

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

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IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
JAMES L. FLOWERS, M.D.,	:	LS0208062MED
RESPONDENT.	:	

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The State of Wisconsin, Medical Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Medical Examining Board.

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs with the Department General Counsel within 15 days of this decision. The Department General Counsel shall mail a copy thereof to respondent or his or her representative.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 21<sup>st</sup> day of May, 2003.

Sidney Johnson  
Medical Examining Board

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**IN THE MATTER OF THE DISCIPLINARY**

**PROCEEDINGS AGAINST**

**PROPOSED DECISION**

**LS0208062MED**

**JAMES L. FLOWERS, M.D.,**

**RESPONDENT.**

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**PARTIES**

The parties in this matter under § 227.44, Stats., and for purposes of review under § 227.53, Stats., are:

James L. Flowers, M.D.

9407 N. 49th Street, #204

Milwaukee, WI 53233

Medical Examining Board

P.O. Box 8935

Madison, WI 53708-8935

Department of Regulation and Licensing

Division of Enforcement

P.O. Box 8935

Madison, WI 53708-8935

This proceeding was commenced by the filing of a Notice of Hearing and Complaint on August 6, 2002. The Answer was filed on August 26, 2002. The hearing was held on November 7, 2002. The hearing transcript was filed on November 14, 2002. Attorney James W. Harris appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. The respondent, James L. Flowers, appeared without legal counsel.

Based upon the record herein, the Administrative Law Judge recommends that the Medical Examining Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

**FINDINGS OF FACT**

1. James L. Flowers (d.o.b., 01/09/47), 9407 N. 49th Street, #204, Milwaukee, WI 53233, was, at all time material to the Complaint filed in this matter, a physician and surgeon licensed by the state of Wisconsin, license #21678, which was first granted on July 14, 1978.

2. On November 28, 2001, respondent was convicted in the United States District Court for the Eastern District of Wisconsin, in case 01-CR-129 on his plea of guilty, of two counts of violating 26 USC s. 7206 (1), filing false corporate income tax returns.

3. The Information filed in case 01-CR-129 charged that:

a. On or about September 15, 1996 in the State and Eastern District of Wisconsin, Dr. James L. Flowers, did willfully make and subscribe, and caused to be made and subscribed, a 1995 U.S. Corporation Income Tax Return, Form 1120, for Flowers Medical Clinic, S.C. The return contained a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service. Flowers did not believe the return to be true and correct as to every material matter, in that on Line 1c. the return stated that for 1995 the "Gross receipts/sales (Less returns/allowances)" of Flowers Medical Clinic, S.C., was \$334,853 when he well knew that the correct amount was substantially higher than he reported.

b. On or about September 15, 1997 in the State and Eastern District of Wisconsin, Dr. James L. Flowers, did willfully make and subscribe, and caused to be made and subscribed, a 1996 U.S. Corporation Income Tax Return, Form 1120, for Flowers Medical Clinic, S.C. The return contained a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service. Flowers did not believe the return to be true and correct as to every material matter, in that on Line 1c. the return stated that for 1996 the "Gross receipts/sales (Less returns/allowances)" of Flowers Medical Clinic, S.C., was \$498,512 when he well knew that the correct amount was substantially higher than he reported.

4. Respondent was sentenced to six months in prison followed by 120 days of electronically monitored home confinement, one year of supervised release (beginning concurrently with his home confinement), and a \$3,000 fine. He was released from prison on or about July 16, 2002, to begin his home confinement and supervised release.

## CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to s. 448.02 (3) Wis. Stats., and s. MED 10.02 (2) Wis. Adm. Code.

2. Respondent's conduct, as described in Findings of Fact 2 and 3 above, constitutes a violation of s. Med 10.02 (2) (z), Wis. Adm. Code.

