

BEFORE THE WEST VIRGINIA BOARD OF OSTEOPATHY

WEST VIRGINIA BOARD OF OSTEOPATHY

Complainant,

v.

**Complaint Nos. 04-22, 05-23, 05-27, 06-04,
06-27, 06-32, 09-19**

BRIAN J. McDEVITT, D.O.,

Respondent.

CONSENT ORDER

The West Virginia Board of Osteopathy (hereinafter referenced as the "Board") has investigated allegations of unprofessional conduct on the part of BRIAN J. MCDEVITT, D.O., (hereinafter referenced as the "Respondent"), in the above-referenced complaint files and has initiated proceedings against the Respondent thereupon. After review of all the charges and the evidence to be offered by the Board, counsel for the parties have subsequently conferred and proposed an agreed disposition of the case. Upon consideration of the proposed terms of disposition, the Board concludes that it would be appropriate and to the benefit of all to accept the proposal. Now, therefore, the Board and BRIAN J. MCDEVITT, D.O., (hereinafter referenced as the "Respondent") have reached agreement as to appropriate findings and disposition of this matter, with due consideration for protection of the public interest.

The West Virginia Board of Osteopathy and BRIAN J. MCDEVITT, therefore, agree to entry of the following Order:

FINDINGS OF FACT

1. At all times material hereto, the Respondent, BRIAN J. MCDEVITT, D.O., has been a licensee of the Board, holding Board-issued license #1665 to practice osteopathic medicine and surgery in the State of West Virginia.

2. The Respondent has practiced osteopathic medicine in his offices in Cabell, Logan, and Mingo Counties in West Virginia.

3. On January 20, 2010, the Respondent entered a plea of "GUILTY" to a felony criminal charge of Conspiracy to Misuse a DEA Registration Number, in violation of 21 U.S.C. §846, as charged in an Information filed in the United States District Court for the Southern District of West Virginia, as case number 2:10-cr-00001. This is a criminal offense that directly relates to the practice of medicine.

4. As a result of his guilty plea, the Respondent was convicted of this felony offense.

5. In connection with his plea before the United States District Court, the Respondent submitted a written "Stipulation of Facts" in which the Respondent conceded certain facts to provide a basis for his plea. Within this stipulation, the Respondent acknowledged that he permitted employees of his offices in Varney, Chapmanville and Huntington, West Virginia, to assess patients in his absence and to dispense phentermine, a Schedule IV Controlled Substance, to these patients when the employees were not legally authorized to dispense controlled substances.

6. None of the employees referenced in his stipulation have been licensed to practice osteopathic medicine in this state.

7. From 2006 through 2009, the Respondent regularly received patients for medical treatment at his office in Chapmanville, West Virginia, and dispensed the Controlled Substances Hydrocodone and Alprazolam to many of these patients on a regular basis. In his care of eight of these patients (identified as Patients E, F, G, H, I, K, L, and M, in the Statement of Charges filed by

the Board on March 12, 2010), the Respondent failed to take reasonable measures, such as random pill counts, prescription profiles and urine screens, to detect and prevent the diversion, misuse and abuse of the Hydrocodone and Alprazolam that he prescribed to these patients, despite having access to information indicating that diversion and abuse of these drugs was occurring.

8. In his care of Patients E, F, G, H, I, J, K, L, and M, the Respondent did not report, write or record, and did not cause his staff to report, write or record, any patient information after the first office visit, other than vital signs, diagnosis codes and a list of medications prescribed. He also failed to report and record these patients' symptoms, progress, responses to medication, changes in status, referrals for other care, and evaluations for other causes of, or contributory factors to, the diseases affecting these patients.

9. In his care of Patients A, E, F, G, H, I, J, K, L, and M (as identified in the Statement of Charges filed by the Board on March 12, 2010), the Respondent did not report, write or record, and did not cause his staff to report, write or record any medical reason or justification for the frequency with which these patients were scheduled for office visits,

CONCLUSIONS OF LAW

1. The West Virginia Board of Osteopathic Medicine is a board of examination and registration created for the purpose of regulating the practice of osteopathic medicine and surgery in the State of West Virginia. *W. Va. Code* §§ 30-14-1 and 30-14-3.

