BEFORE THE BOARD OF HEALING ARTS
OF THE STATE OF KANSAS

In The Matter of	)	
ANN K. NEUHAUS, M.D.	)	
	)	**KSBHA Docket No. 10-HA00129**
Kansas License No.: 04-21596	)	
	)	

FINAL ORDER FOLLOWING REMAND

NOW, on this 7th day of July, 2017, this matter comes before the Kansas State Board of Healing Arts ("Board") for the issuance of a Final Order in the above-captioned matter against Ann K. Neuhaus, M.D. ("Respondent") following Remand. All prior Final Orders issued by this Board with regard to Respondent have been vacated and modified as directed by the Honorable Franklin R. Theis of the District Court of Shawnee County, Kansas.

The Board's complaint requests the revocation of Respondent's license to practice medicine and surgery in the State of Kansas and to assess costs. The Initial Order was filed following a hearing on the Board's Complaint seeking action against Respondent for alleged violations of the Kansas Healing Arts Act, K.S.A. 65-2801, *et seq.* ("KSHAA" or the "Act"). The Initial Order by the Presiding Officer from the Office of Administrative Hearings ("OAH") was issued on February 20, 2012 ("Initial Order"). A Final Order was issued thereafter and the Final Order was vacated and remanded to the Board as a result of the Memorandum Opinion and Entry of Judgment, issued on March 7, 2014 ("2014 Opinion"). Thereafter, a Conference Hearing was held on December 11, 2014, pursuant to, and in accordance with, the provisions of the Kansas Administrative Procedure Act, K.S.A. 77-501, *et seq.* ("KAPA"). Respondent appeared in person and by and through counsel, Robert V. Eye of the law firm of Kauffman & Eye. Petitioner Board appeared by and through Reese H. Hays, Litigation Counsel. Mark A. Ferguson appeared as Special Counsel to the Board. A copy of The Transcript of The Proceedings ("Tr.") is made part

of the Agency Record and incorporated herein by reference. The transcript includes only the public portion of the Conference Hearing. Thereafter, a Final Order of the Board was issued on January 9, 2015 and February 13, 2015 ("Final Orders"). The Final Orders were vacated and remanded to the Board for further consideration consistent with the Memorandum Opinion and Entry of Judgment, issued on January 13, 2007 ("2017 Opinion").

The Final Orders of the Board were vacated by the 2017 Opinion and the matter was remanded to the Board. Additional deliberations were conducted by the Board on June 9, 2017. The Board acts in its quasi-judicial capacity and engages in private deliberations to reach a decision as permitted by law. Pursuant to the authority granted to the Board through the KSHAA, and in accordance with the provisions of KAPA, the Board hereby enters a Final Order in the above-captioned matter. After reviewing the entire agency record, having previously heard the statements and arguments of the parties, having reviewed all Briefs submitted by the parties, having reviewed the applicable Findings of the Fact and Conclusions set forth in the Initial Order which survive the 2014 Opinion and 2017 Opinion, having given due regard to the presiding officer's opportunity to observe and determine the credibility of each witness, having reviewed the 2014 Opinion (and Appendix), having reviewed the 2017 Opinion, having fully and carefully deliberated and having been otherwise duly advised in the premises, the Board makes the following Findings of Fact[1], Conclusions and Orders as follows: The Board has carefully considered the facts which were

[1] The Findings presented herein are intended to supplement the extensive factual findings contained in the Agency Record reviewed by the Board. These citations supplement the record based upon the argument, evidence and/or testimony provided to the Board. Citations to the Agency Record or the Transcript are not intended to exclude other important facts or references contained in the Agency Record. The citations and references in the Final Order should not diminish the thousands of pages of testimony, evidence and briefing contained in the voluminous Agency Record, all of which was made available to and reviewed by the Board.

proven and determined that Respondent's actions justify revocation and the awarding of costs against Respondent and in favor of Petitioner.

Summary of Procedural History

1. Respondent was licensed to engage in the practice of medicine and surgery in the State of Kansas, having been issued License No. 04-21596 on approximately December 5, 1986.
2. Respondent has remained a general practitioner, with one year of internal medicine graduate medical education training. Respondent has never been board certified in a specialty (Tr. at p. 57, ln.17-21).
3. In 1999, limitations were placed on Respondent's license to practice medicine and surgery in the State of Kansas when Respondent was found to have violated federal regulations concerning controlled substances and her U.S. Drug Enforcement Agency registration was limited (Case No. 00-4A-20). This involved a "substance abuse documentation issue" which was resolved by closing her practice so Respondent no longer needed a DEA License (Tr. at p. 58, ln. 8-13).
4. In 2001, limitations were placed on Respondent's license to practice medicine and surgery in the State of Kansas when Respondent was found to have repeatedly deviated from the standard care in maintenance of patient medical records as required by K.A.R. 100-24-1. This case "was about documentation during conscious sedation, and there was a long hearing with testimony from an anesthesiologist who found that all of my practices as far as the safety and administration of conscious sedation were adequate, but that I hadn't documented heart and lung examinations on all the patients." (Tr. at p. 58, ln. 13-20). As a result, it was stipulated by the parties that "[l]icensee shall comply with all provisions of

K.A.R. 100-24-1, with respect to medical record-keeping." (01-HA-14 at paragraph 33; dated June 15, 2001). Although Respondent closed her practice and no longer performed conscious sedations, this Stipulation has not been lifted and has not expired. This Stipulation remains in full force and effect.

5. Respondent has previously come before this Board, which constitutes prior disciplinary action. The repeated instances of record keeping violations constitutes a pattern and the allegations in the Petition is not considered an isolated incident. The allegations presented herein are numerous and repeated and serve as a legitimate ground for disciplinary action by the Board with regard to record keeping.

6. On April 16, 2010, a Petition was filed by the Board against Respondent (2012 Agency Record 0005-0034). The Petition seeks disciplinary action against Respondent's license to practice medicine and surgery in the State of Kansas for allegations of multiple acts of failing to make and maintain adequate patient medical records. (See Petition at para. 16c; Initial Order at para.14, 31, 44, 55, 63, 71, 80, 90, 98, 106, 118, and 130). The factual allegations and determinations of the Initial Order, as set forth in paragraph 16.c. of the Petition were sustained by the Court in the 2014 Opinion (p.77-83) and are incorporated herein by reference.

7. Effective July 1, 2010, Respondent changed her license from "Active" to "Exempt" for the 2010-2011 renewal period, stating that her professional activities in Kansas would constitute "Charitable Health Care, Treatment of Family and Friends with no compensation."

8. On or about June 20, 2011, Licensee submitted an application with the Board to change the status of her license to practice medicine and surgery in the State of Kansas from "Exempt" to "Active." Licensee's request was stayed by Presiding Officer Gaschler pending the outcome of the Petition.
9. On September 12, 2011, and continuing through September 16, 2011, a formal hearing was held on the complaints asserted in the Petition before Presiding Officer Edward Gaschler with OAH.
10. On or about February 20, 2012, Presiding Officer Gaschler issued a detailed Initial Order, setting forth findings of fact and conclusions of law (2012 Agency Record 01027-01053). The Initial Order ordered the revocation of Respondent's license to practice medicine and surgery in Kansas, and ordered the costs to be assessed against Respondent, as set forth in the statement of costs filed by the Board. The Initial Order is twenty-seven (27) pages and sets forth findings of fact, conclusions of law and a determination of an appropriate remedy. The Initial Order is incorporated herein by reference to the extent not vacated by the 2014 Opinion.
11. On July 6, 2012, the Board issued a Final Order revoking licensure to practice medicine and perform surgery and assessing costs against Respondent (2012 Agency Record 01163-01169).
12. On August 6, 2012, Respondent filed a Petition for Judicial Review of Agency Action pursuant to K.S.A. 77-601, et seq., challenging the Final Order.

2014 Memorandum Opinion

13. On March 7, 2014, the Honorable Franklin R. Theis, Judge of The District Court of Shawnee County, Kansas issued a Memorandum Opinion and Entry of Judgment and Appendix ("2014 Opinion"). The Memorandum Opinion vacated the Final Order of the Board, in part, and remanded the matter to the Board for further consideration consistent with the findings and directives of the 2014 Opinion.

14. Specifically, the 2014 Opinion reversed the allegations set forth in paragraph 16.a. and 16.b. (standard of care violations) and sustained the allegations set forth in paragraph 16.c. of the Petition (record keeping violations). The Judge remanded the matter back to the Board for reconsideration as to the appropriate sanction or sanctions, if any, to be imposed upon Respondent for her violation of K.S.A.65-2836(k) and K.A.R. 100-24-1 and for a determination of whether to assess costs.

15. Paragraph 16 of the Board's Petition provides: "Licensee's acts and conduct during the course of treating Patient #1 constitute violations of the Kansas Healing Arts Act as follows: . . . c. K.S.A. 65-2836(k), in that Licensee has violated a lawful regulation promulgated by the Board, specifically, K.A.R. 100-24-1, by failing to meet the minimum requirements for an adequate patient record." (ROA: 000008; 2014 Opinion at p.78).

16. The allegation of paragraph 16.c. "states a violation of K.S.A. 65-2836(k) based on a violation of K.A.R. 100-24-1 in relation to the maintenance of adequate medical records by Dr. Neuhaus." The Court found that this Regulation of the Board "is not only for the protection of the public, but also for the protection of an individual licensee of the Board of Healing Arts from misdirected claims." (2014 Opinion at pp.78-79).

17. The Regulation of the Board is also for the protection of the integrity of the applicable healing arts profession itself. (2014 Opinion at p. 79). It further operates to facilitate proper peer review, where appropriate, and supports effective regulatory oversight of a licensee's profession by the Board. (2014 Opinion at p. 79).

18. "Fundamentally, K.A.R. 100-24-1 requires the maintenance of records in regard to patient encounters such that a like provider, trained and knowledgeable in the particular field of the healing arts, could, upon review, say that, based on the record maintained or, in the least, by reference to other readily reliable and readily available sources clearly identified in the record, the particular diagnosis or actions taken or omitted by that particular healing arts provider facially indicate a compliance with relevant standards of care or other accepted professional practices in the licensee's field of practice." (2014 Opinion at p. 79).

19. The Court ruled that "[i]t is clear here that Dr. Neuhaus' maintenance of records as to each of the patients #1-- #11 fell below the requirements of K.A.R. 100-24-1 and below any reasonably required standard of care for their maintenance because she failed to document and maintain the reference material she used for her inputs into the DTREE and GAF computer programs, such that, without such documentation, her own professional conduct, the integrity of her profession in the field of medicine in which she was then engaged, . . . and the proper functioning of regulatory oversight was placed in jeopardy and made subject to allegations of inept, unprofessional, even illegal, conduct which could not be at least, *prima facie* resolved by reference to her own records." (2014 Opinion at pp.79-80).

20. From the record as whole, Dr. Neuhaus' omissions have not been proven to be for nefarious reasons, but, rather, just quite inadequate and short-sighted. (2014 Opinion at p. 80). This

statement of the Court which refers to nefarious conduct does not rule out the presence of intentional, willful or negligent conduct reasons for poor record keeping. The reference to the Court's statement ruling out "nefarious conduct" was in the context of a discussion that the acts were not deemed to be motivated by illegal purpose, but they were indeed purposeful and intentional. The Court commented that "the testimonial evidence proffered by Dr. Neuhaus competed with the dismal state of her records." (2014 Opinion at p. 74). The adequacy of her medical records may reflect an incompetence to practice medicine with reasonable skills and safety.

21. At the Conference Hearing, Respondent's counsel made the following admission related to the distinction between intentional and nefarious conduct: "We do not dispute that she conducted herself in a knowing fashion, she never said otherwise. I mean knowing implies willful. Willful implies knowing. So I would simply say that what the district court found was that while her motives may have been misguided they weren't nefarious and that is a difference, and I think it's one from a qualitative standpoint separates her from the --from the practitioner who defies the Board authority and the Board requirements for, you know, completely immaterial reasons or reasons that are in fact nefarious." (Tr. at p.33-34).

22. Respondent testified in the initial hearing (on September 15 and 16, 2011) that she intentionally omitted information on the medical records because she was trying "to protect my patients' privacy as much as I could." (ROA 003121). This is contrasted with her testimony that in other cases she simply neglected to include documents in the medical record (ROA 003150-3151)(". . . but for some reason, it didn't get printed out or – and, you know, it's just a – an oversight on my part");("And I just may have neglected – I

obviously neglected to print it. Because I wouldn't have printed and not put in it the chart, so I evidently didn't print it. And it would have been on the computer for some period of time, but when I quit using that computer, that record would no longer have been accessible.")(ROA 003151).

23. There was extensive questioning of Respondent which elicited testimony of numerous and extensive deficiencies in recording various medical information on patient medical records for patients #1 to #11 (ROA 003182- 003288). Respondent admitted that she could have documented more extensively. Her actions were knowing, willful and intentional because she was "acutely aware" that they were in a "fishbowl" and her concern was to make an "adequate record that didn't have identifiable material that would not be redacted from a record" if viewed by a third party in order to make sure that the records were not "personally identifiable." (ROA 003119 – 003121); "So, I mean, all along, I tried to protect my patients' privacy as much as I could." (ROA 003121 at ln. 3-5). A summary of the testimony of Ann K. Neuhaus during the underlying hearing can be found at pp. A47-A50 of the Appendix to the 2014 Opinion (ROA: 002975-003315).

24. A summary and identification of the records of each of Dr. Tiller's and Dr. Neuhaus' files is included at pp. A72-A102 of the Appendix to the 2014 Opinion.

25. Respondent admitted that there was "nothing within the patient's record that indicates what records [she] relied upon to form the basis of [her] conclusions." (ROA 003234-3235). The rationale for the numerous omissions, as stated by Respondent was clearly for a knowing and intentional reason, however misguided, which was to provide a patient-

centered practice while "maintaining the privacy interests of [her] patients." (ROA 003305-003306).

26. Dr. Neuhaus principally erred in the omission of record retention in the following respects, as found by the Court: "While it is correct from a DTREE or GAF report one can deduce the patient's circumstances from the response to the questions asked, it is equally clear that without a record of the inputs there is a lack of means for verification of the resulting diagnosis. It was in this omission of record retention that Dr. Neuhaus principally erred" (2014 Opinion at pp. 80-81). Such documentation of specific responses is needed for adequate patient follow-up and subsequent evaluation, to determine whether or not their medical condition has improved. Without such documentation, adequate and safe patient follow-up is significantly hindered.

27. "[T]his omission has brought great attention, belabored many, and its resolution has, and will upset some, regardless, all of which K.S.A. 65-2836(k) and K.A.R. 100-24-1 seeks to forestall or mitigate, if not every wholly prevent." (2014 Opinion at p. 81).

28. The Court rejected that Board's Standard of Care allegations. The reason stated by the Court is that: "the Board's findings concerning its charges stated in ¶ 16.a. and ¶ 16.b. of its Petition under each of its Counts I-XI in support of a violation of K.S.A. 65-2837(a)(2) and K.S.A. 65-2837(b)(24) lack "substantial evidence" to support them within the meaning of K.S.A. 77-621(c)(7) and (d). This lack of substantial evidence renders the Board's (initial) Final Order as to those charges "arbitrary" and "capricious" as those terms are used in K.S.A 77-621(c)(8)." (2014 Opinion p. 81).

29. Since the Court found that the Board failed to prove by substantial evidence that Dr. Neuhaus could not perform mental health evaluations or make differential diagnoses generally, or as to any cited patient, or prove that the doing of the same were within the executive province of psychiatrists or other like specialties, any claim Dr. Neuhaus held herself out as able to perform medical services beyond her training and licensure must fail. (2014 Opinion at p. 82). The Court reversed the findings in the Petition under paragraph (a) and paragraph (b) only.

30. A violation of K.S.A. 65-2837(b)(25), which relates to inadequate medical record keeping under K.A.R. 100-24-1 may constitute "unprofessional conduct." (2014 Opinion at p. 82). The Court sustained the allegation set forth in paragraph 16(c) of the Petition.

31. The 2014 Opinion remanded the matter back to the Board "for [a] further hearing concerning the sanction or sanctions, if any, to be imposed upon [Respondent] for her violation of K.S.A. 65-2836(k) by her violation of K.A.R. 100-24-1."

32. The license to practice the healing arts of Dr. Neuhaus was revoked and the hearing's costs assessed to her were both based on the Final Order of the Board, which were both vacated (2014 Opinion at p. 82). The Board was required to issue a new Final Order and apportion the costs, if any.

Conference Hearing: December 11, 2014

33. At the Conference Hearing on December 11, 2014, the Board heard arguments of the parties and asked questions of counsel. After being duly sworn, Respondent Ann K. Neuhaus appeared in person and provided sworn testimony on her own behalf. She responded to specific questions from the Board. (Tr. at pp. 56 to 62).

2015 Final Orders of the Board

34. On January 23 and February 13, 2015, the Board issued Final Orders revoking licensure to practice medicine and perform surgery and assessing costs against Respondent ("2015 Final Orders").

35. On February 9, 2015, Respondent filed a Petition for Judicial Review of Agency Action pursuant to K.S.A. 77-601, et seq., challenging the 2015 Final Orders. The Petition was later amended.

2017 Memorandum Opinion

36. On January 13, 2017, the Honorable Franklin R. Theis, Judge of The District Court of Shawnee County, Kansas issued a Memorandum Opinion and Entry of Judgment ("2017 Opinion"). The 2017 Opinion vacated the Final Orders of the Board, in part, and remanded the matter to the Board for further consideration consistent with the findings and directives of the 2017 Opinion. The 2017 Opinion is lengthy, providing 97 pages of analysis and opinion, making the following numerous and detailed findings and rulings.

37. The Court commented that the Board reached a "somewhat unusual result" because the Board reached the "same result [in the 2015 Final Orders], except for a lesser burden of costs to pay," when the original proceeding was based upon "unprofessional conduct" this allegation had been eliminated as unsubstantiated. (2017 Opinion at p. 7-8). The Board notes that this portion of the 2017 Opinion is not interpreted to suggest that a finding of "unprofessional conduct" for inadequate recordkeeping in violation of the regulation is not possible. To interpret the ruling as preventing such a finding would be in conflict with the 2014 Opinion, which found that a violation of K.S.A. 65-2837(b)(25), which relates to

inadequate medical record keeping under K.A.R. 100-24-1, may constitute "unprofessional conduct." (2014 Opinion at p. 82).

38. The Court stated that "unprofessional conduct" is essentially an allegation of standard of care for recordkeeping (2017 Opinion at p. 9). The Court determined that the Board did not have authority to proceed with the sanctioning of "unprofessional conduct" or "professional incompetence" because the Petition never made that specific charge against Dr. Neuhaus (2017 Opinion at p. 8-9).

39. The Court criticized the Board's reliance upon "non-binding sentencing guidelines" which are not promulgated by an official published rule of the Board (2017 Opinion at p. 14). While it is true that the Guidelines are not binding, and are not regulations, the Board rejects the criticism of the Guidelines because the "sanctioning guidelines are intended to lend credibility to the disciplinary process, aid the Board in efficiently achieving its ultimate goal of protecting the public, and give guidance to licensees and their counsel when faced with allegations of misconduct." (2015 Agency Record at p. 0299). The Guidelines are available to the public through its website, do provide guidance on sanctioning by the Board and may be lawfully relied upon by the Board in guiding and determining appropriate discipline decisions. The current version of the Guidelines was approved and adopted by the Kansas State Board of Healing Arts on August 26th, 2008 (2015 Agency Record at p. 0320). Where an agency possesses discretion, a court must presume the validity of the agency action and cannot substitute its judgment for that of the administrative agency unless the agency's action is unlawful, unreasonable, arbitrary, or capricious.

40. The Court repeatedly stated the concern that the disciplinary proceeding "was not premised on statutory authority charged initially . . . ." (2017 Opinion at p. 14-15). The Court criticized the Board for concluding that the action of the Dr. was "intentional" and more like a "standard of care" violation rather than as the negligent recordkeeping which the Court views as the upper end of the omissions of Dr. Neuhaus (2017 Opinion at p. 15-16).

41. The Court disagreed with the Board's finding that Dr. Neuhaus "intentionally" maintained her records in an inadequate manner because it put Dr. Neuhaus into "a higher category in one grid for the application of sanctions." [Looking at Grid Heading No. 10: Patient Records](2017 Opinion at p. 16). The Board notes that this conclusion is contradicted with Respondent's own testimony that she was intentional in her effort to conceal the information. When Doctor Milfeld inquired of Dr. Neuhaus and asked for her interpretation of "intentional" action, Dr. Neuhaus did not shy away from her disclosure that she was making a conscious effort not to document, for privacy purposes. Dr. Neuhaus attempted to put the actions in context by explaining: "Well, I don't know if anyone is familiar with this case, but a number of these patients' records were discussed at length on the Bill O'Reilly show." (Tr. at p. 59, ln. 9-17). Dr. Neuhaus's own lawyer resisted objections to prevent testimony on this subject and argued that the hearing was de novo, expressing that it was expected that the Board would gather whatever information that it wanted to justify a decision (Tr. at p. 59, ln. 18 to p. 60, ln. 25). Dr. Neuhaus continued, explaining her "motivation" and specific reason for not having personally identifying data in the patient records that could be used to identify the patients. (Tr. at p. 61, ln. 2-24). This issue was also previously addressed in the Conclusions of the Initial Order: "The

Licensee attempts to explain why there is nothing of hers in these patient files. She argues that was to protect the patients. This argument has no merit since each patient was clearly identified. How the nonexistence of specific patient documentation protects patients is not clear and is without merit." (Initial Order at Conclusion No. 6; 2012 Agency Record 01052). Additionally, Respondent testified in the initial hearing (on September 15 and 16, 2011) that she intentionally omitted information on the medical records because she was trying "to protect my patients' privacy as much as I could." (ROA 003121). The Board has reviewed the evidence in the record and concludes that the substantial competent evidence supports the reasonable conclusion that the stated motivations of the Licensee was to create an inadequate record and that the action was intentional and purposeful. This fails to meet the minimum recordkeeping requirements and the Board believes that this purposeful desire to protect the patient(s) is an intentional action by the Licensee. The Board concludes that this determination is supported by substantial competent evidence in the record and any other conclusion is unreasonable.

42. The Court's Opinion at p. 16-26, begins its basic attack upon the consideration of discipline by the Board under Grid Heading No. 2 (dealing with General Misconduct), when the Court clearly believes that the Board should have evaluated the sanction under Grid Heading No. 10 (dealing with Recordkeeping). The Court justifies this conclusion, in part, based upon the citations to the statutes and regulations which follow each Grid Category. Since the Court previously dismissed any finding of "professional incompetency" or "unprofessional conduct," the Court looked to the footnote authority in the Sanctioning Guidelines and pointed out that Grid Heading No. 2 could not apply, because the statutory guidance which

supported this category in the Sanctioning Guidelines was not present. Conversely, the Court directed that only Grid Heading No. 10, for recordkeeping violations, could be supported by the record.

43. A simplified way to look at the analysis of the Court is to say that the Board incorrectly read the sanctioning guideline chart from right to left, rather than left to right. The Court's commentary suggests that the Board engaged in results oriented analysis and application of the Sanctioning Guidelines (which it did not). The Court presupposes that the Board started with the desire to find that revocation was justified, so did not fully analyze whether Sanction Grid Heading No. 2 or Grid Heading No. 10 was the appropriate category to apply to the Licensee. In the opinion of the Court, since the Board compared two categories that both had a "revocation" as their harshest penalty – the presumptive desired disciplinary action of the Board – the Court believes that the Board did not correctly apply the gridlines of the sanctioning guidelines. ["Again, the Board did not choose this grid specifically over the 'patient records' grid because it found the presumed sanction from which it was beginning deliberations, that of the column denoted as 'Presumed Sanction as Modified for Prior Board Actions to Adjustment for Aggravating /Mitigating Factors)', was equally the same, that being revocation."](2017 Opinion at p. 25).

44. The Court also contrasted Grid Heading No. 2 (General Misconduct) with Grid Heading No. 10 (Recordkeeping Violations). In this portion of the Court's analysis, the Judge looked to who the conduct is intended to protect. The Court concluded that General Misconduct has a principal negative impact on the patient; Patient Recordkeeping focuses more on the harm to the profession or to the Board (2017 Opinion at p. 25-26). The Board

disagrees with this conclusion and feels very strongly that deficient patient recordkeeping harms the patient as well as is harmful to the profession and the Board. Patient records are often relied upon by doctors or by others for other legitimate purposes, including for verification of the resulting diagnosis, regulatory oversight, allegations of inept, unprofessional or illegal conduct, or for a second opinion on treatment, all of which justify the need for complete, detailed, comprehensive and accurate records. It is a rare situation when the paucity or patchiness of a physician's records will be supplemented with sworn testimony to describe what is not found in the records. ("Admittedly, the testimonial evidence proffered by Dr. Neuhaus herself competed with the dismal state of her records.")(2014 Opinion at p. 74).

45. The Court suggests that the Board focus first on one of two choices: Did Dr. Neuhaus's violation of K.S.A. 65-2836(k) rest exclusively in a defect of recordkeeping required by K.A.R. 100-24-1 (for recordkeeping violations) in which case her purpose, reason or "*mindset in violating the rule of the Board" was the focus of the sanctio*n; or Did Dr. Neuhaus's violation rest more in *the impact of the rule violation on her patients or other providers* (general misconduct)? (2017 Opinion at p. 30-32).

46. The Court next attacked the Board's definition and application of "Multiple Instances." (2017 Opinion at p. 33). The Court opined that Dr. Neuhaus's conduct involved multiple patients, but it did not constitute multiple instances because it was the "same character of violation for each" patient. Instead, the Court believed that "multiple instances" is reserved for different categories of offenses. The Court stated its belief that Dr. Neuhaus's eleven rule/recordkeeping violations could only fall within "Multiple

Instances – Same Category of Offense" column " because there are no separate categories of offense in this case." (2017 Opinion at p. 34-35). The Board takes issue with this finding, providing a retort to the Court that one of the basic tenets or goals for quality healthcare is the concept of individualized diagnosis and treatment. It is fundamentally unfair and does a disservice to the patient to lump all eleven (11) individual patients into the same category and conclude that recordkeeping violations for the eleven persons constitutes a single offense because they are in the same category of offense. The Board adamantly advances the principle that a physician knows that they treat each patient separately in the clinical setting. Although the example is hyperbole, what if more than one patient had died as a result of complications? The injury or death of multiple patients would certainly not be placed into the category of a single incident. Multiple persons affected should be treated as multiple instances for good reason. This is not just a goal or theoretical principle aspired to by the Board. There are numerous instances in which the Board, or the medical profession, would likely treat the same category of offense as constituting multiple instances. For example, separate malpractice claims, suits or settlements, even if involving the same category of offense, would be treated as separate, and thus multiple, offenses. Similarly, if a physician engages in similar conduct that results in two DUI convictions, this Board would look at the same category of offense as a "multiple offense" as the title was intended. The Board would not, and does not, reserve the application of "multiple instances" only for different categories of offenses, as suggested by the Court.

47. The Court reinforced its Opinion that Grid No. 2 (Category No. 2) would not apply to Dr. Neuhaus because she was not found guilty of standard of care violations, only recordkeeping violations. Additionally, the Court opined that the Board found that Dr. Neuhaus had violated K.S.A. 65-2836(k) and "*not* with violating a prior lawful order or directive of the Board." (2017 Opinion at p. 37-38; emphasis in original). The conclusion of the Court is that the logical grid violation is No. 10 – Patient Records and not No. 2 – General Misconduct. (2017 Opinion at p. 39).

48. The Court seems to suggest that the Board could have made a choice which would not have been questioned by the Court, had it been considered to be based upon K.S.A. 65-2836(k)[addressing minimum requirements for an adequate patient record]. This is supported by the following statement: "The choice by the Board of the applicable grid is more a matter of its chosen perspective for emphasis, which it would be free to make." (2017 Opinion at p. 39).

49. The Court rejected the disciplinary counsel's argument, which the Court believes was adopted in principle in the Board's Final Order, that revocation was "the presumed sanction." (2017 Opinion at p. 42-43). The Court was critical of this, finding that a "presumptive sanction further puts the burden of proof on the physician to overcome the presumption." (2017 Opinion at p. 44). The word "presumed" is a word simply borrowed from the Guidelines and should not be applied to the thoughtful and critical work of the Board. Although the Board may not have engaged in the formulaic and mechanical application that the Court suggests in the 2017 Opinion, or performed the mathematical computation and comparison of the mitigating and aggravating "factors" as conducted by

the Court in the 2017 Opinion, the Board did not conduct a results oriented analysis aimed at reaching a predetermined conclusion at all cost. This Board engaged in careful, honest and thoughtful deliberations before imposing each sanction. Although the sanction conclusion was the same, the process was far from perfunctory.

50. The Court, simply put, does not believe that the Column for "as Modified for Prior Board Actions" applies in this case. The Court disagrees that any of the prior actions (preceding 2010) should be considered "Prior Board Actions." (2017 Opinion at p.47-48). The Board notes that this is in conflict with the Court's prior acknowledgement that the allegations against Dr. Neuhaus are "coupled with the two prior sanctions of her by the Board as set out in [para.] 4 and 5 of the Petition." (2014 Opinion at p.14-15).

51. The entirety of the 97 page opinion can be largely summarized by referring to the following passage: "Accordingly, here, because the Board [started with the far right column of the grid, which provides for modification for Prior Board Actions when the Court is of the opinion that this column lacks any statutory or policy stated purpose] . . . the Court finds the error in fixing its starting point for deliberating the consequence of its aggravating/mitigating factors array was material error requiring a remand back to the Board." (2017 Opinion at p. 51).

52. The Court not only remands the disciplinary matter back to the Board, but also states what it finds to be correct and incorrect in the Board's Final Order (2017 Opinion at p. 51).

    a. INCORRECT: The Board "never clearly articulated a specific view as to what motivated its maintenance of revocation that would necessarily be based on what could arise otherwise as a viable sanction under its Guidelines from its

consideration of the listed aggravating or mitigating factors." (2017 Opinion at p. 52).

b. INCORRECT: The Board did not issue a "statement as to what factors made revocation stand as the presumed sanction. On remand, there will need to be an analysis or statement reflecting why any choice was selected *from the range of sanction options available.*" (2017 Opinion at p. 53; emphasis in original)[Note: "Reasons for any choice need to be given." Opinion at p. 54].

c. CORRECT: The Board correctly "articulated that the burden of these costs dissuaded the Board from imposing a fine, which is clearly a rational reason given the loss of her professional license." (2017 Opinion at p. 54).

d. INCORRECT: The choice for the sanction should arise after applying the aggravating/mitigating factor analysis. (2017 Opinion at p. 54). Revocation cannot be the "presumptive" sanction. It still could be the conclusion, but will need to have a definitive explanation as to its choice by rejecting and "remarking on the unsuitability of the other sanctions available." (2017 Opinion at p. 54-55).

e. CORRECT: The language of the Board in describing a factor as "small mitigating" was acceptable. The Court rejected the objection of Dr. Neuhaus that this was not precise enough. (2017 Opinion at p. 72).

f. INCORRECT: The Court could not discern a difference between certain "factors." Dr. Neuhaus complained about "double counting." This is caused by redundancy of certain words (i.e., vulnerability, frequency, injury). Stating that the "factor" is both aggravating and mitigating is "imprecise." (2017 Opinion at p. 73).

53. The Court goes further to suggest that if there is a range of sanctions available, that the Board also articulate "the greater importance or lesser importance of certain factors or identify the controlling factor or factors, that got the Board to its chosen sanction" and why one sanction in the range was chosen over others available within the range. (2017 Opinion at p. 55).

54. The sanction choices must relate to, and rationally advance, the agency's public purpose as well as evidence credible consistency. (2017 Opinion at p. 57).

55. The Board needs to evaluate if the aggravating or mitigating circumstances actually aid in the determination. If there is no connection between the purpose and the factor, then there is a disconnect. (2017 Opinion at p. 57)(Specific Examples are provided in 2017 Opinion at p. 58-61). [Note: If 2A is used, then potential "harm to patients" should not be used as an aggravating factor because that "rationale" shows up in the Description. Likewise, if 10A is used, "intent" should not be used as an aggravating factor because that "rationale" shows up in the Description].

56. The goal of the Board's analysis as stated by the Judge: Were the aggravating/mitigating factors applied appropriately to the particular grid, gridline, or column selections and were they factually and rationally supported? (2017 Opinion at p. 61). The "factors considered" should be tied to the column, grid or gridline selected. (2017 Opinion at p. 72).

57. The Board should not make a "general verdict," but instead, should either assign some weight to a particular factor, or have support in the record. (2017 Opinion at p. 70-71).

58. The Court applied its own analysis and evaluated each of the criticisms levied by Dr. Neuhaus as to each of the factors. The Court evaluated each factor, from the perspective of the column, grid, or gridline selected. (2017 Opinion at p. 72-88).

59. The Board is free to reconsider the sanctions to be imposed since the Board considered it should not levy fines given its order assessing costs. (2017 Opinion at p. 96).

60. The Judge remanded the matter back to the Board for reconsideration as to the appropriate sanction or sanctions, if any, to be imposed upon Respondent for her violation of K.S.A.65-2836(k) and K.A.R. 100-24-1 and for a determination of whether to assess costs.

Deliberations by the Board

61. The Board was provided a complete copy of the Agency Record.

62. Further deliberations of the Board occurred after remand, including during a Regular Meeting of the Board on June 9, 2017.

63. The Board is adequately reminded that the District Court rejected the "Standard of Care violations" and supported the record keeping violations asserted against the Respondent (2014 Opinion).

64. Dr. Garold Minns has been designated by the Board as the Presiding Officer and is authorized to be the signatory on the Final Order as permitted by K.S.A. 77-514(g).

65. The decisions rendered in this case have not been made based upon any personal objections against abortion providers or based upon religious, political or philosophical grounds. Instead, the Board is careful to make decisions based on relevant evidence and valid considerations. The decisions of the Board are made based upon consensus. Deliberations revealed near unanimity of all members of the Board, whether lay or professional.

66. The focus in this disciplinary matter is not the fact that Respondent's practice included abortion care. The Board did not find that Respondent violated K.S.A. 65-6703 in any respect. Rather, the focus for the Board is on the adequacy and sufficiency of the Licensee's record keeping and her repeated violations of regulation in this area. The primary goal of the Board is to protect the patient. Patient safety is the paramount concern.
67. The Kansas Healing Arts Act is constitutional on its face and as applied in this case.
68. The Kansas State Board of Healing Arts, created in 1957, is the licensing and regulatory Board for many health care providers in Kansas. The Board is comprised of 15 members including 5 Medical Doctors (M.D.), 3 Osteopathic Doctors (D.O.), 3 Chiropractic Doctors (D.C.), 1 Podiatric Doctor (D.P.M.), and 3 public members.
69. Eleven (11) members of the Board participated in the deliberations on June 9, 2017, all in person. Each continued to participate in the deliberations thereafter either by email or by phone with special counsel to the Board. The Board Members who participated included the following: Anne Hodgdon; David Laha, DPM; Douglas Milfeld, MD; Garold Minns, MD; Jerry DeGrado, DC; Joel Hutchins, MD; John Settich, Ph.D.; Robin Durrett, DO; Ronald Varner, DO; Steven Gould, DC; and Terry Webb, DC.
70. The Disciplinary Panel members consisted of Michael J. Beezley, M.D. and M. Myron Leinwetter D.O. As such, these individuals recused themselves from participating in the Board hearing and deliberations on the matter. Additionally, Board Member Richard A. Macias voluntarily recused himself to avoid any appearance of impropriety.
71. General Counsel Kelli Stevens and Executive Director Kathleen Lippert were conflicted out of advising the Board on the remanded disciplinary decision in this matter. Mark

Ferguson serves as special legal counsel to the Board. For the purposes of this proceeding, and to ensure compliance with K.S.A. Supp. 77-514(h), Mr. Ferguson was not supervised or directed by Ms. Stevens in any proceeding arising out of this matter.

