testimony.

<sup>45</sup> Maine Decision.

<sup>46</sup> 12 AAC 40.017 provides:

The board may deny an application for licensure if the applicant is the subject of an unresolved investigation, complaint review procedure, or other disciplinary proceeding undertaken by a certifying or licensing agency of another state, territory of the United States, or other country..

<sup>47</sup> AS 08.64.326(a)(13), (b).

B. *Dr. Cooper's Failure to Disclose Material Information*

Alaska Statute 08.64.326(a)(9) authorizes the Board to impose discipline if it finds that the licensee has “engaged in unprofessional conduct . . . in connection with the delivery of professional services to patients . . .”<sup>48</sup> In a regulation, 12 AAC 40.967(2), the Board has declared that “failing to disclose material information to . . . obtain a license” is “unprofessional conduct.” Information requested on an application is material because the Board expressly asked for it.<sup>49</sup> Therefore, if Dr. Cooper failed to disclose information on his license application, he has engaged in unprofessional conduct.

1. Dr. Cooper failed to disclose a material fact when he answered “no” to question 26a.

Question 26a asks:

Relating to the practice of medicine, has there ever been a finding of, or have you ever been found guilty of, professional misconduct, unprofessional conduct, incompetence, or negligence by any jurisdiction of the United States, including military, or any international jurisdiction?

Dr. Cooper received an LOR from the military for comments made to female patients. Dr. Cooper does not dispute the statements were made to obtain information for purposes of determining the appropriate course of treatment.<sup>50</sup> This is the practice of medicine. A CDI found that Dr. Cooper’s comments and questions to his patients was conduct unbecoming an officer. This is a finding of professional misconduct by a military jurisdiction and as such was required to be reported. When Dr. Cooper returned to the military, he specifically returned to be a medical practitioner.<sup>51</sup> His role as an officer was to be a doctor. Therefore, conduct unbecoming an officer that occurred while treating a patient should have been self-reported to the Board.

A reasonable doctor reading the question may have paused to consider whether an LOR as the result of a CDI was a reportable offense, but upon further reflection and as directed by the application, would have disclosed the reprimand. A reasonable professional would see this as a

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<sup>48</sup> The remainder of the paragraph addresses sexual, lewd or immoral conduct in connection with the delivery of professional services.

<sup>49</sup> 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”).

<sup>50</sup> Cooper Testimony; Exhibit C-21, AR at 045 – 049.

<sup>51</sup> Cooper Testimony.

significant event in Dr. Cooper's career. The incident resulted in a two-hour peer review and a letter of reprimand.

Dr. Cooper attempted to justify his failure to self-report based on his belief that the answer to 26a was no because he has never had a medical authority or agency find him to have behaved in an unprofessional manner. He focused much of his testimony on the fact that the finding was not by a medical peer and that when his peers (the credentialing committee) reviewed the matter, they found no wrongdoing. Dr. Cooper questions the propriety of the CDI and its value as evidence of his ability to practice medicine. He characterized the LOR as the result of Air Force politics and not with the realm of the Board.

Dr. Cooper did not fail to self-report the LOR to mislead or hide the incident from the Board. Rather, he omitted it because as he read the question the LOR was not reportable.<sup>52</sup>

Throughout the proceeding, Dr. Cooper had difficulty accepting that it is not for him to decide whether the results of the CDI should be given any weight or its relationship to his ability to practice medicine, rather, it is for the Board to assess. The Board recognizes that an applicant may question whether an item should be reported which is why the application reminds the applicant to include non-reportable disciplinary actions and contains the cautionary "**When in doubt, disclose.**"

Dr. Cooper's testimony emphasized that he had no "doubt" because the LOR and CDI were, in his opinion, a farce and not relevant to his application. He incorrectly characterizes the LOR as a "nonmedical issue."<sup>53</sup> While question 26a may have caused Dr. Cooper to pause and consider whether the LOR was reportable as a finding of unprofessional conduct by a military tribunal, a reasonable physician in Dr. Cooper's position would have answered "yes" to question 26a. Dr. Cooper has not established by a preponderance of the evidence that he correctly answered question 26(a).

