Final Order No. DOH-13-1729-FOF-MQA
FILED DATE AUG 2 6 2013
Department of Health
By [signature]
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2011-08787
DOAH CASE NO.: 13-1205PL
LICENSE NO.: ME0076635

JAMES ALEXANDER COCORES, M.D.,

Respondent.
_______________________________/

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on August 2, 2013, in Deerfield Beach, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Exceptions to the Recommended Order, and Response to Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A, B, and C, respectively) in the above-styled cause. Petitioner was represented by Jennifer Friedberg, Assistant General Counsel. Respondent was present and represented by Sean Ellsworth, Esquire and Anthony Vitale, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULING ON RESPONDENT'S EXCEPTIONS

The Board reviewed and considered the Respondent's Exceptions to the Recommended Order and ruled as follows:

1. Respondent's first exception is hereby denied for the reasons set forth by the Petitioner in its written response to the exception and because the Board does not have substantive jurisdiction over evidentiary matters, and therefore, does not have the authority to make evidentiary rulings.

2. Respondent's second exception is hereby denied for the reasons set forth by the Petitioner in its written response to the exception and because the Board does not have substantive jurisdiction over evidentiary matters, and therefore, does not have the authority to change factual or legal findings which involve the admissibility of evidence into evidentiary hearing.

RULING ON PETITIONER'S EXCEPTIONS

The Board reviewed and considered the Petitioner's Exceptions to the Recommended Order and ruled as follows:

1. Petitioner's exceptions to paragraphs 61, 63, 64 and 65 all revolve around the ALJ's mistaken belief that a Respondent cannot be found to have violated both s. 458.331(1)(t), F.S.; malpractice violation, and s. 458.331(1)(q), F.S.; prescribing, dispensing, administering, mixing, or otherwise preparing a

legend drug, including any controlled substance, other than in the course of the physician's professional practice.

Section 458.331(1)(q) reads in part as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> (q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.

For some unclear reason the ALJ, when citing to s. 458.331(1)(q), quotes the first sentence but ignores the second portion of charge. Based on this partial reading the ALJ then seems to conclude that if a physician respondent committed medical malpractice when he or she inappropriately prescribed drugs, he or she was clearly practicing medicine when the offending act occurred, and therefore, cannot be found to have been prescribing outside the course of the physician's professional practice in violation of s. 458.331(1)(q).

The second sentence of s. 458.331(1)(q) makes its clear that it is presumed that prescribing, dispensing, administering, mixing, or otherwise preparing any legend drug inappropriately

or in excessive or inappropriate quantities is not in a patient's best interest and by definition "not in the course of the physician's professional practice." In other words, if you are prescribing drug in excessive or inappropriate quantities, it is presumed you are prescribing outside of the course of the physician's professional practice." This provision does not require that you show that physician respondent was a street corner drug dealer or handing prescriptions out of his or her garage, or partaking in some sort of nefarious drug crime. All you have to show is that he or she was inappropriately prescribing, and thus, based on the statute, is presumed to be done outside of the course of the physician's professional practice.[1]

When s. 458.331(1)(q) is read in its entirety and given its full reading, s. 458.331(1)(q) and (t) charges are not mutually exclusive. The board has clearly and consistently endorsed this reading of the two statutes and this reading has been upheld by Florida courts in *Scheininger v. Department of Professional Regulations*, 443 So.2d 387 (Fla. 1st DCA 1983) and *Waters v. Department of Health*, 962 So.2d 1011 (Fla. 3d DCA 2007).

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[1]The respondent is allowed of course to attempt to rebut the presumption that the inappropriate prescribing was done outside of the course of the physician's professional practice.

In addition, since the Board is the agency charged with enforcing both statutory provisions, the Board's interpretation is entitled to great deference. *Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906 (Fla. 2002); Miles, Jr. v. *Florida A and M University and the Board of Regents*, 813 So. 2d 242 (Fla. 1st DCA 2002). Given such, the Board believes that its conclusion of law is as reasonable or more reasonable than the ALJ's in this matter and hereby grants the exceptions for the reasons set forth by the Petitioner in its written presentation.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference and as amended by the approved exceptions.[2]

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[2] Even though the Board approved the Petitioner's exceptions, it did not provide substitute findings and did not impose any additional penalties for a s. 458.331(1)(q) violation.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Administrative Law Judge be REJECTED. The Board found mitigating circumstances for a reduction of the penalty recommended by the Administrative Law Judge. Specifically, the Board finds that Respondent has been practicing medicine for 30 years with no prior discipline. Additionally, the Board considered the positive testimony of Respondent's patients.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Respondent shall pay an administrative fine in the amount of 10,000.00 to the Board within 30 days from the date the Final Order is filed. Said fine shall be paid by money order or cashier's check.

2. Respondent shall document completion of the Laws and Rules course sponsored by the Florida Medical Association (FMA) within one year from the date the Final Order is filed.

3. Respondent's license is **permanently** restricted as follows: Respondent is prohibited from ordering, prescribing and/or dispensing controlled substances.

4. Respondent's license to practice medicine in the State of Florida is hereby **SUSPENDED** for a period of one (1) year with

Respondent receiving credit for the 6 months he has already served under the Department of Health's emergency suspension order.

5. Following the period of suspension, Respondent shall be placed on probation for a period of five (5) years subject to the following terms and conditions:

a. Respondent shall appear before the Board's Probation Committee at the first meeting after said probation commences, at the last meeting of the Probation Committee preceding termination of probation, triannually, and at such other times requested by the Committee. Respondent shall be noticed by Board staff of the date, time and place of the Board's Probation Committee whereat Respondent's appearance is required. Failure of the Respondent to appear as requested or directed shall be considered a violation of the terms of probation, and shall subject the Respondent to disciplinary action. Unless otherwise provided in the Final Order, appearances at the Probation Committee shall be made triannually.

b. Respondent shall not practice except under the indirect supervision of a **BOARD CERTIFIED** physician fully licensed under Chapter 458 to be approved by the Board's Probation Committee. Absent provision for and compliance with the terms regarding temporary approval of a monitoring physician set forth below, Respondent shall cease practice and not practice until the

Probationer's Committee approves a monitoring physician. Respondent shall have the monitoring physician present at the first probation appearance before the Probation Committee. Prior to approval of the monitoring physician by the committee, the Respondent shall provide to the monitoring physician a copy of the Administrative Complaint and Final Order filed in this case. A failure of the Respondent or the monitoring physician to appear at the scheduled probation meeting shall constitute a violation of the Board's Final Order. Prior to the approval of the monitoring physician by the Committee, Respondent shall submit to the committee a current curriculum vitae and description of the current practice of the proposed monitoring physician. Said materials shall be received in the Board office no later than fourteen days before the Respondent's first scheduled probation appearance. The attached definition of a monitoring physician is incorporated herein. The responsibilities of a monitoring physician shall include:

(1) Submit quarterly reports, in affidavit form, which shall include:

A. Brief statement of why physician is on probation.

B. Description of probationer's practice.

C. Brief statement of probationer's compliance with terms of probation.

D. Brief description of probationer's relationship with monitoring physician.

E. Detail any problems which may have arisen with probationer.

(2) Be available for consultation with Respondent whenever necessary, at a frequency of at least once per month.

(3) Review 20% of Respondent's patient records selected on a random basis at least once every month. In order to comply with this responsibility of random review, the monitoring physician shall go to Respondent's office once every month. At that time, the monitoring physician shall be responsible for making the random selection of the records to be reviewed by the monitoring physician.

(4) Report to the Board any violations by the probationer of Chapter 456 and 458, Florida Statutes, and the rules promulgated pursuant thereto.

c. In view of the need for ongoing and continuous monitoring or supervision, Respondent shall also submit the curriculum vitae and name of an alternate supervising/monitoring physician who shall be approved by Probation Committee. Such physician shall be licensed pursuant to Chapter 458, Florida Statutes, and shall have the same duties and responsibilities as specified for Respondent's monitoring/supervising physician during those periods of time which Respondent's

monitoring/supervising physician is temporarily unable to provide supervision. Prior to practicing under the indirect supervision of the alternate monitoring physician or the direct supervision of the alternate supervising physician, Respondent shall so advise the Board in writing. Respondent shall further advise the Board in writing of the period of time during which Respondent shall practice under the supervision of the alternate monitoring/supervising physician. Respondent shall not practice unless Respondent is under the supervision of either the approved supervising/monitoring physician or the approved alternate.

d. CONTINUITY OF PRACTICE

(1) TOLLING PROVISIONS. In the event the Respondent leaves the State of Florida for a period of 30 days or more or otherwise does not or may not engage in the active practice of medicine in the State of Florida, then certain provisions of the requirements in the Final Order shall be tolled and shall remain in a tolled status until Respondent returns to the active practice of medicine in the State of Florida. Respondent shall notify the Compliance Officer 10 days prior to his/her return to practice in the State of Florida. Unless otherwise set forth in the Final Order, <u>the following requirements and only the</u>

following requirements shall be tolled until the Respondent returns to active practice:

(A) The time period of probation shall be tolled.

(B) The provisions regarding supervision whether direct or indirect by the monitor/supervisor, and required reports from the monitor/supervisor shall be tolled.

(2) ACTIVE PRACTICE. In the event that Respondent leaves the active practice of medicine for a period of one year or more, the Respondent may be required to appear before the Board and demonstrate the ability to practice medicine with reasonable skill and safety to patients prior to resuming the practice of medicine in the State of Florida.

RULING ON MOTION TO ASSESS COSTS

At the request of the Petitioner, the Board tabled consideration of the costs in this matter to a future meeting.

(NOTE: SEE RULE 64B8-8.0011, FLORIDA ADMINISTRATIVE CODE. UNLESS OTHERWISE SPECIFIED BY FINAL ORDER, THE RULE SETS FORTH THE REQUIREMENTS FOR PERFORMANCE OF ALL PENALTIES CONTAINED IN THIS FINAL ORDER.)

DONE AND ORDERED this 23rd day of August, 2013.

BOARD OF MEDICINE

Crystal A. Sanford

Allison M. Dudley, J.D., Executive Director
For Zachariah P. Zachariah, M.D., Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to JAMES ALEXANDER COCORES, M.D., 5301 N. Federal Highway, Suite 200, Boca Raton, Florida 33487; to Sean Ellsworth, Esquire, 420 Lincoln Road, Suite 601, Miami Beach, Florida 33139; and Anthony Vitale, 2333 Brickell Avenue, Suite A-1, Miami, Florida 33029; to Todd P. Resavage, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Doug Sunshine, Department of Health, 4052 Bald Cypress Way, Bin C-65, Tallahassee, Florida 32399-3253 this 26th day of August, 2013.

Angel Sanders

Deputy Agency Clerk

James A. Cocores, M.D
5301 N. Federal Hwy., Ste. 200
Boca Raton, FL 33487

7012 3050 0002 3881 1553

TO: Cassandra G. Pasley, Bureau Chief
Health Care Practitioner Regulation

FROM: Allison Dudley, Executive Director
Board of Medicine

SUBJECT: Delegation of Authority

DATE: August 22, 2013

During my absence on Thursday afternoon August 22, 2013 Gloria Nelson, Regulatory Supervisor, is delegated to serve as acting Executive Director for the Board of Medicine. She can be reached at (850) 245-4516. During my absence on Friday August 23, 2013 Crystal Sanford, Program Operations Administrator, is delegated to serve as acting Executive Director for the Board of Medicine. She can be reached at (850) 245-4132.

If you have any questions, please let me know.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Petitioner,

vs. Case No. 13-1205PL

JAMES ALEXANDER COCORES, M.D.,

Respondent.
_______________________________/

RECOMMENDED ORDER

This case came before Administrative Law Judge Todd P. Resavage for final hearing by video teleconference on May 6, 2013, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Jenifer L. Friedberg, Esquire
Daniel Hernandez, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Sean M. Ellsworth, Esquire
Ellsworth Law Firm
420 Lincoln Road, Suite 601
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Anthony C. Vitale, Esquire
Anthony C. Vitale, P.A.
Law Center at Brickell Bay
2333 Brickell Avenue, Suite A-1
Miami, Florida 33129

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STATEMENT OF THE ISSUES

Whether, in treating a single patient, who was actually an undercover law enforcement agent, Respondent, a medical doctor, violated sections 458.331(1)(m), (q), and (t), Florida Statutes; if so, whether (and what) disciplinary measures should be taken against Respondent's license to practice medicine.

PRELIMINARY STATEMENT

On March 13, 2013, Petitioner, Department of Health ("the Department"), issued an Administrative Complaint ("Complaint") against Respondent, James Alexander Cocores, M.D. On or about March 26, 2013, Dr. Cocores filed an Election of Rights, disputing the material facts alleged in the Complaint and requesting an administrative hearing. On April 5, 2013, the Department referred the matter to the Division of Administrative Hearings.

Administrative Law Judge John G. Van Laningham was assigned to the matter, and the final hearing was scheduled for May 6, 2013. On May 3, 2013, this case was transferred to the undersigned for all further proceedings.

The parties entered into a Joint Pre-hearing Stipulation and stipulated to certain facts contained in Section E of the Joint Pre-hearing Stipulation. To the extent relevant, those facts have been incorporated in this Recommended Order.

Both parties were represented by counsel at the hearing, which went forward as planned. The Department presented the testimony of Detective Ian Stuffield and Petitioner's Exhibits 1-3, 5, 7-8, 12, and 14 were admitted without objection. Petitioner also offered Exhibits 4 and 13, which were admitted over objection. The Department's exhibits included the deposition transcripts of Edward Dieguez, Jr., M.D., Scott Teitelbaum, M.D., and L.D. Respondent presented the testimony of four witness, E.L.T., E.H.H., Jr., C.D., and M.A.C.

The final hearing Transcript was filed on May 22, 2013. The Department and Dr. Cocores timely filed proposed recommended orders, which were considered in preparing this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

The Parties

1. At all times relevant to this case, James Alexander Cocores, M.D., was licensed to practice medicine in the state of Florida, having been issued license number ME 76635.

2. The Department has regulatory jurisdiction over licensed physicians such as Dr. Cocores. In particular, the Department is authorized to file and prosecute an administrative

complaint against a physician, as it has done in this instance, when a panel of the Board of Medicine has found that probable cause exists to suspect that the physician has committed a disciplinable offense.

3. Here, the Department alleges that Dr. Cocores committed three such offenses. In Count I of the Complaint, the Department charged Dr. Cocores with the offense defined in section 458.331(t), alleging that he committed medical malpractice in the treatment of fictitious patient, L.D. In Count II, Dr. Cocores was charged with prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of his professional practice, an offense under section 458.331(1)(q). In Count III, the Department charged Dr. Cocores with the offense defined in section 458.331(1)(m), alleging that he failed to keep legible medical records that justified L.D.'s course of treatment.

Background and Initial Appointment

4. This matter had its genesis in July 2010, following an anonymous complaint that Dr. Cocores was prescribing Roxicodone (oxycodone hydrochloride), Oxycontin (oxycodone hydrochloride controlled release), and other controlled substances, in exchange for a fee, and without conducting an exam. The complainant further alleged that Dr. Cocores would leave

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prescriptions for controlled substances at the reception desk of his office without seeing the patient.

5. Based on these allegations, the Palm Beach County Sheriff's Office initiated a criminal investigation. Initially, an undercover agent attempted to obtain an appointment with Dr. Cocores for pain management; however, he advised that he was not taking on any new patients for pain management. Thereafter, an undercover officer (hereinafter referred to as L.D.) sought to establish herself as a new patient in need of psychiatric treatment. This strategy was successful, and L.D. obtained an appointment with Dr. Cocores for August 10, 2011.

6. Prior to the first session, an Office-Based Opioid Treatment Order (OBOT Order) was obtained that allowed law enforcement to create undercover audio and video recordings of the sessions by and between L.D. and Dr. Cocores.

7. On August 20, 2011, L.D. presented to Dr. Cocores. As is customary, L.D. completed a lengthy medical questionnaire. In response to the "Presenting Problems" section, L.D. noted "not feeling like me anymore." She further noted, inter alia, that she (1) fatigued easily, (2) was easily distracted, (3) had problems focusing or concentrating, (4) had memory difficulties, (5) believed she was depressed, (6) sometimes had disorganized thinking, social isolation, binged or purged food, anxiety/panic attacks, (7) had trouble sleeping and often wakes during the

night, (8) experienced weekly headaches, (9) had mood swings, and (10) was having financial problems.

8. L.D.'s questionnaire further noted that she felt distant from her husband at times and attributed the same to the loss of her brother. Concerning her physical condition, L.D. noted that her last physical exam was approximately two weeks prior and that she had fallen off of a horse in February 2011. Absent from the questionnaire was any indication of pain.

9. L.D. further documented in the questionnaire that she had not had any previous psychiatric or chemical dependence treatment and that there was no family psychiatric history. She also noted daily use of caffeine, alcohol, codeine, pain killers, and sleeping pills (six months prior). L.D. listed Roxicodone, Xanax (alprazolam), and ibuprophen, as her current medications.

10. During the initial consultation, L.D. explained that her issues stemmed from her decision to remove her brother from life support following a motorcycle accident around Christmas of 2010. L.D. advised Dr. Cocores that subsequent to the accident "things just aren't right any more" and that she felt numb and was "just going through the motions."

11. In addition to providing pertinent family history, L.D. discussed her sleeping problems. When Dr. Cocores inquired into the horse accident, L.D. advised she had been under the

care of a chiropractor, as well as a pain management physician who was prescribing her oxycodone, Xanax, and ibuprophen. During this initial session, L.D. did not request any medications and none were suggested or prescribed by Dr. Cocores.

12. The initial session included discussions on nutritional counseling, guidelines for bereavement, techniques for mitigating pain in her back, and talk-therapy. At the conclusion of the first session, L.D. and Dr. Cocores agreed to reduce further sessions from one hour to a half-hour, due to her financial hardship.

13. Dr. Cocores's medical notations for the first session are less than one page and reflect that the next discussion will focus upon the decision to remove her brother from life support.

September 7, 2011 Session

14. On September 7, 2011, L.D. presented to Dr. Cocores for a follow-up visit. L.D. and Dr. Cocores returned to the topic of removing L.D.'s brother from life-support. L.D. advised Dr. Cocores that she had discussed the same with her pastor, and a discussion followed generally concerning guilt and anger.

15. L.D. initiated a conversation concerning her sleep issues. She advised Dr. Cocores that she had been without Xanax for approximately three weeks, and, therefore, she had been

taking her husband's Ambien at night. She explained that her pain management physician had been "shut down by the DEA or something."

16. L.D. advised Dr. Cocores that her pain management physician possessed a former MRI from an automobile injury, as well as X-rays; however, she was not sure she could "get all that." When L.D. inquired as to whether Dr. Cocores could help her, the following dialogue transpired:

> DR. COCORES: Well, Xanax, I can do. And [the pain management physician] wasn't supposed to be writing this—that oxycodone unless he's a psychiatrist.
>
> L.D.: Oh, really?
>
> DR. COCORES: Yeah. And then once—
>
> L.D.: He didn't say that to me. Maybe (Inaudible)
>
> DR. COCORES: (Inaudible.)
>
> L.D.: Well, apparently, they were after him.
>
> DR. COCORES: They came after me, and I had to change my ways. And—but I am the psychiatrist. So they, so far, are not bothering me. So I can -I -so he wasn't a psychiatrist. He - one of the reasons he might have gotten busted is because he was giving out psychiatric meds with pain medication. You aren't supposed to do that unless you are a psychiatrist. And, basically anyone that writes oxycodone is subject to investigation. And so I stopped writing oxycodone since the DEA was last here in February. And so - and they know I'm not taking any new pain people. But

what I can do is I certainly can write the Xanax, and I can certainly write the Motrin. As far as oxycodone, the only thing I could give you to replace it, is either - I would prefer Vicodin 10-milligrams if you can tolerate it and don't get sick on it. That would be best.

L.D.: Right.

DR. COCORES: I would rather avoid Percocet, which is oxycodone 10.

L.D.: Right.

17. Thereafter, L.D. advised Dr. Cocores that she had previously taken Percocet without issue. L.D. again reiterated that she had fallen from a horse; however, she responded affirmatively to Dr. Cocores's question that she did not have surgery for that event. As a result, Dr. Cocores noted that, "[s]o then you also need to get a copy of an MRI for the next time; although, it's not as crucial with the Vicodin." He also noted that, "[w]hat's good about Vicodin is that you can get refills on it."

18. Respondent prescribed 30 dosage units of Xanax 1 mg and 120 dosage unites of Vicodin[1/] 10/325 mg to L.D. on September 7, 2011. Dr. Cocores noted that, "[w]ell, if you are going to continue with the pastor, you have enough medicines here for three months. And so that will save you some money. And you can continue with him and then if you need some spot checks for therapy, you can come in."

19. The totality of Dr. Cocores' medical notes for the September 7, 2011, session are as follows:

RX Vicodin 10/325 #120
RX Xanax 1mgLS #30

Subsequent Sessions

20. L.D. presented to Dr. Cocores on November 10, 2011, just shy of two months since her last visit. During this "spot check", L.D. and Dr. Cocores very briefly discussed artificial sweeteners and then transitioned to whether the medications were helping L.D. sleep. L.D. advised Dr. Cocores that she had been out of Xanax "for a little bit because I think you - I only got like two months."

21. L.D. advised Dr. Cocores that she didn't like the Vicodin and was hoping to get back on either oxycodone or Percocet.[2/] She informed Dr. Cocores that she didn't know who else to go to. Dr. Cocores instructed L.D. that, "we can't do oxycodone. It's just too expensive and too highly scrutinized and too unavailable." Instead, he notified L.D. that "we could do four Percocet, if you want to."

22. Dr. Cocores informed L.D. that the Xanax could be renewed; however, the Percocet could not. As such, it was agreed that L.D. would make a return appointment in one month. On this date, Dr. Cocores prescribed 30 dosage units of Xanax 1 mg and 120 dosage units of Percocet 10/325 mg to L.D.

Dr. Cocores' medical notations for the November 10, 2011, visit are as follows:

D/C Vicodin
Percocet 10/325
Xanax 1mg LS #30

23. On December 8, 2011, L.D. returned to Dr. Cocores, as scheduled. After discussing various religious traditions, Dr. Cocores segued into whether the medications were working for L.D. She responded affirmatively; however, she noted that she becomes nauseous on occasion. Thereafter, the conversation primarily focused on nutrition. Dr. Cocores also inquired into her pain. L.D. responded by informing Dr. Cocores that her pain was in the thoracic lumbar area and primarily occasioned upon picking up her minor child.

24. Dr. Cocores prescribed 30 dosage units of Xanax 1 mg and 120 dosage units of Percocet 10/325 mg to L.D. Dr. Cocores' medical notes for the December 8, 2011, visit are as follows:

Percocet 10/325 #120
Xanax 1mg #30

25. L.D.'s next spot check with Dr. Cocores occurred on January 4, 2012. On this occasion after L.D. wished Dr. Cocores a Happy New Year and apologized for being 15 minutes late, Dr. Cocores immediately stated, "Well, I'll try to get that—what you need; I guess you just need a refill?" L.D. then advised

Dr. Cocores that she was leaving for a ski trip and requested something stronger like "the oxies that I used to take." Dr. Cocores refused this request noting that "they're unobtainable and they're extremely expensive." He further noted that, "there's just too much scrutiny around those medicines."

26. After discussing vacation plans, a follow-up appointment was scheduled. Dr. Cocores again prescribed 30 dosage units of Xanax 1 mg and 120 dosage units of Percocet 10/325 mg to L.D. On this occasion, Dr. Cocores' medical notes simply provide: "Rxs."

27. On February 1, 2012, L.D. returned to Dr. Cocores. Again, Dr. Cocores prescribed 30 dosage units of Xanax 1 mg and 120 dosage units of Percocet 10/325 mg to L.D. Again, his medical notes for this visit provide: "Rxs."

28. L.D. returned to Dr. Cocores on February 29, 2012. After discussing L.D.'s clothing accessories, Dr. Cocores inquired if the two medicines were "working out all right." L.D. responded that things were going really well and she was staying busy with her child. He further asked if she was still attempting to minimize the daily damage to her spine based on correct posture. She noted that she walks big dogs, and picks up her child.

29. Dr. Cocores confirmed that the Percocet and Xanax were not impairing her ability "to drive or be safe." In response,

L.D. noted that she gets a foul stomach every once in awhile. Dr. Cocores opined that he thought it was the Tylenol more than the Percocet. L.D. agreed and explained that was why she would rather just have the oxycodone. Dr. Cocores replied to this request by stating, "Is that what you want to do?"

30. Thereafter, Dr. Cocores prescribed 30 dosage units of Xanax 1 mg and 75 dosage units of oxycodone 15 mg to L.D. on February 29, 2012. His medical records for that occasion simply provide: Δ (change) Perc→Oxy 15 #75.

31. On March 28, 2012, L.D. returned to Dr. Cocores. After initial greetings, Dr. Cocores confirmed that L.D. had switched to oxycodone from Percocet and inquired as to where she obtained the prescription. He then confirmed that L.D. was "trying to minimize the injury that you inflict upon yourself every day with physical exercise." Dr. Cocores then proceeded to request an updated MRI "or else I can't prescribe it anymore because they're getting very strict with that stuff."

32. L.D. also advised that she needed additional Xanax and Dr. Cocores confirmed through L.D. that the Xanax did not interefere with her functionality. He also asked L.D. whether the oxycodone interfered with her ability to drive or her coordination, to which she said it did not.

33. Dr. Cocores prescribed 30 dosage units of Xanax 1 mg and 75 dosage units of oxycodone 15 mg to L.D. on February 29, 2012. His medical records for that occasion simply provide:

Rx Oxy 15 #75
Rx Xanax 1mg #30

34. L.D.'s last visit to Dr. Cocores occurred on April 25, 2012. Dr. Cocores asked, "So how is the oxycodone and the Xanax working for you, okay? L.D. replied, "I mean, I - I guess I've been doing pretty good, you know." Again, Dr. Cocores asked her whether it interfered with her coordination or driving. L.D. confirmed that she does "okay." Dr. Cocores also confirmed that L.D. had not reinjured her back. L.D. replied that she had not but still lifts her child and walks big dogs and that she gets by.

35. There is no evidence that L.D. provided an updated MRI at any point during this session. Notwithstanding Dr. Cocores's previous demand of an updated MRI as a condition precedent to further prescriptions for oxycodone, he prescribed 30 dosage units of Xanax 1 mg and 75 dosage units of oxycodone 15 mg to L.D. on April 25, 2012. With the exception of writing the date, Dr. Cocores did not author any medical records or notations for this visit.

Expert Testimony

A. Medical Malpractice and Recordkeeping

36. Petitioner offered the deposition of Dr. Edward Dieguez, Jr., M.D., as an expert in pain management. Dr. Dieguez is a diplomate of the American Academy of Pain Management, an anesthesiologist, and chronic pain management specialist. Dr. Dieguez opined that Dr. Cocores fell below the standard of care for the use of controlled substances for the treatment of L.D.'s pain, as set forth in Florida Administrative Code Rule 64B8-9.013.[3/]

37. Dr. Dieguez opined that Dr. Cocores was deficient in every respect of the rule. Specifically, Dr. Dieguez testified that Dr. Cocores failed to comply with the standard of care in the following respects: 1) failed to perform and document a history and physical examination appropriate for a patient with pain; 2) failed to establish sound clinical grounds to justify the need for the therapy instituted; 3) failed to establish a treatment plan, delineating any objectives that he used to determine treatment success, such as pain relief and improved physical and psychological function; 4) failed to use any other modalities of treatment such as interventional techniques, and failed to request consultations with other specialists such as interventions, orthopaedic surgeons, neurosurgeons, or pain specialists; 5) failed in attempting to prevent drug abuse and

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diversion; 6) failed to document evidence to support any diagnostic impression for the therapy instituted and; 7) failed to properly document the medications prescribed including the strength, number, frequency, and date of issuance.

38. Dr. Dieguez also opined that the medical records relating to Dr. Cocores's treatment of L.D. were deficient. Dr. Dieguez succinctly opined that, "there was basically no medical records."

39. The undersigned finds that the testimony of Dr. Dieguez is credible. The undersigned concludes, and Dr. Cocores concedes, that the Department presented sufficient evidence to establish that Dr. Cocores breached the prevailing professional standard of care in prescribing pain medication to L.D., as set forth in rule 64B8-9.013, thus violating section 458.331(1)(t)(1)(Count I), and that Dr. Cocores failed to keep appropriate medical records as required by section 458.331(1)(m)(Count III).

40. The Department also presented the testimony of its second expert witness, Scott Teitelbaum, M.D., by deposition transcript. Dr. Teitelbaum, is certified by the American Board of Pediatrics and the American Board of Addiction Medicine. He is an associate professor at the University of Florida, and is the Vice-Chairman of the Department of Psychiatry. Dr. Teitelbaum practices psychiatry on a daily basis.

41. Dr. Teitelbaum confirmed that rule 64B8-9.013 applies to physicians who practice psychiatry in the state of Florida when those physicians prescribe controlled substances for the treatment of their patients' pain. He further opined that Vicodin, Percocet, and oxycodone are not medications used to treat psychiatric disorders or conditions, and, therefore, Dr. Cocores would have breached the standard of care in prescribing the same in the treatment of any psychiatric condition or mental health disorder.

42. Dr. Teitelbaum testified that Dr. Cocores prescribed Xanax to L.D. for sleep issues. In his opinion, Dr. Cocores breached the standard of care in this regard, because he did not obtain a proper history, which would provide the appropriate rationale for the prescription. Additionally, Dr. Teitelbaum opined that Dr. Cocores breached the standard of care in failing to document and monitor the efficacy of the Xanax prescription.

43. Dr. Teitelbaum also opined that the combination of Xanax (benzodiazepine) with an opioid (such as oxycodone) can create a great risk for adverse medical consequences. He explained that a physician prescribing such a combination must complete a thorough assessment of any substance abuse disorder; conduct drug testing and document the use or non-use of other drugs the patient may be taking; and inquire regarding the patient's alcohol usage.

44. Dr. Teitelbaum opined that Dr. Cocores did not take the above-noted precautionary measures, and, therefore breached the standard of care in prescribing Xanax and oxycodone contemporaneously. The undersigned finds Dr. Teitelbaum's testimony to be credible and that it supports an additional and independent basis for finding that Dr. Cocores violated section 458.331(1)(t)(1)(Count I).

B. Course of Physician's Professional Practice

45. Dr. Dieguez further testified that Dr. Cocores was not practicing medicine during the sessions with L.D. Dr. Deiguez's testimony in this regard is rejected. Dr. Dieguez is not a psychiatrist, has never practiced psychiatry, and conceded that he could not testify regarding whether the interactions by and between Dr. Cocores and L.D. met or breached the standard of care from a psychiatric point-of-view.

46. Although Dr. Teitelbaum testified that he was unclear as to "what was being addressed with respect to the medications that were being prescribed," he did not offer an opinion that Dr. Cocores was not practicing medicine. The undersigned finds, as a matter of ultimate fact, that Dr. Cocores's conduct did not occur outside the practice of medicine, and, therefore, he is not guilty of violating section 458.331(1)(q).

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Mitigation

47. Dr. Cocores presented the testimony of four current or former patients to testify on his behalf. All four indicated that Dr. Cocores is a trustworthy and effective physician that they would recommend to other patients.

48. No evidence was presented that Dr. Cocores has been previously disciplined.

CONCLUSIONS OF LAW

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

50. This is a disciplinary proceeding in which the Department seeks to discipline Dr. Cocores's license to practice medicine. Accordingly, the Department must prove the allegations contained in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

51. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would

need to contain "both qualitative and quantitative standards." The Court held that:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991); rev. denied, 599 So. 2d 1279 (Fla. 1992)(citations omitted).

52. Section 458.331(1), Florida Statutes, authorizes the Board of Medicine to impose penalties ranging from the issuance of a letter of concern to revocation of a physician's license to practice medicine in Florida if a physician commits one or more acts specified therein.

53. In its Complaint, the Department alleges that

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Dr. Cocores is guilty of: committing medical malpractice (Count I); prescribing a legend drug other than in the course of his professional practice (Count II); and failing to keep sufficient medical records (Count III).

54. In Count I of the Administrative Complaint, Petitioner contends that Respondent violated section 458.331(1)(t)(1), which provides:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *
>
> (t) Notwithstanding s. 456.072(2) but as specified in s. 456.50(2):
>
> 1. Committing medical malpractice as defined in s. 456.50. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. Medical malpractice shall not be construed to require more than one instance, event, or act.
>
> * * *
>
> Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph. A recommended order by an administrative law judge or a final order of the board finding a violation under this paragraph shall specify whether the licensee was found to have committed "gross medical malpractice," "repeated medical malpractice," or "medical malpractice," or any combination thereof, and any publication by the board must so specify.

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55. This is a case of medical malpractice, not gross medical malpractice or repeated medical malpractice. Section 456.50(1)(g) defines "medical malpractice" as:

> [T]he failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. . . .

56. Section 456.50(1)(e) provides: "Level of care, skill, and treatment recognized in general law related to health care licensure" means the standard of care specified in s. 766.102." Section 766.102(1), in turn, provides:

> The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

57. The Department contends the following acts or omissions on behalf of Dr. Cocores constitute failures in the prevailing standard in care: failing to conduct a history and physical examination on L.D. at any time; failing to order appropriate diagnostic or objective tests for L.D.; prescribing controlled substances to L.D. without medical justification; prescribing inappropriate quantites of controlled substances to L.D.; failing to establish a treatment plan for the treatment of L.D.'s pain; failing to employ other modalities for the treatment of L.D.'s pain; failing to request consultations with

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other specialists for the treatment of L.D.'s pain; and failing to monitor L.D. for drug abuse and/or diversion of the medications which he prescribed to her.

58. Rule 64B8-9.013(3) defines, to the extent of its reach, the standard of care for a physician's use of controlled substances:

> (3) Standards. The Board has adopted the following standards for the use of controlled substances for pain control:
>
> (a) Evaluation of the Patient. A complete medical history and physical examination must be conducted and documented in the medical record. The medical record shall document the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases or conditions, the effect of the pain on physical and psychological function, and history of substance abuse. The medical record also shall document the presence of one or more recognized medical indications for the use of a controlled substance.
>
> (b) Treatment Plan. The written treatment plan shall state objectives that will be used to determine treatment success, such as pain relief and improved physical and psychosocial function, and shall indicate if any further diagnostic evaluations or other treatments are planned. After treatment begins, the physician shall adjust drug therapy, if necessary, to the individual medical needs of each patient. Other treatment modalities or a rehabilitation program may be necessary depending on the etiology of the pain and the extent to which the pain is associated with physical and psychosocial impairment.

(c) Informed Consent and Agreement for Treatment. The physician shall discuss the risks and benefits of the use of controlled substances with the patient, persons designated by the patient, or with the patient's surrogate or guardian if the patient is incompetent. The patient shall receive prescriptions from one physician and one pharmacy where possible. If the patient is determined to be at high risk for medication abuse or have a history of substance abuse, the physician shall employ the use of a written agreement between physician and patient outlining patient responsibilities, including, but not limited to:

1. Urine/serum medication levels screening when requested;

2. Number and frequency of all prescription refills; and

3. Reasons for which drug therapy may be discontinued (i.e., violation of agreement).

(d) Periodic Review. Based on the individual circumstances of the patient, the physician shall review the course of treatment and any new information about the etiology of the pain. Continuation or modification of therapy shall depend on the physician's evaluation of the patient's progress. If treatment goals are not being achieved, despite medication adjustments, the physician shall reevaluate the appropriateness of continued treatment. The physician shall monitor patient compliance in medication usage and related treatment plans.

(e) Consultation. The physician shall be willing to refer the patient as necessary for additional evaluation and treatment in order to achieve treatment objectives. Special attention must be given to those pain patients who are at risk for misusing

their medications and those whose living arrangements pose a risk for medication misuse or diversion. The management of pain in patients with a history of substance abuse or with a comorbid psychiatric disorder requires extra care, monitoring, and documentation, and may require consultation with or referral to an expert in the management of such patients.

(f) Medical Records. The physician is required to keep accurate and complete records to include, but not be limited to:

1. The complete medical history and a physical examination, including history of drug abuse or dependence, as appropriate;

2. Diagnostic, therapeutic, and laboratory results;

3. Evaluations and consultations;

4. Treatment objectives;

5. Discussion of risks and benefits;

6. Treatments;

7. Medications (including date, type, dosage, and quantity prescribed);

8. Instructions and agreements;

9. Drug testing results; and

10. Periodic reviews. Records must remain current, maintained in an accessible manner, readily available for review, and must be in full compliance with Rule 64B8-9.003, F.A.C, and Section 458.331(1)(m), F.S. Records must remain current and be maintained in an accessible manner and readily available for review.

(g) Compliance with Controlled Substances Laws and Regulations. To prescribe,

dispense, or administer controlled substances, the physician must be licensed in the state and comply with applicable federal and state regulations. Physicians are referred to the Physicians Manual: An Informational Outline of the Controlled Substances Act of 1970, published by the U.S. Drug Enforcement Agency, for specific rules governing controlled substances as well as applicable state regulations.

59. As detailed in the findings of fact above, the undersigned concludes, and Dr. Cocores concedes, that the Department has proved standard-of-care violations in prescribing pain medications to fictitious patient, L.D., in violation of section 458.331(1)(t).

60. In Count II of the Administrative Complaint, the Department avers that Dr. Cocores violated section 458.331(1)(q), which provides:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional

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practice, without regard to his or her
intent.

61. As concluded in the preceding section of this Recommended Order, Dr. Cocores breached the applicable standard-of-care in prescribing controlled substances to fictitious patient, L.D. The undersigned cannot conclude, however, that his conduct occurred outside the practice of medicine, a required element of a section 458.331(1)(q) violation.

62. As detailed in the findings of fact, the only credible evidence presented on this issue was provided by Dr. Teitelbaum. Although understandably unclear as to "what was being addressed with respect to the medications that were being prescribed," Dr. Teitelbaum did not go so far as to opine that Dr. Cocores was not practicing medicine.

63. The undersigned concludes that a reasonable interpretation or characterization of the first two sessions by and between Dr. Cocores and L.D. would be that of talk-therapy. The balance of the "spot check" sessions, admittedly short in duration, may be properly viewed as potential prescription adjustment sessions. The Department failed to present any evidence that the brief consultations with L.D. were incongruous with the psychiatric profession.

64. Assuming, arguendo, that Dr. Cocores's conduct occurred outside the practice of medicine, he could not be

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convicted, in connection with the same underlying behavior, of failing to practice medicine in accordance with the applicable standard of care. See Dep't of Health, Bd. of Chiropractic Med. v. Christensen, M.D., Case No. 11-5163PL, 2012 Fla. Div. Adm. Hear. LEXIS 136 (Fla. DOAH Mar. 16, 2012)(concluding that physician cannot be convicted, in connection with the same underlying behavior, of failing to practice medicine in accordance with the applicable standard of care and simultaneously for conduct occurring outside the practice of medicine).

65. For the reasons expressed above, Dr. Cocores is not guilty of violating section 458.331(1)(q).

66. The Department further contends, in Count III of the Complaint, that Dr. Cocores has violated Section 458.331(1)(m), which provides:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *
>
> (m) Failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination

> results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

67. As set forth in the discussion of Count I, rule 64B8-9.013(3)(f) requires that the medical records contain a complete medical history and physical examination, including history of drug abuse or dependence (as appropriate); diagnostic, therapeutic, and laboratory results; evaluations and consultations; treatment objectives; discussion of risks and benefits; and medications (including date, type, dosage, and quantity prescribed), among other things. For the most part, Dr. Cocores's records contained none of these required elements and generally failed to justify the course of treatment.

68. The undersigned concludes, and Dr. Cocores concedes, that the Department has satisfying its burden that Dr. Cocores failed to maintain legible medical records justifying the course of treatment to L.D., in violation of section 458.331(1)(m).

69. The Board of Medicine imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B8-8.001. As it relates to Dr. Cocores's violation of section 458.331(1)(t), rule 64B8-8.001(2)(t) provides for a penalty range (for a first offense) of one year probation, 50 to 100 hours of community service, to revocation and an administrative fine from $1,000 to $10,000.

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With respect to the violation of section 458.331(1)(m), rule 64B8-8.001(2)(m) provides a penalty range (for a first offense) from a reprimand to a two year suspension followed by probation, 50 to 100 hours of community service, and an administrative fine from $1,000 to $10,000.

70. Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances shall be considered:

> (a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;
>
> (b) Legal status at the time of the offense: no restraints, or legal constraints;
>
> (c) The number of counts or separate offenses established;
>
> (d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
>
> (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
>
> (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
>
> (g) The involvement in any violation of Section 458.331, F.S., of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure.

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(h) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.

(i) Any other relevant mitigating factors.

71. Having considered the potential aggravating and mitigating factors, the undersigned does not find compelling reasons to deviate from the guidelines and, therefore, recommends that the Board of Medicine impose a penalty that falls within the recommended range.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order:

1. Finding that Dr. Cocores violated sections 458.331(1)(t) and (m), Florida Statutes, as Charged in Counts I and III of the Complaint;

2. Dismissing Count II of the Complaint;

3. Imposing $10,000 in administrative fines, suspending Dr. Cocores from the practice of medicine for two years, requiring 200 hours of community service, five years of probation after completion of the suspension, and such restrictions on his license thereafter as the Board of Medicine deems prudent and for as long as the Board of Medicine deems

prudent, and such educational courses in the prescription of controlled substances, as the Board of Medicine may require.

DONE AND ENTERED this 24th day of June, 2013, in Tallahassee, Leon County, Florida.

TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of June, 2013.

ENDNOTES

1/ Vicodine contains a combination of acetaminophen and hydrocodone.

2/ Percocet contains a combination of acetaminophen and oxycodone.

3/ The text of rule 64B8-9.013 is set forth in full in the Conclusions of Law section of this Recommended Order.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK *Angel Sanders*
DATE JUL 0 8 2013

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOAH CASE NO. 13-001205PL
DOH CASE NO. 2011-08787

JAMES ALEXANDER COCORES, M.D.,

Respondent.
_______________________________/

PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner, Department of Health, submits its Exceptions to the Recommended Order issued by the Administrative Law Judge (ALJ), and in support thereof, states as follows:

PRELIMINARY STATEMENT

Under the Section 120.57(1), Florida Statutes (2011), and applicable case law, the Board may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. The Board of Massage Therapy is vested by the laws of Florida with the authority to interpret and apply such laws, regulations and policies as are applicable to programs within the Board's regulatory sphere. Thus, the Board may not be bound by conclusions of law set forth in the Recommended Order to the extent that its conclusions of law are as or more reasonable interpretation than those in the Recommended Order

that are rejected or modified by the Board. See Pan Am World Airways v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983); Barfield v. Department of Health, 2001 WL 1613797 (Fla. 1st DCA 2001); Bayonet Point Regional Medical Center v. DHRS, 516 So. 2d 995 (Fla. 1st DCA 1987); Humana, Inc. v. DHRS, 492 So. 2d 388, 392 (Fla. 4th DCA 1986); *see also* 120.57(1)(l), Fla. Stat. (2008). To the extent that the conclusions of law in the Recommended Order are interpretations of law, regulations and policies within the exclusive purview of the Board of Massage Therapy, they may be rejected and the Board may reject or modify these conclusions of law to reflect a more reasonable interpretation of the applicable law and rules. However, the Board must:

> a) state with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rule and
>
> b) make a finding that the substituted conclusion of law or interpretation of administrative rule is as or more reasonable that that which was rejected or modified.

§ 120.57(1)(l), Fla. Stat. (2011) (emphasis added); see Barfield, 2001 WL 1613797. Finally, simply because a conclusion of law is masked or presented as a finding of fact by the ALJ does not insulate it from its proper status as a conclusion of law subject to review by the Board or reviewing agency. Goss v. District School Board of St. John's County, 601 So. 2d 1232 (Fla. 5th DCA 1992).

Section 456.073(5), Florida Statutes (2011), states, "[t]he determination of whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care, is a conclusion of law to be

determined by the board . . . and is not a finding of fact to be determined by an administrative law judge."

According to Section 120.57(1)(l), Florida Statutes (2011), the Board may reject or modify the findings of fact if the Board first determines from a review of the entire record, and state with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Exceptions to Findings of Fact

1. Petitioner takes exception to paragraph 46 of the Recommended Order. The ALJ states that Dr. Cocores is not guilty of violating Section 458.331(1)(q), Florida Statutes (2011). Based upon Section 456.073(5), Florida Statutes (2011), summarized above, this is a conclusion of law to be determined by the Board and not a finding of fact to be determined by the administrative law judge. In reaching the conclusion that Respondent did not violation Section 458.331(1)(q), Florida Statutes (2011), the ALJ ignores the portion of that Section which states that "it shall be legally presumed that prescribing...legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities...is not in the course of the physician's professional practice, without regard to his or her intent." Dr. Dieguez credibly testified that Respondent inappropriately prescribed controlled substances to L.D. for the treatment of pain. (P. Exh. #12, p. 27-28, 47, 49, 52-53, 55, 62).

Exceptions to Conclusions of Law

2. Petitioner takes exception to paragraph 61 of the Recommended Order. The ALJ states that he cannot conclude that Respondent's conduct, in prescribing controlled substances to L.D., occurred outside the practice of medicine, a required element of a Section 458.331(1)(q), Florida Statutes (2011), violation. Once again the ALJ ignored the provision of Section 458.331(1)(q), Florida Statutes (2011), which creates a legal presumption that prescribing controlled substances inappropriately or in inappropriate quantities is outside the scope of a physician's professional practice. Dr. Dieguez credibly testified that Respondent inappropriately prescribed controlled substances to L.D. for the treatment of pain. (P. Exh. #12, p. 27-28, 47, 49, 52-53, 55, 62).

3. Petitioner takes exception to paragraph 63 of the Recommended Order. The ALJ characterizes the first two sessions between Respondent and L.D. as "talk-therapy" and the remaining sessions as "potential prescription adjustment sessions." These characterizations are not supported by competent substantial evidence. No evidence in the record substantiates a characterization regarding the type of sessions between Respondent and L.D. Dr. Teitelbaum's and Dr. Dieguez's expert testimony was credible. At no time did either expert testify regarding the type of session that occurred.

4. In paragraph 63 of the Recommended Order, the ALJ further states that Petitioner failed to present any evidence that the brief consultations with L.D. were incongruous with the psychiatric profession. In reaching this conclusion the ALJ ignores the fact that Respondent repeatedly prescribed opioid pain medication to L.D. (P. Exh.

#1, 2, 5)[1]. He also ignores Dr. Teitelbaum's credible expert testimony that opioid pain medications, including Vicodin, Percocet and oxycodone are not prescribed for the treatment of any psychiatric disorder or condition. (P. Exh. #13, p. 11-12).

5. Petitioner takes exception to paragraph 64 of the Recommended Order. The ALJ states that if Respondent's conduct occurred outside the practice of medicine, he could not be convicted based upon the same underlying behavior, of failing to meet the applicable standard of care. The ALJ bases his reasoning on Dep't of Health, Bd. of Chiropractic Med. v. Christensen, M.D., Case No. 11-5163PL, 2012 Fla. Div. Adm. Hear. Lexis 136 (Fla. DOAH Mar. 16, 2012). In so doing, the ALJ ignores the Final Order entered by the Department of Health, Board of Medicine in the Christensen case. In the Final Order, the Board of Medicine rejected the paragraphs 42 through 47 of the ALJ's Recommended Order in that case and disagreed with the ALJ's legal conclusion that Sections 458.331(1)(t) and 458.331(1)(q), Florida Statutes, are mutually exclusive. Dep't of Health v. John Peter Christensen, M.D., DOH Case No. 2011-11153, Final Order No. DOH-12-00997-FOF-MQA.

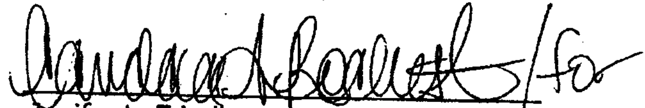
6. Finally, Petitioner takes exception to paragraph 65 of the Recommended Order. The ALJ states again that Respondent is not guilty of violating Section 458.332(1)(q), Florida Statutes (2011). In reaching the conclusion that Respondent did not violation Section 458.331(1)(q), Florida Statutes (2011), the same conclusion reached in paragraph 46 of the Recommended Order, the ALJ ignores the portion of that Section which states that "it shall be legally presumed that prescribing...legend drugs, including

[1] The references to the exhibit numbers are references to the same exhibit numbers that were used at the final hearing in this Case.

all controlled substances, inappropriately or in excessive or inappropriate quantities...is not in the course of the physician's professional practice, without regard to his or her intent." Dr. Dieguez credibly testified Respondent inappropriately prescribed controlled substances to L.D. for the treatment of pain. (P. Exh. #12, p. 27-28, 47, 49, 52-53, 55, 62).

WHEREFORE, Petitioner requests that this honorable Board grant Petitioner's exceptions in this case.

Respectfully submitted,



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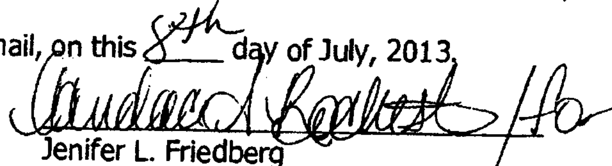
CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to Sean M. Ellsworth, Esquire, 420 Lincoln Road, Suite 601, Miami Beach, Florida 33139, sean@ellslaw.com; and Anthony C. Vitale, Esquire, 2333 Brickell Avenue, Suite A-1, Miami, Florida 33029, avitale@vitalehealthlaw.com, via electronic mail, on this 8th day of July, 2013.



Jenifer L. Friedberg
Assistant General Counsel

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,

Petitioner,

DOAH CASE NO.: 13-1205PL
DOH CASE NO.: 2011-08787

vs.

JAMES ALEXANDER COCORES, M.D.

Respondent.
_______________________________________/

<u>RESPONDENT JAMES A. COCORES, M.D.'S EXCEPTIONS TO RECOMMEDED ORDER</u>

Respondent, James Cocores M.D. ("Dr. Cocores"), through counsel, serves his Exceptions to the Administrative Law Judge's Recommended Order and states:

<u>Exception One</u>

The Administrative Law Judge failed to consider Dr. Cocores' unblemished history as a physician

The record evidence established that Dr. Cocores is a highly distinguished psychiatrist and addiction specialist, teacher, lecturer, and author in his field, and pioneer of numerous medical discoveries. The record evidence further established that Dr. Cocores has made significant contributions to the lives of his patients, to the education of fellow physicians, and to the fields of psychiatry and addiction treatment. Dr. Cocores has been a physician for over 30 years, licensed in Florida since 1998. He has never previously been disciplined by the Florida Board of medicine or any licensing agency. Dr. Cocores has worked in private practice, in outpatient clinics, in research institutions, and in hospitals. *See generally* Curriculum Vitae of James A. Cocores (attached as Exhibit 7 to the deposition of Dr. Dieguez (Petitioner's Exhibit 12) and as Respondent's Exhibit No. 1 to the deposition of Dr. Teitelbaum (Petitioner's Exhibit

13)) (hereinafter "Cocores CV"). After medical school and his residency at Bergen Pines County Hospital in New Jersey, where he became chief psychiatric resident, Dr. Cocores went onto serve as a research director, psychiatric consultant, and medical director for numerous outpatient recovery clinics in New Jersey, as well as serving as a psychiatric consultant for the New York Giants football team and working with Senator Bill Bradley in President George Bush's "war on drugs" in the late 1980s. *See* Cocores CV at 2-6 Since relocating to Florida in 1998, Dr. Cocores has continued to serve as research director and medical director of numerous facilities besides maintaining a robust private practice. *See id*

From January 2008 to May 2011, Dr Cocores served as Adjunct Clinical Assistant Professor in the Department of Addiction at the University of Florida's College of Medicine & McNight Brain Institute. Cocores CV at 6. He has given dozens of lectures around the country and around the world, focusing primarily on addiction and nutrition issues Cocores CV at 10-12. Dr Cocores has authored or co-authored scores of articles in scientific and professional journals and has served as a referee for various medical journals. Cocores CV at 8, 13-18. He has published several important books and book chapters on addiction, dependency, and nutrition issues and pioneered numerous medical discoveries. *See id* Dr. Cocores has been a member of myriad medical professional societies, and for the past 25 years, he has contributed regularly to print, radio, and television media, bringing his expertise on addiction and nutrition to bear on issues of public concern. Cocores CV at 8, 19-23.

<u>Exception Two</u>

The Administrative Law Judge erred by admitting and considering the testimony of Scott A. Teitelbaum, M.D. ("Dr. Teitelbaum").

"Thirty years ago, the Florida Supreme Court stated in no uncertain terms that courts in Florida would not condone trial by ambush." *Thompson v. Wal-Mart Stores, Inc.*, 60 So. 3d 440, 443 (Fla. 3d DCA 2011) (citing *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981)).

In *Binger*, the Florida Supreme Court held that in exercising the discretion to exclude witnesses, courts should be guided by a determination as to whether use of the undisclosed witness will prejudice (surprise in fact) the objecting party. *Id.* at 1314. In addition to prejudice, the Florida Supreme Court instructed lower courts to consider other factors including: "(i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases)." *Id.*

On April 18, 2013, the Administrative Law Judge entered an Order of Pre-Hearing Instructions that states:

> ORDERED that:
>
> 1. Counsel for all parties shall meet no later than 15 days prior to the date for final hearing in this cause and shall:
>
> . . .
>
> (e) Furnish opposing counsel with the names and addresses of all witnesses (except for impeachment witnesses);

On that same date, April 18, 2013, the Department contacted Scott A. Teitelbaum, M.D. and asked him if he would be willing to serve as an expert in this case. After discussions with the counsel for the Department and a review of documents sent by e-mail, Dr. Teitelbaum arrived at a preliminary opinion on or about April 22, 2013. This preliminary opinion was not disclosed to Dr. Cocores, nor was the fact that the Department was planning to call Dr. Teitelbaum as a second expert witness. In fact, according to Dr. Teitelbaum, the Department

never advised him that there was any urgency for him to review the records and provide a final opinion. On or about April 18, 2013, Department's counsel instructed Dr. Teitelbaum that he had roughly two (2) weeks to review the material and provide a final opinion

On April 24, 2013, the parties conducted a telephone conference, in part, to "[f]urnish opposing counsel with the names and addresses of all witnesses (except for impeachment witnesses)." Order of Pre-Hearing Instructions at ¶ 1(e) While the Department did identify witnesses it intended to call at the hearing, it did not identify or disclose Dr Teitelbaum

The following day, April 25, 2013, six business days prior to the administrative hearing, the Department for the first time identified Dr. Teitelbaum as a second expert witness. Dr. Cocores does not suggest the Department acted in bad faith or intentionally violated the Order of Pre-Hearing Instructions. However, it is important to note that on May 3, 2013, Dr. Teitelbaum testified that:

> (1) he was retained on April 18, 2013 – in contravention of the Department's April 25, 2013, claim that, "We have just retained him," *see* Petitioner's Exhibit 13, p.28;
>
> (2) he had a preliminary expert opinion on or about April 22, 2013 – in contravention of the Department's April 25, 2013, claim that, "We do not have an opinion from the second expert," *Id.* p. 32 ;
>
> (3) he was never told there was any urgency in his review of the materials and in fact he was told by the Department that he had roughly two weeks to finalize his opinion *Id.* at p. 33.

By the ALJ admitting and considering the deposition testimony of Dr. Teitelbaum, Dr Cocores was deprived of a meaningful right to confront an important witness and rendered the administrative hearing fundamentally unfair to Dr. Cocores

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2013, the forgoing was sent via Federal Express to the Agency Clerk, Florida Department of Health 4052 Bald Cypress Way, Bin C-65, Tallahassee, Florida 32399; and a copy of the foregoing was sent via electronic mail to Jenifer Friedberg, Assistant General Counsel, Florida Department of Health, 4052 Bald Cypress Way, Bin C-65, Tallahassee, Florida 32399.

/S/ Sean M. Ellsworth
Sean M. Ellsworth, Esq.
Florida Bar No. 39845

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STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

PETITIONER,

v. **CASE NO.: 2011-08787**

JAMES ALEXANDER COCORES, M.D.,

RESPONDENT.

______________________________/

ADMINISTRATIVE COMPLAINT

COMES NOW, Petitioner, Department of Health, by and through its undersigned counsel, and files this Administrative Complaint before the Board of Medicine against the Respondent, JAMES ALEXANDER COCORES, M.D., and in support thereof alleges:

1. Petitioner is the state agency charged with regulating the practice of medicine, pursuant to Chapters 20, 456, and 458, Florida Statutes (2011-2012).

2. At all times material to this Complaint, Respondent was licensed to practice as a physician in the State of Florida, pursuant to Chapter 458, Florida Statutes (2011-2012), having been issued license number ME 76635.

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3. Respondent's address of record is 5301 North Federal Highway, Suite 200, Boca Raton, Florida 33487.

4. At all times material to this Complaint, Respondent was authorized to prescribe controlled substances classified under schedules two through five of Section 893.03, Florida Statutes (2011-2012), to patients.

5. At all times material to this Complaint, Respondent was employed at Southcoast Psychotherapy & Education Associates, Inc. (Southcoast) in Boca Raton, Florida or his own medical practice located a few office suites away from Southcoast.

6. On or about August 10, 2011, L.D., an undercover agent from the PBSO Multi-Agency Diversion Taskforce, presented to Respondent while posing as a patient experiencing psychiatric issues.

7. L.D. informed Respondent that her brother recently passed away and she felt "numb" and felt that she was "going through...[the] motions."

8. L.D. then stated that she fell off a horse in February 2011 and had been receiving treatment from Dr. J.C., a chiropractor and pain management physician.

9. L.D. told Respondent that Dr. J.C. prescribed oxycodone 30 mg, oxycodone 15 mg and Xanax 1 mg to her. She added that she did not fill her most recent prescription for oxycodone 15 mg and that she took only one Xanax 1 mg each night, despite Dr. J.C. prescribing additional Xanax.

10. Oxycodone is commonly prescribed to treat pain. According to Section 893.03(2), Florida Statutes (2011-2012), oxycodone is a Schedule II controlled substance that has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States. Abuse of oxycodone may lead to severe psychological or physical dependence.

11. Xanax is the brand name for alprazolam and is prescribed to treat anxiety. According to Section 893.03(4), Florida Statutes (2011-2012), alprazolam is a Schedule IV controlled substance that has a low potential for abuse relative to the substances in Schedule III and has a currently accepted medical use in treatment in the United States. Abuse of alprazolam may lead to limited physical or psychological dependence relative to the substances in Schedule III.

12. After L.D. stated that she injured her back, Respondent

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conducted no physical examination or drug testing on L.D. and reviewed no diagnostic test results or other medical records regarding L.D.'s condition.

13. L.D. stated that she had X-rays done at her chiropractor's office. Respondent did not ask to see the X-rays and did not ask L.D. to undergo any further diagnostic studies.

14. On or about September 7, 2011, L.D. returned for a follow-up visit with Respondent. Respondent began the visit by again discussing the death of L.D.'s brother and her guilt associated with that loss.

15. L.D. stated that she called Dr. J.C.'s office a few times about getting more Xanax, but then she found out that law enforcement shut down Dr. J.C.'s office. L.D. stated that she ran out of Xanax a few weeks ago but was using her husband's Ambien along with oxycodone 15 mg she had left over from previous prescriptions.

16. Respondent did not address the fact that L.D. admitted to using Ambien from a prescription that was not issued to her.

17. Ambien is the brand name for the drug zolpidem, prescribed to treat insomnia. According to Title 21, Section 1308.14, Code of Federal Regulations, zolpidem is a Schedule IV controlled substance. Zolpidem can

cause dependence and is subject to abuse. However, Ambien is not a scheduled substance according to Florida Statutes.

18. Respondent prescribed 120 dosage units of Vicodin 10/325 mg and 30 dosage units of Xanax 1 mg to LD.

19. Respondent also asked that L.D. undergo a magnetic resonance imaging (MRI) and bring the report of that screening with her to her next visit.

20. Vicodin and Lorcet are brand names for hydrocodone/APAP. Hydrocodone/APAP contains hydrocodone and acetaminophen, or Tylenol, and is prescribed to treat pain. According to Section 893.03(3), Florida Statutes (2011-2012), hydrocodone, in the dosages found in hydrocodone/APAP is a Schedule III controlled substance that has a potential for abuse less than the substances in Schedules I and II and has a currently accepted medical use in treatment in the United States. Abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

21. Respondent conducted no physical examination or drug screening on L.D. and reviewed no diagnostic test results or medical records before prescribing the medication.

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22. On or about November 10, 2011, L.D. returned for a follow-up visit with Respondent.

23. She informed Respondent that she ran out of Xanax and explained that she did not like the Lorcet she received when she filled the September 2011 prescription from Dr. Cocores for Vicodin 10/325 mg.

24. Respondent then prescribed 30 dosage units of Xanax 1 mg and an unknown quantity of Percocet 10/325 mg to L.D. without conducting any type of physical examination or drug screening on her. The quantity of Percocet is unknown because Respondent failed to document it.

25. Percocet is a brand name for oxycodone/APAP, which contains oxycodone and acetaminophen, or Tylenol. According to Section 893.03(2), Florida Statutes (2011-2012), oxycodone is a Schedule II controlled substance that has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States. Abuse of oxycodone may lead to severe psychological or physical dependence.

26. Respondent failed to ask L.D. about the MRI report he requested during L.D.'s last visit.

27. On or about December 8, 2012, L.D. returned for a follow-up visit with Respondent.

28. Once again, Respondent prescribed 30 dosage units of Xanax 1 mg and 120 dosage units of Percocet 10/325 mg to L.D. without conducting any physical examination or drug screening on L.D. and without reviewing any of L.D.'s previous medical records or diagnostic test results.

29. On or about January 4, 2012, L.D. returned for a follow-up visit with Respondent.

30. L.D. asked Respondent whether he could prescribe oxycodone to her. He stated that he would not, but once again prescribed Percocet and Xanax to L.D. without any physical examination or drug screening and without reviewing any medical records or diagnostic test results. Respondent did not document the quantity of medications that her prescribed to L.D.

31. On or about February 29, 2012, L.D. returned for a follow-up visit with Respondent. L.D. told Respondent that the Percocet was bothering her stomach and that she wished to take oxycodone instead.

32. Respondent wrote prescriptions for Xanax and Percocet, and scheduled a follow-up appointment for L.D.

33. Respondent failed to conduct any physical examination or drug screen on L.D. and failed to review any medical records or diagnostics test results before prescribing controlled substances to L.D.

34. Respondent prescribed 30 dosage units of Xanax 1 mg and 120 dosage units of Percocet 10/325 mg to L.D. without conducting any physical examination or drug screening on L.D. and without reviewing any of L.D.'s previous medical records or diagnostic test results.

35. L.D. left Respondent's office and returned to the patient waiting room before realizing that Respondent had given a prescription for Percocet to her. She returned to his office and asked for oxycodone instead of Percocet.

36. Without asking L.D. any further questions or conducting any examination, Respondent took the Percocet prescription from her, wrote a prescription for 75 dosage units of oxycodone 15 mg pills and handed that prescription to L.D. instead.

37. Respondent failed to document the quantity of Xanax that he prescribed to L.D.

38. On or about March 28, 2012, L.D. returned for a follow-up visit with Respondent.

39. Respondent stated to L.D. that he needed an MRI report or he could not prescribe oxycodone to her any longer.

40. Respondent then wrote prescriptions for 30 dosage units of Xanax 1 mg and 75 dosage units of oxycodone 15 mg and provided them to L.D. without examining her, drug testing her or reviewing any of L.D.'s medical history.

41. On or about April 25, 2012, L.D. returned for a follow-up visit with Respondent.

42. Respondent provided L.D. with prescriptions for Xanax and oxycodone and a follow-up appointment for the following month.

