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Step by Step:

The Licensure Discipline Process

A Florida Dentist's Handbook and Risk Management Tips

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THE FLORIDA DENTAL ASSOCIATION'S OFFICIAL PUBLICATION ON HEALTH LAW

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Key to Acronyms

AC: Administrative Complaint

ALJ: Administrative Law Judge

AHCA: Agency for Health Care Administration

BOD: Board of Dentistry

DOH: Department of Health

DCA: District Court of Appeal

DOAH: Division of Administrative Hearings

DEA: Drug Enforcement Agency

ESO: Emergency Suspension Order

FRAP: Florida Rules of Appellate Procedure

HIPAA: Health Insurance Portability and Accountability Act

MFCU: Medicaid Fraud Control Unit

MQA: Medical Quality Assurance

OIR: Office of Insurance Regulation

PCP: Probable Cause Panel

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Introduction

This handbook will take you through Florida licensure discipline process and provide practical risk management advice ("tips") on how to avoid and defend against it. Before we start, let's talk about a few things I have found to be confusing to many Florida dentists:

1. The Florida Board of Dentistry (BOD) is not the same as the Florida Dental Association (FDA). You know that, but remember that your patients don't. When patients call the FDA to complain about a dentist — and they do, almost every day — we offer peer review if the dentist is a member. Peer Review is quick, confidential, saves face, lawfully sidesteps governmental reporting obligations and doesn't count as a "strike" under section 456.50, Fla. Stats., the "three strikes and you're out" law on repeated malpractice (more on that later). If the dentist is not a member, then our volunteer doctors and staff will not provide their expertise and training to resolve the matter and it is left up to the patient to decide what to do next.

TIP: Peer Review mediation is a valuable FDA membership benefit and you would be wise to use it. Recognize that the adverse incident has already occurred. The dissatisfied patient may simply go away or they may decide to sue you. FDA Peer Review gives you control over your destiny.

TIP: Many patients think the FDA is the same as the Florida Bar Association. They call "the bar association" to file complaints against lawyers and they call "the dental association" to file complaints against dentists. The FDA call log shows that on an average day, we get 10-12 calls from the public; on a busy day it can go as high as 20. That's at least 2,600 callers a year, many of whom are complaining about their dentist.

TIP: Upset patients often call the FDA rather than government enforcement agencies simply because we are, by design, easiest to find. For example, Google search "bad Florida dentist." Once you get through "Nightmare Dental Procedures," "Dentist Accused of Torture, Fraud and Abuse of Patients," and "Horrifying Dentist Allegedly Choked Kids, Took Out Teeth for No Reason," you come to a website called MouthHealthy.org.

It stands out as calm, professional, free, meaningful and rapid help for patients who have a problem with a Florida dentist. Please appreciate three things about MouthHealthy.org. First, it is owned by the American Dental Association (ADA) and refers patients with complaints to the state dental association. Second, the organized dentistry website is on the first page and the BOD website is on the third page — so who do you think gets the most calls? Third, MouthHealthy.org probably would have been the number one hit if it weren't for an incident in 2015 that involved a Jacksonville dentist that drew overwhelming media coverage.

Peer Review at the national, state and component level is the most effective and cheapest risk management strategy you will ever see. Among the many health care professional organizations that are out there, the only one offering peer review mediation services to protect you against licensure discipline and civil liability is the FDA.

TIP: **You only get Peer Review protection if you are an FDA member!**

2. A single violation can result in criminal, civil and administrative liability as well as prosecution by various enforcement agencies at both the federal and Florida levels. Dentists most commonly face criminal liability for fraud, controlled substances violations and sexual misconduct, which also serve as the basis for BOD discipline, civil liability and investigation by overlapping federal and state agencies.

TIP: This is not a complete list but, at the **federal level,** be on the lookout for: the Office of Inspector General, the Office for Civil Rights, Recovery Audit Contractors, Zone Program Integrity Contractors, the Drug Enforcement Agency (DEA), licensing boards from other states, the Department of Justice, etc. At the **Florida level,** there is: the BOD, the Department of Health (DOH), the Agency for Health Care Administration (AHCA), the Medicaid Fraud Control Unit, the Attorney General's Office, investigators posing as patients, hospital boards deciding on your privileges (take anything that suggests you are "disruptive" seriously), managed-care credentialing, etc.

TIP: If you are being investigated by more than one agency and your lawyer settles the case, then make sure you get a global settlement, otherwise another enforcement agency may pros-

ecute you for the exact same offense. Double jeopardy applies to criminal sanctions but not to civil monetary penalties.

3. Government agencies talk to each other. For example, if your malpractice insurance reports a closed claim to Florida's Department of Financial Services, Office of Insurance Regulation, as they are required to do under section 627.912, Fla. Stats., then the National Practitioner Data Bank and the Florida DOH are going to hear about it as well. Also, you are required to report board actions in other states to the Florida board. State boards routinely communicate with each other.

4. Other people constantly are watching for enforcement activity against doctors. Some trial lawyers troll government websites looking for potential plaintiffs. For example, if your name shows up on the U.S. Health and Human Services "wall of shame," prepare for the civil lawsuits to come flooding in. The National Practitioner Data Bank and licensure board records never go away.

5. What is the "burden of proof?" In descending order of difficulty for the prosecuting attorney:

- for criminal litigation, it is "beyond a reasonable doubt."
- for disciplinary cases, it is "with clear and convincing evidence."
- for administrative appeals, it is whether the agency's final order is supported by "competent, substantial evidence."
- for civil litigation, it is "more likely than not."

One peculiarity of Florida law is that for physicians (but not dentists), when licensure revocation or suspension is not being sought (i.e., a lesser form of discipline is being imposed like a fine or probation), then the normal "clear and convincing" standard is reduced to the "greater weight of the evidence" standard under sections 458.331(3) and 459.015(3), Fla. Stats.

TIP: If you lose the disciplinary case, you will lose the civil case. Conversely, just because you won the disciplinary case, it does not mean you will win the civil litigation.

TIP: The burden of proof means that the government must prove every single element of the violations alleged against you. You do not have to prove anything, so exercise your right to remain silent!

TIP: If you are informed about the disciplinary investigation, treat it the same way you would a criminal case where you have been falsely accused. Your whole way of life is at stake, so you better prepare to fight. Here's an incomplete list of what's at stake:

- your assets
- your future employment opportunities
- your job as an associate dentist
- your partnership agreement
- your managed-care contracts
- your hospital privileges
- your medical malpractice liability insurance
- the "domino effect," where other states will automatically take disciplinary action against you solely because some other state did
- your status with Medicare, Medicaid, Tricare, Healthy Kids and the DEA, etc.

6. Remember who your audience is: Dentists on the BOD know a lot more about standard of care than someone (who I guarantee you will not be a dentist) sitting in a jury box. Prosecutors and investigators (usually former law enforcement officers) pretty much have seen everything, so don't try to outwit or intimidate them. You'll probably just end up with an obstruction of justice charge. Practicing law is not a do-it-yourself project — let your lawyer do the talking. You will not explain your way out of anything and will more likely end up hurting your case by volunteering what you think is exculpatory information.

TIP: Never lie or try to cover it up, but make sure you know when you're under oath and when you're not.

TIP: If you tell employees not to talk to investigators, that's obstruction of justice. On the other hand, if they decide of their own volition that they don't want to talk to an investigator, that is not obstruction.

TIP: You have more rights in the process then you know about, so don't waive your rights by talking to investigators.

TIP: Never rely on advice you get from other doctors, the investigator, the prosecuting attorney with DOH or anyone other than your lawyer. We'll talk about what to do with subpoenas and search warrants where you are being compelled to produce evidence against yourself later.

7. Know what evidence code and what chapter or practice act applies. Subsections 120.569(2)(g) and 120.57(1)(c), Fla. Stats., set forth rules of evidence in administrative litigation, whereas chapter 90, the Florida Evidence Code, sets forth the rules in civil and criminal litigation. The difference is significant.

TIP: In administrative litigation before the Division of Administrative Hearings (DOAH), which happens when you challenge the allegations against your license, any "evidence of a type commonly relied upon by reasonably prudent persons as in the conduct of their affairs, shall be admissible, whether or not such evidence would be admissible" in civil or criminal litigation.

TIP: In administrative litigation, hearsay is admissible "whether received in evidence over objection or not" and "may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding." In civil litigation, hearsay generally is inadmissible as evidence. Hearsay is when your hygienist tells your patient that you said you messed up and it is accepted as evidence proving the truth of the matter. So, be careful what you say and to whom after an incident.

TIP: In DOAH litigation, "similar fact evidence" (e.g., other instances of malpractice or wrongdoing) is expressly made admissible under section 120.57(1)(d), Fla. Stats. when relevant to prove a material fact in issue such as motive, intent, knowledge, or absence of mistake or accident. The prosecuting attorney must, however, provide notice of their intent to introduce such evidence.

Administrative litigation procedures are under chapter 120 and civil litigation procedures are under chapter 766. The rules are different, so how your attorney plays the game should change as well.

TIP: Many excellent civil litigators have little or no experience with administrative law and vice versa. For example, the majority of DOAH cases go to final hearing within 60-90 days. Civil trials take years. For disciplinary challenges, your lawyer needs to speed up the discovery process. Gathering evidence in two months is challenging compared to the docket in circuit court.

Also, motion practice before the DOAH is different than circuit court litigation. For example, filing a motion with the DOAH without stating whether opposing counsel objects means the motion can be summarily denied by the administrative law judge (ALJ). Also, ALJs, unlike circuit court judges, will rule on most motions without oral argument. In circuit court, it is not at all unusual to file a motion and have opposing counsel not set it for hearing so the case effectively stays "in limbo." By comparison, the DOAH is truly a "rocket docket."

8. Knowing chapter 466 and the BOD rules doesn't mean you know all the rules. For example, chapter 456 applies to all health care professionals and includes rules that go unmentioned in chapter 466. Likewise, Florida's patient brokering, anti-kickback and patient self-referral statutes are nowhere to be found in chapters 456 or 466.

9. Being put on notice of a DOH investigation is upsetting and something for which you have not prepared. You lack objectivity and it will be upsetting. Do not go it alone.

TIP: Put your malpractice carrier on notice of a claim as soon as possible, do it in writing and schedule an appointment with the defense attorney. Insurance companies can deny coverage if you delay in filing a claim, which impairs their ability to defend you (e.g., a key witness dies or documents are lost).

TIP: Realize that your malpractice carrier is under two separate duties: to defend you and to indemnify you. Most policies now cover disciplinary as well as civil litigation. It's best to find out before you file a claim. The defense may be under "reservation of rights," which means they will defend you, but if they lose they may not pay damages or settlement amounts.

TIP: Filing a claim doesn't always mean your premiums will go up or your insurance will be cancelled. When an adjustor gets a claim they set aside a reserve (the amount of money they expect it will take to defend and indemnify you). Just because it is set aside in reserves doesn't mean it gets paid out.

TIP: If the lawyer assigned to defend you doesn't inspire confidence, ask for another one. Some carriers have in-house counsel; others have firms or individual lawyers under contract based on geography; but all of them have access to more than just one insurance defense attorney.

10. The fact that you've been practicing for 30 years and have never had a complaint filed against you is meaningless and should not make you complacent about risk management. First, it is possible that complaints have been filed and dismissed by Medical Quality Assurance (MQA) without you even knowing about it (more on this later). Second, length of practice and prior discipline (or its absence) is never an exculpatory factor. In other words, your track record will definitely either aggravate or mitigate the discipline you receive (BOD Rule 64B5-13.005(2), Fla. Admin. Code), but it will never determine whether you are prosecuted or disciplined. Third, it just takes one complaint to

potentially ruin your career. Fourth, we are all human and make mistakes. Fifth, you practice in Florida so, sadly, it's a matter of "when," not "if."

11. There is a cliché health care risk managers tell their clients: "Be rude, get sued." Medical malpractice happens every day and many times the patient doesn't even know about it. But even if they do know about it, you are at higher risk of facing an MQA complaint or a lawsuit (or both, as they usually travel together) if you are rude or defensive about it.

TIP: Building a personal rapport with your patients and their families may be the biggest factor between who gets sued and who doesn't. Clinical skill certainly matters, but don't underestimate the power of a pleasant personality.

TIP: The second biggest factor between who gets sued and disciplined versus who does not is the FDA Peer Review program, a members-only benefit. You do not want to go through licensure discipline. You want Peer Review. Peer Review is not adversarial or judgmental. It exists to help FDA members resolve complaints without them going to civil litigation or the BOD.

No other health care association protects its members like the FDA does. Peer Review is not offered by the Florida Medical Association, the Florida Nurses Association, the Florida Optometric Association, the Florida Hospital Association or the Florida Chiropractic Association. Some of these associations have bigger budgets and more lawyers, but **only the FDA provides this risk management service for members.** Let that sink in before we move on.

Now let's look at each step in the discipline process.