## ORDER

**NOW, THEREFORE, IT IS ORDERED** that the respondent, James L. Flowers, be and hereby is, REPRIMANDED.

**IT IS FURTHER ORDERED** that:

(1) The license (#26771) of James L. Flowers to practice medicine and surgery in the state of Wisconsin be, and hereby is, LIMITED for an INDEFINITE PERIOD of time subject to the following conditions and limitations:

(A) Conditions and Limitations

1. Dr. Flowers shall successfully complete educational course work approved in advance by the Board, that includes instruction in medical ethics and such other topics as designated by the Board. Upon completion of the educational course work, Dr. Flowers shall arrange for the course sponsor (s) to certify to the Board the results of the course work and to release all records of his attendance.

2. Dr. Flowers shall be responsible for all costs associated with taking the course work required under this Order and shall pay the cost of any examination required for successful completion of the course work.

(B) Board Action. Upon a showing by Dr. Flowers of successful compliance with the terms of paragraph (A) above, the Board may grant a petition by respondent for return of full licensure.

(C) Petition for Modification of Terms: Dr. Flowers may petition the Board to revise or eliminate any of the above conditions. Denial in whole or in part of a petition under this paragraph shall not constitute denial of a license and shall not give rise to a contested case within the meaning of Wis. Stats., s. 227.01 (3) and 227.42.

(D) Department Monitor: The Department Monitor is the individual designated by the Board as its agent to coordinate compliance with the terms of this Order, including receiving and coordinating all reports and petitions. The Department Monitor may be reached as follows:

Department Monitor

Department of Regulation & Licensing, Division of Enforcement

P.O. Box 8935

Madison, WI 53708-8935

FAX (608) 266-2264

TEL. (608) 267-3817

(2) Costs: Pursuant to s. 440.22 Wis. Stats., the cost of this proceeding shall be assessed against respondent, and shall be payable to the Department of Regulation and Licensing.

This order is effective on the date on which it is signed on behalf of the Medical Examining Board.

# OPINION

The Division of Enforcement alleges in its Complaint that by engaging in the conduct described therein, respondent violated s. 448.02 (3), Stats., and s. Med 10.02 (2), (z), Wis. Adm. Code. The evidence presented establishes that the violations occurred.

## **I. Applicable Law**

Section 448.02 (3), (b), Stats., reads, in part, as follows:

(b) After an investigation, if the board finds that there is probable cause to believe that the person is guilty of unprofessional conduct or negligence in treatment, the board shall hold a hearing on such conduct.

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

(z) Violating or aiding and abetting the violation of any law or administrative rule or regulation the circumstances of which substantially relate to the circumstances of the practice of medicine.

## **II Summary of Evidence**

### **(A) Dr. Jay A. Gold**

Dr. Jay A. Gold testified at the request of the Division of Enforcement. Dr. Gold is a physician licensed to practice medicine and surgery in the State of Wisconsin. In addition, Dr. Gold is licensed to practice law in the State of Pennsylvania. He received a B.A. degree from St. John's College in 1971; a law degree from New York University in 1974; a Master's Degree in Public Health from Harvard University in 1977, and a medical degree from Texas A&M University in 1986. Dr. Gold has been a Senior Vice-President at MetaStar, formerly known as the Wisconsin Peer Review Organization, since 1996. MetaStar pursues quality improvement in healthcare under contracts with a number of entities, most notably the federal government, for work with physicians, hospitals and nursing homes in the State of Wisconsin to improve the quality of care for patients. Dr. Gold directs all of the company's clinical activities.

Dr. Gold is also an Assistant Clinical Professor at the Medical College of Wisconsin in the Divisions of Preventative Medicine, Public Health and Bioethics. He teaches several courses, including Occupational Health Law, Public Health Law and Law and Bioethics. Dr. Gold is certified by the American Board of Preventative Medicine as a diplomat in preventative medicine and certified by the American Group of Legal Medicine as a diplomat in legal medicine. He also has memberships as a fellow in the American College of Legal Medicine and the American Health Quality Association. *Tr. p. 9-12; Exhibit 4.*

Dr. Gold offered opinions regarding two issues. His first opinion relates to whether the circumstances of Dr. Flowers' conviction substantially relate to the practice of medicine. His second opinion relates to whether Dr. Flowers' conduct was below the minimally acceptable standards of conduct for a physician in Wisconsin.

