



**STATE BOARD OF HEALING ARTS**

**GUIDELINES FOR THE  
IMPOSITION OF  
DISCIPLINARY SANCTIONS**

## **Section I: Introduction**

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, and includes no discipline, fine, public censure, limitation, suspension, revocation, or denial of an application. In determining which of these sanctions should be imposed, the Board will consider the goals for imposing discipline, among other considerations. The purpose might either be remedial, to protect the public from immediate harm, or punitive.

The Board is also given authority under K.S.A. 65-2838a to enter into non-disciplinary resolutions such as written agreement for a professional development plan, make written recommendations, or issue a written letter of concern to a licensee as a non-disciplinary resolution in certain instances.

These guidelines do not have the force and effect of law, and they do not create binding precedent. By publishing this information, 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 this policy as it determines appropriate and without giving notice. **To be clear, the Board's sanctioning authority is defined and limited exclusively by the applicable statutes, regulations, and settled Kansas case law.** The information contained herein is provided to give all stakeholders insight into the considerations that the Board commonly applies to its analysis pursuant to applicable law.

### **1. Professional Competency**

*Statutes and regulations commonly applied:*

- K.S.A. 65-2836(w) (Failure to report adverse judgment)
- K.S.A. 65-2836(bb) (Failure to adequately supervise a physician assistant)
- K.S.A. 65-2837(a)(1) - (3) (Professional incompetency defined)
- K.S.A. 65-2837(b)(14) (Aiding and abetting unlicensed or incompetent practice)
- K.S.A. 65-2837(b)(24) (Repeated failure to adhere to standard of practice)
- K.S.A. 65-2837(b)(26) (Inappropriately delegating responsibility)
- K.S.A. 65-2837(b)(30) (Failure to properly supervise)
- K.S.A. 65-2837(b)(33) (Violating patient trust for personal gain)
- K.A.R. 100-22-7 (Improper orders to dispense medical devices)
- K.A.R. 100-25-5 (Office-based practice requirements)
- K.A.R. 100-27-1 (Standards for supervising light-based services)

*Comments*

The Kansas Supreme Court stated in *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447 (1968), "[n]o conduct or practice could be more devastating to the health and welfare of a patient or the public than incompetency. . . ." This category of grounds for disciplinary action relates to the demonstrated professional skill of the licensee, and to the licensee's responsibility for services performed by others.

A licensee's professional incompetence may be established directly or indirectly. Direct indicia includes the failure to adhere to the applicable standard of care to a degree constituting gross negligence in a single instance, or to a degree constituting ordinary negligence in multiple instances or in repeated instances, or engaging in other conduct that manifests incompetency. Indirect indicia include actions taken by hospital or other peer review groups for similar conduct, or malpractice settlements or judgments. Whether directly or indirectly established, the sanction should focus on the practitioner's professional level of skill possessed and utilized in practice as indicated by demonstrated abilities and exercise of professional judgment.

A licensee is also responsible to the patient and the public when delegating to others the authority to perform professional services. This responsibility is generally described in terms of standards for supervision or delegation. Those standards are generally stated at K.S.A. 65-28,127. Additional standards pertaining to specific professions appear throughout the statutes and regulations.

While actual patient injury is not an element of professional incompetency, the reasonable likelihood of harm and the licensee's ability and willingness to acknowledge and overcome deficiencies are commonly factors in determining the sanctions to be imposed based upon a finding of professional incompetency.

*a. Licensee's Professional Incompetence*

Traditionally the Board has often imposed limitations on practice and other remedial means to address incompetency when the licensee appears cooperative. When a person does not appear to have the skills or the desire to remediate deficiencies, or when the public health and safety is in jeopardy, more severe disciplinary sanctions are necessary. In most cases, an order imposing remedial steps that does not include limitation on or separation from practice is only appropriate when the practitioner acknowledges the deficiency and there are grounds to believe that the licensee will be able to overcome that deficiency.

