

LICENSE NO. J-7460

IN THE MATTER OF  
THE LICENSE OF  
CARL JOSEPH D'AGASTINO, M.D.

BEFORE THE  
  
TEXAS MEDICAL BOARD

AGREED ORDER

On the 15 day of June, 2018, came on to be heard before the Texas Medical Board (the Board), duly in session, the matter of the license of Carl Joseph D'Agastino, M.D. (Respondent).

On November 6, 2017, Respondent appeared in person, with counsel Mark Beaman at an Informal Show Compliance Proceeding and Settlement Conference in response to a letter of invitation from the staff of the Board. The Board's representatives were Margaret C. McNeese, M.D., a member of the Board, and Sharon J. Barnes, a member of a District Review Committee (Panel). Heather Detrixhe Barham represented Board staff and prepared this Order.

BOARD CHARGES

Board Staff alleged that Respondent violated the standard of care and engaged in unprofessional conduct by non-therapeutically prescribing large volumes of controlled substances to fifteen patients without valid medical purposes.

Board Staff also alleged that Respondent failed to maintain adequate medical records in that he routinely failed to implement proper screening or monitoring for abuse or diversion, increased dosage without indication and/or objective evidence of patient improvement, and rarely implemented or recommended alternate treatment modalities.

BOARD HISTORY

Respondent has not previously received a disciplinary order from the Board. Upon the recommendation of the Board's representatives and with the consent of Respondent, the Board makes the following Findings and Conclusions of Law and enters this Agreed Order.

## FINDINGS

The Board finds the following:

1. General Findings:

- a. Respondent received all notice required by law. All jurisdictional requirements have been satisfied. Respondent waives any defect in notice and any further right to notice or hearing under the Medical Practice Act, Title 3, Subtitle B, Texas Occupations Code (the Act) or the Rules of the Board.
- b. Respondent currently holds Texas Medical License No. J-7460. Respondent was originally issued this license to practice medicine in Texas on March 4, 1995. Respondent is not licensed to practice in any other state.
- c. Respondent is primarily engaged in the practice of pain management and anesthesiology. Respondent is not board certified.
- d. Respondent is 61 years of age.

2. Specific Panel Findings:

- a. Respondent's prescribing practices violated the applicable standard of care.
- b. Respondent's medical documentation did not meet the guidelines set out in Texas Medical Board Rule 170.3 Specifically, Respondent did not implement or adequately document findings of patient monitoring techniques, such as urinalyses, pill counts and/or review of a patient's prescription history
- c. Respondent used similar, broad spectrum of pain management medications to treat patients with varying medical conditions and comorbidities. Some of these medications can be associated with dependency and addiction.
- d. Respondent prescribed controlled substances to several patients who returned urinalyses positive for illicit drugs, primarily marijuana (tetrahydrocannabinol or THC).

3. Mitigating Factors:

- a. In determining the appropriate sanctions in this matter, the Panel considered the following mitigating factors:

- i. Respondent's clinic is a properly registered pain management clinic with no reports to the Texas Medical Board of significant deficiencies.
- ii. Respondent's has practiced for more than twenty years with no disciplinary history.
- iii. Respondent has significant and pertinent formal fellowship training.
- iv. Respondent admitted that his documentation was deficient and has taken proactive steps to improve medical records.
- v. Respondent has implemented corrective measures, including but not limited to increased monitoring practices and informing patients that treatment will be discontinued if they repeatedly test positive for THC.
- vi. Respondent has cooperated in the investigation of the allegations related to this Agreed Order. Respondent neither admits nor denies the information given above. To avoid further investigation, hearings, and the expense and inconvenience of litigation, Respondent agrees to the entry of this Agreed Order and to comply with its terms and conditions.

#### CONCLUSIONS OF LAW

Based on the above Findings, the Board concludes that:

1. The Board has jurisdiction over the subject matter and Respondent pursuant to the Act.
2. Section 107.052 of the Act authorizes the Board to impose disciplinary action(s) against a licensed physician who prescribes a dangerous drug or controlled substances for a purpose that is not a legitimate medical purpose as defined by the Board; prescribing to a known user.
3. Section 164.051(a)(1) of the Act authorizes the Board to impose disciplinary action(s) against a licensed physician who commits an act prohibited under Section 164.052.
4. Section 164.051(a)(3) of the Act authorizes the Board to impose disciplinary action(s) against a licensed physician who violates Board Rules 165.1(a) failure to maintain an adequate medical record; and 170.3 failure to adhere to those established guidelines and requirements for the treatment of pain.