First, in reference to whether the circumstances of Dr. Flowers' conviction substantially relate to the practice of medicine, Dr. Gold's response was yes. Dr. Gold said that first, the crimes were committed on behalf of Dr. Flowers' medical practice. Second, "the fraudulent intent, the saying of something that is not so for the benefit of the person saying it is the sort of thing that is not considered to constitute professional conduct". He said that both the law and common sense consider that somebody who does that in one area may be likely to do it in other areas as well. *Tr. p. 18-19.*

Dr. Gold further testified that "it is considered very important for physicians to be honest and trustworthy. This is spelled out in Principle 2 of the Principles of Medical Ethics adopted by the American Medical Association in which it points out that a physician shall be honest in all professional interactions and indeed places on physicians the obligation to report those of their colleagues who are not. There are important reasons for this. Licensure is a mechanism that's used by the law to protect the public from those who are incompetent or those who might injure the public. And dishonesty or untrustworthiness in a physician, just in addition to the fact that you don't want to see it in anybody, can be particularly injurious to patients". He also said that, "to give just one example among many, physicians sometimes may order unnecessary tests or perform unnecessary procedures that may put patients at risk in order to enhance the physician's income. There are many things like that. And fraud is considered to be a crime of moral turpitude. That is a crime that involves guilty knowledge or wrongful intent, a crime considered to be wrong whether or not the law says it's prohibited, wrong in and of itself, and I believe every jurisdiction fraudulent intent, per se, makes a crime of moral turpitude. The law is very concerned that the public be safeguarded against those who have committed such acts because they've exhibited character traits that might injure the public. In this particular case, you also have the circumstance that the fraud which Dr. Flowers was convicted was a fraud that he committed on behalf of his medical practice. So in that sense, you also see a direct relationship to medical practice". *Tr. p. 15-17; Exhibit 6.*

When asked whether during his review of the circumstances of the crime, if he saw facts or circumstances that related to professional judgment or professional responsibility, Dr. Gold said that he did. He said that the issue of honesty and trustworthiness is of the essence of the fiduciary responsibility of a physician that the physician needs to have in order to practice medicine according to minimal professional standards. A conviction of fraud indicates that such trustworthiness and honesty may be absent. *Tr. p. 17.*

Second, Dr. Gold testified that in his opinion, based upon a review of the circumstances of the crime for which Dr. Flowers was convicted and the circumstances of the practice of medicine, Dr. Flowers' conduct was below the minimally acceptable standards of conduct for a physician in Wisconsin. *Tr. p. 19.*

## **(B) Dr. Flowers**

Dr. Flowers testified that he was under the impression, based on information from the Board, that the Board would not pursue a disciplinary action in his type of situation. He said that prior to accepting a plea bargain in the criminal case, his attorney, Franklin Gimbel, contacted someone in the Department of Regulation and Licensing or the Board's office and "asked if a physician were convicted on a tax case where there was no indication that any patient was overbilled nor improperly treated, whether that would present a problem with the physician's license". According to Dr. Flowers, his attorney was advised by the Board that it would not take

action and that the Board had not taken such action in the past. He said that the difficulty is that his attorney did not request advice in writing and he did not specifically mention his (Dr. Flowers') name. It was a general question. He said that his attorney's "best belief, based on other matters which were ongoing, was that he spoke with Attorney Thexton, but he is unable to swear to that". *Tr. p. 86-87.*

In reference to protection of the public, Dr. Flowers testified that the events which took place relating to his conviction occurred from 1994 through 1996. They involved an

incorporated clinic that he ran which is no longer in business. He said that since 1998, he has been an employee of MFM Clinic and has fully paid all taxes in all subsequent years. He said that he has no interest in operating a business in Wisconsin of any type. There has been no indictment or accusation of anything improper with his personal taxes and there was not one improper medical-related billing or charge or anything patient related that would affect the welfare of a patient involved. *Tr. p. 91-92.*