In instances where the Board finds that the licensee appears to lack the skill or knowledge necessary to provide services in a practice area, the Board will often consider seeking an evaluation of practice skills, and, if deficiencies are discovered, then it may serve as a basis for remedial steps.

A licensee that is found to lack general skill or knowledge is often be removed from practice until that skill and knowledge is regained.

If the licensee has the requisite knowledge and skill, but fails to use necessary professional judgment, the Board faces a more difficult task of remediation. Separation from practice, in whole or in part, might become necessary in order to prevent harm to patients.

*b. Professional Incompetence of Supervised Persons*

Practitioners often may delegate to others the authority to provide professional services. A licensee may be subject to discipline for delegating inappropriately or for the failure to supervise. The disciplinary sanction for failing to delegate or supervise appropriately may be punitive rather than remedial.

## **2. General Misconduct**

*Statutes commonly applied:*

- K.S.A. 65-2836(a) (Fraud in application for license)
- K.S.A. 65-2836(b) (Unprofessional, dishonorable, incompetent practice)
- K.S.A. 65-2836(f) (Violation of act, pharmacy or KDHE statutes or regulations)
- K.S.A. 65-2836(g) (Invading branch of healing arts without license)
- K.S.A. 65-2836(h) (Practice under false name)
- K.S.A. 65-2836(j) (Discipline by another state)
- K.S.A. 65-2836(k) (Violation of Board regulation or order)
- K.S.A. 65-2836(l) (Failure to report knowledge of violation)
- K.S.A. 65-2836(n) (Cheated on licensure exam)
- K.S.A. 65-2836(q) (Violated federal controlled substance law)
- K.S.A. 65-2836(r) (Failure to furnish Board information legally requested)
- K.S.A. 65-2836(s) (Sanctions by peer review group)
- K.S.A. 65-2836(t) (Failure to report discipline by other state or peer group)
- K.S.A. 65-2836(u) (Surrender of license or authority in another state or forum)
- K.S.A. 65-2836(v) (Failure to report surrender of license or authority)
- K.S.A. 65-2836(x) (Failure to report adverse judgment)
- K.S.A. 65-2836(aa) (Submitting fraudulent claim, bill or statement)
- K.S.A. 65-2837(b)(3) (Treating without patient consent)
- K.S.A. 65-2837(b)(9) (Wrongful participation in exclusion of licensee from medical staff)
- K.S.A. 65-2837(b)(6) (Betrayal of confidential information)
- K.S.A. 65-2837(b)(10) (Failure to effectuate advanced directive)
- K.S.A. 65-2837(b)(12) (Conduct likely to deceive or harm public)
- K.S.A. 65-2837(b)(15) (Allowing another to use license)
- K.S.A. 65-2837(b)(18) (Obtaining fee by fraud, deceit or misrepresentation)
- K.S.A. 65-2837(b)(21) (Performing tests, exams, services without legitimate purpose)
- K.S.A. 65-2837(b)(27) (Experimental treatments)
- K.S.A. 65-2837(b)(31) (Unlawful abortion of viable fetus)
- K.S.A. 65-2837(b)(32) (Billing for pathology labs not personally performed)

*Comments*

Generally stated, misconduct is that which is recognized to be unsafe or improper by the ethical and competent members of the profession. Misconduct also includes general conduct that is dishonorable or unprofessional and includes acts prohibited by policies expressed in legislation. Discipline for misconduct is often punitive in nature.

### **3. Criminal Conduct**

*Statutes commonly applied:*

K.S.A. 65-2836(c) (Conviction of felony or Class A Misdemeanor)

K.S.A. 65-2836(cc) (Assisted suicide)

K.S.A. 65-2837(b)(5) (Performing criminal abortion)

*Comments*

Conduct which is criminal, or is deemed criminal, may form the basis for imposing discipline against a licensee because such misconduct reflects upon the licensee's fitness and qualifications to practice in the healthcare field and detracts from the trust the public must be able to give healthcare professionals. A licensee who has exhibited dishonesty, poor moral character, a lack of integrity and/or an inability or unwillingness to follow the law has demonstrated an unfitness to practice and may be subject to discipline against his or her professional license. Honesty and integrity are deeply ingrained in the practice of the various healthcare professions. This category of misconduct should be deemed serious because of its potential for public harm and the ill repute that it brings upon the profession as a whole. This type of conduct is often addressed with discipline that is intended to be punitive.

When a licensee has been convicted of a felony, in addition to the general aggravating and mitigating circumstances that apply to all categories of misconduct the Board will consider K.S.A. 65-2836(c). That section requires the Board to revoke or deny an application "unless a 2/3 majority of the board members present and voting determine by clear and convincing evidence that such licensee will not pose a threat to the public in such person's capacity as a licensee and that such person has been sufficiently rehabilitated to warrant the public trust."

### **4. Sexual Misconduct**

*Statute commonly applied:*

K.S.A. 65-2836(b)(16) (Sexual abuse, misconduct or exploitation related to practice)

*Comments*

The Board has a zero-tolerance policy when sexual misconduct involves a minor. In all situations a finding of sexual misconduct involving minors and related to professional practice should result in revocation of a license.

The professional boundary required between physicians and patients is based upon the fiduciary relationship in which the patient entrusts his or her welfare to the physician, and reflects the physician's respect for the patient.<sup>1</sup> That boundary, once crossed, severely impacts the patient's wellbeing on an individual basis, and causes distrust to other professional relationships in general. Sexual misconduct is a harmful example of a boundary violation,

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<sup>1</sup> Glen O. Gabbard, M.D. and Carol Nadelson, M.D., *Professional Boundaries in the Physician-Patient Relationship*, Journal of the American Medical Association, May 10, 1995; Vol. 273, No. 18, pg. 1445.

occurring in multiple contexts and involving a wide range of behaviors. Sexual misconduct includes sexual relations with a patient, sexual impropriety towards a patient, sexual conduct towards patients, sexual harassment in the workplace, sexual conduct between supervisors and subordinates, the commission of sexual assault, and any sexual crimes.

Any sexual conduct towards current patients is considered misconduct even if otherwise consensual. Sexual conduct towards former patients is misconduct when the licensee exploits knowledge or information obtained from the previous physician-patient relationship. Sexual or romantic relationships between physicians and their patients may exploit the vulnerability of the patient, may obscure the physician's objective judgment concerning the patient's care, and may reflect a general lack of ability/willingness to maintain clinical objectivity. Sexual misconduct between a physician and a patient is never diagnostic or therapeutic. Further, romantic or intimate relationships may impede the physician's ability to confront the patient about noncompliance with treatment or to bring up unpleasant medical information. Physicians must set aside their own needs or interests in the service of addressing the patient's needs. The physician-patient relationship depends upon the ability of patients to have absolute confidence and trust in the physician, and a patient has the right to believe that a physician is dedicated solely to the patient's best interests.

This category of misconduct is commonly deemed serious because in addition to the potential for patient harm, such misconduct erodes the public's trust and confidence in the health care profession and damages the credibility of the healing arts professions. Upon a finding of sexual misconduct, the Board will take appropriate measures to impose a sanction and/or monitoring requirements that address the severity of the misconduct and the potential risk to patients.

## **5. Billing / Business Transactions**

*Statutes and Regulations commonly applied:*

K.S.A. 65-2837(b)(22) (Excessive fee)

K.S.A. 65-2837(b)(29) (Referring patients to entity in which licensee has significant ownership)

K.A.R. 100-22-3 (Business transactions with patients)

*Comments*

Billing and business transactions with patients includes misconduct such as charging excessive fees for services, fee-splitting, failing to disclose to the patient a financial interest, and entering into business transactions with patients separate from the practice of the healing arts. Public policy dictates that a practitioner should not charge or collect an excessive fee. Public policy also prohibits fee splitting because the licensee's decision to provide, or not to provide, services may be influenced by the fact that he must split his fees. Such arrangements may also cause non-licensed professionals to recommend the services of a particular licensee out of self-interest, rather than the actual competence of the licensee. It is believed that the public is best served by recommendations that are uninfluenced by financial considerations.