72. The Board considered the entire agency record and abided by the directives of the 2014 and 2017 Opinions in its issuance of a new Final Order. The Board was provided with a complete copy of the Agency record, including the 2014 and 2017 Opinions.

73. Neither party filed a brief or presented oral argument on the issues remanded by the judge and the issues to be considered by the Board at this stage of the proceedings.

74. A quorum of members were present and participated in the deliberations. The collective decision of the Board was made based upon consensus of the Board. The Board members functioned as presiding officers in this matter.

75. The stated mission of the Board is: "Safeguard the public through licensure, education and discipline of those who practice the healing arts in Kansas." This is consistent with the stated statutory purpose of the Act which sets forth the following purpose: "Recognizing that the practice of the healing arts is a privilege granted by legislative authority and is not a natural right of individuals, it is deemed necessary as a matter of policy in the interests of public health, safety and welfare, to provide laws and provisions covering the granting of that privilege and its subsequent use, control and regulation to the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice of the healing arts and from unprofessional conduct by persons licensed to practice under this act." K.S.A. 65-2801.

76. The stated Philosophy of the Agency is: "The Kansas Board of Healing Arts will perform licensing and regulatory functions in accordance with all applicable statutes, rules, and regulations in an open, courteous, and efficient manner. The Board affirms that safeguarding the public is their primary responsibility. The Board and its' staff will approach their responsibilities in a balanced and sensible fashion so regulation can be performed aggressively, but fairly for the benefit of every patron of the State of Kansas."

77. Pursuant to K.S.A. 65-2836(k), the Board may limit Licensee's license to practice the healing arts in the State of Kansas for violation of K.A.R.100-24-1, a lawful Regulation promulgated by the Board.

78. It is considered that there is no disputed issue of material fact and the only issues to be determined is the appropriate sanction, if any, for the recordkeeping violations and a decision whether or not to assess costs.

Applicable Law

K.S.A. 65-2836 of the Healing Arts Act states, in pertinent part.

A licensee's license may be revoked, suspended or limited, or the licensee may be publicly or privately censured or placed under probationary conditions, or an application for a license or for reinstatement of a license may be denied upon a finding of the existence of any of the following grounds:

... (b) The licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency, except that the board may take appropriate disciplinary action or enter into a non-disciplinary resolution when a licensee has engaged in any conduct or professional practice on a single occasion that, if continued, would reasonably be expected to constitute an inability to practice the healing arts with reasonable skill and safety to patients or unprofessional conduct as defined in K.S.A. 65-2837, and amendments thereto.

... (f) The licensee has willfully or repeatedly violated this act,.... or any rules and regulations adopted pursuant thereto, or any rules and regulations of the secretary of health and environment which are relevant to the practice of the healing arts.

... (k) The licensee has violated any lawful rule and regulation promulgated by the board or violated any lawful order or directive of the board previously entered by the board.

K.S.A. 65-2837(b) of the Healing Arts Act states, in pertinent part:

"Unprofessional conduct" means:

(25) Failure to keep written medical records which accurately describe the services rendered to the patient, including patient histories, pertinent findings, examination results and test results.

K.S.A. 77-527 of the Kansas Administrative Procedure Act states, in pertinent part:

(d)... In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officers opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties.

(e) The agency head or designee shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) The agency head or designee shall render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the person who rendered the initial order. . . .

(g) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(h) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between this order and the initial order and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section shall include, or incorporate by express reference to the initial order, all the matters required by subsection (c) of K.S.A. 77-526, and amendments thereto.

100-24-1 of the Kansas Administrative Regulations (K.A.R.) provides:

Adequacy; minimal requirements.

a. Each licensee of the board shall maintain an adequate record for each patient for whom the licensee performs a professional service.

b. Each patient record shall meet these requirements:

1. Be legible;
2. contain only those terms and abbreviations that are or should be comprehensible to similar licensees;
3. contain adequate identification of the patient;
4. indicate the dates any professional service was provided;
5. contain pertinent and significant information concerning the patient's condition;
6. reflect what examinations, vital signs, and tests were obtained, performed, or ordered and the findings and results of each;
7. indicate the initial diagnosis and the patient's initial reason for seeking the licensee's services;
8. indicate the medications prescribed, dispensed, or administered and the quantity and strength of each;
9. reflect the treatment performed or recommended;
10. document the patient's progress during the course of treatment provided by the licensee; and
11. include all patient records received from other health care providers, if those records formed the basis for a treatment decision by the licensee.

c. Each entry shall be authenticated by the person making the entry unless the entire patient record is maintained in the licensee's own handwriting.

d. Each patient record shall include any writing intended to be a final record, but shall not require the maintenance of rough drafts, notes, other writings, or recordings once this information is converted to final form. The final form shall accurately reflect the care and services rendered to the patient.

e. For purposes of implementing the Healing Arts Act and this regulation, an electronic patient record shall be deemed a written patient record if the electronic record cannot be altered and if each entry in the electronic record is authenticated by the licensee.

K.S.A. 65-2846 provides for the costs of proceedings and the assessment of costs incurred:

(a) If the board's order is adverse to the licensee or applicant for reinstatement of license, costs incurred by the board in conducting any proceeding under the Kansas administrative procedure act may be assessed against the parties to the proceeding in such proportion as the board may determine upon consideration of all relevant circumstances including the nature of the proceeding and the level of participation by the parties. If the board is the unsuccessful party, the costs shall be paid from the healing arts fee fund.

(b) For purposes of this section costs incurred shall mean the presiding officer fees and expenses, costs of making any transcripts, witness fees and expenses, mileage, travel allowances and subsistence expenses of board employees and fees and expenses of agents of the board who provide services pursuant to K.S.A. 65-2878a and amendments thereto. Costs incurred shall not include presiding officer fees and expenses or costs of making and preparing the record unless the board has designated or retained the services of independent contractors to perform such functions.

(c) The board shall make any assessment of costs incurred as part of the final order rendered in the proceeding. Such order shall include findings and conclusions in support of the assessment of costs.

K.S.A. 65-2863a provides for the assessment of "Administrative fines"

(a) The state board of healing arts, in addition to any other penalty prescribed under the Kansas healing arts act, may assess a civil fine, after proper notice and an opportunity to be heard, against a licensee for a violation of the Kansas healing arts act in an amount not to exceed $5,000 for the first violation, $10,000 for the second violation and $15,000 for the third violation and for each subsequent violation. All fines assessed and collected under this section shall be remitted to

the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the state general fund.

(b) This section shall be part of and supplemental to the Kansas healing arts act.

Application of the Guidelines for the Imposition of Disciplinary Sanctions

On August 26, 2008, the Board approved the adoption of the Guidelines for the Imposition of Disciplinary Sanctions ("Sanctioning Guidelines"). The Sanctioning Guidelines are made available to the public and published on the Board's website. (*See www.ksbha.org/newsroom/publications.shtm*). These Sanctioning Guidelines are recited at length hereafter because the Sanctioning Guidelines provide the detailed policy rationale and guide the application of the sanctions herein.

The Sanctioning Guidelines set forth the basic principle that a licensee of the healing arts holds a respected and elevated position in society with responsibility not only to patients, but also to the public, to colleagues, to the profession to self, and to the health care system in general. The mission of the Board of Healing Arts is to protect the public by authorizing only those persons who meet and maintain certain qualities to engage in the health care professions regulated by the Board, and to protect the integrity of the profession. This mission is served by creating a regulatory environment that all competent and honorable practitioners to practice, their art and science, by disciplining those who engage in professional incompetence, unprofessional conduct or other proscribed conduct, and by imposing sanctions that appropriately protect the public from immediate harm, remediate and rehabilitate when possible, or punish when necessary, but ordering the least restrictive discipline necessary to meet the proper sanctioning goals.

Inappropriate sanctions can undermine the goals of discipline. Sanctions that are too lenient or that do not adequately address the underlying causes for the violations do not deter and may result in decreased public confidence in the system. Sanctions that are too restrictive may also result in decreased confidence in the system, and may result in fewer reports of violations and create a more litigious environment.[2] As a result, the guidelines do not establish a precise formula for calculating sanctions.

The Healing Arts Act and related regulations both prescribe and proscribe conduct that might be grouped in general categories of administrative requirements, misconduct that is harmful to the health care system in general, failure to perform a duty regarding patient care, and other misconduct that may result in patient harm. Patient harm may be economic harm, delay of appropriate treatment, or adverse patient outcomes. The guidelines attempt to take into consideration all of these legitimate interests when determining the imposition of disciplinary action.

When the Board finds that a licensee has engaged in conduct constituting grounds for disciplinary action, the range of disciplinary authority that is available is quite broad. In determining which of these sanctions should be imposed, the Board should consider the goal for imposing discipline. The purpose might either be remedial, to protect the public from immediate harm, or punitive.

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[2] The Board considered assessing fines against Respondent for each instance. While doing so would be justified based upon the facts and authorized by law (K.S.A 65-2863a) and the Sanctioning Guidelines, the Board ultimately concluded that Revocation, Costs *and* Fines would simply be too punitive and harsh. It was recognized that the assessment of costs would be substantial and, therefore, would serve the same purpose in this case.

The Board recognizes the value of a predictable and consistent pattern of disciplinary sanctions. These sanctioning guidelines are intended to lend credibility to the disciplinary process, aid the Board in efficiently achieving its ultimate goal of protecting the public, and give guidance to licensees and their counsel when faced with allegations of misconduct. This framework applies in any matter when approving a Final Order, announcing the appropriate mitigating and aggravating factors the Board will consider in determining the level of discipline and establishing a graduated scale for multiple and repeated misconduct.

Revocation is appropriate to achieve a remedial purpose, protection, or punishment. Removing a licensee from practice protects the public from future misconduct. Additionally, removing or preventing a person from practice is appropriate when the misconduct demonstrates that the licensee lack the necessary competence or professionalism to merit the privilege of licensure.

By adopting the policy statements as set forth in the Sanctioning Guidelines, the Board does not limit itself to any form of disciplinary order and it may consider its entire range of authority. The Board may depart from the policy as it desires and without giving notice.

The Sanctioning Guidelines are intended to supplement rather than replace the policies that have been previously adopted by the Board regarding disciplinary actions. The guidelines are in addition to other provisions of law that might apply in a specific situation, including the authority of the Board to assess costs in a proceeding.

Definitions Provided Sanctioning Guidelines

Section IV of the Sanctioning Guidelines define the following terms:

- "Injury" – harm to a patient, the public, or the profession, which results from a licensee's acts or omissions.

- "Potential for Injury" – harm to a patient, the public, or the profession that is reasonably foreseeable at the time of the licensee's acts or omissions, but for some intervening factor or event, would probably have resulted from the licensee's acts or omissions.
- "Intent" – the conscious objective or purpose to accomplish a particular result.
- "Knowledge" – The conscious awareness of the nature of the conduct, but without the conscious objective or purpose to accomplish a particular result.
- "Negligence" – failure to exercise the standard of care that a reasonably prudent licensee would have exercised in a similar situation.
- "Ordinary negligence" – the failure to use ordinary care in the licensee's practice.
- "Gross negligence" – a conscious, wanton act or omission in reckless disregard for the foreseeable outcome.
- "Inadvertence" – an accidental oversight through unintentional neglect.

Although not defined in the Sanctioning Guidelines, the term nefarious was discussed extensively by the parties at the Conference Hearing. "Nefarious" is generally considered to be defined as "wicked or criminal." Nefarious means something that is "Evil or Immoral" and is also defined as "flagrantly wicked or impious; evil." *See* Merriam-Webster.com. The word nefarious comes from the root word "nefas," which is "[a] wrongful, sinful, wicked, unlawful or criminal act." Ballentine's Law Dictionary, 3rd Ed., p.838. Respondent erroneously applies the Court's reference to nefarious conduct to the situation at hand. The Board agrees with the Court that the conduct was not nefarious or motivated by illegal purpose. However, the actions of Respondent were intentional and willful, as admitted by Licensee and her legal counsel. Therefore, the "intent" of the Respondent is relevant to the consideration by the Board.