In terms of rehabilitation, Dr. Flowers said that since he is not doing anything involving patients relating to taxes, he does not advise them and he does not fill out their tax returns, and he is not even doing corporate tax returns now, he does not feel there is a need for rehabilitation. *Tr. p. 92-93.*

In reference to deterrence, Dr. Flowers testified that his criminal conviction more than accomplishes the goal of deterrence. He said that there were several newspaper articles written about his conviction. He said that he has already been punished severely. He asked: "How can discipline of myself for taxes protect any patient I will treat in the future since it no way impacts on my practice of medicine for them?" *Tr. p. 90-91, 99-102.*

Finally, Dr. Flowers said that, in his opinion, imposing punishment is not the role of the Board.

### **(C) Attorney Franklin Gimbel**

Attorney Franklin Gimbel testified at the request of Dr. Flowers. Attorney Gimbel represented Dr. Flowers in the criminal proceeding in which Dr. Flowers was convicted for filing false tax returns. Atty. Gimbel testified that he thought Dr. Flowers' criminal case was defensible, and that while nobody in his business has a crystal ball that can give any assurance as to what result might come from a contested criminal case, he felt that Dr. Flowers had a better-than-average chance to defend his case successfully. He said that Dr. Flowers told him that he did not want to pursue the criminal case because he did not have the financial resources to pursue the case. *Tr. p. 95-96.*

Atty. Gimbel further testified that Dr. Flowers asked him what, if any, implication there might be to his license as a physician in the State of Wisconsin, and that they talked about the possible penalties that might flow from the criminal case. In terms of the Dr. Flowers' license with the State of Wisconsin, Atty. Gimbel said that he did have a conversation with a representative of the Department of Regulation and Licensing on a hypothetical basis at that time. He said that he believes that the person was an attorney, but he could not be certain. He said that the person was a male and that the person told him that it was his view that a person who would be convicted of a tax offense would not suffer a loss of his professional medical license. He said that the information that he got from the person and passed on to Dr. Flowers was that the worst case scenario would be, if in fact it was even reviewed by the Department of Regulation, that the outgrowth of that review would be some kind of a reprimand. *Tr. p. 97-98.*

### **III. Analysis**

Section 111.321 and 111.322, Stats., prohibit a licensing agency from discriminating against an individual on the basis of a conviction record. Section 111.335 (1) (c), Stats., provides that notwithstanding s. 111.322, it is not discrimination because of conviction record to terminate from licensing any individual who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the



circumstances of the licensed activity.

The purpose of the exception structured by the Legislature in s. 111.335 (1) (c), Stats., was discussed by the Wisconsin Supreme Court in County of Milwaukee v. Labor and Industry Review Commission, 139 Wis. 2d 805, 407 N.W. 2d 908 (1987). Although the Court's discussion focused on the employment area, the societal interests discussed are relevant to the licensing area. The Court stated, Id. at 821, that:

It is evident that the legislature sought to balance at least two interests.

On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

In reference to assessing the risk of recidivism, the Supreme Court stated, Id. at 823-824, that:

In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related. ...

Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. ...

It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.

In this case, one's initial reaction may be that Dr. Flower's conviction for filing false tax returns does not substantially relate to the practice of medicine and surgery. As defined under

s. 448.01 (9), Stats., the term "practice of medicine and surgery", appears to relate more to the care and treatment aspect of the practice of medicine and to the representations made to the public by an individual that he or she is able to practice medicine. However, as Dr. Gold noted during his testimony, there are other aspects

of the practice of medicine that deal more with business and financial practice that may come into play and that may result in injury to patients.