Additionally, engaging in the sale of non-health related goods by practitioners with their patients erodes the primary obligation of the practitioners to serve the interests of their patients

above their own financial interests. The interest of the patient is paramount. Failure to perform these duties regarding patient care has the potential to cause patient harm.

## **6. Advertising**

*Statutes and Regulations commonly applied:*

K.S.A. 65-2836(d) (Fraudulent or false advertising)

K.S.A. 65-2837(b)(1) (Fraudulent or false advertising)

K.S.A. 65-2837(b)(2) (Representing permanent cure for incurable disease or injury)

K.S.A. 65-2837(b)(4) (Falsely advertising entitlement to practice branch of healing arts)

K.S.A. 65-2837(b)(7) (Advertising professional superiority)

K.S.A. 65-2837(b)(8) (Advertising guarantee)

K.S.A. 65-2837(b)(13) (Misrepresenting skill of licensee or of treatment)

K.S.A. 65-2837(b)(17) (False, fraudulent or deceptive statement on a document)

K.A.R. 100-22-4 (Description of specialty certification)

K.A.R. 100-18-1 (Free offers)

*Comments*

Advertising is commercial speech that may be protected by the First Amendment. However, the Constitution does not protect false, deceptive or misleading speech, such as representing false credentials, bait and switch advertising, or guarantees of a cure for a manifestly incurable disease. When a licensee is found to have advertised using a factual representation that violates the statutes and regulations, the sanction should achieve correction, deterrence from future violations, and a punitive element.

## **7. Impairment / Fitness to Practice**

*Statutes commonly applied:*

K.S.A. 65-2836(e) (Impaired by alcohol or drugs)

K.S.A. 65-2836(i) (Inability to practice by reason of impairment)

K.S.A. 65-2836(o) (Mentally ill, disabled, not guilty based upon mental disease)

*Comments*

Impairments include drug abuse, alcohol abuse, and mental or physical conditions that impede the licensee's ability to practice with reasonable skill and safety. In determining the appropriate sanction, the Board may also consider whether the practitioner has insight into the impairment. The Board has traditionally taken the view that a practitioner, who has sought help for impairment and has actively taken steps to adequately address the issue, is less of a concern than an impaired practitioner who refuses to seek help or take steps to address the problem. The goal is to facilitate efforts to rehabilitate those impaired. In the process of rehabilitation, measures including separation from practice are often necessary to protect the public.

In situations where the practitioner is cooperative and seeks rehabilitation, it is the policy of the Board that referral to a facility or organization for evaluation, treatment or monitoring regarding the impairment shall not be considered disciplinary action solely on the basis of a person being impaired. When a licensee is found to be impaired and is not cooperative, or when uninterrupted practice endangers the public, then disciplinary action becomes necessary.

## **8. Administrative Requirements**

*Statutes and Regulations commonly applied:*

K.S.A. 65-2836(m) (Required disclosures for breast abnormality)

K.S.A. 65-2836(y) (Failure to maintain liability insurance)

K.S.A. 65-2836(z) (Failure to pay stabilization fund surcharges)

K.A.R. 100-22-2 (Disclosure of professional activities for exempt license)

K.A.R. 100-22-6 (Posting notice at practice location)

*Comments*

Violations of administrative requirements include conduct such as failure to maintain malpractice insurance and pay premium surcharges, failure to inform a patient in writing of abnormality in breast tissue for which surgery is the recommended treatment, failure to comply with the office based surgery regulations, failure to identify professional activities for exempt licenses and failure to post the prescribed notice to the public in the office. The level of sanctioning will often depend upon the licensee's state of mind.

## **9. Inappropriate Prescribing**

*Statutes and Regulations commonly applied:*

K.S.A. 65-2836(p) (Controlled substances for other than medically accepted or lawful purpose)

K.S.A. 65-2837(b)(11) (Amphetamine law)

K.S.A. 65-2837(b)(23) (Excessive or improper or not in course of regular practice)

K.S.A. 65-2837(b)(28) (Anabolic steroids or human growth hormone)

K.S.A. 65-2837a (Amphetamine law)

K.A.R. 100-22-8a (Lipodissolve)

*Comments*

Inappropriate Prescribing includes such misconduct as the failure to follow required procedures that have been established to ensure prescriptions are legitimate, prescribing to family or friends who suffer from addiction or misuse, diversion for self-use, and criminal

trafficking in dangerous drugs. This category of misconduct should be deemed serious because of its potential for public harm and its abuse of the unique privilege to prescribe drugs, including controlled substances. Also, prescription orders that are believed to not meet the standard of care will often be considered as professional incompetence unless there are specific facts that establish unethical or unlawful conduct.

## **10. Patient Records**

### *Statutes and Regulations:*

K.S.A. 65-2837(b)(6) (Willful betrayal of confidential information)

K.S.A. 65-2837(b)(20) (Failure to transfer records to another licensee)

K.S.A. 65-2837(b)(25) (Failure to keep records)

K.A.R. 100-22-1 (Failure to release records)

### *Comments*

Failure to adequately maintain patient records includes misconduct such as the failure to adequately document evaluation and/or treatment of the patient, failure to adequately maintain or store the records, and failure to allow the patient or the patient's authorized representative access to the records.

The Board may also consider the pervasiveness of such misconduct with regard to the licensee's practice in determining the appropriate remedy.

### *Aggravating and Mitigating Factors - policy considerations*

After it has been established that a violation has occurred, the Board may consider facts and circumstances unique to the case to determine the sanction that is appropriate in light of any aggravating and/or mitigating factors that the Board finds applicable to the particular case.

## **General Categories<sup>2</sup> of Sanctionable Conduct**

1. Professional Competency.
2. General Misconduct.
3. Criminal Conduct.
4. Sexual Misconduct.
5. Billing/Business Transactions.
6. Advertising.
7. Impairment/Fitness to Practice.
8. Administrative Requirements.
9. Inappropriate Prescribing.
10. Patient Records.

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<sup>2</sup> These categories are intended to be general and descriptive in nature. The Board's substantive analysis and/or sanctioning determination in a given case is not limited by the descriptive categories described here. The Board's sanctioning authority is defined and limited exclusively by the applicable statutes, regulations, and settled Kansas case law. The information contained herein is provided only to give all stakeholders insight into the considerations that the Board commonly applies.

## **General Categories<sup>3</sup> of Sanctions**

1. Non-disciplinary resolution (private letter of concern, written recommendations, etc.).
2. Censure.
3. Fine.
4. Remediation/rehabilitation (education, training, treatment, monitoring).
5. Probation/temporary practice limitations.
6. Suspension.
7. Permanent practice limitations.
8. Revocation.

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<sup>3</sup> These categories are intended to be general and descriptive in nature. The Board's sanctioning authority is defined and limited exclusively by the applicable statutes, regulations, and settled Kansas case law.

