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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST MILES J. JONES, M.D., RESPONDENT	:	FINAL DECISION AND ORDER LS0110041MED

The parties in this matter under section 227.44 of the Statutes and section RL 2.037 of the Wisconsin Administrative Code, and for purposes of review under sec. 227.53, Stats. are:

State of Wisconsin
Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Ave.
Madison, WI 53708-8935

Miles J. Jones, M.D.
1704 S E 11th Ave.
Lee's Summit, MO 64081

State of Wisconsin
Medical Examining Board
1400 East Washington Ave.
Madison, WI 53703

This matter was initiated by the filing of a complaint (DOE case # 00 MED 148) with the Medical Examining Board ("the board") on October 4, 2001. The complaint contained three counts of alleged unprofessional conduct. A Notice of Hearing was prepared by Arthur Thexton, an attorney in the Division of Enforcement ("Division") of the Department of Regulation and Licensing and sent by certified mail to Dr. Jones on the same date. The Notice and Complaint were received and signed for by "Cathy Wall (registered agent)" on October 9, 2001. No answer was filed by Dr. Jones within 20 days as required by the Notice of Hearing.

The prehearing conference was held on November 9, 2001 and Dr. Jones was available by phone along with Mr. Thexton. Dr. Jones was informed that he was technically in default for having failed to file an answer, but upon his assertion that he had been away from his office -- and in fact outside of the lower 48 states -- for the previous few months, he was granted an additional 30 days in which to file an answer.

On November 14, 2001, Mr. Thexton filed an Amended Complaint. The amended complaint contained the original three counts plus five more. On December 9, 2001, Dr. Jones sent an e mail message containing a Motion to Dismiss based on an alleged lack of jurisdiction because no Wisconsin resident had complained about him, and on December 10, 2001 he filed an answer, designated "Respondent's Response".

The parties submitted arguments as scheduled and the ALJ issued an oral opinion in a telephone conference on February 22, 2002, that he would be recommending dismissal of the complaint. Following that telephone conference, Mr. Thexton requested permission to file a second Amended Complaint. Leave to file an Amended Complaint was granted on February 24, 2002.

Mr. Thexton filed a Second Amended Complaint on April 9, 2002. The complaint contained the previous eight counts plus three more. On April 24, 2002, the ALJ sent a letter to Dr. Jones with a copy to Mr. Thexton reminding him that he needed to file an answer within twenty days; but that since the obligation had not been stated explicitly when the Second Amended Complaint was filed, the deadline for filing would be twenty days from the date of the letter, i.e. by May 14, 2002. On May 3, 2002, Dr. Jones sent a letter saying that he had not yet received the complaint. Mr. Thexton responded to this letter with copies of the complaint by fax and by e-mail on May 7, 2002. Also on May 7, 2002 the ALJ sent Dr. Jones a letter stating "I hereby extend the deadline for filing an Answer to May 27, 2002" and that any request for an extension beyond that date would have to be supported by " 'good cause', i.e. good reason(s) for not being able to file the Answer on time."

Dr. Jones did not file an Answer to the Second Amended Complaint by May 27, 2002. On

May 31, 2002, the ALJ informed Mr. Thexton by letter (copied to Dr. Jones) that the ALJ would entertain a motion for default. On the same day, Mr. Thexton filed a Motion for Default. A hearing on the motion was scheduled for June 19, 2002, and a Notice of Motion Hearing was sent to the parties on June 4, 2002.

The hearing was held as scheduled on June 19, 2002 and recorded. Mr. Thexton was unavailable, and DOE was represented by Attorney James Harris. Dr. Jones stated that he mis-read the letter and calendared the due date for the Answer as June 27, 2002. With some discussion and explanation on the record of the hearing, including a recitation of Dr. Jones's other procedural oversights that had been forgiven, the Motion for Default was granted.

The ALJ thereafter filed his Proposed decision on November 4, 2002, and Mr. Thexton filed his Objections to Proposed Decision on November 11, 2002.