Dr. Gold testified that, in his opinion, the circumstances of Dr. Flowers' conviction substantially relate to the practice of medicine. He said that first, the crimes were committed on behalf of Dr. Flowers' medical practice. Second, "the fraudulent intent, the saying of something that is not so for the benefit of the person saying it is the sort of thing that is not considered to constitute professional conduct". He said that both the law and common sense consider that somebody who does that in one area may be likely to do it in other areas as well. He also noted that dishonesty or untrustworthiness in a physician can be particularly injurious to patients. One example is that a physician may order unnecessary tests or perform unnecessary procedures that may put patients at risk in order to enhance the physician's income. He said that the law is very concerned that the public be safeguarded against those who have committed acts, such as fraud, because they have exhibited character traits that might injure the public. *Tr. p. 18-19.*

In my opinion, Dr. Flowers' conviction for filing false tax returns reflects that he is dishonest and untrustworthy and that, if permitted to continue to practice medicine and surgery without the imposition of corrective measures, is likely to cause injury and harm to his patients and the public in the future.

#### **IV. Discipline**

Having found that Dr. Flowers violated laws relating to the practice of medicine, a determination must be made regarding whether discipline should be imposed, and if so, what discipline is appropriate.

The Medical Examining Board is authorized under s. 448.02 (3) (c), Stats., to warn or reprimand a person, or limit, suspend or revoke any license, certificate or limited permit granted by the board to a person if it finds that the person is guilty of unprofessional conduct or negligence in treatment.

The purposes of discipline by occupational licensing boards are to protect the public, deter other licensees from engaging in similar misconduct and to promote the rehabilitation of the licensee. State v. Aldrich, 71 Wis. 2d 206 (1976). Punishment of the licensee is not a proper consideration. State v. MacIntyre, 41 Wis. 2d 481 (1969).

The Division of Enforcement recommends that Dr. Flowers be reprimanded and that his license be limited through the duration of his supervised release. The terms of the limitation would require Dr. Flowers to have a mentor who will agree to review generally his practice as it may relate to fiscal matters, and require the mentor to make periodic reports to the Department Monitor indicating that there is no cause for concern in fiscal matters relating to his practice. Dr. Flowers recommends that no discipline be imposed. *Tr. p. 110-111, 119.*

Based upon the evidence presented, the Administrative Law Judge recommends that

Dr. Flowers be reprimanded and that his license to practice medicine and surgery be limited for an indefinite period of time as set forth in the proposed Order. This measure is designed primarily to assure protection of the public.

The evidence presented establishes that Dr. Flowers' conviction for filing false tax returns substantially relate to the practice of medicine. By requiring Dr. Flowers to complete the recommended educational course work, the Board will provide some assurance to the public that Dr. Flowers will be capable of practicing in a manner that safeguards the interest of the public.

## V. Costs of the Proceeding

Section 440.22(2), Stats., provides in relevant part as follows:

In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department.

The presence of the word "may" in the statute is a clear indication that the decision whether to assess the costs of this disciplinary proceeding against the respondent is a discretionary decision on the part of the Board, and that the Board's discretion extends to the decision whether to assess the full costs or only a portion of the costs. The Administrative Law Judge's recommendation that the full costs of the proceeding be assessed is based primarily on fairness to other members of the profession.

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.

This approach to the imposition of costs is supported by the practice of the Wisconsin Supreme Court, which is granted similar discretionary authority by SCR 22.24 to impose costs in attorney disciplinary hearings. The Court acknowledges the logic of imposing the cost of discipline on the offender rather than on the profession as a whole, and routinely imposes costs on disciplined respondents unless exceptional circumstances exist. In the Matter of Disciplinary Proceedings against M. Joanne Wolf, 165 Wis. 2d 1, 12, 476 N.W. 2d 878 (1991); In the Matter of Disciplinary Proceedings against Willis B. Swartwout, III, 116 Wis. 2d 380, 385, 342 N.W. 2d 406 (1984).

Based upon the record herein, the Administrative Law Judge recommends that the Medical Examining Board adopt as its final decision in this matter, the proposed Findings of Fact, Conclusions of Law and Order as set forth herein.

Dated at Madison, Wisconsin this 6th day of February, 2003.

Respectfully submitted,

Ruby Jefferson-Moore

Administrative Law Judge