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All “Pushers” Are Not Created Equal! The Inequities of Sanctions for Physicians Who Inappropriately “Prescribe” Controlled Substances

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I. INTRODUCTION

It is estimated that at least seven million people regularly use prescription drugs without medical supervision, the majority of which are addictive.¹ This led to a 1983 figure of \$60 billion to treat drug abuse in the United States.² Who is watching the licensed practitioners who serve as the gatekeepers of these drugs?

Licensed health care professionals are governed in their practice by a maze of incongruent rules and regulations. The administrative agency ("Board") in the state where the professional is licensed has authority to sanction the licensee for inappropriate behavior.³ In addition to Board

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1. Drug and Alcohol Abuse Treatment, Pub. L. No. 99-570, 100 Stat. 3207-160(a)(2) (1986) (codified at 21 U.S.C. 801 (1994), Historical and Statutory Notes).

2. *Id.* at 3207-160(a)(4).

3. In Florida, the state administrative agency for physicians is the Board of Medicine at the Agency for Health Care Administration, Tallahassee, Florida ("Board"). The Board's disciplinary actions follow the Florida Medical Practice Act, FLA. STAT. §§ 458.327, 329 (1997). They follow the court proceedings of the Administrative Procedures Act, FLA. STAT. §§ 120.57(1), (2) (Supp. 1998), and the sentencing guide of FLA. ADMIN. CODE (1999) (formerly FLA. ADMIN. CODE 59 r. 8.001).

penalties, a health care professional who violates federal or state law in the course of her practice may also be governed by the respective criminal laws.⁴ Although an abundance of enthusiastic legislation is available for use in regulating licensed practitioners, when applied, these laws lead to inconsistent, unforeseeable, and usually insufficient punishments in comparison to the culpability of the professional's actions.

Generally when a health care professional prescribes or dispenses controlled substances inappropriately, a criminal investigation of the suspected individual will begin. The state prosecutor then has the responsibility to recognize the individual as a licensed health care professional and report the criminal charge to the Board. Theoretically, the criminal trial and state administrative proceeding run concurrently and may result in dual judgments. However, professional culpability could be overlooked if the prosecutor either neglects to inform the administrative agency or the practitioner holds a license to practice in more than one state and the prosecutor errs by only reporting to the state agency in which the practitioner was currently working when criminally charged.

Statutes vary among the states and this note is therefore limited to an exploration of the inequities of sanctions of cases in Florida. In addition, federal rules that govern physicians who inappropriately prescribe controlled substances in Florida will be reviewed.⁵ Part II reviews the legislative history of the statutes that govern physician prescribing. Part III weighs criminal charges and defenses. Part IV reviews civil liabilities. In conclusion, Part V provides an illustration of the inequities of sanctions towards the more fortunate professional as compared to nonprofessional defendants.

4. In Florida, the State Attorney General is responsible for criminal charges under the Florida Comprehensive Drug Abuse Prevention and Control Act, FLA. STAT. § 893 (Supp. 1996) (amended at 21 U.S.C. § 841 by the Controlled Substance Act, Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970), and the United States Sentencing Guidelines, § 2D1.1 (1998) ("Guidelines"). If there is ever a conflict in these rules, the statutes prevail over the Guidelines.

5. This note only reviews cases involving validly licensed physicians. Controlled substances, for purposes of this note, are prescription drugs including narcotics found in schedules II-IV of the Drug Abuse Prevention and Control Act, FLA. STAT. § 893.03 (Supp. 1996), having a recognized medical use. For a review of pharmacist liabilities see, for example, P.G. Guthrie, Annotation, *Revocation or Suspension of License or Permit to Practice Pharmacy or Operate Drugstore Because of Improper Sale or Distribution of Narcotic or Stimulant Drugs*, 17 A.L.R. 3d 1408 (Supp. 1998). For a review of nursing liability see, for example, Emile F. Short, Annotation, *Revocation of Nurse's License to Practice Profession*, 55 A.L.R. 3d 1141 (Supp. 1998).

II. LEGISLATIVE HISTORY

The first Congressional attempt to regulate both the distribution and marketing of dangerous drugs was the Pure Food and Drug Act of 1906,⁶ which was likewise repealed in 1938.⁷ In 1914, two attempts at regulation were passed. The Harrison Act,⁸ which was repealed in 1970,⁹ and the Narcotic Drugs Import and Export Act,¹⁰ which was repealed in 1970. Finally, in 1970, Congress repealed all prior federal drug control legislation and enacted the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Act").¹¹ Title II of the Act is the Controlled Substance Act.¹² Fourteen years later, the Comprehensive Crime Control Act of 1984 was passed to revise the Act, thereby allowing stricter penalties for violating narcotics laws.¹³ The idea behind the combination Act, as stated by the United States Supreme Court in a 1975 case against a physician, was to create uniformity between the state and federal laws, thereby enabling more effective communication in the war against drugs and less subjective sanctions.¹⁴

The Act requires all persons who manufacture and distribute controlled substances to register with the Attorney General of the United States.¹⁵ Physicians who prescribe controlled substances and who fail to register are subject to criminal penalties under section 822 and 841(a)(1) of the *United*

6. Pub. L. No. 59-384, 34 Stat. 768 (repealed 1938), primarily created to prevent interstate commerce of adulterated drugs.