# Non-binding Table of Common Sanctions<sup>4</sup>

Category of Conduct	Description	Common range of sanctions prior to adjustment for aggravating/mitigating factors
1	<b>Professional Competency</b>	
1A	Facts indicate lack of skill and judgment that endangers patient safety or gross negligence	Suspension, limitation, probation, remediation, fines, revocation
1B	Facts indicate Licensee is generally safe and competent but has negligently failed to use skill or judgment	Non-disciplinary resolution, probation, remediation, \$500 - \$2499 fine
2	<b>General Misconduct</b>	
2A	Facts indicate misconduct that endangers patient safety, actually misleads, board, or is disruptive to board processes	Suspension > 30 days, probation, remediation, revocation, \$500-\$5000 fine
2B	Facts indicate misconduct not likely to harm patients but discredits profession or has potential to mislead the board or the public or cause economic loss to patients	Censure, suspension < 30 days, probation, remediation, fine \$500-\$2499
2C	Parallel actions by other states or by facilities	Parallel other state action
3	<b>Criminal Conduct</b>	
3A	Felony conviction	By statute: revocation, unless 2/3 majority of Board determines, by clear and convincing evidence, that licensee will not pose threat to public and that licensee has been sufficiently rehabilitated to warrant public trust
3B	Misdemeanor relating to professional	Suspension < 90 days,

<sup>4</sup> This table does not have the force of law, regulation, or binding policy. It does not constitute the analytical framework that will necessarily guide the Board’s sanctioning analysis in every case. By publishing this information, 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 sanction identified as an “example of common sanction” as it deems appropriate in any case without additional notice. **The Board's sanctioning authority is defined and limited exclusively by the applicable statutes, regulations, and settled Kansas case law. The information contained herein is provided to give insight into the considerations that the Board commonly applies to its analysis pursuant to applicable law.**

	practice, crimes of dishonesty, against persons or crimes of moral turpitude reflecting on profession	probation, remediation, limitation, \$500-\$5000 fine
3C	Misdemeanor not related to professional practice, not against persons, and not a crime of dishonesty or moral turpitude reflecting on profession	Censure, probation, \$500-\$2499 fine
4	<b>Sexual Misconduct</b>	
4A	Sexual misconduct-direct abuse or direct exploitation of a patient	Revocation
4B	Sexual misconduct-impropriety involving patient	Suspension, limitation, probation, remediation, \$500-\$5000 fine
4C	Sexual misconduct-sexual harassment/impropriety associated with professional practice	Suspension< 90 days, probation, remediation, \$500-\$5000 fine
5	<b>Billing/Business Transactions</b>	
5A	Billing/Business Transactions-involving exploitation of patient or fraud	Suspension, limitation, probation, revocation, \$500-\$5000 fine
5B	Billing/Business Transactions-otherwise wrongful	Censure, suspension< 90 days, remediation, probation, \$500-\$2499 fine
6	Advertising	
6A	Advertising involving misleading, false or prohibited statements, exploitation, economic injury, or giving false hope	Censure, remediation, \$500-\$5000 fine
7	Impairment/Fitness to practice	
7A	Impairment-non cooperative or unable to remediate	Suspension, probation, limitation, revocation
7B	Impairment-appears remediable	Limitation, remediation, probation
8	<b>Administrative Requirements</b>	
8A	Administrative Requirements-Intentional or wanton, potentially disruptive to regulation of the profession	Censure, \$2500-\$5000 fine
8B	Administrative Requirements-Negligent failure to adhere	Censure, fine< \$500
9	<b>Inappropriate Prescribing</b>	
9A	Inappropriate Prescribing-no legitimate medical purpose	Suspension> 90 days, limitation, probation,

		remediation, revocation \$2500-\$5000 fine
9B	Inappropriate Prescribing-willfully or negligently failed to follow requirements	Censure, suspension< 90 days, limitation, probation, remediation, revocation \$500-\$5000 fine
10	<b>Patient Records</b>	
10A	Patient records-deceptively altered or intentionally failed to create patient records	Suspension, probation, limitation, \$2500-\$5000 fine
10B	Patient records-poor documentation, failure to provide records to patient upon lawful request, or negligently failed to meet record keeping requirements	Censure, probation, remediation, limitation, fine \$500-\$2500

APPROVED by the Kansas State Board of Healing Arts this 14<sup>th</sup> day of June, 2019.

  
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