Instructions for Applying Sanctions Grid and Explanations of Case Types

In applying the Sanctioning Grid, there is no "presumed sanction" to serve as a starting point for conduct described; instead there is a range of sanctions within a column. The instructions

within the Guidelines provide that when the licensee is found to have committed multiple categories of offenses, the Board is to consider whether the offenses are multiple ways of describing the same conduct or are separate occurrences and events. If the offenses are separate and are best described in different categories, the sanctions for each offense should be added together. If the instances of misconduct are similar sanctions, treat as multiple instances of same category and modify the decision to use the Presumed Sanction for Multiple Instances (Grid column 5). If multiple categories of offenses might apply to the same instance or transaction, use only the most severe sanction. Mitigating and aggravating factors should then be applied, with the resulting sanction being within the Range when Presumed Sanction is Modified by aggravating and mitigating Factors (Grid column 6).

Aggravating and Mitigating Factors - Policy Considerations

After it has been established that a violation has occurred, then the Board should consider the facts and circumstances unique to the case to determine whether the presumptive sanction is appropriate in light of any aggravating and/or mitigating factors. Aggravating factors may justify more restrictive or severe discipline. Mitigating factors may justify less severe or restrictive discipline. It is important to note that all factors will not necessarily be given equal weight.

Additional Considerations for the Imposition of Disciplinary Actions

Failure to adequately maintain patient records includes misconduct such as the failure to adequately document evaluation and/or treatment of the patient. The purpose for maintaining patient records include: (1) to furnish documentary evidence of the patient's history, symptoms and treatment; (2) to serve as a basis for review, study and evaluation of the care rendered; (3) to ensure the records provide meaningful health care information to other practitioners should the

patient have his or her care transferred to another provider; and (4) to assist in protecting the legal interests of the patient, and responsible practitioner.

The interest of the patient is paramount. Failure to perform these duties regarding patient care has the potential to cause patient harm. In addition to the general aggravating and mitigating circumstances that apply to all categories of misconduct, the Board may also consider the pervasiveness of such misconduct with regard to the licensee's practice in determining the appropriate remedy.

ANALYSIS, FINDINGS AND CONCLUSIONS OF THE BOARD

The Respondent has maintained a license to practice medicine and surgery in Kansas since 1986. Respondent is no stranger to this Board, having been involved in two prior disciplinary actions, including claims involving recordkeeping (See para. 3 and 4 above). The underlying matter is a disciplinary action that was filed against Respondent by the Petitioner Board in 2010. This case has progressed in one status or another for over seven (7) years. The Judge's Order remanded the matter back to the Board "for [a] further hearing concerning the sanction or sanctions, if any, to be imposed upon [Respondent] for her violation of K.S.A. 65-2836(k) by her violation of K.A.R. 100-24-1."

The Complaint alleged that Respondent was professionally incompetent and committed unprofessional conduct and other violations of the Healing Arts Act. (*The professional incompetence of Respondent is no longer an issue because this portion of the initial Final Order was vacated by Judge Theis in the 2014 Opinion*). The remaining portion of the Complaint alleges that Respondent failed to maintain adequate and accurate patient medical records. Patient records

should include the following documentation and information: patient identification, dates of professional services rendered, pertinent and significant information concerning the patient's condition, description of vital signs and test performed, with findings and results of each, initial diagnosis, statement of the patient's initial reason for seeking services, treatment recommended, documentation regarding the patient's progress during treatment and the inclusion of all patient records received from other health care providers which form the basis for a treatment decision. Failure to include this information and documentation in each patient record constitutes a failure to maintain an adequate patient medical record as required by K.A.R. 100-24-1.

The matter proceeded to a formal hearing before OAH in 2011. The parties presented testimony and evidence to the presiding officer. Subsequent to the hearing, the presiding officer issued the Initial Order. The remaining pertinent part of the Presiding Officer's Initial Order finds that Dr. Neuhaus committed multiple violations of the Kansas Healing Arts Act, including failing to make and maintain adequate patient records. Based upon all of the remaining findings of the Initial Order, as supported by the Court's 2014 and 2017 Opinions, and after taking into consideration past disciplinary actions taken against Respondent, the Board must consider the appropriate sanction, if any, for the record keeping violations.

The Board is permitted to consider the Initial Order issued on February 20, 2012, as modified by the 2014 and 2017 Opinions of Judge Theis and the detailed Appendix provided by the Court, which is a synopsis prepared by the Court of what it believed the record revealed was the substantive, relevant and material testimony given by witnesses at the hearing. (The 2014 Opinion is found at pages 3635-3718 of the Agency Record which was provided to the Board; The Appendix is found at pages 3719-3820 of the Agency Record). Additionally, the 2017 Opinion

guides the Board and dictates the pertinent findings of fact and conclusions of law to support the Final Order issued by the Board, particularly with regard to the application of the Sanctioning Guidelines.

Based on the evidentiary references and discussion in the 2015 and 2017 Opinions and the evidence of record greatly summarized in the Appendix, the Board's allegations in its Complaint can be sustained as to each of its Counts I- XI as stated and alleged at paragraph 16c, which relates to record keeping. The District Court rejected the "Standard of Care violations" but did support the record keeping violations asserted against the Respondent.

The purpose herein is to issue a Final Order based upon the Board's review of an Initial Order issued by a Presiding Officer at the OAH, as modified by the 2015 and 2017 Orders of Judge Theis. The previous Final Orders have been vacated and this Board must enter a Final Order on sanctions, if any, for Recordkeeping violations, plus costs, if any. The review is conducted pursuant to K.S.A. 77-527 of the Kansas Administrative Procedure Act. The Board previously heard arguments of the parties and asked questions of counsel and the Respondent. The parties submitted Briefs in support of their arguments and were permitted sufficient time to argue their respective sides of the case.

Pursuant to K.S.A. 77-527(d), the Board exercises *de novo* review and has all the decision-making power that the Board would have had to render a final order if the Board presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law. Further, in reviewing the findings of fact, the Board shall give due regard to the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The Board shall also consider the whole agency record in rendering its Final Order, which it has done in this matter.

The issues considered by the Board are those as if no Final Order had ever been previously rendered in this case. The Board accepts, adopts, and incorporates by reference herein, each Finding of Fact set forth in the Initial Order, as explicitly modified by the 2014 Opinion and 2017 Opinion issued by Judge Theis. The Board accepts, adopts, and incorporates by reference herein, each Statement of Fact, Conclusion of Law and Order of the Court set forth in each of the Opinions.

The Petitioner Board has the burden to prove its allegations by a preponderance of the evidence, which it has done with regard to the allegations of recordkeeping violations. The Petitioner Board must meet the burden of proof to establish that Respondent committed violations of the Healing Arts Act that are sufficient grounds to revoke her license or take other disciplinary action. The evidence relied upon must be substantial and competent when viewed in light of the entire record. The evidence relied upon by this Board is clearly substantial and competent when viewed in light of the entire record. K.A.R. 100-24-1 is subject to written standards and the sanctions are administered in a uniform and consistent way. The detailed Guidelines for the Imposition of Disciplinary Sanctions, are published, easily available to the public, easily and consistently applied and have been in existence for many years. The evidence, case law, prior decisions of the Board and the Guidelines provide clear direction to the Board. No disparate outcomes are present as the Agency and the Board have consistently and uniformly applied these Sanctioning Guidelines.

The Board must decide whether Respondent committed a violation of the Healing Arts Act as set forth in paragraphs 14, 31, 44, 55, 63, 71, 80, 90, 98, 106, 118 and 130 of the Initial Order, as it relates to the Board's allegation that "the Licensee's practice was in violation of K.S.A. 65-2836 (k) in that the Licensee violated K.A.R. 100-24-1 in failing to meet the minimum

requirement for maintaining adequate patient records" as alleged in paragraph 16 c of the Petition. The Board concludes that Dr. Neuhaus's recordkeeping practices are deficient, and do not attack her evaluation and treatment recommendations. Patient records should stand on their own and be sufficient to permit another reviewing physician to receive adequate knowledge to permit the reviewing physician to rely on the adequacy of the patient records without the aid of other supplementation. The purposes for completeness are several, but primarily for accurate patient care. Consistent with the findings of the Court in the Opinions, the Board finds that, upon full consideration of all relevant facts, arguments, and circumstances in this proceeding, for Respondent's violations of the Healing Arts Act, Respondent's license to practice medicine and surgery in Kansas should be subject to the following discipline: Revocation of License and assessment of a portion of the costs. This sanction is the conclusion of the Board after applying the Guidelines as set forth hereafter.

Placement in Grid

The Board looked very closely at the Sanctioning Guidelines and the chart to determine which Grid and Gridline applied to this disciplinary matter. The Board moved from left to right to determine the appropriate grid, gridline and column which applied.

The Board considered the distinction between General Misconduct and Recordkeeping Violations. The Board examined the key issue of failure to maintain adequate patient records (Recordkeeping Violations). The Board was very careful and deliberate to be sure that their consideration did not suggest any evaluation of standard of care as "Standard of Care" is not an issue in this disciplinary matter. The pivotal question the Board consider was which of the two choices applied: Did Dr. Neuhaus's violation of K.S.A. 65-2836(k) rest exclusively in a defect of

recordkeeping required by K.A.R. 100-24-1 (for recordkeeping violations)? Or did Dr. Neuhaus's violation rest more in the impact of the rule violation on her patients or other providers (general misconduct)? The Board compared and contrasted Grid Heading No. 2A & 2B (General Misconduct) with Grid Heading No. 10A & 10B (Recordkeeping Violations), while eliminating the other categories of offenses and eliminating Gridlines 10C, 10D, 2C and 2D. The Board considered and discussed that both grid placements could potentially apply given the circumstances; Respondent's misconduct may be placed in either one of two Board Sanctioning Grid Categories (see generally, Guidelines at pages 6-7 and 14-15). Either grid is applicable based upon the broad categories involved. Respondent's conduct may be placed into the General Misconduct Category in that her misconduct was potentially harmful to patients and was disruptive to Board processes. Sanctioning Guidelines at Section II, Category 2, p. 6. Respondent's misconduct may also be placed into the Patient Record Category regarding failure to maintain or create documentation. *See* Sanctioning Guidelines at Section II, Category 10, p. 14.

After careful review and analysis by the Board, the Board focused on Grid 10 as the category of offense that applied to Dr. Neuhaus.

Placement in Gridline

Next, the Board analyzed the sanctioning Guidelines and selected the appropriate gridline within the broader category. Comparing and contrasting Gridline 10A and 10B, the Board settled on gridline 10A, as it believed that there was sufficient competent evidence to support that the Respondent "intentionally failed to create documentation." (See paragraphs 20 – 23, 41, above and the discussion of aggravating and mitigating factors at section A.k., below).

The Board finds that Dr. Neuhaus "intentionally" maintained her records in an inadequate manner. "Intent" is defined in the Sanctioning Guidelines as the conscious objective or purpose to accomplish a particular result. The Facts above establish that Respondent's actions were intentional, willful and knowing; the actions were not the result of negligent, reckless or careless behavior, since they exceeded this threshold. The Respondent's actions were not nefarious because they were not taken for illegal purposes. The Board is aware that Judge Theis is critical of this finding because, according to the view of the Court, it puts Dr. Neuhaus into "a higher category in one grid for the application of sanctions." However, the Board took a hard look at sanction Grid Heading No. 10: Patient Records, and compared the two gridlines A & B, settling on Gridline 10A.

The Board also discussed, debated and considered the purpose, reason or mindset in violating the rule of the Board was the focus of the sanction. The actions of Respondent were clearly, intentional, knowing and willful, which could place the action within the Category of Offense 10A, rather than 10B.

Placement in Column

When moving from left to right across the Sanctioning Guidelines, after selection of the potential grid and gridline, the appropriate column must be considered. When counting from left to right, there are 7 columns. The first column is titled "Category of Offense" and the seventh column is on the far right and is titled "Presumed Sanction as Modified for Prior Boar Actions (Prior to Adjustment for Aggravating/Mitigating). The Board considered each of the possible columns and settled on one: 10A, Column 5. The Board determined that Dr. Neuhaus' eleven

(11) rule/recordkeeping violations fell within column 5 because there are multiple instances within the same category of offense in this case. The Board discussed and considered this at some length, not because there was any disagreement on this point, but because the Court attacked the Board's definition and application of "Multiple Instances." (2017 Opinion at p. 33-34). The Court opined that Dr. Neuhaus's conduct involved multiple patients, but it did not constitute multiple instances because it was the "same character of violation for each" patient. Instead, the Court believed that "multiple instances" is reserved for different categories of offenses. The Board discussed this and disagreed (See para. 46 above and the discussion of aggravating and mitigating factors at section A.d., below). The Board had no difficultly concluding that the eleven (11) separate and individual patients should constitute eleven separate incidents, or incidents, of inadequate recordkeeping. The Board does recognize and acknowledge that there are circumstances when multiple patients could or should be considered to be the same character of violation and not treated as multiple instances. However, this might occur in a more limited circumstance when the physician was doing something very repetitive. In a prior disciplinary matter which involved recordkeeping the infraction arose in an electronic recordkeeping environment and the erroneous action of the physician involved multiple and repetitive actions. That situation was an error that got repeated, through keystrokes and the repetitive nature of the action, which compounded the problem to multiple patients. Yet, the Board distinguished that case, finding that it was a more routine act that was multiplied due to the repetitive nature of the record, not because there were multiple patients involved. As a result, the multiple instances dictate the placement in the third column ("Multiple Instances – Same Category of Offense") of the Chart.

It should also be noted that although the Board reviewed column 7, it did not apply it to this case. This is because this column applies to "Prior Board Actions" and the Court outright rejected that there were "prior board actions" which applied in this case. (See paragraph 50, above).

Considering the Range of Sanctions

Once the proper grid, gridline and column of the Sanctioning Guidelines was chosen, the Board determined the appropriate sanction within the range of sanctions available for the given grid and gridline. The presumed sanction in gridline 10A, column 5 is 30-89 day suspension and $2500-$5000 Fine for each instance (see Guidelines, p. 5). The initial sanction was the maximum within the range of options available as set forth in the Guidelines. A suspension would be the "presumptive" sanction based upon this gridline and column selection, prior to applying the aggravating and mitigating factors. Suspension of the Respondent's license and a fine for "each instance" was a possibility. Yet, the Board determined that revocation was the appropriate sanction after consideration and application of the aggravating and mitigating factors (See extensive and detailed analysis below).

Aggravating and Mitigating Factors

AFTER the sanction is determined, the Board considered and applied each aggravating and mitigating factor which applied to this case. The following aggravating and mitigating factors were considered by the Board and are identified with a general statement describing how the factor modifies the presumptive sanction:

A. Factors relevant to the misconduct committed:

a.) **Nature and gravity of the allegations:** Small mitigating factor.

b.) **Age or vulnerability of patient:** Strong aggravating factor. Many of these patients were minors and were particularly vulnerable given their physical and mental condition, as presented to Respondent.

A significant concern of the Board is the age of the patients involved. These patients are particularly vulnerable, given their adolescent ages. All eleven (11) patients were 18 years of age or younger, with more than half being 15 or younger. Each of the patients identified was young and regardless of other factors makes them uniquely vulnerable: Patient #1 (14 year old); Patient #2 (10 year old); Patient #3 (15 year old); Patient #4 (15 year old); Patient #5 (15 year old); Patient #6 (16 year old); Patient #7 (15 year old); Patient #8 (13 year old); Patient #9 (15 year old); Patient #10 (18 year old); Patient #11 (16 year old). (Initial Order at Findings of Fact Nos. 25, 32, 56, 64, 72, 81, 91, 99, 107, 119; 2012 Agency Record 01039, 01040, 01041, 01043, 01044, 01045, 01046, 01047, 01048, 01049, 0101050).

Another significant concern of the Board is the mental state of the patients, as presented and noted in at least some portion of the record. These patients are particularly vulnerable, given their stated mental state, making them even more susceptible to other potential health concerns and risks. Many of the patients had some evidence of experiencing harmful behavior(s), either through suicide, hurting themselves or thoughts of death or traumatic event; These are red flags and indicators that independently suggest vulnerability, increasing the personal and professional responsibility to carefully and fully document the patient records: Patient #2 ("the DTRBE Diagnosis report shows that there had been recurrent thoughts of death (not just fear of dying), recurrent suicide ideation without specific plan,"); Patient #3 ("to diagnose Patient #3 with Major Depressive Disorder, Single Episode, Psychotic Features"); Patient #4 ("The Licensee diagnosed Patient #4 with Acute Stress Disorder, Moderate. This diagnosis requires that the patient has "experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to physical integrity of self or others" (DSM-IV-TR)"); Patient #5 ("In the computer generated reports, the diagnosis is Major Depressive Disorder, Single Episode."); Patient #6 (the Licensee shows a diagnosis of Acute Stress Disorder and shows that the patient has "experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to physical integrity."); Patient #7 (although there is conflicting information, "the GAF report generated by the Licensee's computer and the DTREE Positive DX report both suggested that Patient #7 was suicidal."); Patient #8 ("Although it is not in the patient's file, the Licensee testified during an inquisition or court hearing that she diagnosed Patient #8 with Suicide

Ideation and Acute Stress Disorder. This diagnosis is not found in the patient's record maintained by the Licensee."); Patient #10 ("In the Licensee's computerized DTREE Positive DX report and the GAF report, the Licensee reaches a diagnosis of Acute Stress Disorder, Severe" and "Under the DSM-IV-TR diagnostic criteria, it is necessary for a patient to have this diagnosis to have 'experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to physical integrity.'"); Patient #11 ("The patient record of Patient #11 indicates that she might be in danger of hurting herself and yet there is nothing contained in the record to assess this situation. The Licensee ignored this."). (Initial Order at Findings of Fact Nos. 39, 32, 48, 59, 68, 76, 86 , 94 , 111-112, 115, 127; 2012 Agency Record 01041, 01040, 01042, 01043, 01044, 01045, 01046, 01047, 01049-01050, 01051).

"It must be noted that in each of the 11 cases above the Licensee diagnosed each patient as having a major mental illness. In some cases, the patients were, according to the Licensee's diagnosis, suicidal." (Initial Order at Conclusion No. 4; 2012 Agency Record 01051). This is not an attempt to reconsider a standard of care issue related to making of mental health evaluations or diagnosis, as standard of care concerns have been removed by the Court; instead, this conclusion is noted for the significance of the recordkeeping violations.

c.) **Capacity or vulnerability of patient or victim of licensee's misconduct:** Aggravating factor, given that the patient was vulnerable and heavily reliant upon the Respondent. The patients were 10-18 years of age, being young and inexperienced. See detailed summary and citation to the record in the immediately preceding category.

d.) **Number/frequency of act:** Aggravating factor because there are eleven (11) patients involved and each has numerous act of intentional improper and incomplete recordkeeping. The Board feels very strongly that deficient patient recordkeeping harms the patient as well as is harmful to the profession and the Board. Patient records are often relied upon by doctors or by others for other legitimate purposes, including for verification of the resulting diagnosis, regulatory oversight, allegations of inept, unprofessional or illegal conduct, or for a second opinion on treatment, all of which justify the need for complete, detailed, comprehensive and accurate records. It is a rare situation when the paucity or patchiness of a physician's records will be supplemented with sworn testimony to describe what is not found in the records. ("Admittedly, the testimonial evidence proffered by Dr. Neuhaus herself competed with the dismal state of her records.")(2014 Opinion at p. 74).

The Board finds that each act of inadequate or incomplete recordkeeping for an individual patient is considered a separate incident. If there are multiple deficiencies found in a single patient

record, these are not separate incidences, provided they are all for the same patient. By contrast, each patient is a separate incident, regardless of the number of inadequacies in that patient's medical records. This is consistent with the basic tenet and goal for quality healthcare -- individualized diagnosis and treatment. Each individual patient should not be lumped together in one group. Although all eleven (11) individual patients may be combined into the same general category of offense, they are all individual persons and each case is a separate and distinct "incident." This Board does not conclude that recordkeeping violations for the eleven persons constitutes a single offense just because they are in the same category of offense. The Board desires to advance the fundamental principle, and believes that each physician should know, that they treat each patient separately in the clinical setting. There is no cookie cutter approach, and the individualized care should be protected. Therefore, deficient or inadequate recordkeeping is a separate incident when a different patient is involved. Although the example is hyperbole, what if more than one patient died because of complications? The injury or death of multiple patients would certainly not be described as a single incident. Multiple persons affected by the same or similar recordkeeping deficiencies should be treated as multiple instances. This is not just a goal or theoretical principle aspired to by the Board. There are numerous instances in which the Board, or the medical profession, would likely treat the same category of offense as constituting multiple instances. For example, separate malpractice claims, suits or settlements, even if involving the same category of offense, would be treated as separate, and thus multiple, offenses. Similarly, if a physician engages in similar conduct that results in two DUI convictions, this Board would look at the same category of offense as a "multiple offense" as the title was intended. The Board would not, and does not, reserve the application of "multiple instances" only for different categories of offenses. Similarly, the National Practitioner's Data Bank would treat each patient as a different incident for reporting purposes.

e.) **Injury caused by misconduct:** Minor impact because there was not tangible personal injury to the patient.

f.) **Frequency of commission of acts:** Considered an aggravating factor because there have been multiple and repeated acts of recordkeeping violations by the Respondent. Although there have been no known acts of recordkeeping violations between 2001 and the acts underlying the Petition filed in 2010, there are prior acts committed by Licensee.

g.) **Potential for injury ensuing from act:** There is injury to the patient and the profession.

h.) **Consensus about blameworthiness of conduct:** Respondent is solely to blame for the conduct.

i.) **Abuse of trust:** The acts of improper recordkeeping did not necessarily abuse the trust of a particular patient. However, the acts abuse the trust of the Agency and the Board, given that there is a Stipulation in place that Respondent has abused and failed to meet.

j.) **Consent of patient:** Not applicable.

k.) **Intentional vs. inadvertent:** Strongly aggravating. The actions of Respondent were clearly and admittedly intentional, willful and knowing. The acts of improper recordkeeping were not inadvertent. The Board is much more forgiving of mistakes. However, the Board does not consider the actions of the Respondent to be inadvertent or honest mistakes, made negligently or recklessly. The Board notes Respondent's own testimony that she was intentional in her effort to conceal the information. When Doctor Milfeld inquired of Dr. Neuhaus and asked for her interpretation of "intentional" action, Dr. Neuhaus did not shy away from her disclosure that she was making a conscious effort not to document, for privacy purposes. Dr. Neuhaus attempted to put the actions in context by explaining: "Well, I don't know if anyone is familiar with this case, but a number of these patients' records were discussed at length on the Bill O'Reilly show." (Tr. at p. 59, ln. 9-17). Dr. Neuhaus's own lawyer resisted objections to prevent testimony on this subject and argued that the hearing was de novo, expressing that it was expected that the Board would gather whatever information that it wanted to justify a decision (Tr. at p. 59, ln. 18 to p. 60, ln. 25). Dr. Neuhaus continued, explaining her "motivation" and specific reason for not having personally identifying data in the patient records that could be used to identify the patients. (Tr. at p. 61, ln. 2-24). This issue was also previously addressed in the Conclusions of the Initial Order: "The Licensee attempts to explain why there is nothing of hers in these patient files. She argues that was to protect the patients. This argument has no merit since each patient was clearly identified. How the nonexistence of specific patient documentation protects patients is not clear and is without merit." (Initial Order at Conclusion No. 6; 2012 Agency Record 01052). Additionally, Respondent testified in the initial hearing (on September 15 and 16, 2011) that she intentionally omitted information on the medical records because she was trying "to protect my patients' privacy as much as I could." (ROA 003121). The Board has reviewed the evidence in the record and concludes that the substantial competent evidence supports the reasonable conclusion that the stated motivations of the Licensee was to create an inadequate record and that the action was intentional and purposeful. This fails to meet the minimum recordkeeping requirements and the Board believes that this purposeful desire to protect the patient(s) is an intentional action by the Licensee. The Board concludes that this determination is supported by substantial competent evidence in the record and any other conclusion is unreasonable.

l.) **Motivation of criminal, immoral, dishonest or personal gain:** The District Court found that Respondent's conduct was not nefarious in nature. While Respondent was paid for her services there was no additional financial incentive created by failing to properly document

the medical records of patients. The Board does not allege criminal, immoral, dishonest or personal gain by the Respondent.

m.) **Length of time that has elapsed since misconduct:** There have been no known acts of recordkeeping violations between 2001 and the acts underlying the Petition filed in 2010. The acts complained of occurred several years ago, but the Respondent has testified that she has closed her practice. However, the time which has elapsed since Respondent's misconduct does not mitigate her violations to a point where revocation is inapplicable. Furthermore, the length of time is simply because the proceedings have lingered at various stages and the disciplinary process has been protracted.