7. *Id.*

8. Pub. L. No. 63-223, 38 Stat. 785 (repealed 1970).

9. *Id.*

10. Pub. L. No. 63-230, 38 Stat. 275 (repealed 1970).

11. 21 U.S.C. §§ 801-901 (1970) [hereinafter *Act*].

12. 21 U.S.C. § 801.

13. The Comprehensive Crime Control Act of 1984 revised the Act of 1970 to allow real property in the scope of civil forfeiture. 21 U.S.C. § 881(a)(7) (1988). *See, e.g.,* M. Lynette Eaddy, *How Much is Too Much? Civil Forfeitures and the Excessive Fines Clause After Austin v. United States*, 45 FLA. LAW REV. 709 (1993).

14. *United States v. Moore*, 423 U.S. 122 (1975). In *Moore*, it was argued that a registered physician cannot be prosecuted under section 841 because section 841, which carries much harsher penalties, is reserved for an individual "outside the 'legitimate distribution chain.'" *Id.* at 130. Other sections such as sections 842 and 843, which are more lenient were proffered as the correct avenue of prosecution. *Id.* at 131. The Court held that section 841 is applicable when the activities fall outside the normal course of professional medical practice and congressional intent is not to set up distinct sections for punishment of differing classes of individuals. *Id.* at 124, 132. Moore was charged under 21 U.S.C. § 841(a)(1) with the unlawful distribution of methadone, a schedule II narcotic. *Id.* at 124.

15. 21 U.S.C. § 822 (1994).

States Code.¹⁶ Under the Act, physicians are also required to keep records of controlled substance distribution.¹⁷ Failure to comply with the Act can result in criminal sanctions.¹⁸ In *United States v. Betancourt*,¹⁹ the court explained that once registered with the Drug Enforcement Administration (“DEA”), the physician is required to prescribe controlled substances in the usual course of professional practice and for legitimate medical purposes.²⁰ The Act defines “dispense” as “to deliver a controlled substance to an ultimate user . . . pursuant to the lawful order of, a practitioner, including the prescribing, . . . administering[,] . . . packaging, labeling or compounding” of a controlled substance.²¹ “Dispense,” therefore, connotes a lawful order. If a physician unlawfully prescribes a controlled substance he has not dispensed under this statute, he has “distributed” in violation of law.²²

In addition to the Act, there are parallel state administrative rules imposed by the medical licensing board that could result in physician liability.²³ The Board has been empowered to discipline a licensee by suspending or revoking the practitioner’s license, by reprimand, or by fine.²⁴

16. See *United States v. Blanton*, 730 F.2d 1425 (11th Cir. 1984), which involved a physician’s refusal to register in order to dispense Schedule II N drugs, which included methaqualone. *Id.* at 1427. The Court explained that:

To possess or dispense a controlled substance, doctors must be licensed to practice medicine and register annually with the Drug Enforcement Administration (DEA). 21 U.S.C.A. § 822. Doctors may acquire and dispense controlled substances “to the extent authorized by their registration.”

Id. § 822(b). The registration application contains a separate box denoting each schedule and directs applicants to check each box which is applicable in registering for desired schedules. The statute mandates that the DEA register physicians in every schedule they check if the physicians are authorized by state law to dispense the substances included in that schedule.

Id. at 1427 n.1.

17. 21 U.S.C. § 830 (1994).

18. 21 U.S.C. § 841 (1994) (quoting 21 U.S.C. § 822).

19. 734 F.2d 750 (11th Cir. 1984).

20. *Id.* at 757. In *Betancourt*, the court reasoned that prescribing methaqualone excessively, without further medical inquiry, is in violation of section 841 as not a legitimate medical purpose. *Id.* at 757.

21. 21 U.S.C. § 802(10) (1996).

22. *United States v. Black*, 512 F.2d 864, 866 (9th Cir. 1975).

23. TIMOTHY S. JOST ET AL., *Consumers, Complaints, and Professional Discipline: A Look at Medical Licensure Boards*, 3 HEALTH MATRIX 309, 330 (1993); The Medical Practice Act, FLA. STAT. § 458 (1993).

24. Jost, *supra* note 23. This note will only look at section 458.331(1) of the *Florida Statutes*:

(c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine.

Once the Board decides to cite a physician for misconduct, the case becomes public record.²⁵ Formal disciplinary sanctions must be initiated by citation, thereby placing the physician's reputation on the line.²⁶ The Board's final decision to cite a physician is a reflection of the serious nature of the offense.²⁷ In an Ohio study of 200 complaints lodged against physicians, only five (2.5%) resulted in formal disciplinary action by citation.²⁸ Potential concurrent liability of a practitioner under the numerous Board rules and inconsistent criminal statutes has led to much controversy and confusion, leaving the practitioner with ripe arguments focused on constitutional invasions, legislative intent, and statutory interpretations.

III. CRIMINAL LIABILITY

Many criminal defenses for physicians are founded in the area of statutory interpretation. For example, section 893.13(1)(a) of the *Florida Statutes* uses the word "selling" to define the criminal act of dispensing controlled substances.²⁹ In the case of *Cilento v. State*,³⁰ a physician, Cilento, dispensed controlled substances by means of a prescription issued in bad faith, not in the course of medical practice.³¹ He claimed his actions were "prescribing" and not "selling," therefore, not in violation of the Act, which expressly requires selling of a controlled substance for sanctions.³² The court held that prescribing in bad faith is "selling" through statutory interpretation.³³

....