5. Section 164.051(a)(6) of the Act authorizes the Board to impose disciplinary action(s) against a licensed physician who fails to practice medicine in an acceptable professional manner consistent with public health and welfare as defined by Board Rules 190.8(1)(A), fails to treat a patient according to the generally accepted standard of care; 190.8(1)(B), is found negligent in performing medical services; 190.8(1)(C), fails to use proper diligence in one's professional practice; 190.8(1)(D), fails to safeguard against potential complications; and 190.8(1)(H), fails to disclose reasonable alternative treatments to a proposed procedure or treatment.

6. Section 164.052(a)(5) of the Act authorizes the Board to impose disciplinary action(s) against a licensed physician who engages in unprofessional or dishonorable conduct that is likely to deceive or defraud the public, as provided by Section 164.053, or injure the public.

7. Section 164.053(a)(5), of the Act authorizes the Board to impose disciplinary action(s) against a licensed physician who prescribes or administers a drug or treatment that is non-therapeutic.

8. Section 164.001 of the Act authorizes the Board to impose a range of disciplinary actions against a person for violation of the Act or a Board rule.

9. Section 164.002(a) of the Act authorizes the Board to resolve and make a disposition of this matter through an Agreed Order.

10. Section 164.002(d) of the Act provides that this Agreed Order is a settlement agreement under the Texas Rules of Evidence for purposes of civil litigation.

#### ORDER

Based on the above Findings and Conclusions of Law, the Board ORDERS that Respondent shall be subject to the following terms and conditions:

1. Within one year from the date of the entry of this Order, Respondent shall enroll in and successfully complete the medical recordkeeping course offered by University of California San Diego Physician Assessment and Clinical Education (PACE) program or an equivalent course approved in advance by the Executive Director. To obtain approval for a course other than PACE courses, Respondent shall submit in writing to the Compliance Division of the Board

information on the course that includes description of the course content, faculty, course location, and dates of instruction. Respondent shall submit documentation of attendance and successful completion of this requirement to the Compliance Division of the Board on or before the expiration of the time limit set forth for completion of the course.

2. Within one year from the date of the entry of this Order, Respondent shall enroll in and successfully complete a custom program in the topic of pain management offered by University of California San Diego Physician Assessment and Clinical Education (PACE) program or an equivalent course approved in advance by the Executive Director. To obtain approval for a course other than PACE courses, Respondent shall submit in writing to the Compliance Division of the Board information on the course that includes description of the course content, faculty, course location, and dates of instruction. Respondent shall submit documentation of attendance and successful completion of this requirement to the Compliance Division of the Board on or before the expiration of the time limit set forth for completion of the course.

3. Respondent shall be subject to the following terms and conditions for 8 consecutive monitoring cycles (defined below). Respondent's practice shall be monitored by a physician (monitor), in accordance with §164.001(b)(7) of the Act. The Compliance Department of the Board shall designate the monitor and may change the monitor at any time for any reason. The monitor shall have expertise in a similar specialty area as Respondent. The Compliance Department shall provide a copy of this Order to the monitor, together with other information necessary to assist the monitor.

a. As requested by the Compliance Department, Respondent shall prepare and provide complete legible copies of selected patient medical and billing records (selected records). The Compliance Department shall select records for at least 30 patients seen by Respondent during each three-month period following the last day of the month of entry of this Order (reporting period). The Compliance Department may select records for more than 30 patients, up to 10 percent of the patients seen during a reporting period. If Respondent fails to see at least 30 patients during any three-month period, the term of this Order shall be extended until Respondent can submit a sufficient number of records for a monitor to review.

b. The monitor shall perform the following duties:

- 1) Personally review the selected records;
- 2) Prepare written reports documenting any perceived deficiencies and any recommendations to improve Respondent's practice of medicine or assist in the ongoing monitoring process. Reports shall be submitted as requested by the Compliance Department; and
- 3) Perform any other duty that the Compliance Department determines will assist the effective monitoring of Respondent's practice.

c. The Compliance Department shall provide to Respondent a copy of any deficiencies or recommendations submitted by the monitor. Respondent shall implement the recommendations as directed by the Compliance Department. If the chart monitor recommends that Respondent restrict or suspend his or her practice of medicine, Respondent shall be required to personally appear before a panel of Board representatives, upon written request mailed to Respondent's last known address on file with the Board at least 10 calendar days before the requested appearance date. Such appearance shall be for the purpose of consideration of the chart monitor's recommendations of restriction or suspension and held in accordance with 22 TEX. ADMIN. CODE, §187.44. Based upon the panel's findings and recommendations, the Board may modify this Order so that Respondent's practice is restricted or suspended, in accordance with the chart monitor's recommendations, or take any other action that may be appropriate to resolve the issues presented.

d. The monitor may recommend that Respondent complete a competency evaluation. A monitor's recommendation for a competency evaluation must be reviewed by the Chair of the Disciplinary Process and Review Committee (DPRC) for the purpose of making a determination of whether a competency evaluation is warranted. The Chair may approve or deny the monitor's recommendation. If the Chair approves the recommended competency evaluation, then the following terms shall apply and shall be a requirement of this Order:

1. Within 10 calendar days of being notified by the Compliance Department of the Board that the Chair has approved the monitor's recommendation, Respondent must contact a program approved by the Board and schedule an assessment of at least two days in length

to determine Respondent's competence and ability to practice medicine.