B. Factors relevant to the licensee:

a.) **Age:** Respondent is not young or new to the practice, which might provide some leniency. Instead, Respondent is more mature in age and presumably more experienced in life and should know how to satisfy the legal obligations of the profession. Respondent is not new to the profession as she has been a licensee since 1996; she is an experienced practitioner who should know of her duty to document within a patient's record.

b.) **Experience in practice:** Aggravating factor because the Respondent is experienced, not only in the practice, but in the methods and requirements of the Kansas Healing Arts Act.

c.) **Past disciplinary record:** Exceptionally aggravating, given that there is a past record of disciplinary activity for this same offense – recordkeeping violations. While the issues in this case are different, the Respondent continues to have problems with accurate and adequate patient records as defined by K.A.R. 100-24-1. The Board considers this to be the most significant and important factor in Section B. It is an aggravating factor which applies to the Licensee.

d.) **Previous character:** There is no evidence to support that Respondent is of poor moral or social character. Respondent has positively contributed to certain aspects of her profession and donated her time, energy and talents, which suggests that she has a good moral and social character. Respondent has "not withdrawn from service to the medical community." (Tr. at p. 30, ln. 1-9).

e.) **Mental or physical health:** Not applicable.

f.) **Personal circumstances:** Not applicable.

C. Factors relevant to the disciplinary process:

a.) **Admission of key facts:** Aggravating factor as the key facts are admitted or undisputed based upon the record, as directed by the District Court. The key facts establish numerous acts of improper recordkeeping.

b.) **Full and free disclosure to the Board:** There is no evidence that Respondent has attempted to conceal facts. Respondent has fully and freely disclosed information to the Board. However, the Presiding Officer found that Respondent's testimony was lacking in credibility and persuasiveness.

c.) **Voluntary restitution or other actions taken to remedy the misconduct:** There is no evidence that Respondent has taken any initiative to seek out or receive additional training, education or supervision on recordkeeping over the years that this matter has been proceeding. There is also no evidence that Respondent has taken any initiative to seek out or receive additional training, education or supervision on recordkeeping after the Stipulation was entered in 2001. In fact, Respondent and legal counsel admit that nothing has been done to improve or educate Respondent in this area. Respondent points out that she was not "required" to take classes or receive any additional training as part of the Stipulation and has not otherwise been imposed by the Board. However, someone who recognizes that they have been found to engage in numerous and repeated recordkeeping violations and shows a genuine desire to change past wrongful behavior should take the initiative in this area. The failure to take "any steps" toward further training and/or education to correct these recordkeeping deficiencies, either after the Stipulation was entered in 2001, or the Court issued its Opinion in March of 2014, is evidence of a general disregard for the spirit, intent and language of the Stipulation that "Licensee shall comply with all provisions of K.A.R. 100-24-1, with respect to medical record-keeping."

d.) **Bad faith obstruction of disciplinary process or proceedings:** Respondent has fully cooperated with the disciplinary process and proceedings.

e.) **False evidence, false statements, other deceptive practices during disciplinary process or proceedings:** Not applicable.

f.) **Remorse and/or consciousness of wrongfulness of conduct:** The Board concludes that it does not appear that The Licensee recognizes that she has done anything wrong. It also appears that Respondent has not learned from prior disciplinary actions taken by the Board and the Respondent fails to express contrition or otherwise acknowledge the wrongful nature of her conduct or the negative impact it has upon the profession. The Board observed that Respondent felt justified in her actions and showed no signs of remorse.

g.) **Impact on patient:** There was no evidence that Respondent provided an actual threat to the patient (Tr. at p. 23, ln. 3-4). The Board expressed grave concern that these patients may have had a unique need for follow up because Respondent testified that some exhibited suicidal ideation or other indicators of mental illness or psychiatric problems. There were numerous procedural alternatives to ensure completeness and confidentiality of medical records (sueh as assigning a random number or keeping a private ledger to link the patient to a number) in order to both comply with the law and exercise the Respondent's concern for patient privacy and confidentiality from third parties. Failure to properly document denies the patient of the opportunity to receive proper follow up care and treatment.

h.) **Public perception of protection:** The public perception is damaged, and the negative impact upon the public trust in the profession, by the actions of Respondent through her complete disregard for recordkeeping requirements.

D. General aggravating and mitigating circumstances:

a.) **Licensee's knowledge, intent, degree of negligence:** The actions of Respondent were clearly and admittedly intentional, willful and knowing. The acts of improper recordkeeping were not inadvertent or negligent.

b.) **Presence of other violations:** Not applicable.

c.) **Present moral fitness:** There is no evidence of the present moral fitness of the Respondent.

d.) **Potential for successful rehabilitation:** The history for the Respondent suggests that Respondent is incapable of successful rehabilitation.

e.) **Petitioner's present competence in medical skills:** There is no evidence that Respondent has taken any initiative to seek or receive any additional training, education or supervision on recordkeeping over the years that this matter has been proceeding. There is also no evidence that Respondent has taken no initiative to seek out or receive additional training, education or supervision on recordkeeping after the Stipulation was entered in 2001. In fact, Respondent and legal counsel admitted that nothing has been done to improve or educate Respondent in this area.

f.) **Dishonest/Selfish motives:** The Court found Respondent was not acting with nefarious motive.

g.) **Pattern of misconduct:** There have been multiple and repeated acts of recordkeeping violations by the Respondent; both present and past. The recent acts which form

the basis for the Petition involve eleven (11) separate and distinct patients and involve numerous recordkeeping violations.

h.) **Illegal conduct:** The Court found Respondent was not acting with nefarious motive. Respondent has never been charged with a crime and this is not an immoral act.

i.) **Heinousness of actions:** Not applicable because there is no allegation that the Respondent committed heinous acts.

j.) **Ill repute upon profession:** The Board considers this to be an aggravating factor because the public perception is damaged, and there is a negative impact upon the public trust in the profession, when a physician has a disregard for minimum recordkeeping requirements. The Mission of the Board, the Philosophy of the Agency and the policies behind the Sanctioning Guidelines are all implicated by inadequate recordkeeping.

k.) **Personal problems (if there is a nexus to violation):** Not applicable.

l.) **Emotional problems (if there is nexus to violation):** Not applicable.

m.) **Isolated incident unlikely to reoccur:** The history presented by Respondent indicate that the incident of recordkeeping violations are likely to reoccur; Respondent lacks any potential for rehabilitation or remediation by this Board based, in part, upon the fact that Respondent failed to learn from her prior misconduct and correct her behavior. Respondent has taken no action to prove otherwise. There is no evidence that Respondent has taken any initiative to seek out or receive additional training, education or supervision on recordkeeping over the years that this matter has been proceeding. There is also no evidence that Respondent has taken no initiative to seek out or receive additional training, education or supervision on recordkeeping after the Stipulation was entered in 2001. In fact, Respondent and legal counsel admit that nothing has been done to improve or educate Respondent in this area.

n.) **Public's perception of protection:** Disciplinary sanctions in general send a strong message to the general public that the Board is interested and committed to protecting the integrity of the profession and protecting the public. The Mission of the Board, the Philosophy of the Agency and the policies behind the Sanctioning Guidelines are all implicated by a physician's inadequate recordkeeping.

Conclusions of the Board Regarding Discipline

Proper, complete and accurate medical recordkeeping and sufficient documentation is needed for multiple reasons and justifications. The purpose for maintaining patient records include: (1) to furnish documentary evidence of the patient's history, symptoms and treatment; (2) to serve as a basis for review, study and evaluation of the care rendered; (3) to ensure the records provide meaningful health care information to other practitioners should the patient have his or her care transferred to another provider; and (4) to assist in protecting the legal interests of the patient, and responsible practitioner. Second opinions are no less important. Second opinions must meet the same level of minimum documentation. This minimum threshold of acceptable recordkeeping protects the patient, the physician and the profession. This is consistent with the allegation of paragraph 16.c. of the Petition which "states a violation of K.S.A. 65-2836(k) based on a violation of K.A.R. 100-24-1 in relation to the maintenance of adequate medical records by Dr. Neuhaus." This is also consistent with prior orders of the court where the Court found that this Regulation of the Board "is not only for the protection of the public, but also for the protection of an individual licensee of the Board of Healing Arts from misdirected claims." (2014 Opinion at pp.78-79). In these cases, the potential for harm is great because failure to meet the minimum recordkeeping requirements prevents adequate patient follow-up and/or subsequent evaluation, and can inhibit the ability to determine whether the patient's medical condition has improved. Without such documentation, adequate and safe patient follow-up is significantly hindered. The allegation of paragraph 16.c. "states a violation of K.S.A. 65-2836(k) based on a violation of K.A.R. 100-24-1 in relation to the maintenance of adequate medical records by Dr. Neuhaus." The Court found that this Regulation of the Board "is not only for the protection of the public, but also for the protection

of an individual licensee of the Board of Healing Arts from misdirected claims." (2014 Opinion at pp.78-79).

After considering the aggravating and mitigating factors the Board concludes that the proper and appropriate sanction is revocation. The aggravating factors heavily outweigh the mitigating factors. The aggravating factors provide an overabundance of justification for reaching the conclusion that revocation is the appropriate sanction in this case.

The Board considered and has articulated herein a specific view as to what motivates its choice of the particular sanction selected. Suspension was initially chosen and selected from the range of sanction options available. Then, the Guidelines permit the Board to move to increase or decrease the range based upon the aggravating and mitigating factors. The Board moved from left to right, moving from column 5 to column 6, and then found that the aggravating factors justified an increase in discipline to elevate the sanction to revocation. The sanction chosen relates to, and rationally advances, the agency's public purpose as well as evidence credible consistency of application of the Guidelines. These specific purposes are the following: Revocation is appropriate to achieve the intended remedial purpose, protection, and punishment. Removing the Licensee from practice protects the public from future misconduct. Additionally, removing or preventing the Licensee from practice is appropriate because the misconduct demonstrates that the licensee no longer deserves the privilege of licensure.

Authority to Award Costs

K.S.A. 65-2846 provides that if the Board's decision is adverse to Respondent, costs may be assessed to the parties in a proportion that the Board may determine based on "all relevant circumstances...." The Board finds that, upon full consideration of all relevant facts, arguments,

and circumstances in this proceeding, the costs of this proceeding, should be assessed against Respondent.

Costs to be Considered

Petitioner submitted an Amended Statement of Costs on December 29, 2014. The itemization of costs only included the costs through the Administrative Hearing in September of 2011 and did not include costs from the time Presiding Officer Gaschler issued the Initial Order. The Amended Statement of Costs did not include the costs of the prior Final Orders, the appeals to the District Court, the remands to the Board, the hearing on December 11, 2014, or subsequent proceedings or litigation which followed the Administrative Hearing. The additional costs through the date of the issuance of this Final Order would be substantial but would be difficult to quantify. Some costs were not tracked since this time and many of these additional costs could not be assessed against Respondent because they either were not statutorily authorized or incapable of being computed based upon the Agency's billing procedures. As a result, the Board limits the costs considered to those included in the Amended Statement of Costs filed on December 29, 2014.

Apportionment of Costs

Respondent objects to the Petitioner's Amended Statement of Costs, claiming that the revised statement does not attempt to differentiate between the costs incurred for the several claims and advances a methodology without citation to or reliance on legal authorities. The Board disagrees with Respondent's analysis. Petitioner does differentiate between costs and proposes a methodology for the Board to consider.