(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.

FLA. STAT. §§ 458.331(1)(c), (q) (Supp. 1998).

25. Jost, *supra* note 23 at 326.

26. *Id.* at 327.

27. *Id.* at 330.

28. *Id.*

29. FLA. STAT. § 893.13(1)(a) (1997).

30. 377 So. 2d 663 (Fla. 1979).

31. *Id.* at 664.

32. *Id.* at 666.

33. *Id.*

Therefore, a physician who is alleged to have prescribed a controlled substance in violation of the Act can only be found criminally liable if the prescriptions were written in bad faith.³⁴ Bad faith can be proven when the prescribing was done in opposition of proper medical standards.³⁵ However, it should be noted that nonconformity to the standard medical practice is only evidence in support of bad faith and must further be proven by medical expert testimony.³⁶ The burden of going forward with evidence to challenge the Act and establish an exception or exemption to the Act rests with the defendant.³⁷ This must be distinguished from the burden of persuading the jury beyond a reasonable doubt that the defendant did commit the crime, as this burden always remains with the prosecution.

By contrast, other courts have held that a physician could not be prosecuted for selling controlled substances when the physician has prescribed the drugs to another.³⁸ These courts stated that the term "selling" did not adequately describe the physician's action of prescribing within the course of patient treatment.³⁹ In *Ex parte Evers*,⁴⁰ when the physician prescribed amphetamines to a patient for alleged fatigue, it was found that while the statute could apply to a licensed practitioner, the issue was whether it is applicable to a physician who writes a prescription in the course of practice.⁴¹ In reaching its holding, the court stated that the criminal statutes are to be strictly construed in a light most favorable to the defendant.⁴² Testimony, in this case, could not establish the actual selling of pills by the physician under the statutory construction, and the statute should not be extended by construction.⁴³ Statutory interpretation varies among the districts making conclusions of law difficult to ascertain.

A license to practice medicine is the basic requirement to prescribe substances that may be otherwise illegal. A license does not, however, protect the physician from state intervention by the police. In *United States v. Moore*,⁴⁴ a licensed physician argued that he could not be prosecuted

34. *Id.*

35. *Cilento*, 377 So. 2d at 666.

36. 21 U.S.C. § 885(a)(1) (1970).

37. *Id.*

38. *Ex parte Evers*, 434 So. 2d 813 (Ala. 1983), *rev'd*, 434 So. 2d 817 (Ala. Crim. App. 1983). *See also* *Rudell v. State*, 453 So. 2d 1329 (Ala. Crim. App. 1984) (holding statute does not apply to a licensed physician who writes a prescription within the scope of his registration).

39. *Evers*, 434 So. 2d at 816.

40. 434 So. 2d at 813.

41. *Id.* at 816.

42. *Id.*

43. *Id.* at 816-17.

44. 423 U.S. 122 (1975).

under the federal Act⁴⁵ for distribution or dispensing a controlled substance because he was acting within his professional practice.⁴⁶ The Court disagreed, holding that Congress did not intend two separate and distinct penalty systems, one for a licensed physician and the other for a "pusher."⁴⁷ The Court stated that the defendant was exempt under section 841(a)(1) of the *United States Code* from only the legitimate dispensing of controlled substances.⁴⁸ There was nothing in the statute to infer that a registrant is exempt from prosecution when he acted like a "pusher" outside of the usual course of professional practice.⁴⁹

Additionally, statutory interpretation has uncovered the fact that prescribing controlled substances constitutes a "delivery" if such act of prescribing could be reasonably contemplated to result in actual transfer to the patient by a pharmacist.⁵⁰ Delivery is defined by the Florida Comprehensive Drug Abuse Prevention and Control Act to include constructive and attempted transfers as well as actual delivery.⁵¹

In the case of *Felker v. State*,⁵² the physician argued he was permitted to carry cocaine and admitted to having more at his medical office when he was found to have cocaine residue in a nasal spray bottle, on a straw, and a knife.⁵³ A search of his office revealed three bottles of cocaine hydrochloride, a schedule II controlled substance, in his personal desk drawer.⁵⁴ The court stated that the Act makes it unlawful for any person to have possession of any controlled substance in a "carte blanche" fashion.⁵⁵ The court further stated that allowing physicians to possess controlled substances for their own personal, nonmedical use, was not the legislature's intention.⁵⁶ However, in this case, despite the drug residue evidence, the physician was found not guilty because there was not enough evidence to prove he was in actual possession of the drug at the time of the arrest.⁵⁷ This case demonstrates that the statutory authority is available to convict

45. 21 U.S.C. § 841(a)(1) (1970).

46. Moore, 423 U.S. at 131.

47. *Id.* at 132.

48. *Id.* at 138.

49. *Id.*; see also *United States v. Steele*, 105 F.3d 603 (11th Cir. 1997) (extending violations from physicians to pharmacists).

50. *State v. Vinson*, 298 So. 2d 505, 507 (Fla. 2d Dist. Ct. App. 1974).

51. *Id.*; FLA. STAT. § 893.02(5) (1997).