2. Respondent shall authorize the approved program to send a written report regarding Respondent's performance and results of the competency evaluation directly to the compliance officer.
3. Upon completion of the competency evaluation, and based upon its results, Respondent must personally appear before a panel of Board representatives, upon written request mailed to Respondent's last known address on file with the Board at least 10 calendar days before the requested appearance date. The panel may make recommendations for appropriate action, including that Respondent follow all the program recommendations, comply with other necessary re-training or re-education measures, and may impose any other restrictions or suspension of Respondent's practice. Section 187.44 of this title (relating to Probationer Show Compliance Proceedings) applies to such appearances.
4. The Board may temporarily restrict or suspend Respondent's license based upon the results of the competency evaluation or Respondent's failure to follow any and all requirements set forth in subsection (c) of this section. Chapter 187, Subchapter F of this title (relating to Temporary Suspension and Restriction Proceedings) applies to such proceedings.

e. The monitor shall be the agent of the Board, but shall be compensated by the Respondent through the Board. Such compensation and any costs incurred by the monitor shall be paid by Respondent to the Board and remitted by the Board to the monitor. Respondent shall not charge the compensation and costs paid to the monitor to any patients.

f. A "monitoring cycle" begins when the Compliance Department selects patient records for review, and concludes when Respondent receives the monitor's report for that group of records and has made payment for the costs of that monitoring cycle.

4. Within one year following the date of the entry of this Order, Respondent shall take and pass with a score of 75 or above the Medical Jurisprudence Examination ("JP Exam") given by the Texas Medical Board. Respondent is allowed three attempts to successfully pass this examination.

Respondent's failure to take and pass the JP Exam within three attempts within one year following the date of the entry of this Order shall constitute a violation of this Agreed Order. After a committee of the Board or a panel of Board representatives (Board Representatives), has considered the information related to Respondent's violation of this provision and has determined that Respondent has not fulfilled the requirements of this provision, Respondent's medical license shall be **IMMEDIATELY SUSPENDED** pursuant to correspondence to Respondent from the Executive Director or Secretary-Treasurer of the Board indicating that Board Representatives have considered the information related to Respondent's violation of this provision and have determined that Respondent has not fulfilled the requirements of this provision. Although Respondent shall be invited to provide information or testimony to the Board Representatives, Respondent specifically waives any administrative due process under the Medical Practice Act, or the Administrative Procedure Act, for the Board Representatives to consider this information. **THIS SUSPENSION SHALL BE EFFECTIVE WITHOUT THE NEED FOR A HEARING AT THE STATE OFFICE OF ADMINISTRATIVE HEARINGS OR OTHER ADMINISTRATIVE DUE PROCESS UNDER THE MEDICAL PRACTICE ACT OR THE ADMINISTRATIVE PROCEDURE ACT, AND RESPONDENT SPECIFICALLY WAIVES ANY SUCH HEARING OR DUE PROCESS AND ALL RIGHTS OF APPEAL.** Respondent shall be notified of any suspension by certified mail, return receipt requested to Respondent's last known address on file with the Board. If Respondent's license is suspended on such a basis, the suspension shall remain in effect until such time as Respondent takes and passes the JP Exam and subsequently appears before the Board in person and provides sufficient evidence which, in the discretion of the Board, is adequate to show that Respondent possesses the skills and knowledge to safely practice in Texas and is otherwise physically and mentally competent to resume the practice in this state.

5. Respondent shall pay an administrative penalty in the amount of **\$5,000** within one year of the date of the entry of this Order. The administrative penalty shall be paid in a single payment by cashier's check or money order payable to the Texas Medical Board and shall be



submitted to the Board for routing so as to be remitted to the Comptroller of Texas for deposit in the general revenue fund. Respondent's failure to pay the administrative penalty as ordered shall constitute grounds for further disciplinary action by the Board, and may result in a referral by the Executive Director of the Board for collection by the Office of the Attorney General.

6. At all times while Respondent is under the terms of this Order, Respondent shall give a copy of this Order to all hospitals, nursing homes, treatment facilities, and other health care entities in Texas where Respondent has privileges, has pending an application for privileges, applies for privileges, or otherwise practices. Within 30 days of being first contacted by the Compliance Division of the Board following entry of this Order, Respondent shall provide to the Compliance Division of the Board documentation, including proof of delivery, that the Order was delivered to all such facilities.

