

**Health Law:
Quality & Liability**

Prof. Thaddeus Pope

Healthcare Licensing

Licensing:

Gatekeeping
Discipline

**Gatekeeper
function of
licensing**

Gate-keeping:
controlling who
gets to practice
medicine

**Legal
Requirement**

Governed by
state statutes

Strictly **required**

You **may NOT**
practice profession
without license

Medical school

Graduate medical
education

Residency, Fellowship

USLME

Minnesota

21,000 licensed
physicians

16,000 located MN

We focus on Medical
Boards, but same
issues arise with
other licensed HCPs
(e.g. nurses)

Rationale

Assume public is
incapable of evaluating
quality

Assumes accreditation
not sufficient

Miami Herald, 10/29/06

What is now available on Web sites . . . is often **confusing and perhaps useless,**"

"It's still a **tower of Babel** out there."

Unlicensed Practice of Medicine: Recent Cases

Reasons for unlicensed practice

- Ignorance
- Greed
- Sex
- Fun
- Hubris
- Scope of practice dispute
- True altruism (meet needs)
- Competitive forces**

1

CAM advocates



Robert Oldham Young

Internationally known proponent of alternative medicine went **beyond** advocating dietary changes and used intravenous "treatments" on people

Arraignment - Nov. 20, 2014



Peter B. Adeniji - \$1,200 "miracle cure."

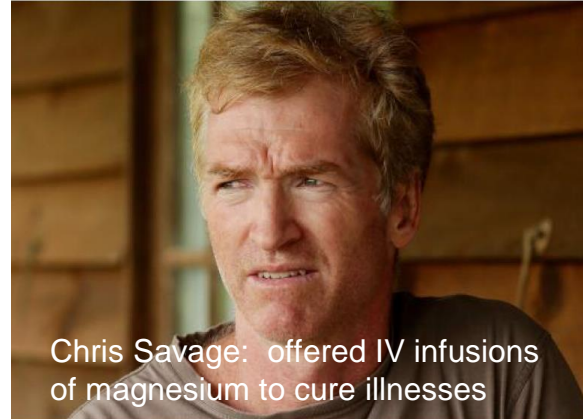
2

**Pure greed
& fraud**



Keith Barton

Promised to cure cancer, HIV
Took \$10k, \$20k from patients
Convicted 10 felony counts
Jan. 2014

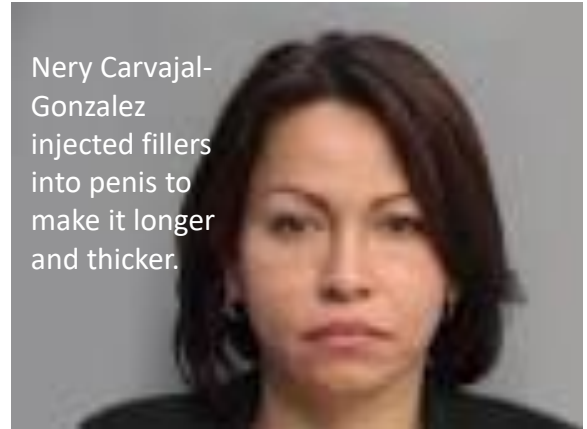


Chris Savage: offered IV infusions of magnesium to cure illnesses

El Dentista —performed dental work with instruments from the trunk of his car



Nery Carvajal-Gonzalez injected fillers into penis to make it longer and thicker.



Raffaele Di Paolo

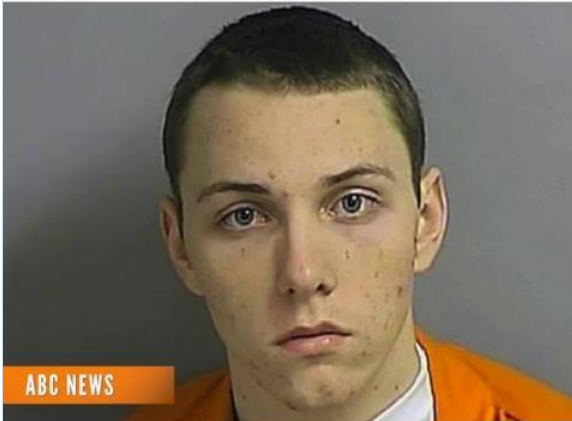
Fake IVF specialist - duped women who were desperate to become mothers into paying for expensive "treatments" doomed to fail.

Placed his hand into patients' vaginas

sent some infertile women fake ultrasound images of fetuses, which he said were in their wombs.

3

Fun



Matthew Scheidt, 18, was sentenced in Nov. 2012 to a year in jail for **impersonating a physician assistant** at a Florida hospital where he dressed wounds, examined disrobed patients and performed CPR.

4

Sex



Carlos Hernandez Fernandez - Denver surgical assistant posed as a plastic surgeon and ran his own cosmetic surgery clinic



Phillip Winikoff - door to door breast exams

5

Not just
healthcare
professionals



Kitchen claimed to have graduated from Duquesne University School of Law in 2005, and then worked for BMZ Law for 10 years before being promoted to partner in April 2014.

Her lawyer argued she provided good legal work and her clients were happy.

6

2 more risk areas for unlicensed practice

Cosmetic / spas

Telemedicine

Tele- medicine



Doctor gets jail time for online, out-of-state prescribing

The decision could give prosecutors broader reach in pursuing criminal charges in such cases.

By AMY LYNN SORRELL, amsnews staff. Posted June 1, 2009.

In a case that could have ramifications for online prescribing, a Colorado physician was sentenced to nine months in jail for prescribing an antidepressant over the Internet to a California teenager who later committed suicide.

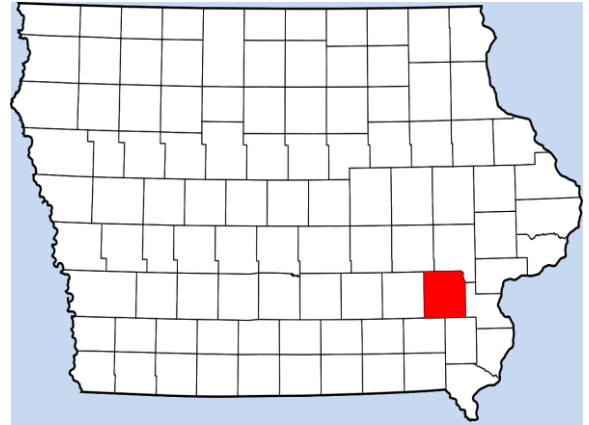
San Mateo County prosecutors charged psychiatrist Christian Hageseth III, MD, of Fort Collins, Colo., with a single felony count of practicing medicine without a valid California license.

6

Cosmetic & Spas



State v. Miller



Charge:
Practicing
medicine
without license

A crime

Not just money
damages

Jail

Similar rules
and analysis
under **MN law**

MN prohibition

Minn. Stat. 147.081(1)

“It is **unlawful** for any person to practice medicine . . . unless . . . the person holds a valid license”

Minn. Stat. 147.081(2)

“Any person violating the provisions of subdivision 1 is guilty of a **gross misdemeanor.**”

Minn. Stat. 609.02

(1) "Crime" means conduct which is prohibited by statute and for which the actor may be sentenced to imprisonment . . .

(3) “**Gross Misdemeanor**” . . . sentence [91 to 364 days]

MN definition

“Practice of
medicine” is
defined very
broadly

Minn. Stat. 147.081(3)

“A person . . . is ‘**practicing medicine**’ or engaged in the ‘practice of medicine’ if the person does any of the following:”

6

alternative
definitions

“offers or undertakes to perform any **surgical operation** . . .”

“offers to undertake to use **hypnosis** for the treatment or relief . . .”

“uses . . . the designation . . . medical doctor . . . MD DO . . .”

“**advertises, holds out** to the public, or represents in any manner that the person is authorized to practice medicine in this state”

“offers or undertakes to prescribe, give, or administer any **drug or medicine** for the use of another”

“offers or undertakes to **prevent or to diagnose, correct, or treat** in any manner or by any means, methods, devices, or instrumentalities, any disease, illness, pain, wound, fracture, infirmity, deformity or defect of any person”

Effective on February 4, 2016, sports team physicians visiting Pennsylvania will now be permitted to treat their players in Pennsylvania without fear of violating Pennsylvania law. Previously, visiting team doctors technically could not treat their own players without a Pennsylvania medical license.