Based upon the entire record in this case the Medical Examining Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The respondent is Miles James Alfred Jones, Jr., M.D. At all times relevant to the facts of this proceeding, Dr. Jones was licensed as a physician and surgeon in the State of Wisconsin. Dr. Jones's license number is 22012. Dr. Jones is a board-certified forensic pathologist. Dr. Jones's address of record with the department is Physicians Laboratory Service, 2511 Hwy 441N, Clayton, GA 30525.

2. Dr. Jones is or has been licensed to practice medicine in other states, including Alabama, Indiana, Kansas, Minnesota, Missouri, Nevada, North Carolina, North Dakota, South Carolina, Tennessee, and West Virginia. Dr. Jones's home address is 1704 S E 11th Ave., Lee's Summit, MO 64081.

Facts Associated with Count I.

3. On January 21, 2002, DOE Investigator Steven Rohland logged on from a location in Wisconsin to an internet site known as www.net-dr.com and completed a questionnaire which constituted a request for a prescription drug. Mr. Rohland requested ten tablets of Viagra®, a prescription-only drug.

4. Mr. Rohland did not have a conversation with any physician or any person acting on behalf of any physician, or any authorized prescriber of prescription medications, nor did any such person conduct a physical examination of Mr. Rohland. Dr. Jones did not establish a legitimate physician-patient relationship with Mr. Rohland, and Dr. Jones did not inform Mr. Rohland about the availability of alternate viable medical modes of treatment and the benefits and risks of those treatments.

5. On January 28, 2002, Mr. Rohland received ten tablets of Viagra® by Federal Express. The tablets were in a standard prescription bottle bearing a standard pharmacy prescription label stating that the contents were Viagra® and that they were dispensed on the order of Dr. Miles Jones, DEA # ********* by Giannato's Pharmacy of Newark, New Jersey (a licensed pharmacy in that state). The labeling did not contain adequate directions for use in compliance with §502(f) of the federal Food, Drug & Cosmetic Act [21 USC §352(e)].

Facts Associated with Count II.

6. On some 240 occasions between November 3, 1999 and February 15, 2002, Dr. Jones prescribed prescription-only drugs to residents of the State of Wisconsin on the basis of questionnaires only and without physical examination. Each of the prescriptions was dispensed by Giannato's Pharmacy of Newark, New Jersey in a manner similar to the prescription delivered to Mr. Rohland.

7. Dr. Jones did not establish a legitimate physician-patient relationship with the persons for whom he ordered prescriptions, nor did he inform the patients about the availability of alternate viable medical modes of treatment and the benefits and risks of those treatments.

8. Dr. Jones knew or should have known that the persons requesting the drugs were Wisconsin residents.

Facts Associated with Count III.

9. As reported in an article in the Journal of Medical Internet Research in March of 2001, Dr. Jones dispensed Viagra® (sildenafil) to some 2,100 patients from 46 states and several foreign countries between June of 1998 and March of 1999. Dr. Jones did not see or examine any of these patients, and did not inform them of alternative modes of treatment.

Facts Associated with Count IV.

10. In March of 1999, Dr. Jones, from his place of business in Missouri, provided a prescription for Viagra® (sildenafil) to a person in Kansas. Dr. Jones did not see or examine the patient, and did not inform her of alternative modes of treatment.

Facts Associated with Count V.

11. In August of 1999, Dr. Jones, from his place of business in Missouri, provided a prescription for Xenical® (orlistat) to a person in New Jersey. Dr. Jones did not see or examine the patient, and did not inform her of alternative modes of treatment.

Facts Associated with Count VI.

12. In August of 1999, Dr. Jones, from his place of business in Missouri, provided a prescription for Zyban® (bupropion hydrochloride) to a person in New Jersey. Dr. Jones did not see or examine the patient, and did not inform her of alternative modes of treatment.

Facts Associated with Count VII.

13. In December of 1999, Dr. Jones, from his place of business in Missouri, provided a prescription for Viagra® (sildenafil) to a person in an unknown location. Dr. Jones did not see or examine the patient, and did not inform him of alternative modes of treatment.