7. THE FOLLOWING PROVISION PERTAINS, EXCLUSIVELY AND TO THE EXCLUSION OF ALL OTHER TERMS, TO ORDERING PARAGRAH No. 3, regarding chart monitoring cycles:

Ordering Paragraph Number 3 of this Agreed Order (above) shall be extended for any period of time that: (a) Respondent subsequently practices exclusively outside the State of Texas; (b) Respondent's license is subsequently cancelled for nonpayment of licensure fees; (c) this Order is stayed or enjoined by Court Order; or (d) for any period of time longer than 60 consecutive days that Respondent does not actively practice medicine. If Respondent leaves Texas to practice elsewhere or ceases active practice for more than 60 consecutive days, Respondent shall immediately notify the Board in writing. Upon Respondent's return to active practice or return to practice in Texas, Respondent shall notify the Board in writing. When the period of extension ends, Respondent shall be required to comply with the terms of this Order for the period of time remaining on the Order. Respondent shall pay all fees for reinstatement or renewal of a license covering the period of extension or tolling.

8. Respondent shall comply with all the provisions of the Act and other statutes regulating the Respondent's practice.

9. Respondent shall fully cooperate with the Board and the Board staff, including Board attorneys, investigators, compliance officers, consultants, and other employees or agents

of the Board in any way involved in investigation, review, or monitoring associated with Respondent's compliance with this Order. Failure to fully cooperate shall constitute a violation of this order and a basis for disciplinary action against Respondent pursuant to the Act.

10. Respondent shall inform the Board in writing of any change of Respondent's office or mailing address within 10 days of the address change. This information shall be submitted to the Registration Department and the Compliance Department of the Board. Failure to provide such information in a timely manner shall constitute a basis for disciplinary action by the Board against Respondent pursuant to the Act. Respondent agrees that 10 days' notice of a Probationer Show Compliance Proceeding to address any allegation of non-compliance of this Agreed Order is adequate and reasonable notice prior to the initiation of formal disciplinary action. Respondent waives the 45-day notice requirement provided by §164.003(b)(2) of the Medical Practice Act and agrees to 10 days' notice, as provided in 22 Texas Administrative Code §187.44(4).

11. Any violation of the terms, conditions, or requirements of this Order by Respondent shall constitute unprofessional conduct likely to deceive or defraud the public, or to injure the public, and shall constitute a basis for disciplinary action by the Board against Respondent pursuant to the Act.

12. Respondent shall be permitted to supervise and delegate prescriptive authority to physician assistants and advanced practice nurses and to supervise surgical assistants.

13. The above-referenced conditions shall continue in full force and effect without opportunity for amendment, except for clear error in drafting, for one year following the date of the entry of this Order. If, after the passage of the one-year period, Respondent wishes to seek amendment or termination of these conditions, Respondent may petition the Board in writing. The Board may inquire into the request and may, in its sole discretion, grant or deny the petition without further appeal or review. Petitions for modifying or terminating may be filed only once a year thereafter.

RESPONDENT WAIVES ANY FURTHER HEARINGS OR APPEALS TO THE BOARD OR TO ANY COURT IN REGARD TO ALL TERMS AND CONDITIONS OF THIS AGREED ORDER. RESPONDENT AGREES THAT THIS IS A FINAL ORDER.

**THIS ORDER IS A PUBLIC RECORD.**

**(SIGNATURE PAGES FOLLOW)**

I, CARL JOSEPH D'AGASTINO, M.D., HAVE READ AND UNDERSTAND THE FOREGOING AGREED ORDER. I UNDERSTAND THAT BY SIGNING, I WAIVE CERTAIN RIGHTS. I SIGN IT VOLUNTARILY. I UNDERSTAND THIS AGREED ORDER CONTAINS THE ENTIRE AGREEMENT AND THERE IS NO OTHER AGREEMENT OF ANY KIND, VERBAL, WRITTEN OR OTHERWISE.

DATED: 3-26, 2018.

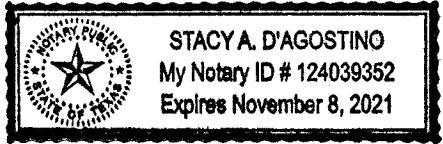
[Signature]  
CARL JOSEPH D'AGASTINO, M.D.  
Respondent

STATE OF Texas §  
COUNTY OF Midland §

SWORN TO AND ACKNOWLEDGED BEFORE ME, the undersigned Notary Public, on this 26 day of March, 2018.

[Signature: Stacy A. D'Agostino]  
Signature of Notary Public

(Notary Seal)



SIGNED AND ENTERED by the presiding officer of the Texas Medical Board on this  
15 day of June, 2018.

  
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Sherif Z. Zaafran, M.D., President  
Texas Medical Board