

STATE OF MAINE  
BOARD OF LICENSURE IN MEDICINE

In re:	)	CONSENT
Michael J. Festino, M.D.	)	AGREEMENT
Complaint No. CR10-248	)	

This document is a Consent Agreement, effective when signed by all parties, regarding a disciplinary action concerning the license to practice medicine in the State of Maine held by Michael J. Festino, M.D. The parties to the Consent Agreement are: Michael J. Festino, M.D. ("Dr. Festino"), the State of Maine Board of Licensure in Medicine ("the Board") and the State of Maine Department of the Attorney General. This Consent Agreement is entered into pursuant to 10 M.R.S. § 8003(5)(B) and 32 M.R.S. § 3282-A.

STATEMENT OF FACTS

1. Dr. Festino has held a license to practice medicine in the State of Maine since September 18, 1967. Dr. Festino specializes in Internal Medicine and Cardiovascular Diseases.

2. On or about January 29, 2010, the Board received an application from Dr. Festino to renew his Maine medical license. On that application, Dr. Festino answered "yes"<sup>1</sup> to questions 14.13 and 14.14, which asked if he had had any medical malpractice suits or claims filed against him since his last renewal or any open malpractice claims. Dr. Festino provided a written explanation for his "yes" responses to these questions. According to Dr. Festino, H.D., his former fiancée, filed a lawsuit against him for the medical

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<sup>1</sup> The form instructs applicants who answer "yes" to any questions to provide a full, written explanation.

care and treatment that he provided for her during the time that they were a couple. Dr. Festino admitted that H.D. was not a patient of his, that he never assumed the role of primary care provider for her, and that his provision of some medical care and treatment of her – at her request – was an error in judgment. Dr. Festino also admitted that: he prescribed controlled substances to H.D. at her request during his relationship with her; and he was embarrassed that he allowed his close, emotional relationship with H.D. to cloud his judgment. According to Dr. Festino, all of the prescriptions for controlled substances that he issued to H.D. were “medically appropriate.”

3. Based upon Dr. Festino’s “yes” responses and his detailed written explanation, the Board staff initiated an investigation of this matter. As part of the investigation, Board staff requested a report from the Prescription Monitoring Program (P.M.P.) regarding Dr. Festino, and requested that a subpoena be issued to Dr. Festino for the complete medical records regarding his treatment of H.D.

4. The P.M.P. report confirmed that Dr. Festino had prescribed controlled drugs to H.D. on eight (8) occasions between June 2008 and January 2009. In addition, the P.M.P. report indicated that Dr. Festino had self-prescribed a controlled substance on three (3) occasions between March 2008 and June 2009. In response to the Board subpoena for H.D.’s medical records, Dr. Festino provided laboratory and diagnostic reports regarding H.D., but no clinical records.

5. On May 10, 2010, the Board reviewed the foregoing information and voted to initiate a complaint against Dr. Festino's Maine medical license pursuant to 32 M.R.S.A. § 3282-A. The Board docketed the complaint as CR10-248.

6. On August 9, 2010, the Board received a response from Dr. Festino to complaint CR10-248.

a. Self-Prescribing (Self-Treatment). In his response, Dr. Festino admitted that he had self-prescribed, Lorazepam, a controlled drug for the past ten years, and that doing so was wrong. Dr. Festino explained that these prescriptions for controlled substances were not new, and were in the same amount and dosages as had been prescribed for him by his primary care provider beginning in 1995. Dr. Festino indicated that he has since had his primary care provider assume this responsibility, including a review of the appropriateness of this medication – including the amount and dosage - which his primary care provider determined to be medically appropriate. Dr. Festino apologized to the Board for his failure to realize that self-prescribing controlled substances was inappropriate, and assured the Board that it would never again occur.

b. Treating Family/Close Persons (Treatment of H.D.). In his response, Dr. Festino admitted that he had treated H.D. and that doing so was wrong. Dr. Festino admitted that he should not diagnose, treat or prescribe any medications to any person with whom he has a close, personal relationship. Dr. Festino admitted that he was in a close, personal relationship

with H.D. and that he was not her primary care provider. According to Dr. Festino, his personal feelings for H.D. caused him to make decisions – such as prescribing her controlled substances – that he should not have made. According to Dr. Festino, he has come to understand the boundary that he violated when he treated and prescribed for H.D. by attending a three day course in boundaries at Vanderbilt University Medical Center called “Maintaining Proper Boundaries.”

c. Medical Record Keeping. In his response, Dr. Festino admitted that he failed to create and maintain medical records to support his medical treatment of H.D., including his prescribing her controlled drugs. Dr. Festino admitted that he prescribed controlled drugs to H.D. on multiple occasions and failed to create any medical records to explain why he prescribed them. Dr. Festino admitted that he should have created and maintained medical records regarding his treatment of H.D., including the medical decision-making regarding his prescribing her controlled substances, which he asserts was medically appropriate.

7. On or about September 14, 2010, the Board reviewed Complaint CR10-248, and voted to schedule the matter for an adjudicatory hearing. In addition, the Board authorized its legal counsel to negotiate a consent agreement with Dr. Festino that resolved Complaint CR10-248 without an adjudicatory hearing.

8. This Consent Agreement has been negotiated by counsel for Dr. Festino and counsel for the Board in order to resolve complaint CR10-248

without an adjudicatory hearing. Absent Dr. Festino's acceptance of this Consent Agreement by signing and dating it in front of a notary and returning it to the Board on or before October 11, 2010, the matter will proceed to an adjudicatory hearing. In addition, absent the Board's acceptance of this Consent Agreement by ratifying it on October 12, 2010, the matter will proceed to an adjudicatory hearing.

9. By signing this Consent Agreement, Dr. Festino and his legal counsel waive any and all objections to, and hereby consent to the presentation of this Consent Agreement to the Board for possible ratification. Dr. Festino and his legal counsel also forever waive any arguments of bias or otherwise against any of the Board members in the event that the Board fails to ratify this proposed Consent Agreement.

#### COVENANTS

In lieu of proceeding to an adjudicatory hearing in this matter, Dr. Festino agrees to the following:

10. Dr. Festino admits that with regard to complaint CR10-248 the Board has sufficient evidence from which it could reasonably conclude that he: (a) self-prescribed controlled drugs (engaged in self-treatment); (b) provided medical treatment, including prescribing controlled drugs to H.D., with whom he had a close, personal relationship; and (c) failed to create and maintain appropriate medical records regarding his treatment of H.D. and his prescribing controlled drugs to H.D. Dr. Festino admits that such conduct

constitutes unprofessional conduct and grounds for discipline of his Maine medical license pursuant to 32 M.R.S. § 3282-A(2)(F).

11. For the conduct described in paragraphs 1-10 above, Dr. Festino agrees to accept, and the Board agrees to issue, the following discipline:

a. A REPRIMAND. Dr. Festino agrees that self-treating/self-prescribing controlled drugs, treating/prescribing controlled drugs to someone with whom he is in a close personal relationship, and failing to create medical records is inappropriate. Dr. Festino admits that such conduct negatively reflects upon the practice of medicine. Dr. Festino shall take all measures necessary to ensure that such conduct does not again occur.

b. A MONETARY PENALTY of One Thousand Dollars and Zero Cents (\$1,000.00). Dr. Festino shall ensure that he pays the monetary penalty within thirty (30) days following the execution<sup>2</sup> of this Consent Agreement. Payment shall be made by certified check or money order made payable to "Treasurer, State of Maine," and be remitted to Maureen Lathrop, Investigative Secretary, Maine Board of Licensure in Medicine, 137 State House Station, Augusta, Maine 04333-0137.

c. Within twelve (12) months of the execution of this Consent Agreement, Dr. Festino shall successfully complete a course pre-approved by the Board in medical record-keeping, and shall provide written (documentary) proof of his successful completion of the foregoing pre-approved course to the Board. This course, which shall be paid for by Dr. Festino, shall not be

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<sup>2</sup> For the purposes of this Consent Agreement, "execution" means the date on which the final signature is affixed to this Consent Agreement.

creditable towards continuing medical education required for Dr. Festino's medical re-licensure.