2. By pleading Guilty in the United States District Court for the Southern District of West Virginia to Conspiracy to Misuse a DEA Registration Number, in violation of 21 U.S.C. §846, the Respondent has been convicted of a felony, relating directly to the practice of medicine, in a court of

competent jurisdiction, which is grounds for disciplinary action pursuant to W. Va. Code §30-1-8(a) and §30-14-11(a)(1), and section 18.1.11 of the Board's rule, 24 CSR 1.

3. By admitting that he permitted four of his employees to assess patients and to dispense phentermine when he was not present and that these employees were not licensed or otherwise legally authorized to dispense controlled substances, the Respondent has aided, assisted and procured unlicensed persons to practice medicine, which is grounds for disciplinary action pursuant to W. Va. Code §30-14-1 and section 18.1.13 of the Board's rule, 24 CSR 1.

4. By routinely prescribing the controlled substances Hydrocodone and Aprazolam to patients E, F, G, H, I, J, K, L, and M, without taking reasonable measures to prevent diversion, misuse and abuse of the substances he prescribed, the Respondent has engaged in dishonorable and unprofessional conduct of a character likely to harm the public, which is grounds for disciplinary action pursuant to section 18.1.5 of the Board's rule, 24 CSR 1.

5. By failing to record and document sufficient information in the care of patients A, E, F, G, H, I, J, K, L, and M to show the need for specific, controlled substances and the frequency with which they were prescribed, and by failing to record and document the patients' responses or his evaluation and consideration of other reasonable alternatives, the Respondent has failed to keep written records justifying the course of treatment of his patients, which is grounds for disciplinary action pursuant to section 18.1.21 of the Board's rule, 24 CSR 1.

5. The West Virginia Board of Osteopathy is authorized to enter into stipulations and consent orders for the resolution of contested cases before the Board when the disposition of the case will reasonably provide for protection of the public interest. W. Va. Code §30-1-8(e).

LICENSEE'S ACKNOWLEDGMENT OF RIGHTS

The Respondent, BRIAN J. MCDEVITT, by placing his signature on this Consent Order, hereby represents that he has read this document and that he understands and acknowledges the following impact of this order upon his rights:

1. This is a legally binding document that affects his rights and privileges.
2. He has the right to consult a lawyer concerning the terms of this agreement and the legal rights and remedies that may otherwise be available to him.
3. The West Virginia Board of Osteopathy may not suspend, revoke or take any other disciplinary action regarding his license unless one of three conditions occurs: 1) he consents to the disciplinary action, OR 2) the West Virginia Board of Osteopathy conducts a hearing before imposing any restriction, suspension or revocation, OR 3) the Board finds that his continuation in practice would cause an immediate danger to the public.
4. He understands that, instead of accepting this agreement, he may demand that the Board of Osteopathy prove the charges against him by presenting evidence in a hearing conducted under law. If he chose to have a hearing, he would not have the burden of proof. He could, however, present evidence in his own behalf and would have the right to cross-examine any witnesses who might testify against him. He also understands that he would have the right to subpoena witnesses and records in order to compel their production at the hearing.
5. This agreement is a legally binding order. If he accepts this agreement, he admits to violation of standards of professional conduct.
6. This is a **public document** and the Board is legally obligated to allow any person to review this Consent Decree and Order. This action and order may be reported to other jurisdictions and to the National Practitioner Data Bank and to the Federation of State Medical Boards.

