

# UPDATE ON MEDICO LEGAL ISSUES RELATED TO PAIN PRACTICE AND PRESCRIPTIONS

---

Darrell W. Contreras, Esq., LHRM, CHC-F, CHPC, CHRC

JD HealthCare Partners, LLC

Compliance Consulting • Risk Management

# What is new?

---

- Are pharmacies still refusing to fill prescriptions?
- Were there any changes in the Florida law?
- Is the DEA still pursuing criminal action against physicians?
- What has the Board of Medicine done?
- How can you protect your practice?

# “The Pharmacy will not fill my script!”

- Frequency appears to have decreased over the last year
- What is the driver?
  - DEA visits pharmacy
  - FEAR!!!!
  - Pharmacy – How do I keep myself out of jail?
- What does the law say?
  - No Florida or Federal law to help
  - June 2013 – AMA House of Delegates

# Responding to Pharmacies

---

- AMA Response to Drug Store Chain Intrusion into Medical Practice
  - Inappropriate interference includes:
    - Diagnosis
    - Treatment plan
    - ICD-9 codes
    - Previous medications
    - Previous therapies
    - Routine pharmacist calls for verification of prescription

# Responding to Pharmacies

---

- Contact the pharmacy
  - Some will be unreasonable; some will work with you
- Physician attestation form
  - Pharmacy generated:

## **PHARMACY/PHYSICIAN CONTROL VERIFICATION FORM**

In an effort to prevent fraudulent prescriptions, this form is intended to prevent diversion and accurately verify prescriptions. By filling out this form, provider ensures and verifies that all of the medications listed below have been written by the doctor for the patients listed. Please fill out the form below so we can dispense the medication to your patient in a timely manner.

**\*INSTRUCTION FOR MD OFFICE:** Please Verify All Scripts attached by Printing Your Name and Putting Today's date on the line below. When Complete, Fax back to the pharmacy listed below

- Physician generated (see handouts)

**JD HealthCare Partners, LLC**

# Were there any changes to Florida law?

---

- No action from the legislature for 2014
- Preemption of city and county ordinances still an issue
  - Some counties have passed resolutions urging no preemption
- Outward Appearance:
  - Enforcement/Monitoring phase
- Other States have been catching up
  - Tennessee Chronic Pain Treatment Guidelines

# DEA Activity Against Physicians/Clinics

---

- Enforcement activity is still hot
- DEA Goal:
  - Remove prescriptions from the street
- DEA does not evaluate real treatment
  - Evaluate “Factors for Investigation”
  - Look at the elements of the crime

# DEA – Factors for Investigation

---

1. An inordinately large quantity of controlled substances was prescribed.
2. Large numbers of prescriptions were issued.
3. No physical examination was given.
4. The physician warned the patient to fill prescriptions at different drug stores.
5. The physician issued prescriptions knowing that the patient was delivering the drugs to others.



# DEA – Factors for Investigation

---

6. The physician prescribed controlled drugs at intervals inconsistent with legitimate medical treatment.
7. The physician involved used street slang rather than medical terminology for the drugs prescribed.
8. There was no logical relationship between the drugs prescribed and treatment of the condition allegedly existing.
9. The physician wrote more than one prescription on occasions in order to spread them out.

# Federal Drug Law:

---

## **21 U.S.C. §841(a) - Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

# Proving Guilt...The elements of the crime

---

The elements:

- (1) "that the defendant distributed or dispensed a controlled substance";
- (2) that the defendant "acted knowingly and intentionally"; and
- (3) "that the defendant's actions were not for legitimate medical purposes in the usual course of his professional medical practice or were beyond the bounds of medical practice."

JD HealthCare Partners, LLC

Compliance Consulting • Risk Management

*United States v. Singh*, 54 F.3d 1182, 1187 (4th Cir.1995)

# “Willful Blindness” = Knowledge & Intent

---

**United States v. Singh**, 54 F.3d 1182 (4<sup>th</sup> Cir. 1995).

- A physician’s lack of concern for their patients *e.g.*, failure to properly examine, treat and monitor the patient, establishes the physician’s willful blindness.

# U.S. Supreme Court

---

## **Global-Tech Appliances, Inc. v. SEB S.A.,**

131 S.Ct.2060 (2011)

- *Two (NEW) basic requirements for Willful Blindness:*
  - (1) The defendant must subjectively believe that there is a high probability that a fact exists and
  - (2) The defendant must take deliberate actions to avoid learning of that fact.

# Willful Blindness Applied

---

**U.S. v. Orta-Rosario.** NOs. 10-4684, 10-4750 (4<sup>th</sup> Cir. 2012)

- The Court found Dr. Orta-Rosario's actions were deliberate and calculated to avoid knowledge of the illegal aspect of the enterprise.

# Willful Blindness Applied

---

**U.S. v. Ly**, NO. 12-16580, NON-ARGUMENT CALENDAR, (11<sup>th</sup> Cir. 2013)

1. First, Ly avoided learning whether or not his patients' claimed ailments were legitimate or warranted long-term medication treatment. His regular patient visits lasted only 10-14 minutes each, during which time he performed no physical exam.
2. Second, Ly was willfully blind to facts showing his patients' abuse or diversion of the pills he prescribed them.

# Board of Medicine Activity

---

- Settlement offers have been restrictive
- The settlement process is more uncertain
- Things to watch carefully



# Board Settlements Offers

---

## Settlement Agreements Typically Include:

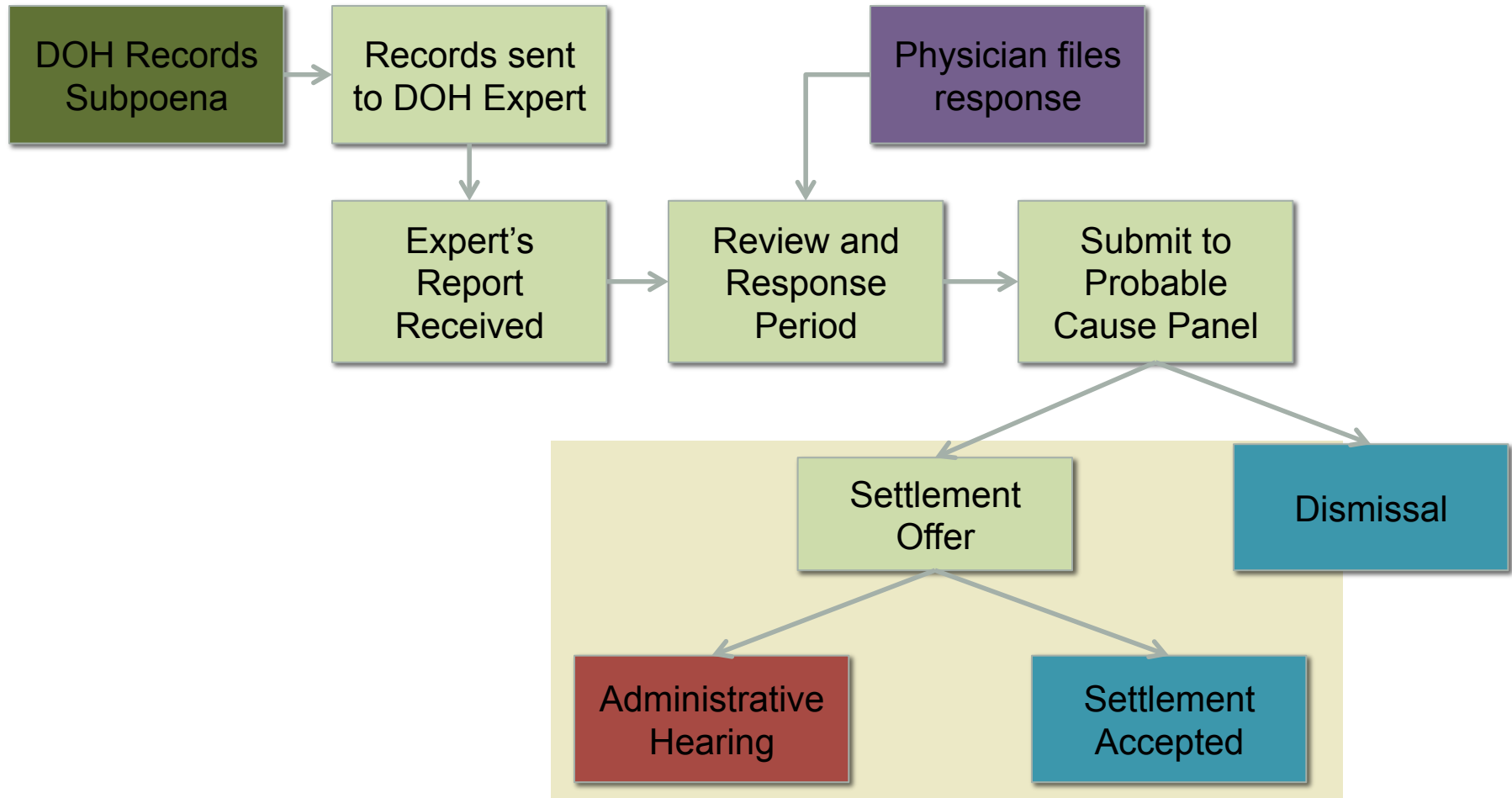
- Similar to “No Contest”
- Reprimand/discipline on license
- Fine – \$5,000 to \$30,000 or more
- Administrative Fee – \$1,000 to \$10,000
- CME Requirement – Usually several classes
- Practice Restrictions – no prescribing CII or CS
- Monitor – A board-certified specialist to periodically review your records...approved by the board
- Periodic reports to the Board
- Probation period

# Monitor Requirement

---

- Indirect Supervision –
- Board Certified in physician's area of specialty
- Must be approved by the Board
- Must be within 20 miles of physician's practice
- 50% review of active records at least once/month
- Monitor reviews copies of prescriptions

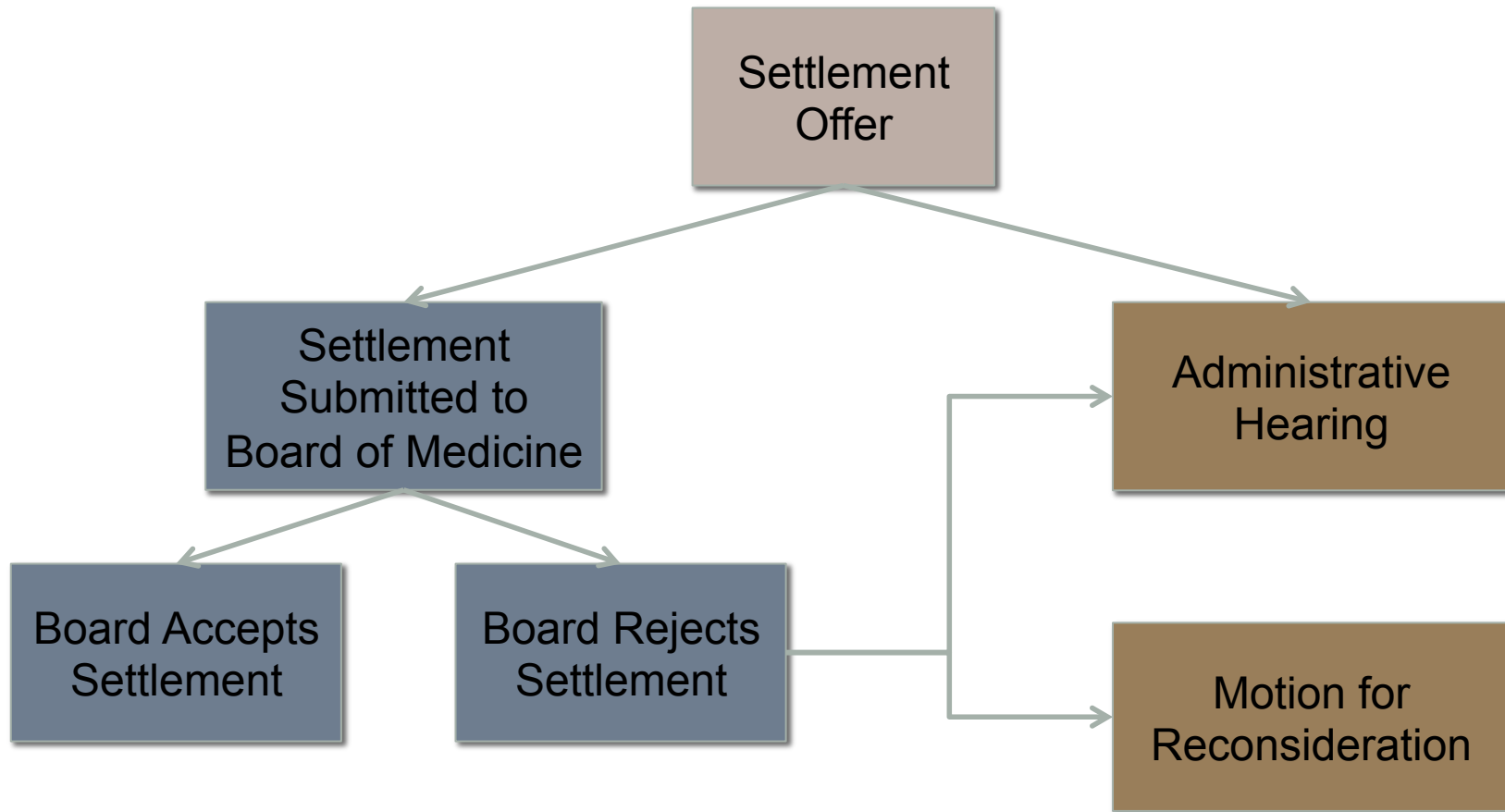
# Slide From Last Year:



JD HealthCare Partners, LLC

# Focus on Settlement Offers

---



# Board Results

---

- Rejecting settlement offers
- Requiring strict enforcement for pain management
  - Surrender license to prescribe
- Settlement amounts are negotiable

## Option

- Motion for reconsideration or
- Reject Settlement and go to hearing

# How To Protect Your Practice

---

Documentation is critical...watch for these areas of concern:

- Prescription quantity/dosage
- Documentation of physical examination
- Combination of medications
- Referrals for or consideration of other treatments
- Follow-up on referrals for other treatments
- Plan of care for continued controlled substance therapy
- Urine drug screening/testing
- E-FORCSE check

# Thank You

**Contact Information:**

Darrell W. Contreras, Esq., LHRM, CHC-F, CHPC, CHRC

Partner

JD HealthCare Partners, LLC

e-mail: [darrell@jdhealthcarepartners.com](mailto:darrell@jdhealthcarepartners.com)

phone: 863-797-9917

**JD HealthCare Partners, LLC**

Compliance Consulting • Risk Management