

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Board of Registration in Medicine,
Petitioner,

No. RM-21-175

Dated: **JAN 21 2022**

v.

John J. Diggins, M.D.,
Respondent.

Appearance for Petitioner:

Patrick G. Fitzgerald, Esq.
178 Albion Street
Wakefield, MA 01880

Appearance for Respondent:

David M. Gould, Esq.
98 North Washington Street
Boston, MA 02114

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF RECOMMENDED DECISION

Discipline may be imposed upon the respondent physician. During sustained periods of time, he failed to maintain up-to-date medical records. More recently, he committed the crime of operating a motor vehicle under the influence of alcohol.

RECOMMENDED DECISION

The Board of Registration in Medicine (board) commenced disciplinary proceedings against respondent John Diggins, M.D., and referred the case to DALA for recommended findings of fact and rulings of law.

An evidentiary hearing took place on September 1-2, 2021. The witnesses were: Dr. Diggins himself; his former colleagues James Goodwin and Dr. Alex Altamirano; his current colleagues Mark Hutchinson, Gregory Mirhej, and Dr. Richard Listerud; and police officer Nathan Goodrow. The hearing was transcribed in two volumes. I admitted into evidence

exhibits marked 1-14, overruling objections to nos. 13-14 and impounding no. 13.¹ The record closed with the parties' submission of closing briefs on January 10, 2022.

Findings of Fact

I find the following facts based on the testimony, the exhibits, and the stipulations.

1. Dr. Diggins is licensed to practice medicine in Massachusetts under certificate number 238052. (Diggins 1/61; Exhibit 1.)²
2. Dr. Diggins grew up in Norwood. Early in his adult life, after an extensive course of study, he was ordained a priest. He taught philosophy and other topics at Providence College and became involved in medicine-related research. (Diggins 1/50, 2/82-87; Exhibit 13.)
3. Dr. Diggins was in his thirties when he enrolled at the University of Cincinnati College of Medicine. Early during medical school, he left the priesthood. He graduated in 2003, and began a triple-board residency—in pediatrics, general psychiatry, and child-and-adolescent psychiatry—at the Cincinnati Children's Hospital and Medical Center. He completed the residency in 2008. (Diggins 1/50-55, 2/87-94.)
4. During the third year of his residency, on November 25, 2006, Dr. Diggins celebrated Thanksgiving in Massachusetts. After drinking several beverages, he was stopped in his car by the Marlborough police. He failed field sobriety tests. A breathalyzer registered blood-alcohol-content measurements of twice the 0.08% legal limit. Dr. Diggins was charged with operating under the influence. He admitted to facts sufficient to warrant a finding of guilt

¹ The parties jointly moved to impound Exhibit 13, a detailed medical record, pursuant to G.L. c. 4, § 7, 26th para., (c). Several documents referring to portions of Exhibit 13 are being unsealed in a separate order.

² Citations to the transcript are by witness, volume, and page.

and the charge was continued without a finding. The conditions of that disposition included a 72-hour alcohol-education program. (Diggins 1/55-59, 1/112; Exhibits 6-7.)

5. Upon completing his residency, Dr. Diggins applied for a Massachusetts medical license. He disclosed his prior OUI. In October 2008, after interviewing Dr. Diggins, the board issued him a license. He began practicing at UMass Memorial Health. (Diggins 1/59-62, 2/95-101.)

6. In 2011, Dr. Diggins left UMass for a position at a Veterans Affairs hospital in Wyoming. He believed that a woman with whom he was romantically involved would follow him from Massachusetts to Wyoming. When this plan fell through, he was devastated. He began to drink more heavily, in isolation, consuming approximately one bottle of wine per night. (Diggins 1/67-73, 2/101-02; Exhibit 13.)

7. In 2014, Dr. Diggins returned to Massachusetts for a position at Providence Hospital. After a time, he began to fall behind on his paperwork. The hospital required each doctor to complete a note for each patient encounter within one day. Dr. Diggins sometimes fell several days' worth of notes behind schedule. Hospital staff voiced concerns about his outstanding records. He agreed to a performance improvement plan. These issues eventually led Dr. Diggins to resign. He was asked, however, to continue working for the hospital on a locum tenens basis. (Diggins 1/69-73, 2/102-04; Altamirano 1/127.)

