

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 11, 2007

Donald Patrick, M.D., J.D.
Executive Director
Texas Medical Board
333 Guadalupe, Tower III, Suite 610
Austin, Texas 78701

HAND DELIVERY

**RE: Docket No. 503-06-2336; In the Matter of the Complaint Against
Robert Christopher Kuhne, M.D.**

Dear Dr. Patrick:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us

Sincerely,

A handwritten signature in black ink, appearing to read "Wendy K. L. Harvel".

Wendy K. L. Harvel
Administrative Law Judge

WKLH/l
Enclosures

xc: Docket Clerk, State Office of Administrative Hearings - **VIA HAND DELIVERY**
Roger Calhoun, Staff Attorney, Texas Medical Board 333 Guadalupe, Tower III, Ste 610, Austin, TX 78701 -
VIA HAND DELIVERY
Sonja Aurelius, Hearings Coordinator, Texas Medical Board, 333 Guadalupe, Tower III, Ste. 610, Austin, TX 78701
- **VIA HAND DELIVERY**
Frank B. Walker, Law Offices of Mark J. Hanna, 900 Congress Avenue, Suite 250, Austin, TX 78701 -
VIA REGULAR MAIL

IN THE MATTER OF THE § BEFORE THE STATE OFFICE
COMPLAINT AGAINST § OF
ROBERT C. KUHNE, M.D. § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Staff of the Texas Medical Board (Staff) brought this disciplinary proceeding against Respondent Dr. Robert Kuhne, alleging that Dr. Kuhne violated the Texas Medical Practice Act and Board Rules. Staff and Dr. Kuhne filed Motions for Summary Disposition that request the Administrative Law Judge (ALJ) to find that no material fact issues exist in this case and to issue a Proposal for Decision. Because the allegations against Dr. Kuhne include only one isolated, unknowing billing error, this case should be dismissed.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The jurisdiction, notice, and procedural history of this case are uncontested. Therefore, those matters are presented in the findings of fact and conclusions of law without discussion.

III. UNDISPUTED FACTS

The parties agreed to the facts of the case. The material undisputed facts are:

- ▶ On May 18, 2005, Dr. Kuhne received a request for medical records for patient S.H.
- ▶ On May 20, 2005, Dr. Kuhne responded to the request for medical records indicating that he needed payment for the medical records in the amount of \$81.00
- ▶ There was no medical emergency underlying the request for medical records.
- ▶ Under the applicable Board rule, Dr. Kuhne should have charged \$39.00.
- ▶ Dr. Kuhne made a mistake in the amount that he charged. There are no other

allegations of incorrect billing against Dr. Kuhne.

- ▶ Dr. Kuhne received no money in response to his request for medical records.
- ▶ Dr. Kuhne received a second request for S.H.'s medical records on September 7, 2005.
- ▶ Dr. Kuhne sent S.H.'s medical records to S.H.'s new physician on September 8, 2005.
- ▶ Dr. Kuhne never received payment for S.H.'s medical records.

IV. ANALYSIS

A. Dismissal Is The Appropriate Action

Staff brought this case on the basis of one billing mistake Dr. Kuhne made. At the prehearing conference, on the record, Staff indicated that this is the only pending case against Dr. Kuhne and that there are no other pending billing complaints against him. Both parties submitted motions for summary disposition, and neither party objected to the other party's recitation of the facts. Based on the undisputed facts, this is the only case against Dr. Kuhne for incorrect billing. Furthermore, Dr. Kuhne did not intentionally or knowingly over bill his patient. Rather, he relied (mistakenly) on the law that establishes the fees a hospital may charge for copying and releasing patient records.¹

Licensing agencies are prohibited from taking disciplinary action against a health care professional for unknowing and isolated billing errors.² As Dr. Kuhne explained in his uncontroverted affidavit, he did not intentionally over bill his patient. He relied instead on the statute that applies to hospitals. Thus, his billing mistake was unknowing. Furthermore, this is the

¹ Affidavit of Dr. Kuhne, Ex. 9 to Dr. Kuhne's Motion for Summary Disposition; TEX. HEALTH & SAFETY CODE § 241.154

² TEX. HEALTH AND SAFETY CODE § 311.0025(e).

only billing complaint the Board has received against Dr. Kuhne. Because the allegation in this case is that Dr. Kuhne made one error, not even the multiple errors contemplated by the Health and Safety Code, the Board should dismiss this case.

B. Elements of Complaint

Although the ALJ has determined that this case presents an unknowing and isolated billing error, which the Texas Medical Board is prohibited from pursuing under statute, the ALJ concludes that if this case were addressed on the merits, Dr. Kuhne would be entitled to summary disposition in his favor.

1. Medical record release time

Staff alleged that Dr. Kuhne violated the statute and Board rule that require physicians to release medical records within fifteen days of a patient's request for the records.³ The statute and rules create an exception to the fifteen-day requirement. When there is no emergency, a physician is not required to release medical records until the patient remits payment for the records.⁴ The physician is permitted to hold the records until payment is received; the physician is never required to release the records if the patient does not pay.