TERMS OF ORDER

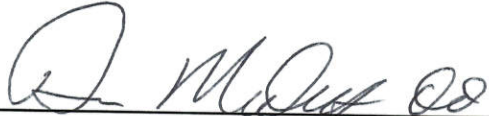
- 1) As a result of the Respondent's unprofessional conduct, the West Virginia Board of Osteopathy hereby REVOKES the license of the Respondent, BRIAN J. McDEVITT, D.O., to practice osteopathic medicine and surgery in this State. The Respondent may not reapply to the Board for a license until at least THREE YEARS have elapsed from the entry, by an officer of the Board, of this Consent Order.
- 2) It is further ORDERED that the Respondent shall not seek authorization from, and will not be granted authorization by, the Board for the corporations Comp Care, Incorporated, and Medical Care, Incorporated, to provide osteopathic medicine and surgery in this State as long as his license remains revoked.
- 3) Conditions for Grant of New License – In the event that the Respondent seeks to apply for a new license to practice osteopathic medicine and surgery in this State, the Respondent must satisfy all statutory and regulatory requirements for licensure as they exist at the time of such application AND he must meet the following conditions:
 - a) He shall affirmatively demonstrate his awareness of the effects of his misconduct and shall prove that he has sufficient character and trustworthiness, pursuant to factors described by the West Virginia Supreme Court of Appeals in the opinions entered in Matter of Dortch, 199 W.Va. 571, 486 S.E. 2d 311 (1997) and In re McMillian, 210 W.Va. 265, 557 S.E. 2d 319 (2001), to be able to practice without likelihood of engaging in subsequent unprofessional conduct; and
 - b) He shall undergo an assessment of his functional, clinical, and ethical skills, through a program affiliated with either the Coalition for Physician Enhancement or the Post-Licensure

Assessment, or their successor entities, and approved by the Board prior to entering such assessment.

- 4) In the event that his assessment identifies the need for additional training or study in a clinical or practical program, and Dr. McDevitt otherwise qualifies for licensure, the Board may grant him a restricted license for the purpose of completing the training so identified, but the grant of a restricted license shall not entitle him to a renewal thereof or to reinstatement under a full, unrestricted license to practice.
- 5) If the Respondent completes all requirements and qualifications for a license specified in this Consent Order, the Board will grant him a license under terms of probation, including a requirement that he may only practice under the supervision of another licensed physician approved by the Board for such purpose.
- 6) The Respondent shall not receive a permit to prescribe Controlled Substances in this State until he demonstrates to the satisfaction of the Board, following at least two years of practice under probation, that he is sufficiently responsible and trustworthy that the public interest would not be adversely affected through the issuance of such authority.
- 7) If the Respondent engages in any act inconsistent with this Consent Order or inconsistent with accepted standards of professional conduct, the Board may rescind, terminate, modify or dissolve this Consent Order or, in its discretion, seek permanent revocation of the Respondent's license to practice osteopathic medicine.

ACKNOWLEDGMENT OF LICENSEE:

I have reviewed the provisions of this Consent Order. I understand that it is a binding, public admission of unprofessional conduct. I freely agree to abide by the terms set out herein and to be bound by them.


Signed: 
BRIAN J. MCDEVITT, D.O.

Date: 07/15/10


ENTRY

By agreement of the West Virginia Board of Osteopathy, it is so ORDERED and entered this 22 day of July, 2010.

WEST VIRGINIA BOARD OF OSTEOPATHY


by: 
ERNEST MILLER, D.O.
Chairman

Order prepared by:


DOREN BURRELL (W.V.S.B. #555)
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Charleston, WV 25301

Counsel for WV Board of Osteopathy

Inspected by:


RODNEY A. SMITH (W.V.S.B. #9750)
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Charleston, WV 25301

Counsel for the Respondent

AGREEMENT FOR RESOLUTION OF ADMINISTRATIVE PROCEEDINGS

Intent of the Parties

WHEREAS, the West Virginia Board of Osteopathy (hereinafter referenced as the "Board"), an administrative agency of the State of West Virginia, has pending before it numerous complaints alleging that BRIAN J. McDEVITT, D.O., has engaged in unprofessional or unethical conduct in the practice of osteopathic medicine and surgery and that he has failed to comply with registration requirements for the operation of certain osteopathic medical corporations; and

WHEREAS, BRIAN J. McDEVITT, D.O. (hereinafter referenced as Dr. McDevitt), a licensee of the Board, seeks to resolve and dispose of all matters pending before the Board, without the unnecessary expense of time, money and other resources;

Now, THEREFORE, the Board and Dr. McDevitt have entered the following agreement regarding the disposition of all complaints, administrative petitions, and allegations pending before the Board.