43. Respondent did not examine or drug test L.D., did not review any of L.D.'s previous medical records and did not mention the MRI he asked about during L.D.'s previous visit.

44. Respondent also failed to document the quantity of medications that he prescribed to L.D.

45. At no time during L.D.'s visits did Respondent document any medical justification for prescribing controlled substances to L.D.,

document a complete medical history or physical examination for L.D. or document treatment objectives for L.D.

46. Respondent also failed, on at least four occasions, to document the medications that he prescribed to L.D.

47. Respondent failed to establish a treatment plan delineating the objectives that he would use to determine treatment success, including pain relief and improved function.

48. Respondent failed to employ any other treatment modalities in his treatment of L.D., such as interventional techniques, and failed to refer L.D. for consultations with other specialists, including a pain specialist or surgeon.

COUNT I

49. Petitioner realleges and incorporates paragraphs 1 through 48 as if fully set forth herein.

50. Section 458.331(1)(t)1, Florida Statutes (2011-2012), subjects a physician to discipline for committing medical malpractice as defined in Section 456.50, Florida Statutes (2011-2012). "Medical malpractice" is defined by Section 456.50(1)(g), Florida Statutes (2011-2012), as "the failure to practice medicine in accordance with the level of care, skill, and

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treatment recognized in general law related to health care licensure." Section 456.50(1)(e), Florida Statutes (2011-2012), provides that the "level of care, skill, and treatment recognized in general law related to health care licensure" means the standard of care that is specified in Section 766.102(1), Florida Statutes (2011-2012), which states:

> The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

Section 458.331(1)(t)1., Florida Statutes (2011-2012), directs the Board of Medicine to give "great weight" to Section 766.102, Florida Statutes (2011-2012).

51. Respondent failed to meet the prevailing standard of care in one or more of the following manners:

a. By failing to conduct a history and physical examination on L.D. at any time;

b. By failing to order appropriate diagnostic or objective tests for L.D.;

c. By prescribing controlled substances to L.D. without medical justification;

d. By prescribing inappropriate quantities of controlled substances to L.D.;

e. By failing to establish a treatment plan for the treatment of L.D.'s pain;

f. By failing to employ other modalities for the treatment of L.D.'s pain;

g. By failing to request consultations with other specialists for the treatment of L.D.'s pain; and/or

h. By failing to monitor L.D. for drug abuse and/or diversion of the medications which he prescribed to her.

52. Based on the foregoing, Respondent violated Section 458.331(1)(t)1., Florida Statutes (2011-2012), by committing medical malpractice.

COUNT II

53. Petitioner realleges and incorporates paragraphs 1 through 48 as if fully set forth herein.

54. Section 458.331(1)(q), Florida Statutes (2011-2012), subjects a physician to discipline for prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this subsection, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including controlled substances, inappropriately or in excessive or inappropriate quantities, is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to the physician's intent.

55. Respondent prescribed, dispensed, administered, mixed, or otherwise prepared a legend drug, other than in the course of his professional practice, in one or more of the following manners:

a. By excessively prescribing controlled substances to L.D.; and/or

b. By inappropriately prescribing controlled substances to L.D.

56. Based on the foregoing, Respondent violated Section 458.331(1)(q), Florida Statutes (2011-2012), by prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of Respondent's professional

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practice.

COUNT III

57. Petitioner realleges and incorporates paragraphs 1 through 48 as if fully set forth herein.

58. Section 453.331(1)(m), Florida Statutes (2011-2012), subjects a physician to discipline for failing to keep legible medical records that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations or hospitalizations.

59. Respondent failed to keep legible medical records that justify the course of treatment of L.D. in one or more of the following manners:

a. Failing to document any medical justification for prescribing controlled substances to L.D.;
b. Failing to document a complete medical history;
c. Failing to document a physical examination for L.D.;
d. Failing to document treatment objectives for L.D.; and/or
e. Failing to document the medications that he prescribed to L.D.

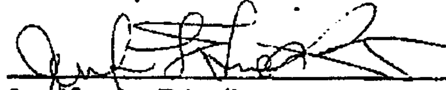
60. Based on the foregoing, Respondent violated Section

458.331(1)(m), Florida Statutes (2011-2012), by failing to keep legible medical records that justify the course of treatment.

WHEREFORE, the Petitioner respectfully requests that the Board of Medicine enter an order imposing one or more of the following penalties: permanent revocation or suspension of Respondent's license, restriction of practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, corrective action, refund of fees billed or collected, remedial education and/or any other relief that the Board of Medicine deems appropriate.

SIGNED this 8th day of March, 2013.

John H. Armstrong, MD, FACS
State Surgeon General and
Secretary of Health



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FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Angel Sanders
DATE MAR 13 2013

PCP: March 8, 2013
PCP Members: Dr. S. Rosenberg; Dr. El Sanadi

DOH V. JAMES ALEXANDER COCORES, M.D. Case No. 2011-08787

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DOH V. JAMES ALEXANDER COCORES, M.D. Case No. 2011-08787

NOTICE OF RIGHTS

Respondent has the right to request a hearing to be conducted in accordance with Section 120.569 and 120.57, Florida Statutes, to be represented by counsel or other qualified representative, to present evidence and argument, to call and cross-examine witnesses and to have subpoena and subpoena duces tecum issued on his or her behalf if a hearing is requested.

NOTICE REGARDING ASSESSMENT OF COSTS

Respondent is placed on notice that Petitioner has incurred costs related to the investigation and prosecution of this matter. Pursuant to Section 456.072(4), Florida Statutes, the Board shall assess costs related to the investigation and prosecution of a disciplinary matter, which may include attorney hours and costs, on the Respondent in addition any other discipline imposed.

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STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

PETITIONER,

DOAH Case No.: 13-1205PL
DOH Case No.: 2011-08787

v.

JAMES ALEXANDER COCORES, M.D.,

RESPONDENT.
_______________________/

MOTION TO BIFURCATE AND RETAIN JURISDICTION TO ASSESS COSTS IN ACCORDANCE WITH SECTION 456.072(4),FLORIDA STATUTES (2012)

The Department of Health, by and through undersigned counsel requests the Board of Medicine enter an Order bifurcating the issue of costs and retaining jurisdiction to assess costs, against Respondent for the investigation and prosecution of this case in accordance with Section 456.072(4), Florida Statutes (2012). Petitioner states the following in support of the request:

1. At its next regularly scheduled meeting, the Board of Medicine will take up for consideration the above-styled disciplinary action and will enter a Final Order therein.

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2. Pursuant to Section 120.569(2)(1), Florida Statutes (2012), the final order in a proceeding heard by an administrative law judge, which affects a party's substantial interests, must be rendered within ninety (90) days after a Recommended Order is submitted to an agency, unless the ninety (90) days is waived by the Respondent.

3. The Administrative Law Judge's Recommended Order was submitted to the agency on or about June 24, 2013; and ninety (90) days from that date is on or about September 22, 2013.

4. Section 456.072(4), Florida Statutes (2012), states as follows:

> In addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, pursuant to this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is not board, shall assess costs related to the investigation and prosecution of the case. The costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is no board, shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto...

5. In order for the Board to assess costs against the Respondent, under the current case law, the Department is required to obtain an

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outside expert attorney opinion verifying the reasonableness of the time spent by the Departments attorneys on this matter or the amount of fees sought. *Georges v. Department of Health,* 75 So. 3d 759 (Fla, 2nd DCA 2011).

6. In order for the Board to assess costs against the Respondent, under the current case law, the Department is also required to verify attorneys' time spent on a case and prepare supporting affidavits for the amount of attorneys' time sought to be recovered. *Georges v. Department of Health,* 75 So. 3d 759 (Fla, 2nd DCA 2011).

7. There is insufficient time for the Department to verify its attorneys' time spent on the case; prepare supporting affidavits for the amount of attorneys' time sought to be recovered; and obtain an outside expert attorney opinion verifying the reasonableness of the time spent by the Department's attorneys on this matter or the amount of fees sought.

8. The bifurcation of the issue of cost recovery by the Department to a later date will not cause any undue hardship to the Respondent as it will delay, rather than expedite, the date at which a final order on the assessment of cost would be entered against Respondent, and thus delay the date upon which any payment for costs would be due and owing.

9. Petitioner requests that the Board grant this motion, bifurcate

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the issue of assessment of costs and retain jurisdiction to assess costs against Respondent once the Department has obtained an outside expert attorney opinion verifying the reasonableness of the time spent by the Department's attorneys on this matter or the amount of fees sought, obtains supporting affidavits for the amount of attorneys' time sought to be recovered and brings a motion to assess costs before the Board of Medicine.

WHEREFORE, the Department of Health requests that the Board of Medicine enter an Order bifurcating the issue of cost assessment and retaining jurisdiction to assess costs against Respondent.

Respectfully submitted this 28th day of June, 2013.

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to **Sean M. Ellsworth, Esq.**, Ellsworth Law Firm, P.A., Suite 601, 420 Lincoln Road, Miami Beach, Florida 33139, sean@ellslaw.com; and **Anthony Vitale, Esq.**, Anthony C. Vitale, P.A., Suite A-1, 2333 Brickell Avenue, Miami, Florida 33029, avitale@vitalehealthlaw.com by email, this 28th day of June, 2013.

Jennifer L. Friedberg
Assistant General Counsel

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