Facts Associated with Count VIII.

14. In February of 2000, Dr. Jones, from his place of business in Missouri, twice provided a prescription for Viagra® (sildenafil) to a person in an unknown location. Dr. Jones did not see or examine the patient, and did not inform him of alternative modes of treatment.

Facts Associated with Count IX.

15. In July of 2001, Dr. Jones, from his place of business in Missouri, provided a prescription for Xenical® (orlistat) to a person in Texas. Dr. Jones did not see or examine the patient, and did not inform him of alternative modes of treatment.

Facts Associated with Count X.

16. DOE Attorney Arthur Thexton wrote to Dr. Jones on May 23, 2001 at both his residence address and his business address on file with the board, and requested that Dr. Jones contact him. The letters were not returned by the U.S. Postal Service as undelivered. Between May 23, 2001 and July 17, 2001, Mr. Thexton sent e-mails to Dr. Jones and left a telephone message for him, but Dr. Jones did not reply.

17. On July 17, 2001, Mr. Thexton wrote to Dr. Jones at the same two addresses and enclosed investigative subpoenas stating on their face that Dr. Jones was required to appear for an interview in Mr. Thexton's office. The letters were not returned. Mr. Thexton also caused the local sheriff to make several attempts to serve Dr. Jones personally but no-one answered the door at Dr. Jones's residence.

Facts Associated with Count XI.

18. On December 11, 2001, Dr. Jones signed a document filed in this proceeding in which he stated "Respondent has been working/living outside the continental United States for the last seven (7) months and has not deliberatively [sic] avoided service." On March 12, 2002, Dr. Jones filed another signed document in which he reported the dates of his absence from the lower 48 states in 2001 as February 21 to May 7, August 10 to November 15, and December 15 to December 27.

19. Dr. Jones's casual and inaccurate reporting of dates related to important events in this proceeding constitutes the making of a false statement to the board.

CONCLUSIONS OF LAW

1. The Medical Examining Board is the legal authority responsible for issuing and controlling credentials for the practice of medicine and surgery in Wisconsin, under ch. 448, Stats., and it has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 15.08(5)(c), Stats., sec. 448.02 (3), Stats., and ch. Med 10, Wis. Admin. Code.

2. The Medical Examining Board has personal jurisdiction over Dr. Jones, based on his holding a credential issued by the board and upon service of the Complaint in this proceeding.

3. By supplying a prescription order for Viagra® for a person located in Wisconsin and causing a pharmacy to deliver Viagra® to him, without establishing a legitimate physician-patient relationship and without informing him about the availability of alternate viable medical modes of treatment and the benefits and risks of those treatments, as set forth in Findings of Fact numbered 3 through 5, Dr. Jones has violated sec. Med 10.02 (2) (g), (h), (u) and (z), Wis. Admin. Code.

4. By supplying prescription orders for Viagra® for persons located in Wisconsin and causing a pharmacy to deliver Viagra® to them, without establishing legitimate physician-patient relationships and without informing them about the availability of alternate viable medical modes of treatment and the benefits and risks of those treatments, as set forth in Findings of Fact numbered 6 through 8, Dr. Jones has violated sec. Med 10.02 (2) (g), (h), (u) and (z), Wis. Admin. Code.

5. In prescribing prescription drugs to persons with whom he did not have a valid physician-patient relationship, and without informing them of the availability of alternate viable medical modes of treatment and the benefits and risks of those treatments, as set forth in Findings of Fact numbers 9 through 15, respondent has violated sec. Med 10.02(2)(g), (h), (u), and (z), Wis. Adm. Code.

6. In failing to respond to repeated inquiries and subpoenas by the board, as set forth in Findings of Fact numbered 16 and 17, Dr. Jones has violated §§ Med 10.02 (2) (k), and Med 10.02 (2) (intro.), Code

7. By failing, in concert with Giannotto's Pharmacy, to include labeling which contained adequate directions for use, in compliance with §502(f) of the federal Food, Drug & Cosmetic Act [21 USC §352(e)], as set forth in Findings of Fact numbered 5 and 6, Dr. Jones has violated § Med 10.02(2)(g), (h), (u), and (z), Wis. Adm. Code.