STEP 1: Who Gets Licensure Complaints?

The Florida DOH, Division of MQA, gets complaints against dentists and hygienists. In the 80s, the Department of Business and Professional Regulation did intake. Then it was the AHCA. Then in 1997, hospitals, clinical labs and ambulatory surgical centers stayed with AHCA, but individual licensees went to the DOH.

The DOH has grown dramatically since then. It now regulates more than 200 types of licensees in more than 40 health care professions. You might be surprised to learn there are nine different types of dental licensees:

- dental
- dental hygienist
- dental expert witness
- dental laboratory
- dental radiographer
- dental residency permits
- dental teaching permits
- dental temporary certificates
- dental health access licensees

Further, there are permits for anesthesia providers and dispensing practitioners. In this context, there is no practical difference between a permit and a license — both subject you to government regulations. The government regulates health care professionals more than any other profession except, perhaps, commercial airline pilots.

TIP: Judges ensure legal procedure is followed, the "finder of fact" plays an even more important role in determining the ultimate question: Did you violate the rules or not (i.e., are the allegations against you true or false, are you "guilty" or "not guilty")? In civil litigation, the judge watches over evidence and procedure, but does *not* make the findings of fact. That is left to the jury. Administrative law is completely different.

As a generalization in licensure discipline (unlike civil litigation), the DOH/MQA acts as both investigator and prosecutor, while the Florida BOD acts as judge and jury under *informal* hearings. This is because in informal hearings, you have admitted to the facts and they are no longer an issue. But in *formal* hearings, the ALJ under the DOAH (not the DOH/BOD) acts as an unbiased, non-adversarial judge, but also serves as the finder of fact.

It is crucial to understand who will decide whether the allegations against you are true. In civil and criminal litigation, it is the jury. In informal administrative litigation, you already have admitted the allegations to the BOD; in formal hearings under administrative law, the ALJ serves as the finder of fact and it is extremely difficult for the DOH/BOD to reverse those findings.

TIP: Whether your license is sanctioned depends to a large extent on who you have chosen to serve as the finder of fact. The first choice you make is whether you disagree with the facts; the second choice you make is who — between the DOH/BOD and an independent ALJ — do you want to decide the facts. Many good dentists have been disciplined because they made uninformed choices on these two questions.

The BOD's job is not to protect the individual patient; although, they often will require restitution to the patient as part of the licensure discipline. The BOD's job is to protect public safety by ensuring "that every dentist or dental hygienist practicing in this state meets minimum requirements for safe practice."

The board consists of 11 members appointed by the governor and confirmed by the Florida Senate. Seven of the board members are licensed dentists who actively practice dentistry, two are licensed dental hygienists and two are laypersons who have no experience in the profession. Each dentist who serves on the board must have at least five years of experience as a practicing dentist. The board is a mix of general practice and specialties.

STEP 2: Who May File a Complaint?

Anyone. Moreover, they are encouraged to file complaints. For example, section 456.068, Fla. Stats., mandates that the AHCA establishes a toll-free telephone number for reporting complaints. As another example, section 456.073(11), Fla. Stats., gives complainants "a privilege against civil immunity" with regard to complaints and information they provide to the MQA. Under section 456.073(12)(a), Fla. Stats., they lose the immunity only if the licensee complained against can prove they acted "in bad faith or with malice in providing such information." This means that you, as the doctor complained against, must retain counsel and sue in circuit court to prove the complaint was filed with "intentional fraud or malice."

TIP: Intentional fraud is different from acting in bad faith, but both terms are undefined by statute. Also, it is almost impossible for you to prove what was in the mind of the complainant and they will be sure to deny bad faith and malice. Also, the DOH may continue its investigation and prosecution even if you prevail in the civil suit. Further, if you lose the civil suit, then you owe the complainant court costs and reasonable attorney's fees.

TIP: Don't expect to avoid discipline by arguing the complainant had improper motives. Disgruntled patients are obviously the most prolific source of serious "informed consent" and "standard of care" MQA complaints. But patients also routinely complain that the front office staff was rude, they were made to wait or they were charged too much.

TIP: Remember, there is no financial cost and extremely low liability risk to the patient to file a complaint against you. Assume that if you practice long enough, you will have a complaint filed. Regardless of what you do or don't do, some patients are beyond your control, unreasonable and vindictive. So, the important question is not who may file a complaint. Rather, it is what complaints will the MQA act on? More on this later.

TIP: Assume that there are plaintiffs' attorneys involved even if you don't spot them. Under s. 766.106, Fla. Stats., plaintiffs' lawyers *must* file with the MQA in order to file in circuit court, so lawyers are a huge source of referrals to the DOH.

TIP: Trial lawyers get calls from potential medical malpractice plaintiffs every single day. Within the first six minutes, a good lawyer already has decided to get a retainer agreement signed or to hang up on the caller as a literal waste of their time. Why six minutes? Because that is the smallest increment of time that gets billed or written off by the firm. The quickest way for a lawyer to get off the phone when the case is a "dog" — as opposed to a "drowning baby" — is to tell the caller, "I can't help you. Call the Department of Health." So, a lot of complaints (some serious, some frivolous) get filed with the MQA because of lawyers, and by now, everybody has at least one lawyer in the family.

On the other hand, if the lawyer wants the case, they will actively assist their client to file with the MQA. It is an inexpensive, yet effective, way to have the government gather the evidence they intend to use against you at trial.

Medical malpractice insurance companies are required to report settlements, as are self-insured dentists. If you have privileges and are on staff, hospitals are required to submit "adverse incident" or "Code 15" (within 15 days) and "Code 24" (within 24 hours) reports, as well as medical staff sanctions. Managed-care plans and health insurers may, but rarely do, file complaints. The DOH also investigates licensees on its own initiative, even though no complaint has been filed (more on Emergency Suspension Orders later). Each month, the AHCA contacts the U.S. Department of Health and Human Services to determine who is in default of their student loan obligations, which is a disciplinary violation as well as a breach of contract liability. *(See, section 456.0721, Fla. Stats.)*

Self-reporting

You might be surprised to learn that you are required to report yourself under five circumstances.

1. You legally are required to notify your patient, in person, if an "adverse incident results in harm," which may trigger a DOH complaint/litigation.

TIP: Section 456.0575, Fla. Stats, doesn't define what "adverse incident" or "harm" means. Adverse incident is used in the hospital licensure act and mandates a written report to the ACHA within 15 days. But what adverse incident means outside the hospital setting is undefined. The statute also says your "notification" is not an admission of liability and cannot be used as evidence against you. This statute first passed in 2003, but there is no case law construing it, which leads me to believe doctors are simply ignoring it and hoping they don't get caught.

2. Section 466.028(1)(ii), Fla. Stats., makes it a disciplinary violation for you to fail to report to the BOD "in writing, and within 30 days if action has been taken against one's license … in another state, territory or country."

3. Section 465.072(1)(x), Fla. Stats., requires you to report to the BOD "in writing, within 30 days after the licensee has been convicted, or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction." If the crime involves controlled substances or fraud, this typically further triggers an Emergency Suspension Order (ESO). This will be discussed later on in this handbook.

TIP: Very few things you do in your practice will get you in criminal trouble. It pays to know what they are and diligently avoid them. Controlled substances violations and fraud are felonies likely to be prosecuted and will result in a five-, 10- or 15-years prohibition on licensure.

TIP: Plea bargain felonies down to misdemeanors in order to avoid long-term prohibitions on licensure.

4. Section 456.063(3), Fla. Stats., requires a licensee to report allegations of sexual misconduct to the DOH without regard to the practice setting where the alleged misconduct occurred. Note that the self-reporting obligation applies to mere allegations of sexual misconduct.

5. Section 456.059, Fla. Stats., requires dentists to report themselves to the Office of Insurance Regulation (OIR), which is under the Department of Financial Services, not the DOH, whenever there is "any claim or action for damages for personal injury alleged to have been caused by error, omission or negligence in the performance of such licensee's professional services or based on" lack of informed consent. Similarly, section 627.912(1)(f), Fla. Stats., requires dentists to report claims or actions if the insurer or the self-insured fund does not. These reports must be made within 30 days of a settlement if it includes a payment of $1 or more. Even if there was no money paid to the claimant in the settlement, the licensee must still report to the OIR, which will report to the DOH, if the insurer paid $5,000 or more in defending you. Remember from earlier that the insurance company has two separate duties: to defend and to indemnify.

Similarly, claims and actions must be reported if there is an "entry of any judgment against (the dentist) for which all appeals as a matter of right have been exhausted or for which the time period for filing such an appeal has expired." Note that the self-reporting obligation applies to any "claim" not just a lawsuit. In this context, "claim" means the receipt of a notice of intent to initiate litigation, a summons and complaint, or a written demand from a person or his or her legal representative stating an intention to pursue an action for damages.

TIP: Importantly, the FDA's Peer Review process has been crafted so that patient mediation requests do not rise to the level of being reportable "claims." More on how FDA Peer Review also avoids BOD discipline later. Also, later we will discuss whether the Fifth Amendment's privilege against self-incrimination applies to disciplinary cases.

The "Honor Code"

Section 466.028(1)(f), Fla. Stats., makes it a disciplinary violation for you to fail to report to the DOH *any other licensee* who you either "know" or you have "reason to believe is clearly in violation" of BOD rules.

TIP: Many DOH complaints are filed by dentists who are your business competitors. These don't necessarily involve standard of care, informed consent or improper delegation; they involve advertising. Remember that complainants are generally immune from liability and that if you get your advertising wrong, the violation is literally memorialized in print for all the world to see.

TIP: As a licensee complained against, you have the right to get a copy of the complaint filed. But, realize that when another dentist or hygienist in the community is the one filing the complaint, they will typically file it anonymously to avoid potential loss of patient referrals or embarrassing social encounters.

The official DOH complaint form states that a signature is "required to file (a) complaint." But the signature need not be the complainant's proper name. I've seen complaints signed by what appeared to my untrained eye to be "Richard Nixon."

TIP: If you are unsure about advertising your practice, call the FDA and ask for "The Dos and Don'ts of Dental Advertising," or click here to access the article.

TIP: Earlier, I wrote that you may have complaints filed against you that you don't even know about. For example, if a complaint is dismissed for not being legally sufficient, then there is no investigation and no record created. Under section 456.073(1), the subject of the complaint has a right to a copy of the complaint, but only if it "resulted in the initiation of an investigation."

STEP 3: What Complaints Will the MQA Actually Investigate?

The DOH *must* investigate any written signed complaint that is "legally sufficient," meaning it alleges ultimate facts that, if proven, would constitute a violation. Frivolous complaints that you were rude or made the patient wait will not be investigated. But the DOH *may* investigate written anonymous complaints and complaints from confidential informants if they are legally sufficient, the alleged violation is substantial and the DOH has reason to believe after preliminary inquiry that the allegations are true. That gives the DOH a lot of discretion.

TIP: Once the complaint has been filed, the person filing it cannot stop it, even if they request the DOH to cease the investigation and report that the matter has been settled amicably. *(See, section 456.073(1), Fla. Stats.)* The DOH investigates individual complaints, not to redress wrongs suffered by a specific person, but rather to protect the safety of the public.

The DOH *may* start investigations even if there is no complaint filed. If the department has "reasonable cause" to believe that a licensee or group of licensees is violating the law or disciplinary rules, they can initiate investigations on their own authority. Again, there is broad discretion on what gets investigated.

Finally, under section 456.073(1), Fla. Stats., physicians, podiatrists and chiropractors will typically be investigated if a paid claim that exceeds $50,000 is reported within the previous six years. In contrast, under section 466.028(6), Fla. Stats., dentists will be investigated if a single paid claim exceeds $25,000, or there are three or more malpractice claims where indemnity has been paid (in any amount) in the previous five-year period.

STEP 4: The Timing of the DOH Investigative Process

We have seen that the DOH must investigate some complaints, but has broad discretion to investigate others. In general, you will be given notice that they are investigating you, but not always (more on that later).

Statute of Limitations

There is a statute of limitations on licensure cases, but we will see it has little practical effect. Section 456.073(13), Fla. Stats., says an Administrative Complaint (AC), which is the formal charging document, must get filed within six years after the time of the incident or occurrence giving rise to the licensure complaint.

TIP: This time frame is significantly longer than the two-year statute of limitations on malpractice litigation (which often can be extended) and the four-year minimum records retention period under BOD Rule 64B5-17.002, Fla. Admin. Code. Thus, you should consider retaining your records for a longer time if you anticipate problems.

When the clock starts ticking also is different. For licensure discipline, it's six years from the incident; for medical malpractice litigation, it's two years from when the patient "knew or reasonably should have known that the injury was caused by malpractice;" for the BOD records retention rule, it's four years "from the date the patient was last examined or treated by the dentist." Participating provider agreements for managed-care plans and Medicaid rules also specify different records retention periods.

So, recognizing that the original records are literally the "best evidence" in licensure and malpractice litigation under the Florida Evidence Code (chapter 90, Fla. Stats.), how long should you keep them to protect yourself? **I would recommend seven years.**

TIP: If you don't already have a written records management policy that says how long to keep records, you need to get one as soon as possible. The "records owner" statute (subsections 456.057(10) and (11), Fla. Stats.) requires that:

> all records owners shall develop and implement policies, standards and procedures to protect the confidentiality and security of the medical record. Employees of records owners shall be trained in these policies, standards and procedures. Records owners are responsible for maintaining a record of

all disclosures of information contained in the medical record to a third party, including the purpose of the disclosure request. The record of disclosure may be maintained in the medical record.

TIP: How will you prove compliance if the policy, training and record of disclosures are not written down?

TIP: Have one rule for all your records, or else you will get totally confused and end up not following your own policy, which will be used against you at trial.

I recommend seven years from the last scheduled appointment or treatment of any kind, regardless of who did it. These dates usually coincide, but not always. For example, think about the emergency procedure you did, the prophy you authorized 13 months ago, or the script you called in and forgot about.

TIP: An exception to the recommended seven-year rule would be where your records are unhelpful to your defense (i.e., another doctor looking at them would immediately see you did something wrong). Then it is in your best interest to dispose of them as quickly as possible. Note that this strategy comes with an unacceptably high risk of "spoliating" evidence because you are departing from your written records retention policy, which means that the judge can instruct the jury to assume wrongdoing on your part simply because evidence is missing due to your action.

Also, recognize that there is no "one-size-fits-all" answer to how long to keep records. For example, the six-year filing time frame for licensure actions doesn't apply when "criminal actions, diversion of controlled substances, sexual misconduct or impairment by the licensee" is involved. As another example, in licensure cases where it can be shown that "fraud, concealment or intentional misrepresentation of fact prevented the discovery of the violation of law," the complainant gets up to, but no more than, 12 years to file from the time of the incident or occurrence. Many dentists keep records forever, especially now that they are electronic.

Once the investigation starts, there is no time frame within which the DOH must file an AC or suffer dismissal. Section 456.073(4), Fla. Stats., encourages the DOH to complete the investigation "within one year after the filing of the complaint." But the case doesn't get dismissed if it takes longer. Rather, at the one-year mark it simply gets referred to the BOD for their decision on what to do. It does not get automatically dismissed.

"Laches"

Unlike malpractice litigation, there is no effective statute of limitations or "repose" on licensure investigations or BOD disciplinary actions. But under Florida case law, the equitable doctrine of "laches" may apply to dismiss stale investigations and prosecutions. Laches applies if the finder of fact determines that an unreasonable delay in prosecuting has prejudiced the respondent's ability to defend herself against the complaint. *(See, e.g., R. Timothy Carter, O.D. v. DPR, 613 So.2d 78, at 80 [Fla. 1st DCA, 1993])*:

> … (the statutory requirement) that the department "expeditiously investigate complaints" is not an idle recitation, but a directive to act promptly for the protection of the public as well as to assure timely due process to the licensee. And we must assume that the legislature used the words "time limit" in (section 456.073(2), Fla. Stats.) advisedly to communicate clear legislative intent that complaints against licensed professionals regulated by the department and its boards should be expeditiously processed without unjustifiable delay. This expeditious handling of complaints serves to protect the public from potential harm or injury caused by violations of the law and standards governing the professional's practice. Of course, these time limits also accord to the licensee complained against the right to a speedy determination of the matters giving rise to the complaint and provide protection against the potential prejudice that flows from unreasonable delays, such as loss of documents, unavailability of witnesses and fading memories.

STEP 5: Will You Even Know if You Are Being Investigated?

Once under investigation, the respondent usually will receive notification of the investigation. Under section 456.073(1), Fla. Stats., the DOH is required, upon request, to provide a copy of the complaint to the respondent or his or her attorney.

TIP: Always request a copy of the complaint and any attachments considered, and do so in writing. The DOH is legally required to provide this information "promptly."

Fifth Amendment Due Process Requirements

You may have heard in dental school that "licensure is a privilege not a right," implying that it is easy for the government to take away your license to practice. From a legal perspective, this is inaccurate in the health care professions.

TIP: There is a difference between disciplinary proceedings that are "penal" in nature versus those that are "remedial" in nature. You have more protection when discipline is penal rather than remedial.

In Florida, health care licensure discipline is considered penal or "quasi-criminal," not remedial. Interestingly, however, there is a line of cases, starting with *DeBoch v. State of Florida*, 512 So.2d 164 (1987), that say disciplinary actions by The Florida Bar are remedial, not penal, making it easier for the state to punish lawyers than dentists despite the fact that state regulation of both professions aims to protect public safety.

The leading Florida Supreme Court case on this issue is *State ex. rel. Vining v. Florida Real Estate Commission*, 281 So2d. 487 (Fla., 1973). The Fifth Amendment of the U.S. Constitution and Article 1, Section IX of the Florida Constitution extend civil rights present in criminal cases such as the right to be informed of the accuser and the accusations against you as well as the right to cross-examine the accuser and witnesses (i.e., due process of law under the Fifth Amendment). *Vining* is noteworthy because it extends criminal Fifth Amendment protections to licensure cases against dentists. Specifically, *Vining* extends the privilege against self-incrimination to penal cases, defined as those that "… tend to degrade the individual's professional standing, professional reputation or livelihood."

Specifically, this case dealt with the right to remain silent. But remember, in Step 2 we identified five circumstances under which a dentist is compelled to self-report, which would seem to violate the privilege against self-incrimination. Further, under *Sheppard v. Florida State Board of Dentistry*, 369 So.2d 629 (Fla. 1st DCA, 1979), there is no Fifth Amendment privilege when records are required to be made and maintained by statute. Subsection 466.018(3), Fla. Stats., requires you to "maintain written dental records and medical history records which justify the course of treatment of the patient. The records shall include, but not be limited to, patient history, examination results, test results and, if taken, X-rays."

TIP: Don't expect any Fifth Amendment protection for your clinical records. Also, we will learn below that under certain circumstances, the DOH may lawfully investigate licensees without informing them, which raises due process of law considerations under the Fifth Amendment.

TIP: DOH proceedings work differently than other litigation; you will probably not be given all of the information the DOH has against you, especially in the early steps.

When You Will Not Be Told

The DOH may investigate without notifying you under three circumstances. First, under section 456.073(1), Fla. Stats., "if the act under investigation is a criminal offense."

TIP: Not all crimes constitute legally sufficient grounds to investigate. Section 456.074, Fla. Stats., enumerates what crimes constitute disciplinary violations. In general, they are fraud, controlled substance violations and sexual misconduct. Second, under section 456.073(1), Fla. Stats., notification will be withheld if the state surgeon general, the BOD chair and the chair of the Probable Cause Panel (defined below) "agree in writing that such notification would be detrimental to the investigation." This gives wide discretion. Third, when an Emergency Suspension Order (ESO) is involved, the first time you learn of it will be when you are served and told to immediately stop practicing. This is analogous to a nuclear bomb being dropped on your head and is the worst form of licensure discipline. More information on the ESO process follows.

ESOs

ESOs are issued for serious violations relating to the commission of crimes, standard of care or drug use, as well as for student loan defaults. Section 120.60(6), Fla. Stats., and section 456.073(8) and section 456.074, Fla. Stats., outline the procedures for ESOs.

TIP: ESOs are intended to deter others, and for that reason, they are released to the media and plastered all over the internet. You will see your name in the newspaper.

ESOs are significantly different when compared to regular ACs. ESOs are issued when the DOH finds that "immediate serious danger to the public health, safety or welfare" requires emergency suspension, restriction or limitation of a license. An ESO is effectively a stop-work order or temporary injunction to cease practicing.

Under section 120.60(6), Fla. Stats., the DOH is authorized to issue ESOs. Issuance must be consistent with the Fifth Amendment privilege (see above) and should be limited to only that action necessary to protect the public interest. The DOH must state in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety or welfare, and its reasons for concluding that the procedure used is fair under the circumstances.

TIP: The agency's findings of immediate danger, necessity and procedural fairness are judicially reviewable by the appropriate District Court of Appeal (DCA), not the Circuit Court or DOAH. This is because an ESO does not constitute an agency Final Order, as no hearing occurs prior to the ESO being issued. In most cases, the ESO gets issued before the AC because there is an immediate threat to public health. The AC should get filed shortly after the ESO is issued.

TIP: You have a right to get the AC, and it will have more detail.

Discretionary and Mandatory ESOs

Section 456.073(8), Fla. Stats., places further restrictions on the DOH's issuance of "discretionary" ESOs as does section 456.074, Fla. Stats., on "mandatory" ESOs. In discretionary ESOs, the surgeon general typically takes responsibility for issuing the final summary order, but he or she can delegate authority to someone else in the DOH. There is discretion to immediately suspend or restrict the license of any dentist or dental hygienist who tests positive for drugs on a pre-employment or employer-ordered drug test. The licensee is given 48 hours from the time the surgeon general is notified of the confirmed positive test to produce a lawful prescription for the drug or else an ESO will be issued.

TIP: Self-prescriptions are not lawful. Section 466.028(1)(q), Fla. Stats., prohibits a dentist from "prescribing, procuring, dispensing or administering" scheduled drugs or controlled substances to himself or herself.

Section 465.074, Fla. Stats. regulates "mandatory ESOs" and requires emergency suspension in two situations. First, for a licensee who "pleads guilty to, is convicted or found guilty of, or who enters a plea of nolo contendere to, regardless of adjudication, a felony under chapter 409 (social and economic assistance), chapter 817 (fraud), chapter 893 (controlled substances)," the Federal Controlled Substances Act or Medicare/Medicaid regulations. Second, the DOH must issue an ESO upon receipt of information that a licensee has defaulted on a student loan issued or guaranteed by state or federal government. The DOH will notify the licensee via certified mail of the default and, unless the licensee submits proof that new payment terms have been agreed to, the ESO will go into effect 45 days later.

TIP: You might think that not paying a student loan is far less harmful than illicit drugs or fraud, but both will result in mandatory ESOs.

How to Respond to an ESO

This is counterintuitive, but — most importantly — stop practicing immediately or else you will be prosecuted for felony unlicensed practice under sections 466.026 and chapter 775, Fla. Stats. While section 120.06(6), Fla. Stats. requires that an AC in support of the ESO be filed "promptly," it often is not — so being served with an ESO may be your first introduction to licensure discipline.

TIP: Recognizing that you are losing income and have liability exposure for patients who do not receive necessary care, you must take immediate legal action.

If an AC is filed with the ESO, you may challenge it through the DOAH via informal hearing under section 120.569 or formal hearing under 120.57, Fla. Stats. More on the difference between the two later. You also have the right to an expedited hearing.

TIP: Consider if you will have enough time to complete discovery if you request an expedited hearing.

TIP: Don't be fooled by the nomenclature of informal hearings and expedited review.

Even if you get an expedited hearing, there is a significant delay in getting back to work. After the trial, the recommended orders are submitted to the ALJ; the recommended order gets filed by the ALJ; the parties have the right to take exceptions to the final order; and then, the case is finally presented to the BOD, which may reject findings of fact but not conclusions of law in the ALJ's final order. The process is lengthy, and during that time you are out of work.

TIP: There may be a faster way to get back to your practice. ESOs and emergency licensure restrictions are appealable to the 1st DCA in Tallahassee where the DOH maintains its headquarters.

TIP: You also can file an appeal with the DCA where you reside. You may get a faster docket, it will be cheaper to litigate closer to home and there may be favorable case law that is not present in the 1st DCA.

A Petition for Review of a Non-final Order to the DCA is authorized under sections 120.60(6)(c) and 120.68(1) and (2)(a), Fla. Stats. The petition should ask for the ESO to be quashed or, in the alternative, modified based on the allegation that the department has not followed the essential requirements of Florida law. The basis for the DCA appeal is that the DOAH review will not

provide an adequate legal remedy if you prevail because it takes so long.

The leading case is *Cunningham v. AHCA*, 677 So.2d 61 (Fla 1st DCA, 1996), which requires the DCA to consider disruption of your practice as well as harm to patients when you cannot complete treatment plans.

TIP: When you file the petition, also file a Motion Requesting a Stay of the Final Order. If the motion is granted, you can return to practice while the lengthy appeals process works its way through the DCA. The basis of your petition will be the DOH's failure to comply with section 120.60(6)(b), Fla. Stats.

TIP: You have three arguments to support your petition and motion for stay. First, argue that the DOH could have taken other actions short of an ESO to protect public safety. For example, they could have placed an emergency restriction requiring you to practice under the supervision of another doctor. Second, argue that the ESO does not set forth with specificity the facts and reasons for the alleged immediate danger. In *Commercial Consultants Corp. v. DBR*, 363 So.2d 1162 (Fla 1st DCA, 1978), the court held that the agency's reasons for an ESO "must be factually specific and *persuasive* concerning the existence of a genuine emergency." (*Emphasis added.*)

TIP: You essentially are arguing that the conduct complained of will not continue *in the future* regardless of whether it actually happened *in the past.* Third, argue that it is unfair or violates your due process rights discussed above.

STEP 6: The Investigative Process

It's during the investigative phase that doctors must especially be aware of their legal rights. Generally, you will be given notice of the investigation. You are entitled to a copy of the complaint.

TIP: Immediately request the complaint and all attachments in writing or else you will not get them.

First contact usually will be in the form of a letter or phone call from a DOH investigator. It may imply that you must respond in writing to the investigator. It may ask that you contact the investigator by telephone to set up an interview time. More often, they will intentionally call you at the most inconvenient time or show up at the busiest time of the day and flash their badge to rattle your cage because someone who is upset is much more likely to incriminate themselves than a lawyer who deals with investigators every day.

TIP: Some investigators may take the opposite strategy and convince you they're your friend, that "it's no big deal" or that they "just need to hear your side of the story in order to clear you."

TIP: You are *not* legally required to respond to the investigator. You have the right, but not the duty, to submit a written response. A response is not mandated.

TIP: Even though Florida law treats licensure discipline as "quasi-criminal," investigators are under no obligation to tell you your rights. You have rights that you probably don't even know about, but there is no right to a Miranda warning.

TIP: What you think is innocuous or meaningless may end up being critical. Remember, the DOH must prove every single element of the counts against you to prevail. If you give them records, you have made them admissible as evidence against you and have waived any right to object. If you acknowledge that you treated the patient, then the state no longer has to prove this element via a witness.

TIP: Under section 456.073(1), Fla. Stats., dentists have 20 days from the notice to submit a written response. Physicians have 45 days. A written response is crucial because it must be considered by the Probable Cause Panel (PCP) and will be one of your only opportunities to tell your side of the story.

TIP: Some investigators are more creative than others. For example, if you are told that you are not the "target" of the investigation, that they "just need a few records," or they want to ask you "just a few simple questions to clear you," then be on high alert. If you volunteer answers, medical records or reimbursement information, you may have given away documents or damaging information that might otherwise have been protected. Once the information has been given away, you have waived any available objections. You do not want to obstruct justice, but at the same time, you want to force the government to prove the allegations against you.

TIP: Do not ask questions of or expect help from the investigator, the DOH or the BOD. At this point, they are your adversaries, so go to your lawyer — not the government — if you have questions. Only your lawyer is there to protect you — no one else.

TIP: Investigators go by all different types of titles. For example, they could call themselves auditors, surveyors, special agents, compliance officers, quality assurance investigators or medical malpractice investigators.

TIP: If their credentials use the word "integrity," you are being investigated for fraud. If they carry a gun, you are being investigated for criminal activity, so guard against "civil forfeiture" of your assets.

TIP: Never write your own response to the investigator and never agree to an interview. It's always appropriate to politely decline any request for interviews until legal counsel has been consulted. The reason a police officer always asks, "Do you know why I pulled you over?" is to get you to make an admission or a declaration against interest. In plain language, they want you to confess by responding, "Because I was speeding." Respond to a DOH investigator the same way you would respond to the police investigating you. You have the right to remain silent — and it's usually the best strategy.

It is human nature to try to explain your side of the story when accused — do not fall for this trick and be extremely wary of talking to the investigator. DOH investigators are former law enforcement officers trained on how to get confessions. Some may appear friendly and reassuring. Others can be intimidating. Regardless, most have no medical background at all and will not understand you when you try to explain standard of care to them. Further, they have no authority to dismiss the case against you. Most dentists are not trained advocates and therefore, will feel intimidated or lured in by the tone and manner of the investigator's questioning. Nor will they know when an appropriate evidentiary objection should be made.

TIP: You want your lawyer to respond *in writing*. The response will be addressed to the investigator, but your lawyer is writing it to be read by the department's attorneys and medical experts. While a verbal response (other than a confession) will probably not be written down by the investigator, your lawyer's written response is the only thing that will travel with the investigator's report and it is crucial to balance the investigator's recommendation to the PCP.

TIP: The response should not try to blame someone else (unless you can prove it). Rather, the response should:

- focus on factual errors and inconsistencies in the complaint.
- be objective.
- emphasize the training and credentials of the licensee.
- recite an accurate chronology of events.
- attach scientific literature and affidavits from fact or expert witnesses supporting your treatment.
- lay the groundwork for challenging the discipline under either section 120.569 or section 120.57, Fla. Stats., and set out any mitigating factors.

Under Rule 64B5-13.005(2), Fla. Admin. Code, the BOD must consider the following as aggravating or mitigating circumstances:

- danger to the public
- number of specific offenses
- prior discipline
- length of practice
- actual damage caused and its reversibility
- deterrent effect
- effect on the licensee
- rehabilitation efforts by the licensee
- actual knowledge that it was a violation
- attempts (or refusals) by the licensee to correct or stop the violation
- any other aggravating or mitigating circumstances (e.g., health conditions, patient non-compliance, location of service and availability of equipment, etc.)

TIP: Section 456.073(10), Fla. Stats., gives your lawyer a *second* chance to respond in writing once the investigation is concluded, but he or she must ask for it. Always ask for it because your first response will only have the allegations in the AC. In contrast, your second response will include not only the AC, but also the investigator's report as well as the expert witness opinions. This statute provides:

> Upon completion of the investigation and a recommendation by the department to find probable cause, and pursuant to a written request by the subject or the subject's attorney, the department shall provide the subject an opportunity to inspect the investigative file or, at the subject's expense, forward to the subject a copy of the investigative file. Notwithstanding s. 456.057, the subject may inspect or receive a copy of any expert witness report or patient record connected with the investigation if the subject agrees in writing to maintain the confidentiality of any information received under this subsection until 10 days after probable cause is found and to maintain the confidentiality of patient records pursuant

to s. 456.057. The subject may file a written response to the information contained in the investigative file. Such response must be filed within 20 days of mailing by the department, unless an extension of time has been granted by the department.

Agency investigators also must follow procedural rules set forth in section 120.62, Fla. Stats.:

> Every person who responds to a request or demand by any agency or representative thereof for written data or an oral statement shall be entitled to a transcript or recording of his or her oral statement at no more than cost. Any person compelled to appear, or who appears voluntarily, before any presiding officer or agency in an investigation or in any agency proceeding has the right, at his or her own expense, to be accompanied, represented, and advised by counsel or by other qualified representatives.

TIP: At the DOAH trial or a DCA appeal, your credibility as a witness can be impeached by "prior inconsistent statements." Before you testify at trial or on appeal, always review what you said during the investigatory phase so you don't contradict yourself. Unless you have a fantastic memory while under stress, how can you do that effectively if you haven't exercised your right to have a transcript?

TIP: Often, it is the coverup or the lie that will get you in far more trouble than the underlying charge against you. If you lie or alter your records, you should, at best, expect a count of fraudulent misrepresentation or a records violation; at worst, expect to be tried for perjury.

STEP 7: Subpoena Authority

Sometimes the investigator or attorney prosecuting the disciplinary case will simply request production of records from the licensee via a letter. However, section 456.071, Fla. Stats., clearly gives the investigator general authority to subpoena your records and compel your testimony:

> For the purpose of any investigation or proceeding conducted by the department, the department shall have the power to administer oaths, take depositions, make inspections when authorized by statute, issue subpoenas which shall be supported by affidavit, serve subpoenas and other process, and compel the attendance of witnesses and the production of books, papers, documents and other evidence. The department shall exercise this power on its own initiative or whenever requested by a board or the probable cause panel of any board.

When the patient is the complainant, they usually sign an authorization to release records to the DOH and if you don't comply voluntarily, the DOH will then subpoena the records under section 456.071, Fla. Stats. But what happens if the patient has *not* signed an authorization to release records to the DOH because they are missing, uncooperative or dead? In that situation, the DOH can still get your medical records if the allegations concern improper prescribing, standard of care, fraudulent billing, kickbacks or patient-brokering, and they establish "reasonable cause" under section 456.057(8), Fla. Stats.:

> The department may obtain patient records pursuant to a subpoena without written authorization from the patient if the department and the probable cause panel of the appropriate board, if any, find reasonable cause to believe that a health care practitioner has excessively or inappropriately prescribed any controlled substance specified in chapter 893 in violation of this chapter or any professional practice act or that a health care practitioner has practiced his or her profession below that level of care, skill and treatment required as defined by this chapter or any professional practice act and also find that appropriate, reasonable attempts were made to obtain a patient release.
>
> The department may obtain patient records, billing records, insurance information, provider contracts and all attachments thereto pursuant to a subpoena without written authorization from the patient if the department and probable cause panel of the appropriate board, if any, find reasonable cause to believe that a health care practitioner has submitted a claim, statement or bill using a billing code that would result in payment greater in amount than would be paid using a billing code that accurately describes the services performed, requested payment for services that were not performed by that health care practitioner, … received a kickback as defined in s. 456.054, (or) violated the patient brokering provisions of s. 817.505 ...

Enforcement

Under subsection 120.569(2)(k)(2), Fla. Stats., if you do not comply with a lawfully issued subpoena (e.g., you simply ignore it or indicate your refusal to comply with it), then the DOH may file a petition to enforce the subpoena in circuit court. If the court orders the subpoena is valid, then you are in contempt of court for not complying.

TIP: The prevailing party (you, if the subpoena is quashed; the DOH, if it isn't) is entitled to attorney fees and costs incurred in the circuit court litigation.

STEP 8: Challenging a DOH Subpoena

Subsection 120.569(2)(k)(1), Fla. Stats., outlines the procedure to challenge subpoenas. This is done through filing a Motion to Quash or a Motion for Protective Order. Typical grounds for challenging a subpoena are that it:

- was not lawfully issued (e.g., it was not signed properly).
- was not properly served (e.g., your employee lacked authority to accept service of process).
- is being issued for an improper purpose (e.g., to harass or delay).
- is unreasonably broad in scope.
- requires the production of irrelevant material.
- is filed for frivolous purposes.
- needlessly increases the cost of litigation.

You also may challenge a subpoena on U.S. Constitutional grounds as well as under Article I, Section 12 (searches and seizures) and Section 23 (right of privacy) of the Florida Constitution.

TIP: Before you provide anything to the government in response to a subpoena or a request for production, you should have your lawyer review both the subpoena and the records you intend to produce. Once materials are produced, you have waived your right to challenge the subpoena.

TIP: You may be asked to voluntarily sign an affidavit that the copies of the records you provided to the government are "true and accurate" or constitute "the complete" record. Be on high alert, because chances are you did not personally make the copies. Your lowest paid staff person or the investigator probably made the copies and you may have casually observed that process. There is no Florida law requiring you to sign such an affidavit and many times records do not get fully copied. For example, is anyone other than yourself going to take the time to make sure any sticky notes are included; that both the front and back of the pages are copied; that the front and back of the folder is copied (if you use paper records), including any code or color that you may use to indicate a patient's health or billing status; and, that everything is in order, numbered and labeled?

TIP: A subpoena duces tecum (i.e., a subpoena that demands production of document or materials in connection with the appearance of a witness or party at a deposition, hearing or trial) is not a substitute for an unlawful, warrantless search and seizure (i.e., the government cannot serve the subpoena on you or your employee and immediately search and seize records). *(See, Dean v. State of Florida, 478 So. 2d 38 [1985]).*

TIP: Do not think that Florida records confidentiality law or the federal Health Insurance Portability and Accountability Act (HIPAA) gives you any defense against a properly issued subpoena even if the patient hasn't signed an authorization to disclose the records. HIPAA provides exceptions to the confidentiality of identifiable health information for "health oversight activities." Pursuant to 45 C.F.R. §164.52(d), a covered entity must disclose protected health information to a health oversight agency like the DOH.

TIP: If you performed the dental services in a hospital, the BOD is authorized to subpoena the records even if the patient hasn't signed a release under section 395.3025(4)(e), Fla. Stats.

MFCU Search Warrants

Licensure investigations will not involve search warrants. However, if you are being investigated for Medicaid reimbursement fraud, bribes, kickbacks or rebates for patient referrals, abuse or neglect of a child, or financial exploitation of an elderly patient, you probably will first learn of it when you're served with a search warrant by the Florida Medicaid Fraud Control Unit (MFCU) or another governmental enforcement agency. Or, even worse, you will first find out when your credit card is denied or your checks start to bounce because of civil forfeiture (discussed below).

Under subsections 409.920(9)(a-c), Fla. Stats., the MFCU performs both criminal and civil investigations of reimbursement fraud, and criminal investigations regarding alleged patient abuse, neglect and exploitation. Section 466.028(1(t), Fla. Stats., makes fraud in the practice of dentistry a disciplinary violation. Section 825.103, Fla. Stats., makes it a crime to abuse, neglect or financially exploit a child or an elderly person (60 or over).

The MFCU is a unit within the Florida Office of Attorney General, which has been granted statutory authority to issue investigative subpoenas and search warrants to review provider

records for evidence relating to Medicaid fraud and/or patient abuse. Under section 409.9205(1), Fla. Stats, MFCU investigators are active law enforcement. They carry guns, can execute search warrants and have authority to arrest you. Often, they will coordinate searches with local law enforcement.

Under subsection 409.9205(10)(a), Fla. Stats., the MFCU may enter upon the premises of any Medicaid-participating dentist to examine accounts and records that may be relevant in determining the existence of fraud in the Medicaid program. In addition, these powers may be used to investigate the alleged abuse or neglect of patients, or the alleged misappropriation of patients' private funds.

You are required to make available any accounts or records that may be relevant in determining the existence of fraud in the Medicaid program, alleged abuse or neglect of patients, or alleged misappropriation of patients' private funds.

TIP: However, the accounts or records of a non-Medicaid patient may not be reviewed by, or turned over to, the attorney general without the patient's written consent. Additionally, the MFCU can subpoena witnesses or materials, including medical records relating to Medicaid recipients, within or outside the state, and through any duly designated employee; administer oaths and affirmations; and, collect evidence for possible use in either civil or criminal judicial proceedings.

Civil Forfeiture Laws

If you are under criminal investigation (e.g., sex, drugs and fraud — *not* rock and roll), your first notice may be when your bank tells you that your account was seized by the government. When the government shows up at your front door, they will take anything and everything that they think will prove that you are guilty of a crime, that is evidence of a crime or that is used "in furtherance of a crime."

TIP: "In furtherance of a crime" means "civil forfeiture" applies and the government may take away your property *before* you have been found guilty of anything. You may lose your computers, paper records, cash, cellphone, car, bank accounts, maybe even your real estate. You have a very short time to challenge civil forfeiture and the burden is on you to do so.

TIP: You can get your property back if you can prove, for example, that you are innocent or that you did not know that the property taken was being used in furtherance of a crime.

TIP: If you can't get your property back, maybe someone else can, so your business does not go into bankruptcy. For example, someone who is innocent and not under investigation but is a co-owner of the property taken can get it back. Think about what your partnership agreement says about ownership. Think about whether your car is titled in your name, jointly with your spouse or by your business.

What's the Difference Between a Subpoena and a Search Warrant?

Subpoenas are issued by the MFCU or DOH attorney of record requiring you to appear at a deposition or trial. Subpoenas that are "duces tecum" request you to produce documents or materials under your control or bring them to the deposition or trial. Subpoenas are issued by lawyers; search warrants are issued by a judge who is neutral and not in an adversarial relationship with the party getting served.

The MFCU and DOH subpoenas are considered investigatory subpoenas, meaning that, because they are issued by an adversarial party, you may challenge them *before* you produce documents or materials. Subpoenas are less intrusive than a search warrant. When you are served with a subpoena, law enforcement is not going to immediately go through your belongings and there is no threat or actual use of force. When you are served with a search warrant, they will immediately execute it and under section 933.15, Fla. Stats., you are subject to arrest for a misdemeanor if you refuse entry.

Under section 933.02, Fla. Stats., a judge issues a search warrant when an investigator files an affidavit (a written statement made under oath) saying that property has been used as a means to commit any crime. The affidavit asserts probable cause and will name and describe with particularity the person, place or thing to be searched. Under section 933.09, Fla. Stats., if the investigator is refused entry, he or she may lawfully break down the door or a window to gain access to the premises to execute the warrant. Depending on what the judge allows, under sections 933.10 and 101, Fla. Stats., the warrant may be served at night or on a Sunday when you are out of the office. Warrants are issued in duplicate and you, as the subject of the investigation, or whoever is in charge of the premises, will get a copy.

TIP: If no one is present when the warrant is executed, the investigator will simply leave it at the premises. All property removed will be noted on the inventory receipt and you will be given a copy. Hopefully, they will lock the place back up before they leave.

A Case Study: *State v. Tsavaris*, 394 So. 418 (Fla., 1981)

One Monday morning after a patient's death on Saturday night, the Hillsborough County Sheriff's Department showed up at Dr. Louis Tsavaris' office and proceeded to interview Ms. Carlton, Dr. Tsavaris' part-time secretary. The employee refused to give the detectives any of the records or information from the records, stating that this information was confidential and disclosure would be unethical.

Later that same morning, four detectives from the Sheriff's Department and an assistant state attorney went to Dr. Tsavaris' office. They served two subpoenas duces tecum on Ms. Jones, Dr. Tsavaris' full-time secretary. Each subpoena was addressed to "custodian of records, 4600 Habana Suite 28, Tampa, Fla. (Office of Dr. Louis Tsavaris)" and commanded the "custodian of records" to appear before the state attorney "instanter," which is similar to a search warrant in that it demands the records be produced without time to talk to a lawyer. One subpoena demanded all medical records relating to the deceased patient. The other demanded the custodian bring with her the doctor's personal appointment book. Ms. Jones went with two detectives to the office of the state attorney and there turned over to the state attorney four sets of records from Dr. Tsavaris' office. Personnel at the state attorney's office made copies of those records and returned the originals to Ms. Jones.

At trial, Dr. Tsavaris argued that the state attorney had obtained the subpoenaed office records in violation of his right to be free from unreasonable searches and seizures. He further argued that the records should be suppressed because the subpoenas were defective and improperly served.

The Florida Supreme Court held that Dr. Tsavaris had no grounds to object to the defective process and determined that the duty rested on the employee, Ms. Jones, to object to the form of process served: "If a witness fails to object to the form or service of process, the witness waives any right to be heard at a later date on those matters. Objections to the legality of a subpoena are personal and may be asserted or waived only by the person being searched or examined." Thus, the doctor could not object to the subpoena service and process, even though it was his records that were taken.

TIP: Think carefully about your written records policy and under what circumstances employees must contact you before releasing records.

The court further ruled that the doctor could object on the grounds that his constitutional rights under the Fourth Amendment were violated. But it held that a subpoena "will not constitute an unreasonable search and seizure under the Fourth Amendment as long as the subpoena is properly limited in scope, relevant in purpose and specific in directive, so that compliance will not be unreasonably burdensome." The court also noted that there was no objection made at the time of service that the subpoenas were overbroad or irrelevant.

The first employee responded properly, the second employee put the doctor in harm's way.

TIP: Train your employees frequently on your record policy and enforce it strictly.

What Should I Do if the Government Shows Up at My Office?

From the case study, we've learned that if you invite them in, you waive any objections to the search.

TIP: If they ask, "Do you mind if we come in to get out of the sun or to discuss this in private?" do not answer, "Yes," or move out of the entryway. That is consent to conduct the search.

While you have more rights against "inspection" warrants in connection with OSHA (workplace safety, hazard communication, bloodborne pathogens), Office of Radiation Control (X-ray equipment inspection) or anesthesia permitting than you do against search warrants for criminal activity, best practice is to not invite them in unless you knew they were coming and have properly prepared.

TIP: If you refuse entry, the only time they can come in without a warrant is under "exigent circumstances," meaning a grave emergency exists that makes a warrantless search imperative to the safety of police and the public. *(See, Riggs v. State, 918 So. 2d 274 [Fla., 2005].)* Exigent circumstances include the need to preserve life or render first aid, so if they enter your practice on a report of child or elder abuse and hear screaming, a judge will probably rule it as entry under exigent circumstances.

TIP: Ask for their identification and credentials. Keep your copy of the warrant and keep records of who was there and what they took. Don't rely on the inventory receipt. Keep your own record. If they don't have a warrant, you (or your employees if you are not present) should politely refuse entry and call your lawyer at once.

Even if they have a warrant, ask if they can come back at a scheduled time or wait so you can have your lawyer present. If they decline — which they probably will — don't refuse entry or you will be arrested for obstruction of justice.

Remain with the MFCU investigators and inform them that they may not review or remove any non-Medicaid patient records or files. You and your employees cannot be compelled to assist in the search. It is usually a good idea to send your employees home while the investigators conduct the search. You are under no obligation to discuss any matters with law enforcement officials.

If your lawyer is present, let him or her do the talking. If you are alone, try to do the following:

- Do not let them take original records. They are entitled to copies of written records and should return the originals to you.
- Object to seizures of anything outside the scope of the warrant.
- Protect carefully any attorney-client or attorney-work product materials.
- Keep your own inventory of seized property. Copy important documents.
- Object to the seizure of essential records required for your business. Ask that the investigator obtain copies of any hard drives. Ask to have computer discs placed under seal pending review for privilege.
- Do not obstruct justice by interfering with the search. Object, but do not resist.
- Demand all interviews on premises stop immediately. Remember, employees have a right to speak only if they wish to speak. If you tell them not to speak, that is obstruction. However, you have the right to tell them they are not required to speak and then inform the investigator of their decision.
- You cannot be compelled to tell the location of documents.
- After the search, debrief with your lawyer and tell your employees not to discuss the search among themselves or with anyone else.
- Make sure you identify and protect potentially related documents that might have been missed. Do not destroy them and make sure you don't lose them.

STEP 9: Peer Review Protection

From Dr. Tsavaris' case study, we've seen that the ability of licensees to prevent investigation into, and to exclude evidence under procedural and substantive due process rights (Fourth and Fifth Amendment, Section I, Article 23 of the Florida Constitution, and statutory protections), is limited at best.

TIP: Under subsections 395.0193(14) and 395.0197(13), Fla. Stats., the state has the broadest possible authority to get records when the dental procedure took place in a hospital because hospitals must file reports of adverse incidents that become public record. Likewise, if they are investigating an adverse anesthesia occurrence, they will get any and all records.

TIP: Peer review records are non-discoverable, and even if they are found (usually by the patient disclosing them), they are non-admissible as evidence in civil or disciplinary litigation under sections 766.101, Fla. Stats., (civil litigation) and 466.022, Fla. Stats. (licensure discipline). Nor can peer review members or witnesses be compelled to give testimony as to the peer review proceedings. This is another example of how the FDA Peer Review serves as effective risk management for members.

Why Are Peer Review Records Privileged?

The reason peer review records have significantly greater protection is found in subsection 766.101(7)(a), Fla. Stats.: "It is the intent of the Legislature to encourage medical review committees to contribute further to the quality of health care in this state by reviewing complaints against physicians in the manner described in this paragraph." In this context, "medical" includes "dental" and "physician" includes "dentist."

The leading Florida case on peer review immunity, non-discoverability and inadmissibility as evidence is *Cruger v. Love*, 599 So.2d 111 (Fla., 1992), where the Florida Supreme Court defined the scope of documents protected under the peer review privilege. First, it explained the rationale behind the privilege:

> The Florida Legislature enacted these peer review statutes in an effort to control the escalating cost of health care by encouraging self-regulation by the medical profession through peer review and evaluation. (*Holly v. Auld*, 450 So.2d 217, 219-20 (Fla., 1984) [interpreting former section 768.40(4),

Florida Statutes, the predecessor to section 766.101]). In order to make meaningful peer review possible, the Legislature provided a guarantee of confidentiality for the peer review process. (*Holly*, 450 So.2d at 220.)

What Records Are Protected?

The scope of the privilege is made explicit in section 766.101(5), Fla. Stats., which states that:

> The investigations, proceedings and records of a (peer review) committee … shall not be subject to *discovery* or introduction into *evidence* in any *civil or administrative* action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee, and no person who was in attendance at a meeting of such committee shall be *permitted or required to testify* in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof. *(Emphasis added.)*

The Florida Supreme Court explained the reasoning behind the broad scope of privilege in *Cruger*:

> The scope of this statutory privilege is at issue here. The statutes do not define what constitutes records of a committee or board. Therefore, we must look to the legislative intent and policy behind the statutes to determine the extent of the privilege. We have previously held that "[t]he discovery privilege ... was clearly designed to provide that degree of confidentiality necessary for the full, frank medical peer evaluation which the legislature sought to encourage." (*Holly v. Auld*, 450 So.2d at 220.) Without the privilege, information necessary to the peer review process could not be obtained. (*Feldman v. Glucroft*, 522 So.2d 798, 801 [Fla., 1988]). While we recognized in *Holly* that the discovery privilege would impinge upon the rights of litigants to obtain information helpful or even essential to their cases, we assumed that the legislature balanced that against the benefits offered by effective self-policing by the medical community.

The court ruled that the privilege provided by sections 766.101(5) and 395.011(9), Florida Statutes, protects *any document considered by the committee or board as part of its decision-making process.* The policy of encouraging full candor in peer review proceedings is advanced only if *all documents considered by the committee or board during the peer review or credentialing process are protected.* Committee members and those providing information to the committee must be able to operate without fear of reprisal. *(Emphasis added, citations omitted.)*

TIP: This statute does not, however, mean that the actual medical records themselves are protected. As we've seen in the *Sheppard* case *(see, page 9)*, records that are statutorily required to be made and maintained have no Fifth Amendment protection. Similarly, under section 766.101(5), Fla. Stats.:

> Information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his or her knowledge, but the said witness cannot be asked about his or her testimony before such a committee or opinions formed by him or her as a result of said committee hearings.