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<sup>52</sup> Dr. Cooper characterized the LOR to be the result of Air Force Politics and not within the realm the Board: The Wing Commander is a non hospital, non health facility; non medical authority and has no bearing on my practice of medicine, either in the military or outside of it. What reasonable person would know the Alaska Medical Board would even be interested? I truly thought that you were only interested in medical issues and practice.

AR at 25, 26.  
<sup>53</sup> AR at 26.

2. Dr. Cooper Correctly Answered “No” to Question 27a

Question 27a asks whether any jurisdiction, in this case the military, has filed charges against Dr. Cooper alleging “professional misconduct, unprofessional conduct, incompetence, or negligence” relating to the practice of medicine.<sup>54</sup> The evidence presented established by a preponderance of the evidence that an investigation was undertaken in response to a complaint made not by the military, but by a female patient of Dr. Cooper’s.<sup>55</sup> The division has not entered into evidence a charging document. There is no evidence to rebut Dr. Cooper’s sworn testimony that he was unaware of any charges filed against him by “any jurisdiction of the United States, including military. . . .”<sup>56</sup> Therefore, record supports a finding by a preponderance of the evidence that Dr. Cooper did not fail to disclose a material fact when he answered “no” to question 27a.

C. *Dr. Cooper’s Conduct in Maine*

1. The Need for Due Process

Dr. Cooper had been working in Maine under a temporary medical license. On November 4, 2008, he applied for permanent licensure. The Maine Board denied Dr. Cooper’s application for permanent licensure and he appealed.<sup>57</sup> The division, because the Board may deny an application if the applicant is the subject of an unresolved disciplinary proceeding in another state, revised its statement of issues to include this as a basis for denying Dr. Cooper’s application.<sup>58</sup> On November 9, 2010, the Maine Board issued its order affirming denial of permanent licensure and sanctioned Dr. Cooper for unprofessional conduct while he held a temporary license.<sup>59</sup> Once the Maine Board issued its final appealable decision, Dr. Cooper was

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<sup>54</sup> Question 27a asks:

Relating to the practice of medicine, have you ever had charges filed against you alleging professional misconduct, unprofessional conduct, incompetence, or negligence by any jurisdiction of the United States, including military, or any international jurisdiction?

<sup>55</sup> The unchallenged evidence establishes that Dr. Cooper was give a copy of a letter written by the complaining patient and that this complaint served as the catalyst for the investigation, but the division has not established that this is a charging document by a military tribunal. Cooper Testimony; AR 45 – 49.

<sup>56</sup> AR at 90.

<sup>57</sup> Exhibit I.

<sup>58</sup> 12 AAC 40.017.

<sup>59</sup> Maine Decision.

no longer the subject of a disciplinary proceeding in another state and it is questionable whether 12 AAC 40.017 remains applicable.<sup>60</sup>

The division, in its Brief Concerning Impact of Maine Action on Case, seeks to cure any potential defect by asserting a new basis for denial, AS 08.64.326(a)(13). This statute makes denial of licensure in another jurisdiction disciplinable by the Alaska Board. The division's brief also alleges that because the Maine Board described Dr. Cooper's behavior as disruptive, Dr. Cooper's behavior is unprofessional conduct under 12 AAC 40.967(14) and (15). The division did not, however, amend its revised statement of issues to incorporate either AS 08.64.326(a)(13) or 12 AAC 40.967 (14) and (15). Rather, the division cites to *Union Oil Co. of California v. State, Department of Revenue*,<sup>61</sup> as support for its belief that the division may present new theories to justify an administrative decision without revisiting its statement of issues.<sup>62</sup>

The Court in *Union Oil* captures in a footnote the well settled principal that *on appeal*, a court may uphold the trial court's decision if there exist independent legal grounds to support the trial court's conclusion.<sup>63</sup> This is not an appellate proceeding and the division may not rely upon this principal to ignore its obligation to provide notice of the reasons for denial sufficient to satisfy procedural due process.<sup>64</sup>

By statute an applicant is entitled to notice and an opportunity for a hearing on matters that the division claims support denial of an application.<sup>65</sup> Therefore, before addressing the effect of the Maine Decision, it must be determined whether the division's failure to submit a second revised statement of issues results in a denial of due process.