52. 323 S.E.2d 817 (Ga. App. 1984).

53. *Id.* at 819-20.

54. *Id.* at 820.

55. *Id.*

56. *Id.*

57. *Felker*, 323 S.E.2d at 821.

physicians criminally, but the professional seems to elude the law with loopholes.

A. *Constitutional Challenge*

The Act has been challenged by criminally charged physicians on constitutional grounds. These grounds have included vagueness, invasion of Tenth Amendment residual state police powers, right to privacy in the physician/patient relationship, due process, and cruel and unusual punishment. Historically, statutory challenges based on constitutional grounds have been unsuccessful. As early as 1914, contentions that statutory terms, such as “legitimate use,” were void for vagueness, were without success.⁵⁸ The court held, in *Commonwealth v. Gabhart*, that the mere fact that “legitimate use” remained undefined by the statute, did not warrant finding the statute void for vagueness.⁵⁹

Another unsuccessful constitutional argument arose when the Department of Professional Regulation (“DPR”) performed a warrantless, routine administrative search of a pharmacy and found suspect prescriptions for Quaaludes (methaqualone) written by an oral surgeon.⁶⁰ The surgeon attacked the constitutionality of the search as a violation of his reasonable expectation of privacy.⁶¹ The court found that the physician had no grounds for attacking the constitutionality of the search and upheld the physician’s thirty-day suspension.⁶²

Vagueness has also failed as a constitutional argument. The good faith standard of section 893.05(1) of the *Florida Statutes* states that a licensed physician, in the course of his practice, may prescribe, mix, dispense, and administer controlled substances.⁶³ When a physician wrote a prescription for a patient, subsequently found not written in “good faith,” he challenged this clause as unconstitutionally vague.⁶⁴ The Supreme Court of Florida held that the statute is not unconstitutionally vague because it passed the test that “men of common intelligence must necessarily guess at its meaning and differ as to its application.”⁶⁵

In controlled substances cases, even where the suspected physician is visited by undercover agents posing as patients, the defense has not been

58. *Commonwealth v. Gabhart*, 169 S.W. 514 (Ky. Ct. App. 1914).

59. *Id.* at 516.

60. *Cushing v. Department of Prof'l Reg.*, 416 So. 2d 1197 (Fla. 3d Dist. Ct. App. 1982).

61. *Id.* at 1198.

62. *Id.*

63. FLA. STAT. § 893.05(1) (1997).

64. *State v. Weeks*, 335 So. 2d 274, 276 (Fla. 1976).

65. *Id.* at 276.

successful. It has been established that these actions by undercover agents are not grounds for suppression of evidence, although entrapment has been a successful defense.⁶⁶ The key to entrapment is to determine if the undercover agents induced the defendant to act, or if the defendant was predisposed, and was merely given the opportunity to do so.⁶⁷ If a predisposition to act can be established, entrapment may fail.⁶⁸

Other states have challenged other aspects of the Act on constitutional grounds, without avail.⁶⁹ Typically, a physician who is indicted for unlawfully prescribing a controlled substance is more likely to prevail if the defense avoids the constitutional issues and focuses on weak construction and interpretation of the Act.

B. *Criminal Charges: Double Jeopardy?*

Physicians' actions are investigated both criminally and by a board, thus arguments have arisen that findings of the board are final, collaterally estopping the prosecution from proceeding.⁷⁰ The argument that the state is estopped from prosecuting the defendant is usually rejected. In the case of *State v. Fritz*,⁷¹ the court explained that the doctrine of collateral estoppel does not apply because there is a lack of privity between the State Attorney's office and the state's administrative department.⁷²

In 1989, the United States Supreme Court faced the issue of whether and when a civil penalty is considered punishment for the purpose of double jeopardy.⁷³ In *United States v. Halper*,⁷⁴ Halper was working as a manager of a medical laboratory and submitted sixty-five false claims to Blue Cross

66. *White v. State*, 247 S.E.2d 536, 538 (Ga. App. 1978).

67. *Id.*

68. *Id.*

69. In *United States v. Rich*, 518 F.2d 980 (8th Cir. 1975) (Missouri), the court found the failure to delineate parole terms not vague. *Id.* at 986. In *United States v. Atkinson*, 513 F.2d 38 (4th Cir. 1975) (North Carolina), the court held a 12-year sentence does not violate the Eighth Amendment as unusual or excessive punishment. *Id.* at 42. "[I]n the course of professional practice" was held not void for vagueness under the Fifth Amendment; further, the Act, as applied to physicians, does not violate the Tenth Amendment by invading state police powers. *United States v. Collier*, 478 F.2d 268, 271 (5th Cir. 1973) (Georgia); *United States v. Rosenberg*, 515 F.2d 190, 193 (9th Cir. 1975) (California).

70. *State v. Fritz*, 527 A.2d 1157 (Conn. 1987).

71. *Id.* at 1157.

72. *Id.* at 1166.