Back to
facts in
Miller



Were Miller's
“patients”
harmed

Defenses for Miller

Patient consent

Patient constitutional rights

Practice of medicine problems



New Birth New Life Medical Center & Urgent Care

Undercover agent complaining of an itchy throat. Mr. Love-Robinson took her weight, checked her breathing and checked her temperature, then recommended she visit a local pharmacy for allergy medication. "There were no scripts given," he said, "no medical advice given."

"I'm not trying to hurt people," he said. "I'm just a young black guy who opened up a practice who is trying to do some good in the community. If that is a negative thing, we have a lot more work to do in the community than to single out me."





Law student led aspirin



Complain cramps, ask recc



Driver deliver baby in backseat

Georgia pre-1993

Only doctors, dentists, podiatrists, and veterinarians can perform surgery, operation, or procedure in which human or animal tissue is cut, pierced, or otherwise altered by the use of any mechanical means, laser, medication . . .

Struck – vague, overbroad

Scope of Practice

Miller –
unlicensed
for **any** health
profession

Another type case is
where licensed for
one health
profession but
practices **another**



“refers to herself as a doctor,” and
“dresses in a white doctor’s coat.”

once was a licensed chiropractor in the
state of Colorado allowed perform
acupuncture. She lost that license in 2007
after the State Board of Chiropractic
Examiners found she was performing I.V.
treatments with her patented amino acid
infusion formula.

Medical practice
act **excepts** conduct
performed under
another license

Nurse not practice
medicine if doing
nursing services -
in scope of nursing
practice

Tattooing
 Magnetism
 Faith healing
 Electric hair removal
 Hypnotism
 Massage
 Reflexology

Hundreds of bills

APN - anesthesia
 Psychologist – prescribe
 Pharmacist – prescribe
 Midwifery
 Chiropractor - inject

MMA works to address esthetician law

The MMA is working to fix legislation that would require physician clinics offering cosmetology, esthiology or nail services to obtain a salon license. The law was to take effect August 1. MMA representatives met with the Board of Cosmetologist Examiners and the Board of Medical Practice to ensure that services provided in a medical office can continue without the need for new licensure.



Pharmacists provide more direct care



Convicted: Emily Hyatt Medwin

NC only allows certified nurse midwives, not Certified Professional Midwives

Discipline function of licensing

Not only assure
competence at **front**
end

But also weed out bad
apples **after** already
licensed



Stanislaw Burzynski

**Regulation of
quality OTHER
than through
tort liability**

We spent a long time on
malpractice liability

But that is **just one** legal
tool to help ensure
quality

3 other tools

Private regulation
Market forces
Licensing

1. Private regulation

Hospital credentialing

Granting, revoking,
& restricting staff
privileges

MCO Credentialing

Listing, delisting
in networks

2. Market Forces

Brag about
services

Brag about
outcomes



Public reporting on quality



3. Licensing

Every state has its own medical board

Bases for discipline

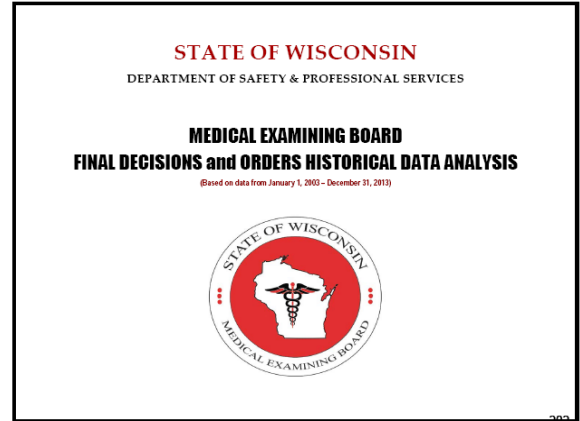
Medical board "triggers" from **other** legal obligations

Malpractice

Abandonment

Informed consent

- Alcohol/drug
- Aiding unlicensed practice
- Incompetence
- Fail to report (crim, malpr, priv)
- Character
- Reciprocal



Med 10.03(2) Direct Patient Care Violations
 Med 10.03(2)(d) Performing or attempting to perform any surgical or invasive procedure on the wrong patient, or at the wrong anatomical site, or performing the wrong procedure on any patient.

Disciplinary

- **Maximum:** Surrender
- **Minimum:** Reprimand

Total Discipline	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003
2 Reprimand								1			1
1 Reprimand*		1									
2 Reprimand, Limitation requiring education/testing*				1				1			
2 Surrender*	1					1					
1 Suspension (Stayed), Limitation requiring education/testing, mentor/supervision, reports, restricting practice*		1									
1 Suspension (Stayed), Limitation requiring treatment*							1				
9	1	2	0	1	0	1	2	1	0	0	1

Types of discipline



900,000 physicians
 1% disciplined each year

State Medical Board Actions	2012
Total state medical board actions	9,219
Board actions by category*	
License restricted	1,480
Reprimand	1,224
Fine	995
Administrative action	949
Probation	913
License suspended	907
CME required	819
License surrendered	511
Conditions imposed	465
License revoked	299
License denied	170
Other	487

Move from
state licensing
to federal
certification

CMS
mandatory &
discretionary
exclusions

Separate from
license under
state law

DHHS (CMS) decision
about whether
physician may
participate in **federal**
healthcare programs

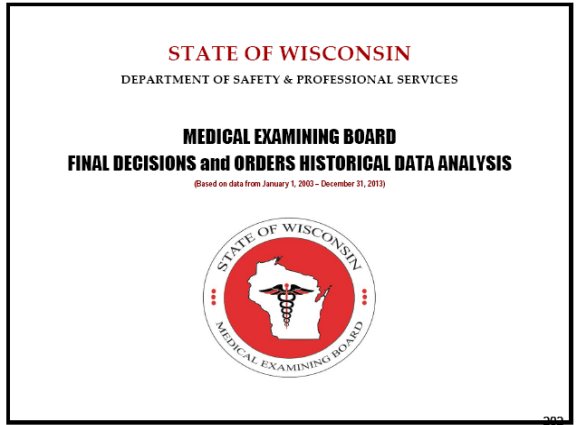
Let's move to one
final type of liability

Discipline function of licensing

Not only assure competence at **front** end

But also weed out bad apples **after** already licensed

Bases for discipline



Med 10.03(2) Direct Patient Care Violations
Med 10.03(2)(c) Performing or attempting to perform any surgical or invasive procedure on the wrong patient, or at the wrong anatomical site, or performing the wrong procedure on any patient.

- Disciplinary
- Maximum: Surrender
 - Minimum: Reprimand

Total	Discipline	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003
2	Reprimand								1			1
1	Reprimand*		1									
2	Reprimand (Limitation requiring education/testing)				1			1				
2	Surrender*	1					1					
	Suspension (Stayed); Limitation requiring education/testing, mentor/supervision, reports, restricting practice*											
1	Suspension (Stayed)*		1									
1	Suspension (Stayed); Limitation requiring treatment*							1				
9	Total	1	2	0	1	0	1	2	1	0	0	1

Medical board “triggers” from **other** legal obligations

Malpractice
Abandonment

Med 10.03(2)(b) Departing from or failing to conform to the standard of **minimally competent medical practice** which creates an unacceptable risk of harm



Dr. Michael Kamrava

Minn. Stat. 147.091 “triggers” from other legal obligations

EMTALA

Malpractice

Abandonment

FILE COPY

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE LICENSE TO PRACTICE MEDICINE AND SURGERY OF : FINAL DECISION AND ORDER (91 MED 066)