12. Upon the execution of this Consent Agreement, the Board agrees to grant Dr. Festino's pending application to renew his Maine medical license.

13. Dr. Festino waives his right to a hearing before the Board or any court regarding all findings, terms and conditions of this Consent Agreement. Dr. Festino agrees that this Consent Agreement is a final order resolving Complaint CR10-248. This Consent Agreement is not appealable.

14. The Board and the Office of the Attorney General may communicate and cooperate regarding Dr. Festino or any other matter relating to this Consent Agreement.

15. Dr. Festino acknowledges that, pursuant to Title 10 M.R.S. § 8003(5)(B), his failure to comply with any of the terms or conditions of this Consent Agreement shall constitute grounds for additional disciplinary action against his Maine medical license, including but not limited to an order, after hearing, modifying, suspending, or revoking his license.

16. This Consent Agreement is a public record within the meaning of 1 M.R.S.A. § 402 and will be available for inspection and copying by the public pursuant to 1 M.R.S.A. § 408.

17. This Consent Agreement constitutes disciplinary action that is reportable to the National Practitioner Data Bank (NPDB), the Healthcare Integrity and Protection Data Bank (HIPDB), and the Federation of State Medical Boards (FSMB).

18. Nothing in this Consent Agreement shall be construed to affect any right or interest of any person not a party hereto.

19. The Board and Dr. Festino agree that no further agency or legal action will be initiated against him by the Board based upon the facts described herein, except or unless he fails to comply with the terms and conditions of this Consent Agreement. The Board may however consider the conduct described above in the event that allegations are brought against Dr. Festino in the future. The Board may also consider the fact that discipline was imposed by this Consent Agreement in determining appropriate discipline in any further complaints against Dr. Festino's license.

20. Dr. Festino acknowledges by his signature hereto that he has read this Consent Agreement, that he has had an opportunity to consult with an attorney before executing this Consent Agreement, that he executed this Consent Agreement of his own free will and that he agrees to abide by all terms and conditions set forth herein.

21. Dr. Festino has been represented by Kenneth Lehman, Esq., who has participated in the negotiation of the terms of this Consent Agreement.

**I, MICHAEL J. FESTINO, M.D., HAVE READ AND UNDERSTAND THE FOREGOING CONSENT AGREEMENT AND AGREE WITH ITS CONTENTS AND TERMS. I FURTHER UNDERSTAND THAT BY SIGNING THIS AGREEMENT, I WAIVE CERTAIN RIGHTS, INCLUDING THE RIGHT TO A HEARING BEFORE THE BOARD. I SIGN THIS CONSENT AGREEMENT VOLUNTARILY, WITHOUT ANY THREAT OR PROMISE. I UNDERSTAND THAT THIS CONSENT AGREEMENT CONTAINS THE ENTIRE AGREEMENT AND THERE IS NO OTHER AGREEMENT OF ANY KIND, VERBAL, WRITTEN OR OTHERWISE.**



DATED: 9/29/2010

Michael J. Festino, M.D.  
MICHAEL J. FESTINO, M.D.

STATE OF Maine

Cumberland, S.S.

Personally appeared before me the above-named Michael J. Festino, M.D., and swore to the truth of the foregoing based upon his own personal knowledge, or upon information and belief, and so far as upon information and belief, he believes it to be true.

DATED: 9-29-10

Travis M. Braum  
NOTARY PUBLIC / ATTORNEY  
Maine Bar Number: 4525

~~MY COMMISSION ENDS:~~ \_\_\_\_\_

DATED: September 29, 2010

K. Lehman  
KENNETH LEHMAN, ESQ.  
ATTORNEY FOR DR. FESTINO

STATE OF MAINE  
BOARD OF LICENSURE IN MEDICINE

DATED: 10/12/2010

Sheridan R. Oldham, M.D.  
SHERIDAN R. OLDHAM, M.D., Chairman

STATE OF MAINE DEPARTMENT  
OF THE ATTORNEY GENERAL

DATED: 10/12/10

Dennis E. Smith  
DENNIS E. SMITH  
Assistant Attorney General

Effective Date: 10/12/10