73. *United States v. Halper*, 490 U.S. 435 (1989). See U.S. CONST. amend. V: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

74. *Halper*, 490 U.S. at 435.

and Blue Shield.⁷⁵ Blue Cross mistakenly paid the claims and passed the charges over to the Federal Government Medicare division.⁷⁶ Halper was convicted on sixty-five counts of violating the criminal false claims statute, imprisoned for two years, and fined \$5000.⁷⁷ The Government then brought Halper up on charges of violating the Civil False Claims Act,⁷⁸ and fined him \$130,000.⁷⁹ The district court held that due to Halper's criminal conviction, an additional civil punishment of \$130,000, when actual damages were significantly smaller, would amount to double jeopardy.⁸⁰

The Government argued on appeal that double jeopardy only applies when the second punishment is also criminal.⁸¹ The Court reasoned that punishment for the purposes of double jeopardy can be both criminal and civil.⁸² Civil judgments can impose punitive damages that far exceed remedial goals and therefore serve punishment purposes.⁸³ The court held, that under the Double Jeopardy Clause, if a defendant has already been punished criminally, he may not be subjected to a civil sanction for the same offense if the civil penalty is retributive and not remedial in nature.⁸⁴ The civil punishment of \$130,000 was found to violate the Double Jeopardy Clause and the case was remanded for adjustment to a remedial amount.⁸⁵

The finding in *Halper* clouds the seemingly bright line of double jeopardy. An assessment must be made of whether the completeness of the punishment under one statute is a potential bar to liability under another applicable statute. When it comes to a physician, where is that line drawn? Who decides if a simple suspension of a medical license accompanied by a fine is adequate "punishment," thereby barring criminal sanctions? This note by no means purports to answer these questions, but attempts to bring these issues to the forefront for examination.

In 1996, in *Borrego v. Agency for Health Care Administration*,⁸⁶ a case of first impression in Florida, a physician was previously convicted of federal Medicare fraud, then using some facts of this underlying conviction, he was later subjected to a licensure suspension by the Board.⁸⁷ The court

75. *Id.* at 437.

76. *Id.*

77. *Id.*

78. 31 U.S.C. §§ 3729-3731 (1994).

79. *Halper*, 490 U.S. at 437.

80. *Id.* at 438.

81. *Id.* at 441.

82. *Id.* at 448.

83. *Id.*

84. *Halper*, 490 U.S. at 448-49.

85. *Id.* at 452.

86. 675 So. 2d 666 (Fla. 1st Dist. Ct. App. 1996).

87. *Id.* at 667.

held the suspension did not constitute double jeopardy.⁸⁸ This holding was based on the much accepted reasoning that disciplinary actions of the state Board are designed to protect public welfare rather than punish the individual.⁸⁹ Although this recent case is promising in that, as Congress intended, crimes are not going without dual sanctions, the civil sanctions imposed on the physician in Borrego were only a \$5000 fine and a suspension of his license for eighteen months.⁹⁰ What if the physician had received a license revocation or imprisonment previously, would this have been civil "punishment" enough to constitute double jeopardy for the second offense?

Another avenue the prosecution may take is that of the Dual Sovereignty Doctrine. This doctrine allows successive state and federal prosecutions for the same crime.⁹¹ However, this avenue, although supported by the United States Supreme Court, is littered with as much, if not more, controversy than double jeopardy, and outside the scope of this note.⁹²

IV. CIVIL LIABILITY AND AN ADMINISTRATIVE CASE REVIEW

State Boards' investigations of physicians originate from two primary sources: Letters or telephone calls from patients, relatives, or friends complaining of mismanaged care or inappropriate conduct; other notices from hospitals, insurance companies, and similar entities, as well as criminal convictions and similar information.⁹³ When an action is taken and a physician's license is revoked or suspended by the Board for inappropriately prescribing a controlled substance, the cases can generally be divided into two categories. The first category involves the practitioner that has been

88. *Id.*

89. *Id.* at 668. *See also* *Helvering v. Mitchell*, 303 U.S. 391, 399 n.2 (1938); *Munch v. Davis*, 196 So. 491, 493-94 (Fla. 1940). "The purposes of the imposition of discipline are to punish . . . deter [and] rehabilitate." FLA. ADMIN. CODE ANN. r 8.001 (1997).

90. Interview with David Osterhouse, Regulation Specialist II, Office of the Agency Clerk, Agency for Health Care Administration, Tallahassee, Fla., *Board of Medicine Final Orders Involving Improper Prescribing or Criminal Convictions* (March 14, 1997).

91. Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C.L. REV. 1159, 1162 (1994).

92. *Id.* Dual sovereignty is supported by the United States Supreme Court. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 91-94 (1985); *United States v. Wheeler*, 435 U.S. 313, 332 (1978).

93. *Jost, supra* note 23, at 310-11. The number of complaints and referrals to the state medical licensing boards has been increasing. *Id.* The number of complaints has almost doubled in eight years, ranging recently from 5000 to 7000 per year. *Id.*

convicted of a prior criminal offense in the course of medical practice.⁹⁴ The second category involves those practitioners that are charged solely under the rules of the administrative agency.⁹⁵

Based on information acquired from Florida's Agency for Health Care Administration, 109 physicians have been cited under the state's administrative agency rules between January 1992 to December 1996.⁹⁶ Ideally, the criminal proceeding is instituted or the criminal judgment reached before the administrative proceeding begins. However, it has been acknowledged that the Board may actually begin the investigation in some cases and subsequently report the alleged criminal violations to the state attorney.⁹⁷ Additionally, it is well known that few proceedings ever reach the courts. Cases not published in the reporters or available in electronic databases are not reflected in this summary. Also, given that in a license revocation or suspension proceeding, the hearing officer's findings of fact need be based only on "competent substantial evidence," the civil charges may be dropped under certain circumstances upon termination of the criminal proceeding.⁹⁸