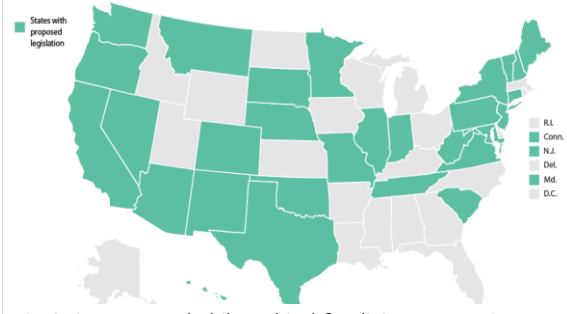
RICHARD KOKEMOOR, M.D., :
RESPONDENT. :

The parties to this action for the purposes of Wis. Stats. sec. 227.53 are:

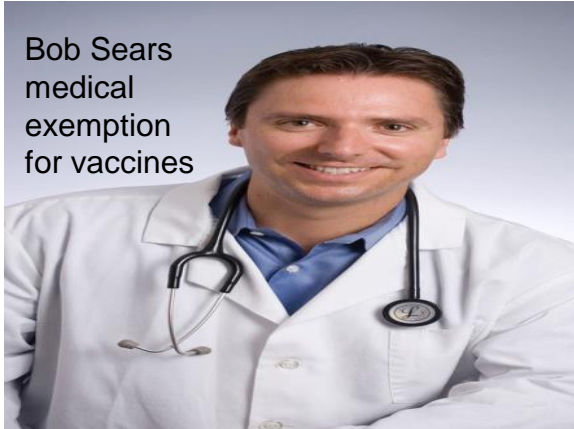
Richard Kokemoor, M.D.
55456 State Road 37
Eau Claire, WI 54701

6. Dr. Kokemoor discussed various risks of the procedure with the patient but failed to adequately advise the patient of the seriousness of these risks and further failed to advise the patient that he had only limited experience in aneurysm surgery, was not a sub-specialist in aneurysm surgery, and was not board certified in neurosurgery. Dr. Kokemoor also failed to provide the patient with the alternative of a lower risk surgery performed by a different, more experienced surgeon in a better-equipped facility.

29 States Have Introduced Vaccine Bills in 2015
Many would make it harder for parents to opt out of immunizing their kids.



CA SB277 removed philosophical & religious exemptions



Bob Sears
medical
exemption
for vaccines

- Alcohol/drug
- Aiding unlicensed practice
- Incompetence
- Fail to report (crim, malpr, priv)
- Character
- Reciprocal

- Lust
- Sloth
- Envy
- Anger
- Gluttony
- Greed
- Pride

Professionalism



Lawrence Egbert

SOUTH METRO

Final Exit Network fined \$30,000 for assisting Apple Valley woman's suicide

Right-to-die group says it will appeal conviction over Apple Valley woman's suicide.

By Jessie Van Berkel (<http://www.startribune.com/jessie-van-berkel/280701532/>) Star Tribune |

AUGUST 24, 2015 - 10:54PM

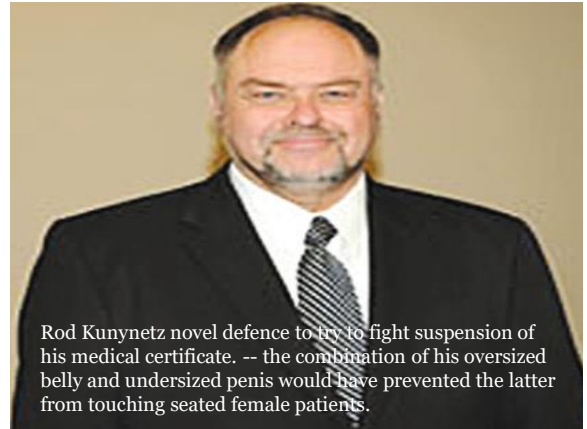
Character



Arthur K. Zilberstein - sexting during surgery

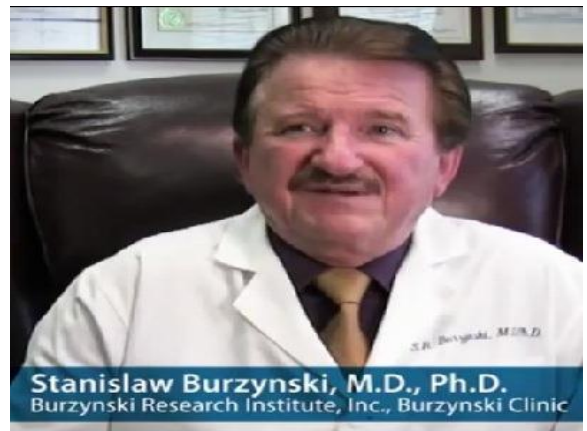


inadvertent exposure of (his) genitals during an attempt to scratch a severe itch,"



Rod Kunynetz novel defence to try to fight suspension of his medical certificate. -- the combination of his oversized belly and undersized penis would have prevented the latter from touching seated female patients.

Quack, greed, money



Stanislaw Burzynski claims to have much better results treating deadly brain cancers than conventional oncology, even though he is not an oncologist

RECEIVED
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LICENSE NO. D-9377
2018 FEB 10 AM 10:20

IN THE MATTER OF THE
COMPLAINT AGAINST:
STANISLAW R. BURZYNSKI, M.D.

BEFORE THE
TEXAS MEDICAL BOARD

FIRST AMENDED COMPLAINT

TO THE HONORABLE TEXAS STATE MEDICAL BOARD AND THE HONORABLE ADMINISTRATIVE LAW JUDGE TO BE ASSIGNED:

COMES NOW, the Staff of the Texas Medical Board (Board staff), and files this Complaint against Stanislaw R. Burzynski, M.D., (Respondent), based on Respondent's alleged violations of the Medical Practice Act (Act), Title 3, Subtitle B, Texas Occupations Code, and would show the following:

Crimes



Joshua Baron

“Need Addreall or Xanax? Let me know what you are willing to do in exchange... please send a pic.”

Convicted Chicago Aug. 2014

Types of discipline



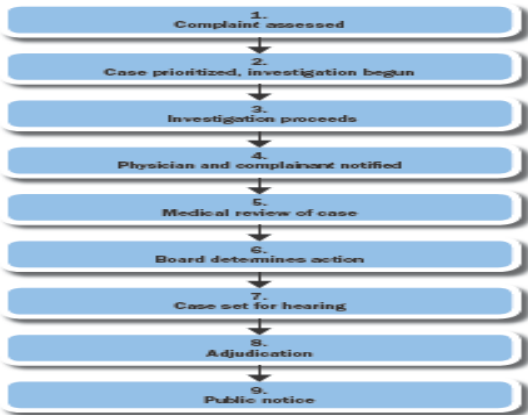
Physicians with an Active License to Practice Medicine in the United States and the District of Columbia, 2010 and 2012	2010		2012	
	Counts	Percentages	Counts	Percentages
Total	850,085	100.0%	878,194	100.0%
Degree Type				
Doctor of Medicine (MD)	789,788	92.9%	812,019	92.5%
Doctor of Osteopathic Medicine (DO)	58,329	6.9%	63,045	7.2%
Unknown	1,968	0.2%	3,130	0.4%
Gender				
Male	568,501	66.0%	578,478	65.9%
Female	246,314	29.0%	264,846	30.2%
Unknown	35,270	4.1%	34,870	4.0%

State Medical Board Actions	2012
Total state medical board actions	9,219
Board actions by category*	
License restricted	1,480
Reprimand	1,224
Fine	995
Administrative action	949
Probation	913
License suspended	907
CME required	819
License surrendered	511
Conditions imposed	465
License revoked	299
License denied	170
Other	487

Process for discipline

The **Medical Board** investigates, prosecutes, and decides

Physician can appeal Board's decision to **court**



Just as Medical Boards are not the only gate-keepers, they are not the only ones to impose sanctions

Hospitals

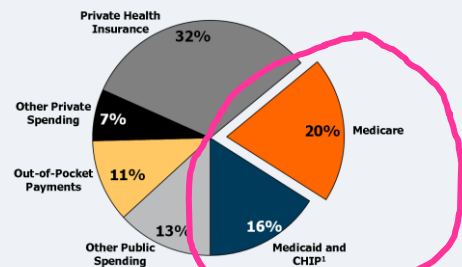
Restrict, revoke staff privileges

MCOs

Delist from network



National Health Expenditures in the United States, by Source of Payment, 2010



Total National Health Expenditures, 2010 = \$2.6 Trillion

NOTES: ¹Includes Children's Health Insurance Program (CHIP) and Children's Health Insurance Program expansion (Title XIX). SOURCE: Centers for Medicare & Medicaid Services, Office of the Actuary, National Health Expenditure Projections 2009-2019, February 2010.