The purpose of a statement of issues is to provide the respondent with notice of the reasons for the denial, what the respondent must prove, and inform the respondent of the right to a hearing.<sup>66</sup> Licensing actions are dynamic, not static.

At the time of Dr. Cooper's August hearing, he knew the division was asserting that the Maine action was a sufficient basis upon which to deny his license. Dr. Cooper cannot claim

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<sup>60</sup> Neither party articulated, as an issue to be resolved on appeal, whether 12 AAC 40.017 remained a valid reason for denial and it need not be resolved in this proceeding. Accordingly, this decision takes no position on the issue.

<sup>61</sup> 677 P.2d 1256, 1263 n. 16 (Alaska 1982).

<sup>62</sup> Division's Brief Concerning Impact of Maine Action on Case at 10.

<sup>63</sup> 677 P.2d at 1263 n. 16 (Alaska 1982); *also see, e. g., Stordahl v. Government Employees Ins. Co.*, 564 P.2d 63, 67 n. 16 (Alaska 1977) (emphasis added).

<sup>64</sup> *See* AS 44.62.370(a).

<sup>65</sup> AS 42.62.370(a)(2).

surprise or lack of notice, that the Maine action, now having been fully adjudicated, remains a reason to deny his application.

Furthermore, this proceeding has supplied ample opportunity for a hearing and Dr. Cooper has availed himself of that opportunity. In addition to his testimony at the August hearing, Dr. Cooper submitted two briefs on the import of the decision. The first was dated November 9, 2010 addresses the Maine hearing, the Maine Board's interactions with Dr. Cooper, the decision of the Maine Board, and whether the Alaska Board should base its denial upon the "biased, unwise, wrongful and illegal actions of the medical board of Maine."<sup>67</sup> Dr. Cooper served his second brief December 2, 2010 in reply to the division's Brief Concerning Impact of Maine Action on Case. In this brief Dr. Cooper acknowledges that "the mere charge for any alleged misconduct by the Maine Board is sufficient grounds for Alaska to issue such a license denial."<sup>68</sup>

The division is requesting denial of Dr. Cooper's application for conduct charged in the revised statement of issues, the Maine disciplinary proceeding. The only difference is that in one instance, the denial was sought under 12 AAC 40.017 and now, because the disciplinary proceeding is concluded, the denial is sought under AS 08.64.326(13). Unlike Dr. Cooper's Idaho licensing action, the division is not seeking to revoke a license by raising acts and presenting evidence on matters not charged in the revised statement of issues. Therefore, permitting the Division to pursue discipline under AS 08.64.326(a)(13) does not deprive Dr. Cooper of due process. Because the division may proceed under AS 08.64.326(a)(13) it is unnecessary to address whether Dr. Cooper's conduct in Maine is unprofessional conduct under Alaska's regulation 12 AAC 40.967.

## 2. The Maine Board's Denial of Dr. Cooper's Application is Disciplinable by the Alaska Board

Under AS 08.64.326(a)(13), the legislature has given the Board the discretion to impose discipline if the Board finds an applicant or licensee has had a license or certificate to practice medicine in another state denied. The "final findings of fact, conclusions of law and order of the authority that suspended or revoked a license or certificate constitutes a *prima facie* case that the

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<sup>66</sup> To be legally sufficient he statement of issues must specify "the statute and regulation with which the respondent must show compliance" and "particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought." AS 44.62.370(a).

<sup>67</sup> Dr. Cooper's First Post Hearing Brief.

<sup>68</sup> Cooper's Second Post Hearing Brief Concerning Impact of Maine Action on Case at 1.

license or certificate was suspended or revoked and the grounds under which the suspension or revocation was granted.”<sup>69</sup> Therefore, the Board may impose discipline for the Maine Board’s denial of Dr. Cooper’s application.