The FDA's Peer Review program is extremely effective at ensuring your records will not be used against you in civil or administrative (licensure) litigation.

STEP 10: Investigative Report

Under section 456.073(2), Fla. Stats., after the DOH completes its investigation, it prepares a written investigative report for the BOD PCP. The report contains the investigative findings and the recommendations of the department concerning the existence of probable cause.

TIP: You have a right to get a copy of the report and all attachments to it. You must request the report in writing within 20 days and you may — and should — have your lawyer file a written response.

When the investigative report is done, the department is given another opportunity to dismiss the case against you. This underscores the importance of counsel submitting written responses within 20 days of when the file is opened and after the investigation is complete. Without your written response the department and the PCP have only the complainant's side of the story.

TIP: You want the case to be dismissed at this point rather than go forward to the PCP. Once a case reaches the PCP step, it becomes increasingly expensive to defend, and the risk of licensure discipline and public embarrassment rises dramatically. A finding of probable cause is the point of no return.

Letters of Guidance and Notices of Noncompliance

TIP: Your written response at the close of the investigation should specifically ask for a "letter of guidance" or a "notice of noncompliance" in lieu of a recommendation of probable cause. The DOH may dismiss your case, or any part of it, if the investigator and DOH attorney determine that there is insufficient evidence to support the allegations. Often, in lieu of finding probable cause, the department may issue a notice of noncompliance or the PCP may issue a letter of guidance.

A letter of guidance or a notice of noncompliance shortcuts a finding of probable cause by the PCP and is in lieu of finding probable cause. Thus, it does *not* constitute formal public discipline against your license. If your case is dismissed before a finding of probable cause, then the investigative report, the letter of guidance and the notice of noncompliance are confidential and exempt from section 119.07(1), Fla. Stats, the state's public records statute.

TIP: Always ask, because the DOH prosecuting attorney has discretion (albeit limited), without input from the PCP, to dismiss your case at this stage.

A notice of noncompliance is an option for an *initial* offense of a *minor violation.* The BOD has established by rule what offenses constitute minor violations for a notice of noncompliance. They are violations that do not demonstrate a serious inability to practice dentistry and that pose no threat to public safety. If you get a notice of noncompliance, be grateful and take action to correct the violation within 15 days from the notice or you will be formally prosecuted.

TIP: If you write a letter or do anything other than accepting, signing and returning the notice of noncompliance, then you have rejected it and the case goes to formal prosecution. You will probably not get a second offer.

TIP: Make sure you pay the fine and document that you've corrected the deficiency. Letters of guidance are similar to notices of noncompliance. If you have already been issued a letter of guidance for a related offense, the DOH cannot issue you a letter of guidance. Also, the PCP may request to review the investigative files pertaining to a case prior to its dismissal by the DOH. If this occurs, and DOH nevertheless dismisses the case, then the PCP may retain independent legal counsel, employ investigators, and continue the investigation and prosecution of the case. This is very bad news indeed, because you want a confidential notice of noncompliance or letter of guidance rather than a finding of probable cause by the PCP.

Citation Offenses

In 1997, the Florida Legislature enacted section 456.077, Fla. Stats., which authorizes the DOH to issue "citations" in simple matters in order to speed up processing of cases.

TIP: Citations are another way to bypass the PCP step; however, unlike letters of guidance and notices of noncompliance, citations are publicly available and may constitute formal discipline that will appear on your license.

After basic investigation, some cases are resolved by the DOH's legal staff sending an offer of citation that gets served on you personally or via certified mail, restricted delivery, to your last known business address. Citations will be issued within six months from the complaint filing date to facilitate swift resolution of simple disciplinary matters.

Citations involve violations where there is no substantial threat to the public health and no violation of standard of care involving injury to a patient. Typical citation offenses include: missing continuing education requirements; failing to timely pay required fees and fines; failing to comply with advertising requirements; and, failing to display licenses and permits.

The citation will be issued directly to the subject and will list the subject's name and address, the subject's license number, a brief factual statement, the sections of the law allegedly violated and the penalty imposed. The citation will clearly state that you may choose, in lieu of accepting the citation, to follow the formal PCP and disciplinary procedure under section 456.073, Fla. Stats.

If you dispute the matter in the citation, the formal PCP and disciplinary procedure must be followed. But if you do not dispute the matter in the citation with the DOH within 30 days after the citation is served, the citation becomes a public final order. Importantly, it does *not* constitute discipline for a first offense. However, it *does* constitute discipline for a second or subsequent offense.

The penalty usually is a fine and remediation of the underlying violation. The DOH also will recover the costs of investigation and prosecution as part of the fine under the citation. The costs assessed will be itemized and will include salaries and benefits of personnel, the time spent by the attorney and investigator, and any other expenses. The BOD will determine the costs by

reviewing an affidavit submitted by the DOH. You have the right to file written objections to how costs were assessed against you.

STEP 11: Probable Cause Determination

If you don't get a dismissal, a notice of noncompliance, a letter of guidance or a citation offer, then your case will proceed to the PCP. Getting to this step dramatically increases the seriousness of the matter and the speed with which it will progress. For example, the PCP has 15 days to request additional investigative information from the DOH if needed. It must make its determination of probable cause within 30 days of receiving the final investigative report. Extensions of the 15-day and the 30-day time limits may be granted, but only by the surgeon general.

The determination as to whether probable cause exists is based on the investigative report, any expert witness opinions and your written response(s).

TIP: In most cases, neither the licensee nor his/her lawyer can participate so, again, the only way you can tell your side of the story is via written response(s).

Whether probable cause exists is decided by majority vote of the PCP. The BOD's PCP consists of three members, and a quorum necessary to vote consists of two members. In the event only two members attend, probable cause shall be determined only if both members vote in the affirmative. Each board under the DOH may provide by rule for multiple PCPs. Currently, the BOD only has one PCP, but medicine and nursing have multiple panels.

One or more PCP members may be former board members with active licenses. Notably, the PCP may include a former or present consumer member at the BOD chair's direction. Having a non-dentist on the PCP may — depending on the circumstances of your case — be to your advantage (e.g., they may have more respect for a doctor or be more lenient than a professional peer) or disadvantage (e.g., they may defer to the dentists regarding scope of practice and standard of care). The PCP also must include a present BOD member.

Under section 456.073(4), PCP proceedings are confidential, exempt from the Sunshine Law and the notice requirements under section 120.525, Fla. Stats., and kept non-public until "10 days after probable cause has been found to exist by the panel or until the subject of the investigation waives his or her privilege of confidentiality."

TIP: If the PCP finds no probable cause, the case is dismissed and no public record is kept.

But, if probable cause to believe that a violation has occurred is the majority finding, then the PCP directs the department to file a formal complaint, and 10 days later the AC becomes public record, even if you ultimately prevail.

TIP: Think of a finding of probable cause and the AC as "the point of no return" beyond which you will have a public record. It is not a finding that you are actually guilty of violating the rules, but nevertheless, it is public record. Anyone can look up an AC by going to: https://appsmqa.doh.state.fl.us/MQASearchServices/EnforcementActionsPractitioner.

At this step, you are "in the system" and no longer "off the grid." Plaintiffs' attorneys can see what you were charged with, as can current and potential patients, and your professional peers. The record never goes away and may be used by credentialing committees, managed-care plans, other states where you have a license and the federal government. It will probably impact your ability to get malpractice coverage or the cost of premiums you pay for liability insurance. After you serve whatever discipline is imposed via the Final Order, you may be eligible to return to practice — but no matter what you do, the record will follow you throughout your career.

STEP 12: The Administrative Complaint

Once the PCP determines there is probable cause to believe a violation occurred, it directs the DOH to formally prosecute the case. At this step, you will be served with a formal AC. Defense costs rise dramatically after this step.

TIP: The AC looks very much like a criminal complaint and has the same appearance as a civil lawsuit. The DOH is referred to as the "Petitioner" and the licensee being prosecuted is referred to as the "Respondent." The AC gets filed with the clerk's office of the Florida BOD and is assigned a case number. The patient involved will be referred to by their initials. Subsequent treating providers seen by the patient for further treatment also will be referred to by their initials.

The first part of the AC contains the factual allegations against you, which are incorporated by reference into Count I. For each count in the complaint, there will be a reference to the statute you are alleged to have violated. Typically, ACs get filed for serious matters, such as "incompetence or negligence by failing to meet the minimum standards of performance in diagnosis

and treatment," which violates section 466.028(1)(x), Fla. Stats. Other common counts are improper delegation of duties, sexual misconduct with a patient, lack of informed consent, improper prescribing, fraud, practicing outside the scope of licensure, and being unable to practice with reasonable skill and safety by reason of illness or use of alcohol, drugs, or mental or physical condition.

TIP: It is not at all unusual for the AC to contain multiple counts. For example, failing to keep records that justify your diagnosis and treatment plan usually coincide with standard of care or informed consent violations. Similarly, not providing records to the patient or the department, and making deceptive, untrue or fraudulent representations in the practice of dentistry also frequently accompany standard of care violations.

TIP: One reason to expect multiple counts in the AC filed against you is so that, even if the DOH loses the standard of care counts, they will prevail on the ancillary counts of records violations or misrepresentation. If the DOH loses on all counts, you stand an excellent chance of recovering attorneys' fees and court costs against the DOH. Multiple counts, therefore, is the easiest way for the government to avoid paying fees and costs.

Finally, the AC will end with a "wherefore clause" that:

> respectfully requests that the Board of Dentistry enter an order imposing one or more of the following penalties: permanent revocation or suspension of Respondent's licensure, or restriction of Respondent's practice, imposition of an administrative fine, issuance of a reprimand, placement of Respondent on probation, corrective action, refund of fees billed or collected, remedial education and/or any other relief that the board deems appropriate.

At this step, "things just got real" and you may have wished you had used the FDA's Peer Review program — but now it is too late.

TIP: Usually, the mere filing of an AC, without an ESO, means you can remain in practice. You need to first correct the infractions alleged in the AC if there is any truth to them. For example, enter an intensive outpatient program if substance abuse is alleged. It helps mitigate the charges against you and may just save your life and career. It also allows you to continue earning money to pay legal expenses. Coordinate your return to work with your lawyer so that you are not charged with unlicensed practice or further disciplinary matters.

STEP 13: Your Election (or Waiver) of Rights

All ACs end with two notices. The first is known as a Notice Regarding Assessment of Costs and basically says, as we've seen before, that the board will assess costs and attorney hours against you under section 456.072(4), Fla. Stats. The second is far more important and is known as Notice of Rights or Election of Rights. Read this very carefully. It says:

> Respondent has the right to request a hearing to be conducted in accordance with section 120.569 and 120.57, Florida Statutes, to be represented by counsel or other qualified representative, to present evidence and argument, to call and cross-examine witnesses, and to have subpoena and subpoena duces tecum issued on his or her behalf if a hearing is requested.

This is one of the most important decisions you will make in the case and in your career: whether to choose an informal hearing under section 120.569 or a formal hearing under section 120.57. It is crucial that the health care professional understand the significance of this seemingly innocuous decision.

TIP: Think of the Election of Rights form as you waiving all of your rights. You may have viable defenses that you don't even know about. If you make the mistake of electing an informal hearing, you have agreed that all the allegations made against you are true and you have admitted you are guilty. The only issue remaining is what will your punishment be.

TIP: The difference between an informal and formal hearing is whether or not you "dispute material facts." In other words, if you disagree with the allegations made against you, or you simply want the government to prove the allegations, you *must* choose a formal 120.57 hearing. If you want to *waive* your rights to challenge the allegations against you, that is what you have done by choosing an informal 120.569 hearing.

TIP: An informal hearing does not mean that it will be relaxed and casual; rather, it means that the licensee waives all rights to challenge the facts underlying the AC. As a prerequisite to a so-called "informal hearing," the respondent admits that the facts alleged in the complaint are true, thereby waiving the right to challenge the complaint.

TIP: Think of the Elections of Rights as more of a "Waiver of Rights." You never elect an informal hearing without advice from competent legal counsel. It is like settling a case without

getting "your day in court." It should be done only after you understand what sanction the agency will recommend as punishment and a settlement stipulation or consent order to that effect has been agreed to by the agency and the regulated party. In other words, with an informal hearing, the violation has already been established and the only substantive issue for the BOD is what the appropriate penalty should be. Section 120.57(4), Fla. Stats. allows for the parties to dispose of the AC via stipulation, consent order or agreed settlement.

TIP: Even if you're ready to retire anyway, think carefully before voluntarily relinquishing your license to make it all go away. Once you have received notice that you are being investigated, a voluntary relinquishment has the same practical effect as having your license revoked for cause. You will be reported to the National Practitioner Data Bank; the disciplinary record will be permanent and there is literally nowhere in the U.S. where you can practice like you did before because every state board treats a voluntary relinquishment after you're on notice of an investigation as a licensure revocation. If you are going to use the "run away and hide" strategy, make sure you do it *before* you are put on notice of the investigation.