Separate from license under state law

Decision about whether physician may participate in **federal healthcare programs**

Mandatory Exclusion

42 U.S.C. § 1320a-7(a)

1. Conviction of program-related crimes
2. Conviction relating to patient abuse
3. Felony conviction relating to health care fraud
4. Felony conviction relating to controlled substance

Permissive Exclusion

42 U.S.C. § 1320a-7(b)

1. Conviction relating to fraud
2. Conviction relating to obstruction of an investigation or audit
3. Misdemeanor conviction relating to controlled substance
4. License revocation or suspension

• • • •



The Honorable Marilyn Tavenner
 Administrator
 Centers for Medicare & Medicaid Services
 U.S. Department of Health and Human Services
 200 Independence Avenue, S.W.
 Washington, DC 20201

Dear Administrator Tavenner:
 We are writing to express our concerns that the Centers for Medicare & Medicaid Services (CMS) has not taken sufficient steps to screen Medicare providers who pose a risk to beneficiaries and taxpayers.

The Social Security Act requires CMS to exclude individuals from participation in any federal health care program, including removal from the list of authorized Medicare providers, if they have been convicted of Medicare-related crimes, patient neglect or abuse, or felonies related to health care fraud or controlled substances. Yet, disturbingly, it appears that at least some individuals convicted of such offenses may continue to remain on the list of eligible providers.

We know that you share with us a strong commitment to reduce waste and fraud in the Medicare system. CMS has taken strides to improve its screening of its list of providers, including physicians, authorized to charge Medicare for health care services. However, some recent analysis performed by our offices raises serious questions as to whether current provider screening is adequate. We are concerned, moreover, that the examples identified by our analysis may be illustrative of a larger problem.

Specifically, we were able to readily identify at least 16 physicians who are enrolled in the Medicare program, and who have been convicted of a crime that requires CMS to exclude the individual from participation in Medicare or any other federal health care program (see Attachment). These examples were not the result of a complete analysis of every provider, but do represent cases easily identified using open sources.

To enable Congress to better understand CMS's current efforts to take action against providers who are convicted of crimes that are supposed to result in mandatory exclusion from Medicare, please provide our offices with the following answers and information:

- 1) Describe the criteria, process, and timeframes for disenrolling such providers (i.e., who is disenrolled from the program, who is not, and why?)
- 2) Has CMS established interagency agreements with other federal and state agencies to ensure that it receives felony conviction information in a timely manner?

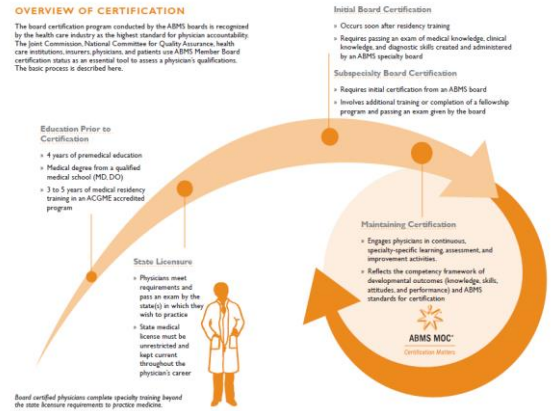


- Allergy and Immunology
- Anesthesiology
- Colon and Rectal Surgery
- Dermatology
- Emergency Medicine
- Family Medicine
- Internal Medicine
- Medical Genetics and Genomics
- Neurological Surgery
- Nuclear Medicine
- Obstetrics and Gynecology
- Ophthalmology
- Orthopaedic Surgery
- Otolaryngology
- Pathology
- Pediatrics
- Physical Medicine and Rehabilitation
- Plastic Surgery
- Preventive Medicine
- Psychiatry and Neurology
- Radiology
- Surgery
- Thoracic Surgery
- Urology

“ABMS, in partnership with its 24 certifying Member Boards, serves the public and the medical profession by improving the quality of health care through setting professional and educational standards for medical specialty certification and practice.”