D. *Board’s Discretion to Deny Dr. Cooper’s Application*

1. Range of the Board’s Discretion

The legislature has given the Board the discretion to deny a license for the same reason it can impose discipline.<sup>70</sup> This means that the Board may, but is not required to, refuse licensure to an applicant who has committed unprofessional conduct or has had a disciplinary action taken in another jurisdiction. 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.<sup>71</sup> Since the Board ordinarily can impose discipline only on “licensees,”<sup>72</sup> 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 as originally happened in Dr. Cooper’s case giving rise to this appeal.

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.<sup>73</sup> Professional sanctions reinforce professional standards, deter other practitioners from committing similar violations and protect the public.<sup>74</sup>

When granting or denying a license the Board weighs the interest of an individual in pursuing his or her chosen profession with its obligation to assure competency of licensees and its obligation to protect the public’s health, safety, and welfare.<sup>75</sup> In administering this authority,

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<sup>69</sup> AS 08.64.326(b).

<sup>70</sup> AS 08.64.240(b).

<sup>71</sup> 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).

<sup>72</sup> AS 08.64.331(a).

<sup>73</sup> AS 08.64.331(a).

<sup>74</sup> See *State, Board of Dental Examiners v. Ness*, Supreme Court No. S-13129 Order at 1 (January 28, 2010 Alaska) (discussing purpose of professional disciplinary sanctions); *In Re Hanlon*, 110 P.3d 937, 946-47 (Alaska 2005) (sanctions protect the public and maintain the integrity of the profession); *State, Dept. of Commerce and Economic Development, Div. of Ins. v. Schnell*, 8 P.3d 351, 358 (Alaska 2000) (primary purpose of disciplinary action against attorney is protection of the public); *In re Inquiry concerning a Judge*, 788 P.2d 716, 722 (Alaska 1990) (primary purpose of judicial discipline is protection of the public; not punishment; *Disciplinary Matter Involving Buckalew*, 731 P.2d 48, 51 (Alaska 1986) (purpose of lawyer discipline includes protection of the public, deterrence of unethical conduct, and education of other professionals).

<sup>75</sup> See *Allison v. State*, 583 P.2d 813, 816 (Alaska 1978) (“Title 8 contains many chapters which contemplate protection of the public’s health and safety and assure competency of those providing the service regulated.”)



the Board is required to “be consistent.”<sup>76</sup> 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.<sup>77</sup>

## 2. Comparison to other Board Actions

Regarding Dr. Cooper’s failure to accurately answer a question on an application, this failure undermines the Board and its staff in performing an important function. However, the Board generally does not refuse or revoke licenses on the basis of failure to disclose, even when the failure involved deliberate decision.<sup>78</sup> Rather, the Board issues a reprimand and fine in misrepresentation and nondisclosure cases.<sup>79</sup> When assessing the appropriate fine, it does not insist upon a flat penalty of \$500 per undisclosed item but rather looks at each case and evaluates the appropriate fine.<sup>80</sup>

## 3. Selection of Board Action

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 disciplinary actions reflecting upon an individual’s professionalism when providing medical care. While the staff may be able to identify disciplinary actions from the National Practitioner’s Data Base profile, from prior applications the applicant may have submitted, or from other collateral sources, these means are imperfect and staff may miss information needed to make decisions. The Board should be able to rely on applicants to give complete and accurate answers on their applications, including any finding of unprofessional conduct relating to the practice of medicine whether the finding was made by a person with medical expertise or not.

If failure to disclose were Dr. Cooper’s only violation, it would support the offering of a license subject to a fine and reprimand. However, there is the denial in Maine to consider.

The Board’s role in these cases is to balance an individual’s interest in pursuing his chosen occupation with protecting the public. Because this is an application for licensure and

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<sup>76</sup> AS 08.64.331(f); *see also* AS 08.01.075(f).

<sup>77</sup> *Id.*

<sup>78</sup> There is one Board action where deliberate concealment resulted in denial. The Board, in *In re Muir*, OAH No. 04-0286 (January 12, 2006), denied a license where it was determined that the deliberate concealment of nine investigations in another jurisdiction and that had they been disclosed would have raised concerns regarding the applicant.