TIP: One way to assess a stipulation or settlement offer (or even the penalty recommended by the ALJ if you opt for a formal hearing) is to review the disciplinary guidelines required under s. 456.079, Fla. Stats. The BOD's disciplinary guidelines are analogous to sentencing guidelines in criminal matters and are mandated by legislation to "specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses." Sentencing guidelines put licensees on notice of minimum and maximum penalties for each violation and ensure the BOD is consistently applying the penalties. If the BOD finds several aggravating circumstances, expect the discipline to be on the high end of the scale and vice versa for mitigating circumstances.

TIP: Another way to assess settlement offers is to review the "subject matter index" required under section 120.53, Fla. Stats. This statute requires governmental agencies to organize and index public disciplinary orders. Until the early 1990s, many licensure boards relied upon their newsletters, which outlined the disciplinary violation and the penalty assessed, to serve as a subject matter index. In *Gessler*, the 4th DCA found that the medical board's failure to maintain a subject matter index was presumptively prejudicial to the respondent and the case was ultimately dismissed by the Florida Supreme Court. The sentencing guidelines have largely replaced the subject matter index, but both should be consulted to compare discipline imposed based on similar violations.

TIP: Even if both parties agree to the settlement, the BOD can nevertheless reject the settlement and impose its own sanction. If licensees knowingly waive their rights by electing an informal hearing, they nevertheless are required to appear, usually through counsel but sometimes in person, before the full BOD. The board may question respondents under oath about their conduct and comment on the inappropriateness of the behavior previously admitted to by the licensee. Respondents will be allowed to present only mitigating circumstances and appeal to the board for mercy. No facts or law may be argued and no new evidence may be introduced, unless it is relevant to mitigating (or aggravating) the sanction to be imposed.

Because the board has the unilateral right to accept, reject or modify the punishment recommended by the DOH and agreed to by the dentist, an informal hearing leaves the professional facing some very real dangers. Dentists should not take comfort in the erroneous belief that, "The board is comprised of practicing dentists, they are on my side, they know what the pressure is like, they will understand and forgive what happened in my practice." The board members (many of whom are not dentists) were appointed by the governor to protect public safety, not to advocate for or protect the interests of individual dental professionals.

Mediation

Under section 120.573, Fla. Stats., the DOH may offer mediation. Choosing mediation does not affect your right to an administrative hearing. If the agency and respondent agree to mediate, in writing, within 10 days after the time period stated in the election of rights, then time limitations imposed for formal and informal hearings are tolled.

TIP: You probably want the allegations against your license resolved as soon as possible. However, mediation is one way to slow down the process while remaining at work.

Parties have 60 days to conclude the mediation. If mediation results in settlement of the administrative dispute, the agency shall enter a Final Order incorporating the agreement of the parties. If mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that they may still choose an informal or formal hearing.

STEP 14: The Informal Hearing Under 120.569

Section 120.569, Fla. Stats., provides that when the "substantial interests" of a party are to be determined by a government agency, the respondent has the right to an administrative hearing in front of — not the BOD or DOH — but the DOAH. "Substantial interests" include your license to practice your chosen profession unencumbered with restrictions, probation, suspension or revocation.

If you elect an informal 120.569 hearing, the case is resolved before the BOD. *Only* by electing a formal 120.57 hearing in front of the DOAH, will the licensee be permitted to dispute the factual allegations made by the DOH, thereby forcing the government to prove its allegations to the satisfaction of an impartial ALJ. Formerly known as hearing officers, their title was changed in 1996 to administrative law judges to more properly describe their non-adversarial function in the system.

As there are no disputed issues of material fact, the agency itself will conduct an informal hearing pursuant to the procedures set forth in section 120.57(2), Fla. Stats. and will issue a final order that is directly appealable to the 1st DCA or the district court where the doctor resides.

STEP 15: The Formal Hearing Under 120.57

The BOD conducts 120.569 hearings. In contrast, formal hearings are conducted by the ALJ assigned by DOAH. Under section 456.073(6), Fla. Stats., board members who served on the PCP for your case will recuse themselves should the matter come up for hearing before the full BOD.

TIP: That being said, don't be lulled into thinking the BOD is completely independent and will guarantee an objective review. They care passionately about these cases or else they wouldn't be on the BOD.

Initiating the Hearing

TIP: Election of a formal hearing does not lead inexorably to the expense and emotional distress of a full-blown trial. First, the summary hearing process is explained below. Second, there is no right to a jury trial in a DOAH proceeding. Third, requesting a formal hearing initiates negotiations with the prosecutor from a position of strength, not weakness. Fourth, you can still negotiate a settlement with the prosecuting attorney while the DOAH proceeding is pending.

If you want to dispute the facts or challenge the AC in front of an independent judge, then you must opt for a formal 120.57 hearing. Within five business days following the DOAH's receipt of a petition or request for hearing, the division shall issue and serve on all original parties an initial order that assigns the case to a specific ALJ and provides general information regarding practice and procedure before the division.

TIP: Once you've initiated a hearing, the BOD can take no further action against your license. In other words, once the case is under DOAH jurisdiction, the BOD has lost jurisdiction (other than to act as a litigant in the DOAH process).

There are two ways to initiate a 120.57 formal hearing. First, your lawyer may file a petition or a request for hearing with the agency (BOD) in question, and the agency will refer the matter to the DOAH. Second, some lawyers choose to initiate formal administrative proceeding by filing their own Petition for Formal Hearing directly with the DOAH rather than the BOD. This alternative disputes all the government's factual allegations and should be accompanied with filing a Notice of Appearance with the DOAH.

TIP: The Notice of Appearance means investigators and the prosecutor for the department may no longer communicate with you directly. Instead, they must communicate with defense counsel.

TIP: Because DOAH hearings proceed rapidly, defense counsel also should consider filing Requests for Admission and Requests for Production at the same time as the Petition and Notice of Appearance.

TIP: Ask for costs and attorneys' fees in your pleadings and at trial. Florida case law is split between whether you waive your right to seek reimbursement if you fail to raise it at trial, with other cases saying it may be raised for the first time on appeal.

TIP: Under section 120.574, Fla. Stats., if the parties agree, you can fast track the case even further with a summary hearing.

Summary Hearings

When your case gets assigned to an ALJ, you will get an initial order that will briefly describe the expedited time sequences, limited discovery and Final Order provisions of a summary procedure.

You have 15 days after service of the initial order to file a motion for summary hearing. If all parties agree, in writing, to the summary proceeding, then the hearing will occur within 30 days of the agreement and the ALJ's decision will occur within 30 days from the conclusion of the final hearing or the filing of the transcript thereof, whichever is later. If you opt for a summary hearing, you must file your witness list no later than five days before the final hearing.

TIP: The witness list contains the names and addresses of witnesses who may testify at the hearing and identifies documentary evidence that may be introduced at the hearing. If a witness is not listed, they cannot be called at trial. Thus, witness lists contain many names and if you don't know why the person is listed, your lawyer needs to find out immediately.

TIP: Summary hearings are so quick because discovery and motion practice is severely limited.

Pre-trial Conference

The ALJ usually will schedule a telephone conference in close connection to the final hearing. At the pre-trial conference, the legal and factual issues to be considered at the final hearing are made explicit; the witnesses and documentary evidence that will be offered at the final hearing are identified; and, the range of penalties that may be imposed are clarified.

The Final Hearing

All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to be represented by counsel or other qualified representative, to propose findings of fact and conclusions of law, and to file exceptions to the ALJ's Recommended Order (more on this later).

TIP: Some lawyers think the ALJs bend over backwards to accommodate parties who are not represented by legal counsel ("pro se"); however, you do not want to represent yourself on a licensure matter.

The hearing is conducted like a bench trial, meaning there is no jury in the room and both arguments of fact and law are directed at the ALJ. Compare this procedure to that of circuit court where facts are decided by a jury and only legal matters are controlled by the judge.

TIP: You can waive both opening and closing arguments — and that often happens — but a good lawyer will both open and close in order to persuade the ALJ of the facts and the applicable law.

The records in a DOAH case consist only of:

- notices, pleadings, motions and intermediate rulings.
- evidence admitted.
- those matters officially recognized.
- proffers of proof and objections, and rulings thereon.
- proposed findings and exceptions.
- any decision, opinion, order or report by the presiding officer.
- all staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records.
- all matters placed on the record after an ex parte communication.
- the official transcript.

Proposed Recommended Orders

After the hearing, section 120.57(1)(b), Fla. Stats., gives both parties the right to submit a proposed Recommended Order. Obviously, each is diametrically opposed to the other and the ALJ chooses bits and pieces from both.

TIP: The proposed order must be separated into findings of fact and legal argument. If argument is mixed in with the proposed findings of fact, it can be stricken from the record.

TIP: A final hearing means that there are material issues of fact, so expect the same testimony to be interpreted differently. Proposed findings of fact must be supported by a citation to the record. A persuasive proposed order will deal with opposing evidence as well and convince the ALJ, the finder of fact, who is more believable between the opposing testimony. A poorly written proposed order will merely reiterate evidence you introduced and not attack the other sides.

The Recommended Order and Exceptions

The ALJ will submit to all parties a Recommended Order consisting of findings of fact, conclusions of law, and a recommended disposition or penalty, if applicable. The end of each Recommended Order from the DOAH has a paragraph entitled, "Notice of Right to Submit Exceptions." The paragraph states that "[a]ll parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case."

If you won the DOAH hearing, and the ALJ's Recommended Order is to your liking, then there is no need to file exceptions.

TIP: Always exercise your right to file an exception to an unfavorable finding of fact. Also, recognize that the opposing party may file objections and you have the right to respond to their exceptions.

In the majority of cases, the DOAH acts as a finder of fact and issues a Recommended Order that an agency often adopts as its Final Order. "Exceptions" are how you argue to the DOH/BOD (and on appeal) that the facts determined by the ALJ are incorrect. Exceptions are not seen in civil or criminal litigation. They are unique to administrative law.

Exceptions are essential if you intend to appeal a Final Order that adopted an unfavorable Recommended Order. In administrative law, exceptions are the *only* means by which a party preserves arguments for appellate review, and the failure to do so can waive the issue on appeal. The leading case, *Rosenzweig v. Department of Transportation*, 979 So. 2d 1050, (Fla. 1st DCA, 2008) states: "It is well-established that a claim of error, even in the administrative law context, cannot be raised for the first time on appeal." *See also, Worster, DDS v. Department of Health*, 767 So. 2d 1239, (Fla. 1st DCA, 2000), in "an appeal from an administrative proceeding, a party cannot argue on appeal matters that were not properly objected to or challenged before the agency."

Even pro se parties must file exceptions in administrative litigation. In *Stueber v. Gallagher*, 812 So. 2d 454, (Fla. 5th DCA, 2002), the court rejected the argument made by a non-lawyer representing himself before an administrative agency that he was not aware of the legal requirements relating to the preservation of error and therefore, should not have been required to file exceptions. The court ruled "in Florida, pro se litigants are bound by the same rules that apply to counsel."

TIP: Your lawyer should file exceptions if proposed findings of fact are unsupported based on "competent substantial evidence" in the record or if the proceedings on which the findings were based did not comply with "essential requirements of law."

DeGroot v. Sheffield, 95 So. 2d 912, (Fla., 1957), defines competent substantial evidence as being "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached" and that "will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." Under *Degroot*, ALJs have broad discretion when it comes to findings of fact in the Recommended Order.

TIP: You will not necessarily win the DOAH case simply because the quality and quantity of evidence supporting your position outweighs the evidence relied on by the ALJ for an unfavorable finding of fact. See, for example, *Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277 (Fla. 1st DCA, 1985):

> It is the (ALJ's) function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence and reach ultimate findings of fact based on competent, substantial evidence. If, as is often the case, the evidence presented supports two inconsistent findings, it is the (ALJ's) role to decide the issue one way or the other. The (DOH/BOD) may not reject the (ALJ's) finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The DOH/BOD is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

TIP: The ALJ has no medical background, so he or she must rely on expert witnesses. There will always be an expert witness that opposes your expert witness, or else you wouldn't be going to trial in the first place. Standard of care cases always pivot on "the battle of the experts."

TIP: The ALJ determines the credibility of witnesses and knows, just as well as the lawyers who hired the experts, which ones are pro-defendant and which are pro-plaintiff. *Goldsmith v. Agency for Health Care Administration*, 957 So. 2d 18, (Fla. 1st DCA, 2007), makes it clear that the "determination of a witness's qualifications to express an expert opinion is within the discretion of the ALJ and will not be reversed absent a showing of clear error."

TIP: You can have the world-renowned leading doctor who has literally written a book on the procedure testify that you did everything right and be opposed by an expert who didn't graduate from an accredited school and just passed the board exam yesterday. This is *not* an example of the lack of "competent substantial evidence." Realistically, the only example of lack of competent substantial evidence is where opposing counsel introduced no expert at all.