8. In 2016, Dr. Diggins began working at the Center for Human Development (CHD) in Springfield. He shouldered a heavy workload. Within months, he again fell behind on his notes. The hospital made voice-recognition software available to Dr. Diggins. A staff member was assigned to assist him with documentation, but he found her efforts counterproductive. In late 2016, Dr. Diggins received oral and written exhortations from his

supervisor, Dr. Altamirano, to catch up. Dr. Altamirano's letters counted Dr. Diggins's outstanding notes at 74 in September 2016 and 90 in March 2017. Late in March 2017, Dr. Diggins was placed on unpaid leave for five days. Soon thereafter, he agreed to a performance improvement plan. In September 2017, Dr. Diggins resigned, leaving behind more than 100 outstanding notes. (Diggins 1/73-95, 2/105-17, 2/134-35; Altamirano 1/127-56; Goodwin 2/64-74; Exhibit 5.)

9. In 2018, Dr. Diggins took a job at Harrington Hospital in Southbridge. While being considered for the position, he disclosed the record-keeping difficulties he had encountered at CHD. The hospital hired him nonetheless. He was assigned a heavy patient load and fell behind on his records again. In late 2018 and early 2019, hospital administrators spoke to Dr. Diggins multiple times about his record keeping. As of early 2019, more than 100 of his notes were overdue. (Diggins 1/95-109, 2/115-18; Mirhej 1/174-90, 1/197-203; Exhibit 4.)

10. First as part of his work for CHD, and later on behalf of the Justice Resource Institute (JRI), Dr. Diggins has provided treatment to juveniles in the custody of the Department for Youth Services. Applicable policies do not permit physicians to leave the juveniles' institutions before completing the requisite paperwork. Dr. Diggins has complied with that policy. (Diggins 1/92-95, 2/113-14; Hutchinson 2/40-45, 2/52-53.)

11. On and off, Dr. Diggins continued in Massachusetts the heavy drinking he had commenced in Wyoming. He stopped drinking for periods of up to six months at a time. As of late 2019, he was drinking approximately one bottle of wine per night on weeknights and two bottles on each night of the weekend. Throughout, Dr. Diggins refrained from drinking while at work. He was not observed to be intoxicated at CHD, Harrington, or JRI. Approximately three times, Dr. Diggins called in to work sick because he was suffering from hangovers. (Diggins

1/73, 1/112-18, 2/99; Altamirano 1/154, 1/165-66; Goodwin 2/62-63; Hutchinson 2/45; Listerud 2/15-16; Mirhej 1/206.)

12. At CHD, Harrington, and JRI, Dr. Diggins has been revered as a skilled and compassionate psychiatrist. His treatment and prescribing practices are impeccable. He has achieved outstanding results. Patients praise his work. Colleagues admire and like him. His employing institutions have treasured his skill set, which is vanishingly rare. The pertinent witnesses, with the possible exception of Dr. Altamirano—but including Dr. Altamirano's supervisor, Mr. Goodwin—believed that the benefits of Dr. Diggins's services easily outweighed the price of his deficient record keeping. (Altamirano 1/152-64; Goodwin 2/61-69; Hutchinson 2/42-43; Listerud 2/14-15; Mirhej 1/198-201.)

13. After midnight on October 6, 2019, Dr. Diggins was spotted driving erratically in Ludlow. He had consumed more than two bottles of wine. He failed field sobriety tests and blew 0.17% on a breathalyzer. He was charged with operating under the influence (second offense) and negligent operation of a motor vehicle. While in jail following his arrest, Dr. Diggins expressed suicidal thoughts and caused himself physical harm. (Diggins 1/109-10; Goodrow 1/27-45; Exhibits 2-3, 13.)

14. Dr. Diggins consulted his supervisor promptly after his arrest. Physicians Health Services (PHS) referred Dr. Diggins to a weeklong evaluation at Bradford Health Services. Providers at Bradford diagnosed Dr. Diggins with severe alcohol use disorder, noting a history of depression. Dr. Diggins enrolled in a twelve-week residential substance-abuse program, which he completed in January 2020. He then executed a three-year treatment plan with PHS, the requirements of which include regular monitoring. Dr. Diggins has embraced his recovery. He attends regular meetings of Alcoholics Anonymous and communicates daily with an AA

sponsor. He has remained sober since his October 2019 arrest. (Diggins 1/110-11, 1/118-19, 2/120-23, 2/137-41; Hutchinson 2/46; Listerud 2/16-17, 2/26-27; Mirhej 1/190-92; Exhibits 1, 13, 14.)

15. Dr. Diggins returned to Harrington in early 2020. His records have not been a problem since. He has been more open about his challenges and more willing to seek help. His record keeping has benefited from the July 2020 arrival at Harrington of a new Outpatient Medical Director, Dr. Aminadav Zakai. Dr. Zakai maintains a close watch on Dr. Diggins's queue of open records. When the queue exceeds approximately fifteen notes, Dr. Zakai and Dr. Diggins agree on a plan and a tight deadline, such as two days, for Dr. Diggins to achieve currency. If Dr. Diggins remains behind, Dr. Zakai requires him to clear his clinical schedule for a session of record-writing. Dr. Diggins has come to recognize the efficacy of Dr. Zakai's approach. He sees that prompt interventions can rescue minor delays from spiraling into crises. (Diggins 1/119-20, 2/125-26, 2/142-44; Listerud 2/17-29; Mirhej 1/192-96, 2/205-10.)

16. The parties' primary factual disagreement revolves around the cause or causes of Dr. Diggins's series of record-keeping troubles.³ Two pieces of pertinent evidence require special attention. First, the parties formally stipulated that, while at Bradford, Dr. Diggins stated that "his documentation has been late due to drinking."⁴ Second, according to a written report prepared at Bradford, Dr. Diggins conveyed to his caregivers that he "believes his documentation has suffered because of his desire to leave work prematurely to engage in drinking." The

³ This paragraph and the three that follow address this key disagreement by way of a less conclusory, more evaluative analysis of the evidence.

⁴ An order issued on December 14, 2021 denied Dr. Diggins's motion to withdraw that stipulation, essentially on the grounds that he had not shown the stipulation to be "improvident or not conducive to justice." *Commonwealth v. Buswell*, 468 Mass. 92, 104 (2014).

stipulation alone is too vague to be illuminating. And the pertinent passage of the Bradford report is likewise short on context and texture. Making matters worse, that passage was written by an unspecified member of a thirteen-person team.⁵ Even so, the stipulation and the report both provide some evidence of statements made nearer to real-time by Dr. Diggins himself. He is by far the best source of information about his own mental state during the pertinent period. The stipulation fortifies the report's credibility, and the report sheds some light on the stipulation's meaning. Together these pieces of information provide a preponderance of the evidence that, on some number of occasions, Dr. Diggins's drive to drink contributed to his escalating backlogs. (Stipulation 5(ii); Exhibit 13.)

17. Complaint counsel would draw a conclusion more far-reaching by order of magnitude: that Dr. Diggins's alcohol use was the essential cause of his entire history of record-keeping problems. That conclusion is unwarranted. The record does not suggest that Dr. Diggins's drinking problem caused him to shrug off his duties with regularity. The witnesses' overwhelming attestation to Dr. Diggins's dedication cuts against such a finding. And Dr. Altamirano was the only witness who perceived a tendency for poor record-keeping to correlate with substance abuse.⁶ Complaint counsel emphasizes that Dr. Diggins has kept timely records ever since his return from Bradford: but he has benefited from new habits and a relatively new supervisor. Moreover, reasonable persons conducting serious affairs are generally disinclined to deduce past misconduct solely from recent successes. (Diggins 2/97-99; Altamirano 1/154,

⁵ An order issued on August 24, 2021 invited Dr. Diggins to make efforts to identify any authors of the Bradford report whom he wished to cross-examine, and required the board to provide reasonable cooperation with any such efforts.

⁶ Dr. Diggins preserved a colorable objection to that portion of Dr. Altamirano's testimony. (Altamirano 1/163-66.)

1/163-66; Goodwin 2/62-63; Listerud 2/19. *See generally* G.L. c. 30A, § 11(2); Mass. Guide Evid. § 407(a).)

18. For his part, Dr. Diggins blames his record-keeping delays on heavy loads of acute cases. I find that he bears personal responsibility as well. He fell badly behind at Providence Hospital, CHD, and Harrington in sequence. His missing records threatened his patients' ability to receive proper care. All three facilities imposed record-keeping requirements evenly on their doctors. The majority of Dr. Diggins's colleagues—though not all—met those requirements. He, too, is able to keep his records current when he proactively tackles early seeds of backlog. (Diggins 2/96-109, 2/119, 2/127-37, 2/150-51; Altamirano 1/133, 1/143-44; Goodwin 2/79-80; Listerud 2/31; Mirhej 1/178, 1/204, 1/211-13.)

19. Dr. Diggins testified that he believes timely medical records to be an element of proper medical care. He has not lived up to that principle, however. Dr. Diggins's passion is providing attentive relief to suffering patients. Criticizing that quality is an unattractive exercise. But Dr. Diggins's performance as a medical record-keeper has fallen drastically short of the standards he has set as a listener, thinker, and prescriber. For nearly a decade, he allocated to record keeping a share of his talents and resources insufficient to satisfy his profession's demands. (Diggins 1/98-04, 2/109-11, 2/125-28, 2/148-49; Listerud 2/14.)

Rulings of Law

I. Impairment by Alcohol

The board is authorized to discipline a physician for "practicing medicine while the ability to practice is impaired by alcohol." G.L. c. 112, § 5, 8th para., (d); 243 C.M.R. § 1.03(5)(a)(4). There is no evidence that Dr. Diggins was ever intoxicated at work. Indeed, complaint counsel so concedes.

Complaint counsel's theory is that the phrase "impaired by alcohol" reaches the instances in which Dr. Diggins's addiction diminished his motivation to complete his treatment notes. This theory is both tenuous and far-reaching. In plain language, the word "impaired" standing alone is somewhat flexible, but the combination "impaired by alcohol" strongly connotes intoxication as a result of alcohol consumption. See *Merriam Webster's Collegiate Dictionary* 622 (11th ed. 2003) (defining "impaired" as, in part, "intoxicated by alcohol or narcotics"). Thus, in the commonplace context of OUI offenses, the words "impaired by alcohol" are roughly interchangeable with "under the influence of alcohol." *Black's Law Dictionary* 603 (10th ed. 2014); *Commonwealth v. Widmaier*, 74 Mass. App. Ct. 1124 (2009) (unpublished memorandum opinion). Both phrases mean "drunk," or some variation thereon, but not "in a hurry to drink."

Prior pertinent case law accords with the plain-language reading of the words "impaired by alcohol" by focusing on intoxication at work. E.g., *In the Matter of Russell*, No. 2017-6 (BORIM July 13, 2017). Even the consent order on which complaint counsel relies most heavily, though short on detail, tends to suggest that the respondent was intoxicated at his hospital. *In the Matter of Coolbaugh*, No. 2017-44, at 2 (BORIM Nov. 22, 2017) (respondent "showed 'Lady Godiva-like photos' of his wife to two [hospital] staff members"). There is thus poor support for the position that an unintoxicated person may be punished as "impaired by alcohol." Indeed, a regime in which disciplinary sanctions may revolve around a person's impatience to leave work would place most professionals at risk.

It is true that a physician may be disciplined for "[b]eing habitually drunk," G.L. c. 112, § 5, 8th para., (e); 243 C.M.R. § 1.03(5)(a)(5), but complaint counsel has not charged that basis for discipline here. There also may arise circumstances in which acute health and safety concerns justify the imposition of restrictive, discipline-adjacent consequences on physicians

battling with substance abuse. *See In the Matter of Maitland*, No. 03-14-DALA (BORIM June 1, 2005). Complaint counsel has not claimed to be pursuing that avenue either. The record reflects neither argument nor proof that public health and safety require Dr. Diggins's prompt separation from his patient population.

The allegation that Dr. Diggins practiced while "impaired by alcohol" must be construed with care given the severity of the stakes. *Cf. Simon v. State Examiners of Electricians*, 395 Mass. 238, 249 (1985). So construed, that allegation is not established here.

II. Maintaining Timely Records

Discipline is also warranted where a physician has committed a "[v]iolation of any rule or regulation of the Board." 243 C.M.R. § 1.03(5)(a)(11). One such regulation requires physicians to maintain medical records that are "complete, timely, legible, and adequate to enable the licensee or any other health care provider to provide proper diagnosis and treatment." 243 C.M.R. § 2.07(13)(a). The board's case law emphasizes that "accurate *and current* medical records are absolutely essential in maintaining a patient's health and welfare." *In the Matter of Krokidas*, No. 88-36-CA (BORIM June 7, 1989) (emphasis added).

Dr. Diggins failed to maintain "timely" and "current" records on multiple occasions. Some of these failures were sustained and egregious. The lateness of Dr. Diggins's records was bad enough to threaten his patients' ability to receive proper care.

To be clear, this conclusion does not arise from an interpretation of the pertinent regulations as imposing strict, no-fault liability for late records. Complaint counsel has not suggested that discipline would be warranted where record-keeping violations result purely from circumstances beyond a physician's control. It is indeed unlikely that 243 C.M.R. § 1.03 could support such a theory, in its context and in the light of the board's mission.

Rather, discipline is warranted against Dr. Diggins because of his own culpability: he bears substantial blame for allowing his files to fall repeatedly and badly below the record-keeping standards that his profession demands. *See supra* p. 8.

III. Undermining the Integrity of the Profession

Complaint counsel's final alleged predicate for disciplining Dr. Diggins is that he engaged in "conduct undermining the public's confidence in the integrity of the medical profession." *Raymond v. Board of Registration in Medicine*, 387 Mass. 708, 713 (1982). The board adopted this theory of discipline not through regulations but "by adjudication," an approach that the Supreme Judicial Court has ratified. *Id.*

The borderlines of the conduct viewed as undermining the public's confidence in the profession are not crystal clear. *In the Matter of Pedro*, No. 2018-54 (Dec. 16, 2021). But the board's case law establishes firmly that this category encompasses "criminal conduct," even when unaccompanied by a conviction. *In the Matter of Barrocas*, No. 2020-27, at 4-5 (BORIM Dec. 17, 2020); *In the Matter of Habener*, No. 2008-055, at 2 (BORIM Mar. 17, 2010). The attitude driving this approach is that *any* criminal behavior is "antithetical to a commitment to preserve life, alleviate suffering, and restore health." *Raymond*, 387 Mass. at 712. *See In the Matter of Tamaren*, No. 2008-10, slip op. at 3 (BORIM Nov. 4, 2009); *In the Matter of Romano*, No. 2005-26, slip op. at 1 (BORIM Apr. 12, 2006); *In the Matter of Kobrin*, No. 03-27-DALA, slip op. at 1-2 (BORIM Nov. 17, 2004), *aff'd*, 444 Mass. 837 (2005).

Here the facts establish that, on October 6, 2019, Dr. Diggins operated a motor vehicle while under the influence of alcohol. That behavior was a dangerous crime. G.L. c. 90, § 24. With or without formal guilty verdicts, OUIs have in the past provoked board discipline. *E.g., In*

the Matter of Marotta, No. 2018-35 (BORIM Aug. 9, 2018). Discipline likewise may be imposed here.⁷

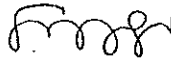
Dr. Diggins's primary rejoinder is that the imposition of discipline on him would violate a constitutional ban on vague laws. The force of this argument is diminished by the board's recurrent holdings that all criminal conduct is sanctionable. *Cf. Arthurs v. Bd. of Registration in Med.*, 383 Mass. 299, 313-14 (1981). In any event, in this tribunal, those holdings are binding.

Conclusion

The board may impose disciplinary measures on Dr. Diggins based on his series of failures to maintain timely medical records and his criminal conduct of October 6, 2019. The appropriate disposition is committed to the board's sound discretion.

It is obvious that any curtailment of Dr. Diggins's ability to treat patients would impose collateral pain both on those patients and on Dr. Diggins's employing institutions. The board is well equipped to consider those consequences in its disposition.

Division of Administrative Law Appeals



Yakov Malkiel
Administrative Magistrate

⁷ Complaint counsel has not suggested that a physician's alcohol use disorder could itself undermine the public's confidence in the integrity of the profession. See U.S. Dep't of Health and Human Servs., *Facing Addiction in America* 2-1 (2016) ("[S]evere substance use disorders . . . were once viewed largely as a moral failing or character flaw, but are now understood to be chronic illnesses characterized by clinically significant impairments[.]").