<sup>79</sup> *See, e.g., In re Sykes* OAH No 08-0475-MED at 11 – 13 (January 29, 2009) (discussing prior Board decisions and memorandum of decision imposing discipline for failure to disclose material information).

<sup>80</sup> *Id.*

not a disciplinary action, it is appropriate to consider whether this is an appropriate case in which to impose terms and conditions of probation on initial licensure as a means of enabling a new applicant with a history of unprofessional conduct and prior disciplinary action in another jurisdiction to practice in Alaska.

In the past, in appropriate cases, the Board has refused licensure to applicants with a history of unprofessional conduct and prior disciplinary actions. The legislature would not have made denial of a license in another jurisdiction after a hearing *per se* disciplinable if it did not consider it a red flag.

The Maine Board of Licensure in Medicine found Dr. Cooper's behavior was unprofessional and therefore disciplinable under 32 M.R.S. §3282-A(2)(F).<sup>81</sup> This statute provides that in Maine:

a licensee is considered to have engaged in unprofessional conduct if the licensee violates a standard of professional behavior, including engaging in disruptive behavior, that has been established in the practice for which the licensee is licensed . . . 'disruptive behavior' means aberrant behavior that interferes with or is likely to interfere with the delivery of care.<sup>82</sup>

The Maine Board considered the evidence presented, Dr. Cooper's demeanor, and assessed the credibility of witnesses. Based on its observations and findings the Maine Board concluded that Dr. Cooper engaged in unprofessional conduct as detailed in 11 enumerated paragraphs at page 5 of the Maine Decision. This is a final appealable order that contains findings of fact and conclusions of law and under AS 08.64.326(b) establishes by a preponderance of the evidence that Maine denied Dr. Cooper's application for permanent licensure because he engaged in 11 acts that violated the standard of professional behavior in Maine. The Maine Decision also establishes by a preponderance of the evidence that these acts are considered unprofessional conduct by that jurisdiction. Dr. Cooper does not dispute the general actions complained of, but rather focuses his objections upon whether the Board and the expert witness had the credentials to assess the propriety of his conduct.

The basis for the LOR and the Maine action both involve Dr. Cooper's interactions with patients. Based on his demeanor as described by the Maine Board and as experienced at this hearing, there appears to be no recognition of the wrongful nature of his conduct, no assurances

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<sup>81</sup> Maine Decision.  
<sup>82</sup> 32 M.R.S. §3282-A(2)(F).

against future violations, and his occupation will present opportunities for future unprofessional conduct. For these reasons, denial of Dr. Cooper's application is appropriate.

E. *Alternatives to Denial of Licensure.*

If the Board finds that in its opinion, there are certain conditions that could protect the public, it could offer a licensee subject to conditions such as continuing education, probation, fines, etc. However, it is unlikely that Dr. Cooper would willingly abide by conditions of licensure when he fails to see "any real linkage between the issues involving Maine and what Alaska expressed concern about in 2008"<sup>83</sup> or why this Board would be interested in an LOR issued for conduct while practicing medicine simply because it was not issued by a medical body.

**IV. Conclusion**

Because Dr. Cooper has had his application for licensure denied in another jurisdiction under circumstances that indicate his conduct falls below professional standards, and because he omitted a material fact on his application, denial of his application for licensure by credentials as a physician is appropriate.

**V. Order**

IT IS HEREBY ORDERED that James C. Cooper's application for a medical license by credentials is DENIED. This order is effective upon adoption by the Board.

DATED this 30<sup>th</sup> day of December, 2010.

By: *Signed* \_\_\_\_\_  
Rebecca L. Pauli  
Administrative Law Judge

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<sup>83</sup> Cooper's Second Post Hearing Brief Concerning Impact of Maine Action on Case Received December 6, 2010 at 2.

## Adoption

The Alaska State Medical Board adopts this decision as final under the authority of AS 44.64.060(e)(1). 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 this decision.

DATED this 13<sup>th</sup> day of May, 2011.

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

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