TIP: Exceptions get filed with the clerk of the DOH/BOD not the DOAH. If you file exceptions with the DOAH, there is no guarantee they will make it over to the BOD and you could waive them on appeal. The Final Order issued by the DOH/BOD must include a specific ruling on each exception. The written exceptions are how you argue to the DOH/BOD that there were errors committed by the ALJ, meaning the Final Order should be modified.

In its Final Order, the DOH/BOD may not reject or modify the findings of fact unless it first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings did not meet essential requirements of law.

TIP: An agency need not rule on an exception that does not clearly identify the disputed portion of the Recommended Order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

TIP: Although nothing in the statutes or rules requires a transcript of the final hearing in order to file exceptions, as a practical matter, you must have a transcript. If you don't have the transcript of the trial, how can you show that the ALJ made an error?

DOH/BOD Final Order

In administrative law, unlike civil litigation, the ALJ does not issue the Final Order. Rather, the ALJ files the Recommended Order with the DOH/BOD, and the DOH/BOD issues the Final Order. The BOD has authority to adopt, reject or modify the Recommended Order. In issuing its Final Order, the DOH takes over from the ALJ and rules on conclusions of law independent of what the ALJ recommendations were. The conclusion of law, sometimes referred to as the "ultimate finding of fact," is "guilty or not guilty" — i.e., whether you violated the BOD rules or not.

Under section 456.073(5), Fla. Stats., health care regulatory boards in Florida (not the ALJ or the DOAH) decide whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care. This is a conclusion of law to be determined by the board and is not a finding of fact to be determined by the ALJ.

If rejecting or modifying a conclusion of law made by the ALJ in the Recommended Order, the DOH/BOD must state with particularity its reasons in the Final Order and must further make a finding that its substituted conclusion of law is as, or more, reasonable than that which was rejected or modified. The DOH/BOD may accept the recommended penalty in a Recommended Order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasoning in the Final Order, by citing to the record in justifying the action.

Under subsection 456.079(5), Fla. Stats., the ALJ must consider the range of designated penalties and must further "state in writing the mitigating and aggravating circumstances upon which the recommended penalty is based."

TIP: By knowing where you fall on the sentencing guidelines and which aggravating and mitigating factors are being considered, your lawyer should have an easier job predicting what the BOD's Final Order will be and whether you should prepare to appeal.

The BOD Hearing

As the respondent, you could simply wait until exceptions and responses are sorted and you get the Final Order from the BOD.

TIP: Never take this "wait and see" approach when your license is at stake. Realize that the prosecuting attorney will appear in person at the BOD hearing where the Final Order is determined. So, you better have your lawyer attend the BOD hearing as well.

Many times the BOD will "rubber-stamp" the ALJ's Recommended Order, but not always. It is not uncommon to see the BOD reject even a stipulated settlement that both parties agreed to so as to dismiss the DOAH case. The BOD has the right, for example, to impose greater penalties, and they often do. Doctors who have a lawyer appearing before the BOD typically have better success than those who do not.

TIP: Even if the Recommended Order from the DOAH is completely in your favor, make sure your lawyer attends the

BOD hearing where the Final Order will be discussed. For example, the DOH/BOD may have filed exceptions and even though your attorney has responded, there is no guarantee that the Final Order will follow the Recommended Order lock-step. Exceptions as well as aggravating circumstances may be completely without merit; however, the BOD may agree with the prosecuting attorney if your attorney is not present to advocate on your behalf.

TIP: If your lawyer anticipates appealing the Final Order, make sure they bring their own court reporter. Agency meetings are obviously "on the record," but even the best court reporter starts to glaze over after the 18th disciplinary case. Make sure you get an accurate transcript of your hearing for the appeal. *See, Esaw v. Esaw*, 965 So. 2d 1261 (Fla. 2nd DCA, 2007): "The most salient impediment to meaningful review of a trial court's decision is not the absence of findings, but the absence of a transcript."

STEP 16: Appealing an Adverse Final Order

If the BOD Final Order completely exonerates you, celebrate and start settlement negotiations on any companion civil or criminal litigation. On the other hand, if the BOD Final Order doesn't go your way, this last and final step tells you what to do to keep practicing.

TIP: After the Final Order is entered, the rules of the game change again. First, appeals are conducted under the Florida Rules of Appellate Procedure (FRAP), not DOAH rules. Second, section 120.68, Fla. Stats., controls the appeal process compared to section 120.569, Fla. Stats., which controlled the informal hearing, and section 120.57, Fla. Stats, which controlled the formal hearing. Third, an appeal is filed with a DCA, not the DOAH or circuit court. Fourth, you are no longer referred to as the Respondent but will be called the Appellant, and the DOH/BOD will no longer be called the Petitioner but will be called the Appellee.

TIP: If you thought the DOAH trial was expensive and drawn out, then you are in for an even bigger shock when you appeal to a DCA. An appeal is literally the "end of the road" and the last thing you can do to protect your license.

Motion for Rehearing and/or Reconsideration

Some lawyers will automatically file a motion with the agency for rehearing or reconsideration trying to get a "second bite of the apple." That's routine in civil litigation, but there are unique risks to taking this step in administrative litigation.

TIP: The BOD doesn't meet every month, so your motion for rehearing will not be heard before your time for filing a notice of appeal runs out. Missing the deadline to file a notice of appeal is substantive and means that the case is over, you've waived your right to appeal and you're done. Like civil litigation, a notice of appeal in an administrative law case must be filed within 30 days from the day the final order at issue was rendered.

TIP: Further, unlike civil litigation, in administrative law a motion for rehearing does not stay the effect of the Final Order.

TIP: In civil litigation, the original notice of appeal and one copy have to be filed with the lower court. In administrative litigation, the appellant must file the original notice of appeal with the agency clerk and a copy with the appropriate DCA.

Motion to Stay

Regardless of whether you file a motion for reconsideration or a notice of appeal, you also will want to file a motion for stay to delay paying the fine, to remain in practice as long as possible or to delay the companion civil lawsuit from moving forward.

TIP: Civil litigators unfamiliar with administrative law may think that filing a notice of appeal results in an automatic stay of the Final Order. It does in civil litigation, but it does *not* in administrative litigation. FRAP rules state, in general, that the "filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay." So, plan on filing the motion for stay simultaneous with the notice of appeal and/or the motion for rehearing.

TIP: The motion for stay is filed with the DCA you have chosen for the appeal. It is not filed with the agency or the DOAH. FRAP rules state: "When an agency has suspended or revoked a license other than on an emergency basis, a licensee may file with the court a motion for stay on an expedited basis."

TIP: You have an excellent chance of winning the motion for stay. FRAP rules state: "Unless the agency files a timely response demonstrating that a stay would constitute a probable danger to the health, safety or welfare of the state, the court shall grant the motion and issue a stay." To like effect is subsection 120.68(3), Fla. Stats.:

> The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, (a stay) shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines

that a (stay) would constitute a probable danger to the health, safety or welfare of the state. The agency also may grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for a (stay). In any event the court shall specify the conditions, if any, upon which the stay … is granted.

Will You Win the Appeal?

Subsection 120.68(7), Fla. Stats., lists the grounds upon which a DCA must "remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate." There are five different ways to win your appeal:

1. If there has been no hearing prior to agency action and the DCA finds that the validity of the action depends upon disputed facts.

TIP: This is a hard argument to win because you're basically saying that you should have elected a formal hearing under section 120.57, Fla. Stats., but for some reason, you did not.

2. The Final Order depends on a finding of fact that is not supported by competent, substantial evidence in the record of the informal or formal hearing.

TIP: This is a hard argument to win. Earlier in this handbook, you walked through the steps of competent substantial evidence and concluded that the ALJ generally has very broad discretion in deciding which expert medical witness to believe regarding standard of care, informed consent or scope of practice. Section 120.58, Fla. Stats., states the DCA "shall *not* substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." *(Emphasis added.)*

3. The DCA will reverse the Final Order if "the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure."

TIP: This is a much easier argument to win than the two previously listed. But remember that a good lawyer will have already argued these points through written exceptions (unique to administrative law) so anticipate the agency to argue that you have procedurally waived your right to make this argument on appeal because you did not raise it earlier, as discussed previously in this handbook. In other words, the DCA may not even hear the substantive argument unless you have a good reason why it wasn't brought up before.

4. The DCA will reverse a Final Order when "the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action."

TIP: This is the easiest argument to win if the ALJ or the DOH/BOD hasn't followed the proper procedural rules for the particular formal or informal hearing. Again, you should have already moved to dismiss the case on this basis long before you get to an appeal, but this is where it makes sense to have a lawyer familiar with administrative litigation review the record and the hearings. As said in the in the beginning of this handbook, there are many excellent civil litigators who don't know administrative law and vice versa.

5. The DCA will reverse a Final Order when it determines the agency has abused its "exercise of discretion."

TIP: This is the most common argument made on appeal and the one most likely to succeed. You will prove "abuse of discretion" if you can prove one of four things:

- The agency acted outside the range of discretion delegated to the agency by law. In other words, if the agency relied on an unwritten policy that should have been promulgated as a formal rule, then you have an excellent chance of winning at the DCA level.
- The agency acted inconsistent with agency rule. For example, if the agency violated its own sentencing guidelines or should have issued a citation instead of a formal Administrative Complaint, then you have an excellent chance of winning at the DCA level.
- The agency's Final Order was inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency. For example, if you have researched the subject matter index for the agency and found a similar fact pattern where the prior licensee was given a six-month suspension but you have been given a revocation of licensure, you have an excellent chance of winning. Similarly, review the agency's prior rulings on exceptions and waivers of their own administrative rules. If you can find a case similar to yours where the BOD granted the licensee a waiver of the same rule under which you got prosecuted, you have an excellent chance of winning on appeal.

- The agency acted in violation of a constitutional or statutory provision. Previously in this handbook, we've talked about your rights under the Federal and Florida Constitutions in connection with subpoenas and warrants; as well as your rights under the "statute of limitations" for disciplinary proceedings, emergency suspension orders and the equitable doctrine of "laches." We've also discussed how peer review records are protected from both discovery and introduction as evidence in either a civil or a disciplinary proceeding.

TIP: In general, we've seen how the burden is on you and your lawyer to file exceptions and challenge evidence before you get to the DCA level. However, constitutionality of an agency's actions is one of the few issues that can be argued on appeal even if it was not raised in the prior proceedings.

TIP: An administrative agency like the DOH/BOD or an ALJ under the DOAH lack subject matter jurisdiction to rule on constitutional questions. If you have a constitutional argument (e.g., the process was served improperly, was overbroad, etc.) then you stand an excellent chance of winning a DCA appeal.

TIP: Winning at an informal or formal hearing is all about the findings of fact and whether competent substantial evidence and the relevant burden of proof has been met. You will *not* be allowed to reargue findings of fact at the DCA level unless you can prove that the DOH/BOD or the DOAH "grossly abused their discretion." Winning at the appellate level is not about rearguing the facts or trying to introduce new evidence; rather, it is about identifying a meaningful error of law. Just like civil litigators may not be adept at administrative law; an attorney who specializes in appeals may have insight that trial counsel did not.

Three Strikes and You're Out (Not!)

Throughout the steps in this handbook, we've seen how the FDA Peer Review program helps you succeed. One of the ways mentioned was that peer review settlements do not count as a strike against your license under the "three strikes and you're out" law. This law came about because of a legislative fight between the trial lawyers and the physicians. It is a perfect example of why you want the FDA lobbying and advocating for you.

Section 456.50, Fla. Stats., and Article X, Section 26 of the Florida Constitution says that "three or more incidents of medical malpractice (in or out of the State of Florida) … occurring on or after Nov. 2, 2004 … (requires that) the board shall not license or continue to license a medical doctor."

This law applies only if "the malpractice has been found in a final judgment of a court of law, final administrative agency decision or decision of binding arbitration," so the FDA modified its peer review procedures to ensure that peer review settlements do not count as strikes against your license. Even better, the FDA helped to limit "three strikes and you're out" to *only* osteopathic and allopathic physicians. Even though chapter 766, Fla. Stats., on medical malpractice litigation applies to dentists as well as physicians, I'm proud that the three strikes law exempts dentists. Let that sink in.

Conclusion

If you have made it this far, you probably know as much about administrative law as some practicing lawyers. The point of this handbook was not to teach you how to be a lawyer. We've already decided that practicing law is not a do-it-yourself project any more than practicing dentistry.

Rather, this handbook was to educate you on what is going on at every step in the process so you can make informed decisions in circumstances that are completely unfamiliar to most doctors. **Hopefully, you have seen that no other health care association protects its members like the FDA does and plan to use Peer Review.** But if you can't avoid licensure discipline, my desire is that you know what is going on every step of the way and how to fight for your license and help your attorney win!