8. In making a false statement to the board, as set forth in Findings of Fact numbered 18 and 19, Dr. Jones has violated § Med 10.02 (2) (intro.), Code.

ORDER

THEREFORE, IT IS ORDERED that the license of Miles P. Jones to practice medicine and surgery in Wisconsin is hereby revoked.

IT IS FURTHER ORDERED that pursuant to § 440.22, Stats., the full costs of this proceeding shall be assessed against Respondent

EXPLANATION OF VARIANCE

The Medical Examining Board has accepted the ALJ's recommended Findings of Fact with the exception of Finding of Fact #19. The ALJ's recommended Finding reads as follows:

> Dr. Jones's casual and inaccurate reporting of dates related to important events in this proceeding constitutes the making of false statement to the board. Despite the inconsistencies with regard to the dates during which he was absent from his home in Missouri, the evidence does not prove that he was deliberately avoiding service.

The State proposed that this should read:

> Dr. Jones's inaccurate reporting of dates related to important events in this proceeding constitutes the making of a false statement to the board. Given the inconsistencies with regard to the dates during which he was absent from his home in Missouri, and his failure to respond to mailed, e-mailed, and telephoned messages, together with the apparent refusal to respond to a deputy sheriff at the door of his residence, the evidence is sufficient to prove that he was

deliberately avoiding service.

The decision whether respondent's actions in this case in terms of his response to filings and inquiries constitute a deliberate intent to avoid service or merely a failure to take the matter seriously requires speculation. The fact that he made false statements to the board is by far the more important consideration, however, and the finding in that regard is retained.

But while the board has left the ALJ's Findings of Fact largely untouched, numerous modifications have been made to his Conclusions of Law. These include the following.

The ALJ's recommendation at Conclusion of Law V reads as follows:

> The evidence is insufficient to prove that Dr. Jones should be held responsible for the introduction into interstate commerce of a drug containing inadequate directions for use.

In his Opinion, the ALJ reasons as follows:

> Count[s] IV through IX also alleged that Dr. Jones, in concert with the dispensing pharmacies, violated Federal rules regarding the labeling of prescriptions by not containing adequate instructions for use. Insufficient facts were pled to suggest that Dr. Jones had any control over the labeling of the prescription containers, and no labeling violation of the federal Food, Drug & Cosmetic Act can be found.

In its Objections, the Division of Enforcement argues that the Conclusion of Law should read:

> The evidence is sufficient to infer that Dr. Jones is accountable for the introduction into interstate commerce of a drug containing inadequate directions for use.

The Division contends that this finding of violation is justified, stating in part:

> The ALJ implies that the pharmacy is responsible for labeling, not the prescribing physician, and in a normal case that would be so. But this is not a normal case. There is evidence that respondent (residing near Kansas City) formed a relationship with Giannotto's Pharmacy (of Newark, NJ) in that hundreds of patients received their prescriptions from that pharmacy. There is evidence that they had no choice of pharmacy, in that the Board's investigator (and the other investigators) merely ordered the prescription drug online from the website, and it came from the pharmacy apparently selected by respondent. It is a reasonable inference, therefore, that the pharmacy and respondent were working together in this enterprise. And, it is a reasonable inference that respondent would know that the medications would be labeled as pharmacies normally label prescription medication. Because such labeling is not adequate for medications prescribed pursuar to diagnosis by mail under the federal law cited, it follows that respondent aided and abetted that violation, and committed unprofessional conduct in so doing (aiding and abetting are specifically included in § Med 10.02(2)(intro), Wis. Adm. Code.)

The board accepts the Division's contention that there is satisfactory evidence that Dr. Jones aided and abetted a violation of th federal labeling laws. Accordingly Conclusion of Law # 8 states:

> By failing in concert with Giannotto's Pharmacy to include labeling which did not contain adequate directions for use in compliance with §502(f) of the federal Food, Drug & Cosmetic Act [21 USC §352(e)], as set forth in Findings of Fact numbered 5 and 6, Dr. Jones has violated § Med 10.02(2)(g), (h), (u), and (z), Wis. Adm. Code.

The ALJ recommended at Conclusion of Law #VI as follows:

> The Medical Examining Board does not have subject-matter jurisdiction over the actions of a physician and surgeon licensed and located in another state, in providing treatment to individuals who are neither residents of nor present in the State of Wisconsin, even if the physician also holds a license to practice medicine and surgery in Wisconsin. Consequently, counts I through IX of the Second Amended Complaint must be dismissed.

The Division vehemently disagrees, and recommends that the Finding state as follows:

> The Medical Examining Board does have subject-matter jurisdiction over the actions of a physician and surgeon licensed an located in another state, in providing treatment to individuals who are neither residents of nor present in the State of Wisconsin, if the physician also holds a license to practice medicine and surgery in Wisconsin. Consequently, counts III through IX of the Second Amended Complaint state claims upon which relief may be granted. In prescribing prescription drugs to persons with whom he did not have a valid physician-patient relationship, and without informing them of the availability of alternate viable medical modes of treatment and the benefits and risks of those treatments, respondent violated

sec. Med 10.02(2)(g), (h), (u), and (z), Wis. Adm. Code.

The board's Conclusion of Law #5 accepts the proposition that subject matter jurisdiction exists and, accordingly, states as follows:

> In prescribing prescription drugs to persons with whom he did not have a valid physician-patient relationship, and without informing them of the availability of alternate viable medical modes of treatment and the benefits and risks of those treatments, as set forth in Findings of Fact numbered 9 through 15, respondent has violated sec. Med 10.02(2)(g), (h), (u), and (z), Wis. Adm. Code.

In concluding that the board does not have subject matter jurisdiction over respondent's internet prescribing in Missouri for patients not located in Wisconsin, the ALJ reasons as follows:

> A state has power, or legislative and administrative authority, over acts done within its borders, c at most, over acts that have effects within its borders. Section 801.04 (2) of the Wisconsin Statutes says "A court of this state having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in s. 801.05 or 801.06 ….", and I do not find authority in either section 801.05 or 801.06 of the Statutes for the assertion of personal jurisdiction over Dr. Jones in this circumstance. . . . . In the absence of any grounds for jurisdiction under secs. 801.05 or 801.06, Stats., Counts IV through IX of the Amended Complaint must be dismissed. The effect of a contrary ruling would be to find a violation of Wisconsin law when neither the doctor nor the patient is in Wisconsin and none of the doctor's activities has an effect in Wisconsin, simply because the doctor holds a Wisconsin license in additio to a license in the state in which he is practicing.

Again, the Division of Enforcement disagrees:

> With respect to subject matter jurisdiction, the statutes governing the Board do not contain any limitation to investigating only actions which occurred in Wisconsin, or have a direct connection. Indeed, the enabling legislation is broad:
>
> > §448.02 **Authority**. (3) *Investigation; Hearing; Action*. (a) The board shall investigate allegations of unprofessional conduct and negligence in treatment by persons holding a license certificate or limited permit granted by the board. (…)"
>
> There is no geographic limit, express or implied. It appears that the legislature intended that the Board uphold its licensing standards irrespective of geography, once the license is granted. And, indeed, the Board would be on sound policy grounds to insist that unprofessional conduct by a Wisconsin licensee result in discipline irrespective of where it occurred.
>
> [A] licensing board enters into a prospectively permanent relationship with its licensee, through a process similar to naturalization. It is not based on as ephemeral a criterion as residence. It is intended to be a lifetime commitment, unless the licensee affirmatively terminates it by surrendering it, or failing to renew. The board is unable to terminate the relationship except by a showing of unprofessional conduct, made and proved in the prescribed manner.
>
> Just as the federal government always has jurisdiction over its citizens and those who choose to receive the benefits of residence in the United States, a licensing board always has jurisdiction ove its licensees who have chosen to receive the benefits of that license. Thus, the jurisdiction of the board is not based on geography, as is the jurisdiction of state courts of general jurisdiction, but is instead based upon the relationship created by licensure.

There is a certain attractiveness to the concept that the medical board in this state should not attempt to assert jurisdiction over conduct occurring in another state that does not directly affect Wisconsin citizens. To so conclude, however, would be to bar action by the board to address even the most egregious and outrageous professional misconduct by a Wisconsin licensee until the other jurisdiction's licensing authority acts; thus permitting the errant licensee to move his practice to Wisconsin with impunity unless and until the other jurisdiction completes its disciplinary process. It is inappropriate public policy to make the health, safety and welfare of Wisconsin citizens dependent on the timeliness and effectiveness of another licensing jurisdiction's disciplinary process.

Count 10 of the Second Amended Complaint recounts the Division's attempts to get actual service of documents associated with this matter and to get respondent to accept service or to respond to the Division's inquiries. The Complaint then alleges that such conduct constitutes a violation of §§ Med 10.02 (intro) and Med 10.02(2)(k), Wis. Admin. Code.[1]

Conclusion of Law #VII of the Proposed Decision states:

> VII. The charge in count X of the Second Amended Complaint is not a valid interpretation of the language in sectio Med 10.02 (2) (k), Wis. Admin. Code, nor can sec. Med 10.02 (2) (intro.) be interpreted to create a responsibility to respond to an investigative letter or an out-of-state subpoena. An investigative subpoena issued by a government agency i Wisconsin has effect only within the borders of the state.

In deciding that respondent's actions did not violate the provisions charged, the ALJ reasoned as follows:

> In the second allegation, Mr. Thexton has gone beyond the bounds of reasonable interpretation to create something that does not exist in a rule. The actual rule which Mr. Thexton alleges was violated by Dr. Jones is sec. Med 10.02 (2) (k), which says that unprofessional conduct includes
>
> > offering, undertaking, or agreeing to treat or cure a disease or condition by a secret means, method, device, or instrumentality; or refusing to divulge to the board upon demand the means, method, device, or instrumentality used in the treatment of a disease or condition [emphasis added].
>
> This rule requires a licensee to divulge his or her "secret" means of treatment, etc. to the board; the word "secret" was not repeated in the second half of the rule, but it is clearly implied. Mr. Thexton has taken the second part of a two-part rule and forced it to stand on its own, out of context. The rule clearly does not mean what Mr. Thexton uses it for, and it is only by an unjustified stretch of imagination and syntax that it can be used as the basis for what he has charged.

Again, the Division disagrees, recommending the following Conclusion:

> The charge in count X of the Second Amended Complaint is a valid interpretation of the language in section Med 10.02 (2 (k), Wis. Admin. Code, and sec. Med 10.02 (2) (intro.) is interpreted to impose a responsibility to respond to an inquiry to licensee from Board or Department staff. An investigative subpoena issued by the Board has effect upon a licensee anywhere that licensee is located, and a licensee is obligated to respond to the Board's process and inquiries, irrespective where the licensee is located.

The Division reasons as follows:

> The ALJ's interpretation suggests that the drafting of the rule contains an error, in that "secret" wa left out of the second clause. The rules of statutory interpretation are to avoid such an interpretation whenever possible. In this case, there is no reason to believe that an error was made. The rule at issue, ¶(k), makes two things unprofessional conduct. The first is that no one may advertise or use a method which is "secret" such as a "secret formula" or a device which operates by a "secret process" or the like. The second part of the rule is not only straightforward, but broader, and says that ***any*** means, method, device, or instrumentality used by a physician must be disclosed to the Board. This is true whether there was a secret involved or not. I believe that this is the standard in medicine: a doctor always fully discloses what the treatment has been, when there are questions later on. I respectfully suggest that this broader meaning was fully intended by the Board when the rule was adopted, and that there are sound and obvious policy reasons for this interpretation.