OVERVIEW OF CERTIFICATION

The board certification program conducted by the ABMS boards is recognized by the health care industry as the highest standard for physician accountability. The Joint Commission, National Committee for Quality Assurance, health care institutions, insurers, physicians, and patients use ABMS Member Board certification status as an essential tool to assess a physician's qualifications. The basic process is described here.



Physicians with an Active License to Practice Medicine in the United States and the District of Columbia, 2010 and 2012	2010		2012	
	Counts	Percentages	Counts	Percentages
Total	850,085	100.0%	878,194	100.0%
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Doctor of Osteopathic Medicine (DO)	58,329	6.9%	63,045	7.2%
Unknown	1,968	0.2%	3,130	0.4%
Certified by an ABMS Specialty Board				
Yes	633,733	74.5%	671,755	76.5%
No	216,352	25.5%	206,439	23.5%

Competition OR consumer protection

Licensing is not just about protecting patients

It is also about establishing economic domains

Lots of “turf” battles

- APN - anesthesia
- Psychologist – prescribe
- Pharmacist – prescribe
- Midwifery
- Chiropractor - inject

North Carolina Board of Dental Examiners

vs.

Federal Trade Commission



Board

Teeth whitening is
part of dentistry

Therefore **off-limits**
to rival kiosks

Board sent **cease-and-desist** letters to several dozen non-dentists, ordering them to **stop** offering cosmetic teeth-whitening services

Federal Trade Commission deemed Board's actions illegal suppression of competition in violation of antitrust law.

Upheld by **4th Cir.**



Home Board Staff Login

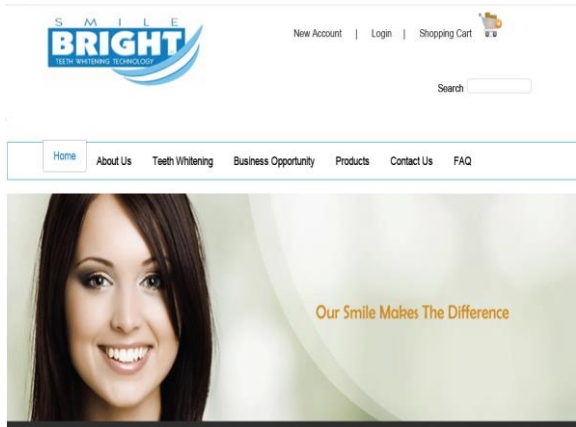
FAQs Links What's New Live Scan

Rules & Laws
License & Permits
License Renewal
Fees
License Verification
Online Services
Disciplinary Action
Continuing Education
Dental Assisting
Filing Complaint
Publications
Meeting Announcements
Payment Arrangements
Forms
Professional Corporation
Online Examination

about the board

Board Members
Effective August 1, 2014:
Stanley L. Allen, DDS, President (Greensboro)
Clifford O. Fairgield, DDS, Secretary-Treasurer (Asheville)
David A. Howdy, DDS, Past President (Washington)
Kenneth M. Sadler, DDS (Winston-Salem)
William H. Litsker, Jr., DDS (Wicklory)
Marlin W. Young, DDS (Wendell)
Carle J. Slack, RDH (Charlotte)
James B. Henby, Jr., Consumer Member (Raleigh)

Sensational Smiles v. Mullen



S M I L E
BRIGHT
TEETH WHITENING TECHNOLOGY

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Our Smile Makes The Difference

“At Smile Bright™, you will experience a fresh, white smile at the **speed of light**. We guarantee a brand new smile 4 shades whiter than what you currently have-- and it's just a 20-minute session away.”

“[P]lace the [whitening gel] tray in your mouth and have a comfortable seat in front of our cutting-edge **LED light**.”

“Our **aesthetic professional** is there to ensure you have a pleasant experience and verify your teeth shade . . .”