The Board's Order is adverse to the licensee and the Board is a prevailing party, which entitles the Board to cost shifting. A prevailing party is the party to a suit who successfully prosecutes the

action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his or her original contention. The prevailing party is one in whose favor the decision or verdict is rendered and judgment entered. With respect to the specific question of attorney fees, it has been stated a prevailing party is the person who has an affirmative judgment rendered in his or her favor at the conclusion of the entire case. *Curo Enterprises, LLC v. Dunes Residential Services, Inc.*, 51 Kan.App.2d 77, 342 P.3d 948 (2015).

The Board was ultimately the prevailing party herein. Although not "necessarily to the extent of [it's] original contention," it did prevail on the issue of recordkeeping violations which resulted in the revocation of Respondent's license. The District Court upheld and sustained many of the factual determinations regarding the recordkeeping violations and the District Court remanded the case for further proceedings on the appropriate sanction. While the Court rejected the standard of care violations, there is no correct way to calculate the degree of success which would support a finding of a specific percentage of success. The apportionment of the costs is not always easily determined. Just because it is difficult to determine or based upon an imprecise method this is not reasonable justification for refusing to make a reasonable attempt to apportion the costs. One could reasonably argue that many of the costs of the proceedings are the same, or nearly the same, regardless of the extent to which the party prevails. There are certain fixed costs and overhead associated with pursuing the action which make apportionment difficult. Only when the cost or expense is wholly related to an unsuccessful claim, should it be excluded as an expense. There are some costs which contribute to the overall cost of the proceedings and the costs to the prevailing party cannot be excised from the total. When the cost or expense is intertwined with both successful and unsuccessful claims, the cost is difficult to divide and is not easily explained

in a strict mathematical formula or percentage calculation. The ultimate desire is to do the best possible to apportion the costs appropriately given the circumstance involved. Even the statute itself recognizes that "the nature of the proceedings" and "the level of participation by the parties" may be considered. *See* K.S.A. 65-2846(a).

There may not be a bright line to follow when making a reasonable attempt to apportion costs. The only obvious expense which could be excluded would be any expert expense when that expert testimony was *only* called for the limited purpose of supporting the standard of care allegations, which were later rejected by the District Court. In this specific instance, this expert cost should be excluded. However, most experts provided additional, more general testimony, which aided the trier of fact in other areas and the factual information provide was not limited only to standard of care testimony.

It is less clear in the case of a cost of a court reporter, administrative law judge, copy costs or other expenses associated with the overall disciplinary action. These expenses are general in nature and not easily applied to a mathematical formula based upon the numerical breakdown of successful and unsuccessful claims. While the cost may reasonably be reduced, the exact amount is an inexact estimation. The law which permits the recovery of costs and the assessment is broad. The statute dictates that "costs incurred by the Board in conducting any proceedings under the Kansas Administrative Procedure Act may be assessed...." (K.S.A. 65-2846(a)(emphasis added)). Additionally, the Board may determine these costs "upon consideration of all relevant circumstances including the nature of the proceeding and the participation by the parties". (K.S.A. 65-2846(a)). The Board has attempted to apply these principles when reviewing the Amended Statement of Costs.

The Petitioner submits an Amended Statement of Costs suggesting an apportionment of one-third. The initial premise of Petitioner is that "[a]ll of the costs in the matter were incurred through the process of addressing all of the allegations in the Petition and not one single cost that was incurred could be attributed to solely addressing the Respondent's violation of K.S.A. 65-2836(k)." (*See* Petitioner's Amended Statement of Costs at p. 2). Petitioner's rationale to support a percentage application is that ". . . the only reasonable distribution of costs in this matter is to assess 1/3rd of all costs in this matter to Respondent because 1/3rd is the amount of allegations this Board was directed to resolve by the District Court." (Petitioner's Amended Statement of Costs, p. 2). While this is partially true, the Board disagrees that this is "the only reasonable distribution of costs." There are other reasonable methods of distribution and apportionment.

The Board strongly considered the prospect of assessing fines against Respondent, *in addition to* imposing the sanction of revocation and assessing costs. Assessing an administrative fine would have been justified based upon the facts of the case, the statutes (K.S.A. § 65-2863a) and the Board's Sanctioning Guidelines. However, the Board elected not to go that far, concluding that the assessment of costs would be substantial and the imposition of fines in addition thereto could be viewed as "*too harsh*" under the circumstances. By taking this position, the Board fully intends to shift as much of the cost of these lengthy proceedings as possible to Respondent. As such, the Board could award a larger percentage of the costs against Respondent than suggested by Petitioner.

The Petitioner did not include all of the costs that could be assessed against Respondent. The Amended Statement of Costs only included costs incurred through the Administrative Hearings conducted in September of 2011 (there were costs dated February 28, 2012, but relate back to the

hearings). Petitioner did not include the costs of the proceedings after that time period. There are costs incurred by the Board for extensive proceedings thereafter which could be assessed against Respondent. Since those costs are not included in the Statement of Costs and Petitioner has narrowly interpreted and applied the cost shifting statute, the Board will not now attempt to quantify or include them. However, the Board considers that the one-third apportionment of the Amended Statement of Costs is actually a smaller fraction of the entirety of all the costs incurred by the Board and associated with this disciplinary action. While the Board does not challenge the position of Petitioner in this regard, the amount of costs, as a smaller portion of all costs incurred, is a fact which supports the assessment of costs pursuant to K.S.A. 65-2846(c).

Furthermore, while Respondent objects to Petitioners methodology, Respondent offers no alternative analysis. Presumably, Respondent simply requests that "zero" costs be assessed against her and seeks to avoid any cost shifting whatsoever. Since the Board cannot look to Respondent for any alternative evaluation method, the Board looks to the suggestions of Petitioner for guidance. Respondent filed a Brief titled "Respondent's Objection To Petitioner's Revised Statement Of Costs," which objected to the methodology for differentiating between the costs incurred, but provides no direction or argument for an alternative methodology. Respondent simply argues for "no costs." This, however, would not be a reasonable approach under the circumstances.

In an attempt to look at this assessment of costs from another perspective, the Board has examined the nature and extent of the costs more closely and also inquired about additional costs that may have been incurred, but not included in the summary provided by Petitioner. The Board also looks to other case law to support this decision. In the 1980s, The Kansas Court of Appeals,

and later the Kansas Supreme Court, adopted the definition of "prevailing party" from Black's Law Dictionary 1069 (5th ed. 1979) as: "The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered. [Citation omitted.] The party ultimately prevailing when the matter is finally set at rest." The Board is the prevailing party in this disciplinary matter. "With respect to the specific question of attorney fees, it has been stated a prevailing party is the person who has an affirmative judgment rendered in his favor at the conclusion of the entire case." *Szoboszlay v. Glessner*, 233 Kan. 475, 482, 664 P.2d 1327 (1983) (quoting *Schuh v. Educational Reading Services of Kansas*, 6 Kan. App. 2d 100, 101, 626 P.2d 1219 [1981]); *See* also Black's Law Dictionary 1298 (10th ed. 2014) (prevailing party is a "party in whose favor a judgment is rendered, regardless of the amount of damages awarded"). Although monetary damages are not at stake in this disciplinary proceeding, the same analysis could be applied herein – The District Court found in Petitioner's favor and Petitioner's actions resulted in a successful outcome, given the relief requested. This is an outcome determinative analysis that would justify an award of all of the costs, or at least a larger percentage of the costs to be assessed. Under a successful outcome approach, the Board would not be limited to an award of costs based only upon the mathematical calculation or division of the amount of successful claims. Under this analysis, the Petition was successful and achieved the ultimate outcome and relief it requested in the Petition.

Respondent argues that that the K.S.A. 77-526(c)(d) and the case of *Water District No. 1 of Johnson County v. Kansas Water Authority*, 19 Kan. App.2d 236, 241 (1994) requires that the statement of costs "must be supported by substantial and competent evidence." The Board agrees

that substantial and competent evidence is required, but believes that such has been provided – the substantial and competent evidence consists of the Exhibits and attachments to the Amended Statement of Costs. These attachments provide the Board with the evidence necessary to review and determine that the actual costs are associated with this matter and are related to the cause to which the Petitioner seeks to assess the charges. The methodology advanced by Petitioner is based upon substantial and competent evidence. Furthermore, the Respondent has not produced conflicting evidence provided an alternative methodology, nor argued that the Exhibits supporting the request are invalid or fail to be associated with Respondent's disciplinary case. Thus, the evidence submitted by Petitioner remains undisputed. An attack on the methodology, without more, is simply an insufficient challenge by Respondent. Therefore, the Board rejects Respondent's attempt to eliminate the assessment of costs altogether based upon the arguments presented. Instead, the Board finds that the Amended Statement of Costs is not based upon an arbitrary allocation, but instead is based upon a reasonable apportionment of identifiable invoices and verifiable receipts, which justify the costs sought by Petitioner.

K.S.A. 65-2846 provides that if the Board's decision is adverse to Respondent, costs may be assessed to the parties in a proportion that the Board may determine based on "all relevant circumstances...." The Board finds that, upon full consideration of all relevant facts, arguments, and circumstances in this proceeding, a portion of the costs of this proceeding should be assessed against Respondent. The Board finds that, upon full consideration of all relevant facts, arguments and circumstances in this proceeding, Respondent's obligation to remit payment of the costs of this proceeding in the amount of $30,890.81 for such costs. The Board determines this amount to be a proper apportionment of costs based upon the facts and the law in this matter.

ORDER

IT IS THEREFORE ORDERED, BY THE KANSAS STATE BOARD OF HEALING ARTS, that Respondent's license to practice medicine and surgery in Kansas, No. 04-21596, is hereby REVOKED.

IT IS FURTHER ORDERED, BY THE KANSAS STATE BOARD OF HEALING ARTS, that the costs of this proceeding in the amount of $30,890.81 are hereby assessed against Respondent. The costs to be paid by Respondent have been apportioned by the Board based upon a review of all Cost information and documentation submitted to the Kansas State Board of Healing Arts.

IT IS SO ORDERED THIS 7th DAY OF JULY, 2017.

\s\ Dr. Minns
Garold Minns, M.D.
Presiding Officer
Kansas State Board of Healing Arts

Approved as to Form by:

\s\ Mark A. Ferguson by MAF (7/7/17)
Mark A. Ferguson; KS # 14843
Special Counsel to the
Kansas State Board of Healing Arts
Gates Shields Ferguson Swall Hammond, P.A.
10990 Quivira, Suite 200
Overland Park, KS 66210

NOTICE OF RIGHTS

PLEASE TAKE NOTICE that this is a Final Order. A Final Order is effective upon service, and service of a Final Order is complete upon mailing. Pursuant to K.S.A. 77-529, Licensee may petition the Board for Reconsideration of a Final Order within fifteen (15) days following service of the final order. Additionally, a party to an agency proceeding may seek judicial review of a Final Order by filing a petition in the District Court, as authorized by K.S.A. 77-601, *et seq*. Reconsideration of a Final Order is not a prerequisite to judicial review. A petition for judicial review is not timely unless filed within **(30) days** following service of the Final Order. A copy of any petition for judicial review must be served upon Kathleen Selzler Lippert, the Board's Executive Director, at 800 SW Jackson, Lower Level-Suite A, Topeka, KS 66612.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing **FINAL ORDER FOLLOWING REMAND** was served this 7th day of July, 2017 by email and by depositing the same in the United States Mail, first-class, postage prepaid, and addressed to:

Ann K. Neuhaus, M.D.
[redacted]
Nortonville, KS 66060

Robert V. Eye
KAUFFMAN & EYE
The Dibble Building
123 SE 6th Ave., Ste. 200
Topeka, Kansas 66603

And a copy was emailed to the following:

Reese H. Hayes, Litigation Counsel
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level-Suite A
Topeka, Kansas 66612

The original will be filed with the office of:

Kathleen Selzler Lippert, Executive Director
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level-Suite A
Topeka, Kansas 66612

\s\ Mark A. Ferguson by MAF (7/7/17)
Mark A. Ferguson