Agreement

BRIAN J. McDEVITT, D.O., and the WEST VIRGINIA BOARD OF OSTEOPATHY agree to the following terms:

Admissions of Conduct

1. McDevitt will admit that he has engaged in unprofessional conduct in violation of the rules of the Board, and he will agree to the entry of a Consent Order finding that he has committed the following offenses:
 - a. He has been convicted of a felony offense that directly relates to the practice of medicine as alleged in Paragraph 19 of the Statement of Charges filed against him on February 26, 2010, in Complaint File No. 09-19;
 - b. He has permitted, aided, assisted, and procured unlicensed personnel to practice osteopathic medicine as alleged in Paragraph 17, of the Statement of Charges filed against him on February 26, 2010, in Complaint File No. 09-19;
 - c. He has engaged in dishonorable, unethical and unprofessional conduct likely to harm the public as alleged in Count XXI of the Statement of Charges filed against him on March 12, 2010, in Complaint File numbers 04-22, 05-23, 05-27, 06-04, 06-27, and 06-32.
 - d. He has failed to maintain written records justifying the course of treatment of patients as alleged in Count XXII of the Statement of Charges filed against him on March 12, 2010 in Complaint File numbers 04-22, 05-23, 05-27, 06-04, 06-27, and 06-32.

License and Prescription Privileges

2. In response to Dr. McDevitt's admissions of conduct, the Board will revoke the license (#1665) of Dr. McDevitt to practice osteopathic medicine and surgery in the State of West Virginia and will revoke his permit to dispense and prescribe controlled substances in this state. However, the Board will allow Dr. McDevitt to apply for a new license after a period of three years has elapsed from the date of revocation of license #1665.
3. In making application to the Board for any authorization to practice under West Virginia law, Dr. McDevitt shall have the burden of proving that he meets all the requirements for such authorization, including proof of character, trustworthiness, and awareness of the effects of his misconduct. As part of his application for license, Dr. McDevitt will undergo an assessment of his functional, clinical, and ethical skills through a program affiliated with either the Coalition for Physician Enhancement or the Post-Licensure Assessment System, and approved by the Board prior to his assessment. He shall then respond to all findings and recommendations of such assessment in the manner recommended in the reports thereof.
4. If Dr. McDevitt meets all of these requirements to be licensed, the Board may grant him a license under probationary terms in which he is restricted to practice under the supervision of another licensed physician designated by the Board.
5. If, after two years of practice, Dr. McDevitt demonstrates that it would not pose a risk of harm to the public for him to prescribe controlled substances, the Board will issue a permit to him to prescribe controlled substances in this state.

Closure of Complaint Files

6. In conjunction with the entry of the Consent Order mentioned above, the Board will dismiss all other counts contained in the Statement of Charges filed against Dr. McDevitt on February 26, 2010, in Complaint File No. 09-19, and in the Statement of Charges filed against Dr. McDevitt on March 12, 2010 in Complaint File numbers 04-22, 05-23, 05-27, 06-04, 06-27, and 06-32. The Board will also permanently close all other complaint files that may currently be pending or unresolved before the Board.

Corporate Practice of Medicine

7. The Board may notify the West Virginia Secretary of State that the corporations Comp Care, Incorporated, and Medical Care, Incorporated, are not authorized to perform osteopathic medicine and surgery in this state.
8. Dr. McDevitt acknowledges that, as long as his license is revoked in this state, he may not own or have any controlling interest in any professional corporation whose principal business activity is the practice of medicine or osteopathic medicine. He may, however, maintain an ownership interest in corporations and other business entities organized for any other, lawful business purpose.

Breach of Agreement

9. If at any time the Board learns of any additional acts, errors or failures to act of Dr. McDevitt that would constitute violations of the rules of the Board or of the provisions of Chapter 30 of the West Virginia Code, such misconduct shall constitute breach of this Agreement. In the event of breach by Dr. McDevitt, the Board will not be bound hereunder to consider or grant any application for license, prescription permit or other authorization to practice osteopathic medicine or surgery within the time periods specified in this Agreement.

Representations and Warranties

10. The parties declare each has had sufficient time to completely read and be advised by counsel concerning this agreement and each party voluntarily accepts, after complete consideration of all facts and their respective legal rights, of which each has been fully advised by their respective attorneys, for the purpose of making a full and final compromise, adjustment, and settlement of any and all claims, disputed or otherwise, that each may have against the other.

Release of Claims and Defenses

12. Dr. Brian J. McDevitt hereby releases and discharges the West Virginia Board of Osteopathy and the State of West Virginia and the Board's respective present and former officers, directors, employees, agents, attorneys, and its respective successors and assigns, from any and all debts, claims, demands, damages, actions, causes of actions, and demands for damages, costs, and fees of any kind whatsoever, whether known or unknown, seen or unforeseen, or suspected, which Dr. McDevitt and his corporations, agents, attorneys, and their respective successors and assigns now has, claims to have, or hereafter may have against any of them for or by reason of any matter, cause, or thing occurring at any time prior to or contemporaneous with the execution of this agreement, including, without limitation on the foregoing, those arising out of or in any way related alleged, or which could have been alleged or asserted, or referred to directly or indirectly in all administrative proceedings or contested cases now or previously pending before the West Virginia Board of Osteopathy.

Execution of Documents

13. The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

Enforcement of Agreement

14. This Agreement is enforceable in the Circuit Court of Kanawha County, West Virginia, and only in that forum, to the extent permitted by the Constitution of West Virginia. No provision of this Agreement, or any document executed pursuant hereto, shall constitute, or be interpreted to constitute, a waiver of jurisdiction or venue by the West Virginia Board of Osteopathy or the State of West Virginia.

Disposition of Files

15. All documents, records, evidence and notes, in any form, obtained, prepared or generated by the Board in the investigation of the complaints and allegations against Dr. McDevitt and the osteopathic medical corporations established by him shall be deemed to be the property of the Board and the State of West Virginia. Dr. McDevitt hereby relinquishes any claim, right, title or interest in the control, maintenance, or disposition of such materials.

No Benefit to Other Parties

16. Nothing in this Agreement is intended, nor shall be construed, to confer any benefit whatsoever on any persons other than the parties as set forth herein.

Public Document

17. This is not a confidential agreement. This Agreement, and all orders and pleadings filed and executed pursuant to this Agreement, are public documents. They may be reviewed and copied by any person, and the Board may produce or copy them upon request of any person, pursuant to the provisions of the West Virginia Freedom of Information Act, W. VA. CODE §29B-1-1 *et seq.* The Board may also provide copies of this Agreement and related orders, or abstracts thereof, to other state and federal agencies and independent organizations.

Effective Date

18. This Agreement shall become effective immediately following execution of this written Agreement by a qualified officer of the Board.

Complete Agreement

19. This Agreement represents the entire understanding between the parties and, without limitation, the parties expressly agree that any previous communications, correspondence, memorializations of agreement and previous agreements are excluded from this Agreement and are not to be employed to construe this Agreement. Any other provisions of this Agreement to the contrary notwithstanding, this Agreement can only be modified by a writing signed by both parties and this provision cannot be orally waived.


The foregoing is hereby agreed by:


BRIAN J. McDEVITT, D.O.


Date: 07/15/10


Rodney A. Smith, Esq.
Bailey & Glasser, LLP

Counsel for Brian J. McDevitt


ERNEST MILLER, JR., D.O.
President, West Virginia Board of Osteopathy

Date: 7/22/10


Doren Burrell, Esq.
Senior Assistant Attorney General
Office of the Attorney General of West Virginia

Counsel for the West Virginia Board of Osteopathy