The board agrees with the Division's interpretation and therefore finds at Conclusion of Law #7 that "In failing to respond to repeated inquiries and subpoenae by the board, as set forth in Findings of Fact numbered 1 and 17, Dr. Jones has violated §§ Med 10.02 (2) (k), and Med 10.02 (2) (intro.), Code."

As discipline, the ALJ recommends that respondent's license be indefinitely suspended, but that the license be restored "upon Dr. Jones producing evidence satisfactory to the Medical Examining Board that he has ceased his practice of prescribing drugs without establishing legitimate physician-patient relationships and without informing patients about the availability of alternate viable medical modes of treatment and the benefits and risks of those treatments."

It is well established that the objective of licensing discipline is the protection of the public by promoting the rehabilitation of the licensee and by deterring other licensees from engaging in similar misconduct. *State v. Aldrich,* 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1968). In addressing these objectives, the ALJ writes in part as follows:

> Dr. Jones gave no indication in his filings or in the various conferences held in this case that he intends to reform his practice voluntarily. He holds licenses in other jurisdictions, especially Missouri, where he now lives, and he maintains the validity of his practice. Therefore, the goal of protection of the public can only be served by preventing him from practicin in the manner described in the Findings of Fact. Given that he is licensed in more than one state, the best that this Board can do is to ensure that he not use his Wisconsin license to practice. His Wisconsin license must be suspended or revoked to prevent further violations. The recommendation in this Proposed Decision is to suspend Dr. Jones's license until he satisfies the Board that he no longer practices in a way that violates the rules as found here.
>
> An indefinite suspension should also satisfy the goal of rehabilitation. In my reading of the cases, the term "rehabilitation" means what is necessary to make a person conform his or her behavior to the requirements of the profession, and it covers both positive and negative reinforcement to deter the offender from similar behavior in the future. See, for example, State v Postorino, 53 Wis.2d 412, 419, 193 N.W.2d 1 at 4 (1972). Thus, even though the purpose of discipline is not to impose punishment *per se*, appreciating the unpleasant consequences of unprofessional behavior is part of rehabilitation.
>
> Finally, the Board must impose discipline sufficient to deter others from similar unprofessional conduct, and an indefinite suspension would seem to be appropriate for this purpose.

In the board's opinion, suspension of the license with provision for reinstatement when and if respondent decides to cease his unprofessional conduct does not adequately address the disciplinary objectives. It does nothing to rehabilitate the respondent because it leaves hin free to continue his misconduct utilizing his licenses in other jurisdictions, and permits him to reinstate his license in Wisconsin should he lose those other licenses merely by discontinuing his misconduct. It does nothing to deter other licensees from engaging in similar misconduct because they would be assured that should their misconduct be discovered, they need only discontinue their unprofessional practices in order to avoid loss of license. Neither a suspension nor a revocation of respondent's license will ensure the safety of Wisconsin residents should respondent decide to continue to prescribe for them, but at least a revocation will send a clear message to other jurisdictions of the seriousness with which this state and this board takes respondent's conduct.

Finally, the ALJ included two Conclusions of Law relating to costs assessment, stating that "Dr. Jones may properly be orderec to pay the costs associated with Counts I, II and XI of the Second Amended Complaint,." but that "[t] he respondent should n be required to pay the costs associated with investigating and prosecuting counts III through X of the Second Amended Complaint."

The Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Moreover, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions, and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following a full evidentiary hearing, that licensee should bear the costs of the proceeding. Because the board has found violations associated with all Counts of the Second Amended Complaint, and in light of the fact that the ALJ adopted all of the factual allegations as Findings of Fact, the board has struck the ALJ's Conclusions of Law relating to costs, and instead orders that the full costs be assessed.

Dated: 1-8-03

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

Virginia S. Heinemann
Board Secretary

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[1] Med 10.02 Definitions. . . . (2) The term "unprofessional conduct" is defined to mean and include but not be limited to the following, or aiding or abetting the same:

* * * *

(k) Offering, undertaking, or agreeing to treat or cure a disease or condition by a secret means, method, device, or instrumentality; or refusing to divulge to the board upon demand the means, method, device, or instrumentality used in the treatment of a disease or condition.