Since the authority to revoke or suspend a physician's license for inappropriate prescribing of controlled substances is vested in an administrative agency—in Florida, the Florida Board of Medicine—the courts generally defer to the agency. Findings are generally affirmed unless they are excessively harsh, shocking, or do not involve an element of intent or moral turpitude.⁹⁹

The following examines a few examples of a court overturning the Board's recommendations for sanctions. In the first example, the Board gave a doctor a six month suspension which was set aside by the court on the grounds that it was too harsh.¹⁰⁰ The Board found that the doctor violated federal law by prescribing morphine "for office use only" and administering

94. The Medical Practice Act, FLA. STAT. § 458.331(1)(c) (Supp. 1998).

95. *Id.* § 458.331(1)(q).

96. Interview with Osterhouse, *supra* note 90. Seventy-five physicians were cited under section 458.331(1)(q) of the *Florida Statutes* for inappropriate prescribing. *Id.* Thirty-four physicians were cited under section 458.331(1)(c) of the *Florida Statutes* for conviction of a crime relating to the practice of medicine or ability to practice medicine. *Id.*

97. *Id.*

98. See *Hoover v. Agency for Health Care Admin.*, 676 So. 2d 1380, 1382-83 (Fla. 3d Dist. Ct. App. 1996); *Arthurs v. Stern*, 560 F.2d 477 (Mass. 1977).

99. See generally *Richardson v. Florida State Board of Dentistry*, 326 So. 2d 231 (Fla. 1st Dist. Ct. App. 1976) (finding that the Board's penalty was too harsh, and dismissing the Board's comparison of facts to a case which involved grossly immoral conduct).

100. *Id.* at 236.

it to his patients.¹⁰¹ The court said that although he did violate federal law by inappropriate use of morphine, he did it without the intent to conceal.¹⁰²

In even more recent examples, sanctions by the Board upon finding physicians prescribing excessive or inappropriate controlled substances have also been met with opposition by the courts.¹⁰³ In *Hoover v. Agency for Health Care Administration*,¹⁰⁴ the court found that the agency failed to prove by clear and convincing evidence, that Hoover, the physician, prescribed controlled substances in violation of section 458.331(1)(q) of the *Florida Statutes*.¹⁰⁵ Hoover was treating patients with intractable pain with large quantities of controlled substances.¹⁰⁶ An investigation was conducted, however, and insufficient evidence was presented by expert testimony to disprove the actual disease of the patients.¹⁰⁷ The sanctions by the Board were subsequently reversed.¹⁰⁸ Despite these few cases, because the courts typically defer so much authority to the administrative agency, it is important for counsel to be familiar with the administrative procedures.¹⁰⁹

When a physician prescribes excessive quantities of controlled substances, a suspension or revocation of the license to practice medicine is usually warranted; the prescription will be deemed inappropriate unless the physician can show through expert testimony that the controlled substances he prescribed were: 1) for patients with serious medical problems requiring the control of pain; 2) in amounts not beyond recommended doses; and 3) for a patient who was already tolerant of such doses.¹¹⁰

In a case involving unprofessional conduct where a physician prescribed unlawfully, or in excessive quantities, a controlled substance to a known addict, the court looked to the surrounding circumstances. The Board found that the physician's treatment was incomplete and did not meet community standards. Unfamiliar with the treatment of narcotics addicts,

101. *Id.* at 234-35.

102. *Id.* at 236.

103. *See Hoover*, 676 So. 2d at 1382. *See also Reese v. Department of Prof'l Reg.*, 471 So. 2d 601, 603 (Fla. 1st Dist. Ct. App. 1985); *Snejj v. Department of Prof'l Reg.*, 454 So. 2d 795, 796 (Fla. 3d Dist. Ct. App. 1984).

104. 676 So. 2d 1380 (Fla. 3d Dist. Ct. App. 1996).

105. *Hoover*, 676 So. 2d at 1385. *See also Jost*, *supra* note 23.

106. *Hoover*, 676 So. 2d at 1381.

107. *Id.* at 1385.

108. *Id.* at 1380.

109. Administrative Procedure Act, FLA. STAT. §§ 120.57(1), (2) (1997).

110. *See generally Johnston v. Department of Prof'l Reg.*, 456 So. 2d 939 (Fla. 1st Dist. Ct. App. 1984) (evidence was insufficient to demonstrate that the prescribing of Dilaudid was improper because it may have been reasonable under the circumstances). *Id.* at 944.

the Board reprimanded and limited the physician's right to prescribe controlled substances when he treats this class of patients.¹¹¹

Suspension of a physician's license for prescribing controlled substances without adhering to minimum community standards, which may involve first giving a physical examination, for example, is usually upheld by the courts.¹¹² In a case where a physician prescribed phentermine and phendimetrazine, schedule IV controlled substances, to patients under his continued care without a physical exam, his license was suspended and the Board's proceedings were upheld by the court, which found that this practice did not meet the minimum community standard.¹¹³

In 1993, a physician appealed a six-month suspension of his medical license and a fine of \$3000 for violation of section 458.331(1)(q) of the *Florida Statutes*, in addition to other sections.¹¹⁴ The physician stated that due to the inadequacies of the state administrative agency in compiling an index of prior decisions to use as precedent, the judgment was potentially prejudicial.¹¹⁵ The court upheld the complaint stating that although the administrative agencies are not bound by prior decisions, the core of the judicial system is the doctrine of *stare decisis*, which was not readily available to the defendant.¹¹⁶ Ironically, while escaping liability on a technicality in 1993, this physician was again cited by the Board in December of 1995 for the same charges.¹¹⁷ This time the physician voluntarily relinquished his license.¹¹⁸ Despite the frequency of citations in Florida, the Board, although it does impose sanctions, often fails to implement penalties that are sufficient to deter misconduct.¹¹⁹ Probably the most paradoxical case in Florida involves a psychiatrist who fought the emergency suspension of his license in 1991, calling the suspension an unconstitutional procedure.¹²⁰ The psychiatrist was addicted to Demerol

111. *Id.* at 943.

112. *Scheininger v. Department of Prof'l Reg.*, 443 So. 2d 387, 388 (Fla. 1st Dist. Ct. App. 1983).

113. *Id.*

114. *Gessler v. Department. of Bus. & Prof'l Reg.*, 627 So. 2d 501, 502 (Fla. 4th Dist. Ct. App. 1993).

115. *Id.* at 503.

116. *Id.* at 504.

117. Interview with Osterhouse, *supra* note 90.

118. *Id.*

119. *See, e.g., Agency for Health Care Admin., Board of Med. v. Blender*, 18 FALR 916 (1995) (physician self injected Darvocet and Valium for four years and received only a license suspension); *Agency for Health Care Admin., Board of Med. v. Royce*, 18 FALR 941 (1995) (psychiatrist's patient died after she self injected herself with controlled substances at her home. The doctor was charged with a record-keeping violation and was issued a letter of reprimand).

120. *Garcia v. Department of Prof'l Reg.*, 581 So. 2d 960 (Fla. 3d Dist. Ct. App. 1991).

(meperidine), a schedule II controlled substance, and denied the problem.¹²¹ He also aided in the escape of a minor from a mental institute, took her to a motel, and injected her with Demerol.¹²² The court held that emergency suspension of his license under section 120.60(6) of the *Florida Statutes* was not unconstitutional and the suspension was upheld.¹²³ During research, it was subsequently learned that the psychiatrist in this case was cited by the state agency once again, five years later.¹²⁴ In December of 1996, he was charged with eight counts of violations of sections 458.331 and 458.327 of the *Florida Statutes*, including failure to maintain records for injectable Demerol and practicing with a revoked license.¹²⁵ This time, the sanctions imposed by the Board were \$5000 and a reprimand.¹²⁶ Public records to date show no criminal procedures pending on this psychiatrist, and although reprimanded, his initial suspension in 1991 is not permanent.

Using this case as an example to determine potential penalties from plain statutory application, the conduct of this psychiatrist, at a minimum, violated: 1) multiple sections of the Florida Medical Practice Act;¹²⁷ 2) The Florida Comprehensive Drug Abuse Prevention and Control Act;¹²⁸ 3) the Controlled Substance Act;¹²⁹ and 4) the United States Sentencing Guidelines.¹³⁰ ("Guidelines"). The Guidelines equate one gram of Demerol as equivalent to fifty grams of marijuana.¹³¹ Simple calculations for a five-year addiction would conservatively place the psychiatrist at a base level of fourteen of the Guidelines, for 6.5 kilograms of marijuana.¹³² In addition,

121. *Id.* at 961.

122. *Id.*

123. *Id.* If the Board finds an immediate, serious danger to the public health, safety, and welfare, it can require emergency suspension or limitation of a physician's license. FLA. STAT. § 120.60(6) (1996).

124. Interview with Osterhouse, *supra* note 90.

125. Section 458.327 of the *Florida Statutes* includes: 1(a) practicing without active license; 1(b) practicing with a suspended or revoked license; and 2(d) leading the public to believe one is licensed without holding an active license. FLA. STAT. §§ 458.327 (1)(a), (b) (1993).

126. Interview with Osterhouse, *supra* note 90.

127. FLA. STAT. § 458 (1993).

128. FLA. STAT. § 893 (1997).

129. 21 U.S.C. § 841 (1994).

130. UNITED STATES SENTENCING GUIDELINES MANUAL § 2D1.1 (1998).

131. *See* Commentary to section 2D1.1 of the Guidelines (providing drug equivalency tables equating 1 gram of meperidine to 50 grams of marijuana). *Id.*

132. Using a conservative calculation, if the physician used a 50 milligrams-per-milliliter injection one weekly for five years, this is 130 grams of Demerol. Then converting to marijuana, per the guidelines, would require multiplying by a factor of 50, thus equating to 6.5 kilograms of marijuana. In *Chapman v. United States*, 500 U.S. 453 (1991), the Court

appendix to section 3B1.3 of Title 18, of the *United States Code*, mandates an upward departure of two levels from the base offense where the defendant abuses a position of public or private trust in violation of section 841 of Title 21, of the *United States Code*.¹³³ Therefore, using these conservative calculations, this psychiatrist is at level sixteen of the Guidelines. The Guidelines also require that prior convictions be considered.¹³⁴ Though he was not criminally indicted for his 1991 offense, it will be used in this calculation despite the oversight by the state, resulting in a sentence calculation of twenty-one to twenty-seven months of imprisonment. However, the Guidelines are not the only rules that apply. The application of section 841(b)(1)(c) of The Act is for controlled substances in schedules I and II, and mandates a sentence of not more than thirty years imprisonment and a fine not to exceed \$2,000,000.¹³⁵ Congressional statutes prevail over the sentencing guidelines if there is a conflict; therefore, the latter calculation under section 841 should control.¹³⁶ Amazingly, the calculation is still not complete until the Board has a chance to impose its sanctions. Rule 59R-8.001 of *Florida Administrative Code*,¹³⁷ and the Medical Practice Act,¹³⁸ would cite the physician with multiple violations resulting in a fine from \$500 to \$10,000 and from one-year probation to a license revocation.¹³⁹ This example portrays the incongruity in the rules, and the potential difficulty in prevailing with a fair and foreseeable sentence. Which of the punishments above is appropriate, and if one sanction was imposed, is that sanction enough to constitute “punishment” therefore barring, via double jeopardy, further prosecution? Perhaps the legislation itself is the reason for the reluctance to sanction licensed professionals.

held that the court of appeals reviewed the sentencing scheme and found it is rational. *Id.* at 456.

133. 18 U.S.C. app. § 3B1.3 (1995).

134. UNITED STATES SENTENCING GUIDELINES MANUAL § 4B1.1 (1995).

135. 21 U.S.C. § 841(b)(1)(c) (1994). *See also, supra* note 4.

136. 21 U.S.C. § 841(b).

137. FLA. ADMIN. CODE ANN. r. 59R-8.001 (1997).

138. The Medical Practice Act, FLA. STAT. § 458.331 (1997).

139. Under rule 59R-8.001 of the *Florida Administrative Code Annotated* and section 458.331 of the *Florida Statutes*, inappropriate or excessive prescribing requires a fine from \$250 to \$5000 and from one-year probation to revocation; self prescribing a scheduled drug requires a fine from \$250 to \$5000 and from one-year probation to revocation; improper prescribing of a schedule II controlled substance requires a fine from \$250 to \$5000 and probation, or two year suspension and probation. FLA. ADMIN. CODE ANN. r. 59R-8.001 (1997); FLA. STAT. § 458.331 (1997). However, the Board reserves its right to deviate from these guidelines for multiple violations and trade or sale of a controlled substance.

V. CONCLUSION: ARE ALL "PUSHERS" TRULY EQUAL?

Ultimately, the physician maintains an unwritten affirmative defense by the mere fact that he or she is a physician. Consider, for example, the infamous case of Dr. Jack Kevorkian. His killing machine used a controlled substance, Thiopental, which he acquired and maintained illegally, in violation of civil and criminal laws. Although Dr. Kevorkian's license to practice medicine was suspended by the Board on November 20th, 1991,¹⁴⁰ it was not until March 26, 1999, that Dr. Kevorkian was found guilty of second degree murder.¹⁴¹ Over 130 lives were lost during that eight year delay, and, even then, Dr. Kevorkian was free on bond for three weeks while awaiting sentencing.¹⁴² Judge Jessica Cooper, who issued the order, seemed to endorse the idea that while Dr. Kevorkian had killed illegally, he is still not really a murderer.¹⁴³

In Florida, a license to practice medicine is considered a privilege which may be withdrawn by the sovereign to preserve the health and welfare of the public and maintain good order in society.¹⁴⁴ The purpose of enacting section 458 of the *Florida Statutes* is to protect the public from practitioners that cannot comply with standards of safe practice.¹⁴⁵ However, once remedial penalties are imposed and the practitioner's license is revoked by the Board, the practitioner becomes a person. Therefore, protecting the public from the practitioner is not enough; the public also needs to be protected from the person. The various arms of the criminal rules are looked to at this point for help in actual punishment. As stated boldly in a Senate Report in 1983, "a sentencing guideline system is intended to treat all classes of offenses committed by all categories of offenders consistently."¹⁴⁶ The legislature admits, in reports such as this, that society consists of differing classes of criminals. To overcome this pitfall, Congress has enacted and supported broad rules with the good faith intent to treat all "pushers" equal, however, little effort is exerted by the state to use this machinery handed to them by Congress.

140. Detroit Free Press, *Key Dates in Kevorkian's Crusade* (March 26, 1999) (last visited April 9, 1999) <<http://www.freep.com/news/extra2/qkchron26.htm>>.

141. Detroit Free Press, *Convicted of Murder* (March 27, 1999) (last visited April 9, 1999) <<http://www.freep.com/news/extra2/qkevo272.htm>>.

142. *Id.*; *Key Dates in Kevorkian's Crusade*, *supra* note 140.

143. National Post Online, *Medical Hit Man's Mission Stopped* (March 27, 1999) (last visited April 9, 1999) <<http://www.nationalpost.com/news.asp?s2=national&s3=reporter&f=990327/2418065.html>>.

144. *Munch v. Davis*, 196 So. 491, 493-94 (Fla. 1940).

145. FLA. STAT. § 458.301(1993).

146. S. REP. NO. 98-225, at 45-46 (1983).