In this case, there is no dispute that Dr. Kuhne held the records for longer than fifteen days. It is also undisputed that the patient never paid Dr. Kuhne for the records and that there was no emergency. Therefore, Dr. Kuhne was under no legal obligation to release the records. However, Dr. Kuhne released the records without receiving payment from the patient, even though he was not required to do so. Because Dr. Kuhne released the records without receiving payment, while under no obligation to release them, he did not violate the statute and rules cited in Staff's complaint

³ TEX. OCC. CODE § 159.006; 22 TEX. ADMIN. CODE § 165.2(b).

⁴ TEX. OCC. CODE § 159.008; 22 TEX. ADMIN. CODE § 165.2(b).

regarding the failure to release medical records.

2. Unprofessional conduct

Staff alleges that Dr. Kuhne engaged in unprofessional conduct that is likely to injure the public when he failed to respond timely to a patient's communication under 22 TEX. ADMIN. CODE § 190.8(2). It is an undisputed fact that Dr. Kuhne responded to the patient's first request for records two days after he received the request. As discussed above, Dr. Kuhne was under no obligation to release the records to the patient until he received payment for them. Dr. Kuhne responded to the patient's second request for records one day after he received it when he supplied the records to the patient's new physician without receiving any payment for them. The ALJ finds that the response times of two days and one day are timely responses to the patient's communications. Therefore, the ALJ finds that Dr. Kuhne did not violate 22 TEX. ADMIN. CODE § 190.8(2).

3. Allowable charges

Staff alleges that Dr. Kuhne violated Board rule by charging too much for medical records. Based on the number of pages Dr. Kuhne needed to copy for his patient, the allowable charge was \$39.00, based on 22 TEX. ADMIN. CODE § 165.2(e)(1). Dr. Kuhne charged \$81.00. He, therefore, charged more than allowed under the rule. However, the Board accuses Dr. Kuhne of violating a rule that states a physician is entitled to *receive* a reasonable cost-based fee for providing medical records. Dr. Kuhne never received a fee for the medical records, and released them without payment. Therefore, the ALJ finds that he did not violate this rule because one of the elements of the rule requires that the physician receive a fee.

Staff argued, nevertheless, that it is a violation of the rule for the physician simply to charge more than a reasonable fee. Certainly if a physician were repeatedly over billing patients for medical records, it would be a violation of the applicable Board rule. But this case does not present those facts. This case presents an isolated billing error that was made in good faith reliance on the

law that applies to hospital billing records. Staff's attempt to discipline Dr. Kuhne for one unknowing billing error would place Dr. Kuhne (and every other physician in Texas) under a strict liability standard. Every billing error could then subject a physician to a disciplinary order and sanction. Disciplining Dr. Kuhne under a Board rule for a one-time billing error is not simply poor public policy, it violates a statute that prohibits the Board from doing the very thing it is attempting to do in this case.⁵

V. FINDINGS OF FACT

1. Robert C. Kuhne, M.D. (Respondent) is a licensed Texas physician.
2. Respondent's Texas medical license was in full force and effect at all times relevant to this proceeding.
3. Board staff served Respondent with a complaint that contained a statement of the legal authority and jurisdiction under which a hearing would be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the matters asserted.
4. On May 18, 2005, Respondent received a request for medical records for patient S.H.
5. On May 20, 2005, Dr. Kuhne responded to the request for medical records indicating that he needed payment of \$81.00 for copying the medical records.
6. There was no medical emergency.
7. Respondent made a mistake in the amount that he charged.
8. Respondent received a second request for S.H.'s medical records on September 7, 2005.
9. Respondent sent S.H.'s medical records to S.H.'s new physician on September 8, 2005.
10. Respondent never received payment for copying S.H.'s medical records.
11. Respondent unknowingly billed S.H. one time for copying charges of \$81.00 when he should have billed her \$39.00.

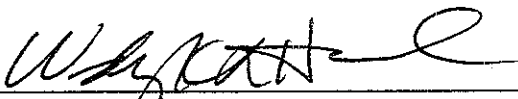
⁵ TEX. HEALTH AND SAFETY CODE § 311.0025(e)

12. Respondent has no other billing error complaints.
13. Respondent's billing error was isolated.

VI. CONCLUSIONS OF LAW

1. The Texas Medical Board (Board) has jurisdiction to discipline its licensees pursuant to the Texas Medical Practice Act (Act), TEX. OCC. CODE ANN., chs. 151-165.
2. The State Office of Administrative Hearings has jurisdiction to hear this matter and issue a proposal for decision, including findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. All parties received adequate and timely notice of the complaint.
4. Respondent promptly replied to the patient's requests as required by TEX. OCC. CODE ANN. § 159.006 and 22 TEX. ADMIN. CODE § 165.2(b). And therefore he did not engage in unprofessional conduct likely to injure the public under 22 TEX. ADMIN. CODE § 190.8(2).
5. A strict liability standard under 22 TEX. ADMIN. CODE § 165.2(e) would inappropriately subject every licensed Texas physician to disciplinary action for one isolated unknowing billing error.
6. The Board may not discipline a licensee for isolated and unknowing billing errors TEX. HEALTH AND SAFETY CODE ANN. § 311.0025(e).
7. This case should be dismissed.

Signed May 11, 2007.



WENDY K.L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS