

“CHANGING THE OUTCOME: APPLICATION OF THE TEXAS DENTAL DISCIPLINARY MATRIX AND PROPOSED REFORMS”

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I. INTRODUCTION

In Texas, the regulation of dental professionals plays a critical role in safeguarding public health and maintaining trust in the dental profession.¹ The Texas State Board of Dental Examiners (the “Board”) has developed a Disciplinary Matrix (the “Matrix”) that assists the Board members and agency staff in the appropriate negotiation of settlements with license holders by identifying possible sanctions and requirements for specific violations.² It also provides notice to licensees of the possible consequences of conduct that violates the Dental Practice Act or Board rules.³

While the Disciplinary Matrix is good in theory because it provides a structured approach to discipline, it faces significant challenges because

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¹ Tex. Occ. Code Ann. § 254.001 (granting the Board authority to regulate dental practice and protect public health and safety).

² 44 Tex. Reg. 2868, 2868 (June 7, 2019) (to be codified at 22 Tex. Admin. Code §§ 101.8, 107.201, 107.203–.204, 107.206, 108.5) (Tex. State Bd. of Dental Exam’rs, Disciplinary Matrix); TEX. STATE BD. OF DENTAL EXAM’RS, *Disciplinary Matrix* (June 7, 2019), https://tsbde.texas.gov/78i8ljhb/2019_06_07_Matrix.pdf.

³ 44 Tex. Reg. 2868; TEX. STATE BD. OF DENTAL EXAM’RS, *Disciplinary Matrix*, *supra* note 2.

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aggravating factors are not consistently or adequately weighed.⁴ Accordingly, the Board must consider changes to the Matrix and stricter adherence to the Matrix’s requirements to have a purposeful effect on determining disciplinary actions for license holders. Without changes, dentists can continue to practice dentistry, despite potentially harming patients, practicing below the minimum standard of care, or by engaging in violations such as self-prescribing controlled substances. Therefore, it is important that the Board amend the Matrix and apply it consistently to develop purposeful sanction determinations for license holders, to protect patients, and to protect the dental profession.

II. BACKGROUND

The Texas Legislature has authorized the Board to discipline licensed dentists for violations of the Dental Practice Act and to adopt and enforce rules pursuant to the Board’s duties under the Act.⁵ The Board may take disciplinary action, including suspending and revoking licenses, against a licensee who is not in compliance with the Dental Practice Act, or the rules adopted by the Board.⁶

A licensee is entitled to a hearing if the Board proposes to reprimand, fine, place the licensee on probation, or suspend or revoke their dental license.⁷ Hearings are conducted by the Texas State Office of Administrative Hearings (“SOAH”) and presided over by neutral administrative law judges (“ALJ”).⁸ An ALJ’s decision is subject to adoption by the Board.⁹ A licensee aggrieved by a Board decision is entitled to judicial review.¹⁰

The Board developed the Matrix in 2010 to help outline its policy when taking disciplinary action in accordance with the Dental Practice Act and Board rules).¹¹ The Matrix also provides licensees, attorneys, administrative law judges, and the public easy access to the Board’s enforcement policies.¹² Further, the Matrix is intended to maintain flexibility in determining the most appropriate sanction for each violation by allowing the Board to consider aggravating and mitigating factors such as: the licensee’s compliance history, the seriousness of the violation, and the threat to the public health and safety.¹³

The Matrix is organized by violation types and divided into tiers based on the severity of the infraction.¹⁴ These violation types align with the descriptions

⁴ See 22 Tex. Admin. Code Ann. § 190.15 (2024) (Tex. Med. Bd., Aggravating and Mitigating Factors).

⁵ Tex. Occ. Code Ann. §§ 254.001, 263.002(a).

⁶ *Id.* at § 263.002.

⁷ *Id.* at § 263.003.

⁸ Tex. Gov’t Code §§ 2001.051, 2001.058.

⁹ Tex. Gov’t Code § 2001.58(e)

¹⁰ Tex. Occ. Code Ann. § 263.009; Tex. Gov’t Code § 2001.146.

¹¹ See 44 Tex. Reg. 2868, 2868.

¹² *Id.*

¹³ See 22 Tex. Admin. Code §§ 107.53 (Tex. State Bd. of Dental Exam’rs, Aggravating and Mitigating Factors).

¹⁴ *Id.*

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specified in the Texas Occupations Code (Dental Practice Act).¹⁵ Each tier in the Matrix includes examples of conduct that may fall within that category, along with the corresponding sanctions that could be imposed.¹⁶ Violations are categorized into three tiers: first-tier violations, which the Board considers “less serious,” and second- and third-tier violations, which the Board classifies as “more serious.” Additionally, the Matrix requires the Board to evaluate all applicable violation sections when determining sanctions for conduct that violates multiple statute sections.¹⁷

**III. CHANGES TO THE MATRIX ARE NEEDED TO ENSURE A PURPOSEFUL
EFFECT ON DETERMINING DISCIPLINARY ACTIONS FOR LICENSE
HOLDERS.**

The Board has been given broad discretion to take disciplinary action against license holders in violation of the Dental Practice Act or other laws relating to the practice of dentistry.¹⁸ However, the Board has been ineffective at applying the Matrix because aggravating factors such as prior disciplinary actions and multiple violations are not given enough weight in sanctioning determinations. Therefore, changes should be made to the weight given to aggravating factors and the enforcement of the Matrix to ensure the disciplinary actions are appropriate.

A. The Disciplinary Matrix Must Weigh Aggravating Factors More Heavily.

Although the Matrix permits the Board to consider mitigating and aggravating factors when deciding sanctions and even allows for stricter measures when aggravating factors justify them, the Board has consistently given these important factors little consideration in its disciplinary decisions for license holders. To ensure the Matrix has a meaningful impact on sanctioning and fosters more consistent and predictable outcomes, it must clearly articulate and explain how these factors influence sanctions. Therefore, the Board must give greater weight to these factors when determining disciplinary actions for license holders.

In any disciplinary proceeding, the Board may consider aggravating factors that warrant more severe or restrictive action, including harm to one or more patients, violation of a Board order, prior similar violations, increased potential harm to the public, and previous disciplinary action by the Board.¹⁹ As a result, the Board has wide discretion in determining what constitutes an appropriate sanction in contested cases.²⁰ Despite the Board’s wide discretion, it is not required to

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Harrison v. Tex. State Bd. of Dental Exam’rs*, No. 03-18-00229-CV, 2020 WL 370886, at *3 (Tex. App.—Austin Jan. 23, 2020, no pet.) (citing 35 Tex. Reg. 8152, 8153–66 (2010)).

¹⁸ See *Fay-Ray Corp. v. Tex. Alcoholic Beverage Comm’n*, 959 S.W.2d 362, 369 (Tex. App.—Austin 1998, no pet.).

¹⁹ 22 Tex. Admin. Code § 107.203 (a) (2010).

²⁰ *Id.* § 100.20 (d).

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consider aggravating and mitigating factors in each decision and these factors are not applied in every case.²¹ Because of this, the Board can decide to place little weight on a license holder’s past violations or previous harm to patients, leading to inconsistent and unpredictable disciplinary outcomes.²²

In *Froemming v. Tex. State Bd. Of Dental Examiners*, the Board used a dentist’s disciplinary history, including four previous Board sanctions and prior violations of a similar nature, to ultimately revoke the dentist’s license; however, this is one of the only cases in which the Board appears to have almost exclusively considered aggravating factors in determining disciplinary action for the license holder.²³ In *Froemming*, the ALJ recommended that Froemming receive the lesser punishment of a five-year license suspension instead of the license revocation requested by the Board.²⁴ The Austin Court of Appeals reasoned that, in rejecting the ALJ’s recommendation, the Board had explained that it “considers aggravating and mitigating circumstances in determining an appropriate sanction, including prior disciplinary action, prior violations of a similar nature, and attempts to circumvent a statute or board rule.”²⁵ The Board also pointed out that Respondent had been sanctioned four times in the past for violations of the Dental Practice Act and Board rules, was on probation pursuant to the last Board order until August 19, 2010, and that his probation was for prior violations of a similar nature.²⁶ As a result, the court found that the Board correctly determined that the ALJ had failed to properly consider the dentist’s prior disciplinary actions and violations. Thus, the ALJ’s sanction recommendation was inconsistent with the Board’s adopted disciplinary guidelines and rules.²⁷ The court affirmed the trial court judgment upholding the Board’s order in full, thereby revoking the dentist’s license.²⁸

Froemming’s case is one of only a few outliers in which the Board heavily weighed aggravating factors, including prior disciplinary history and violations of a similar nature, in the decision to revoke a dentist’s license.²⁹ By contrast, the Board gave little to no weight to aggravating factors, such as past disciplinary history and prior violations of a similar nature, in determining the appropriate sanction against Dr. Beck.³⁰

In Beck’s case, he had been reprimanded by the Board seven times, including a previous license revocation (eventually reinstated), with four of those disciplinary actions occurring after 2011, when the Matrix was in place.³¹ Although

²¹ *Id.* §§ 100.20 (d), 107.203.

²² *Id.* §§ 100.20 (d), 107.203.

²³ *Froemming v. Tex. State Bd. of Dental Exam’rs*, 380 S.W.3d 787, 792–93 (Tex. App.—Austin 2012, no pet.).

²⁴ *Id.* at 790.

²⁵ *Id.* at 792.

²⁶ *Id.* at 792–93.

²⁷ *Id.* at 793.

²⁸ *Id.* at 795.

²⁹ *Froemming*, 380 S.W.3d 787.

³⁰ Tex. State Bd. of Dental Exam’rs, *Enf’t Action Against Beck for Violations of the Tex. Admin. Code*, Docket No. 2017-01048, (Feb. 23, 2018) (Ord. of the Board).

³¹ Tex. Off. Admin. Hr’gs, *Enf’t Action Against Beck for Violations of the Tex. Admin. Code.*, Docket No. 504-17-4937, at 23–24 (Dec. 18, 2017) (Proposal for Decision).

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Beck’s history included egregious violations, such as self-prescribing more than 2,500 Empirin No. Three tablets (a controlled substance) and holding another dentist at gunpoint, the last disciplinary action the Board took against him was an enforced suspension. The Board and the ALJ considered aggravating factors when determining the proper sanctions for Dr. Beck, including previous disciplinary actions by the Board, violations involving more than one patient, violations of a Board order, and “intentional, premeditated, knowing, or grossly negligent act[s] constituting a violation.”³² However, the Board and the ALJ also considered the mitigating factors of Beck’s prior community service and present value to the community, along with the implementation of remedial measures to correct or mitigate harm from the violations. Ultimately, the Board refused to revoke his license, instead adopting the ALJ’s recommendation of a four-year suspension of his license.³³

This stark contrast in the Board’s weighing of aggravating and mitigating factors in these two cases demonstrates that determining disciplinary actions for license holders is unpredictable at best. While the Board and the ALJ in Beck’s case found that mitigating factors outweighed aggravating factors because revocation of Beck’s license would ignore his many years of experience and training,³⁴ the Board in Froemming’s case disagreed with the ALJ’s recommendation and found that the aggravating factors supported revocation.³⁵ Although Beck had many years of experience and training, the ALJ concluded that his approach to Board orders—delegating responsibility to attorneys and failing to take personal accountability—reflected a pattern of disregard for compliance.³⁶ Moreover, the ALJ disagreed with Beck’s assertion that he had established rehabilitative potential, finding instead that his continued misconduct and numerous prior violations outweighed any mitigating factors.³⁷ This inconsistency in weighing aggravating and mitigating factors highlights the need for reforms in the Matrix to ensure more predictable and appropriate disciplinary outcomes.

Absent consistent application of aggravating and mitigating factors in each decision, it is nearly impossible to understand or predict Board actions. Even though the Matrix allows for consideration of these factors in any public action, their application varies significantly from case to case. For example, in *Tex. State Bd. of Dental Exam’rs v. Nino*, the Board identified numerous aggravating factors, including harm to patients and prior disciplinary violations, yet gave little weight to mitigating factors such as the cessation of harmful procedures.³⁸ This unpredictable weighting of factors highlights the broader issue of inconsistency in disciplinary determinations and reinforces the need for clearer guidelines in the

³² *Id.* at 23–24.

³³ *Id.* at 24–26.

³⁴ *Id.* at 21.

³⁵ *Froemming v. Tex. State Bd. of Dental Exam’rs*, 380 S.W.3d 787, 793 (Tex. App.—Austin 2012, no pet.).

³⁶ *Beck*, Docket No. 504-17-4937 at 19.

³⁷ *Tex. State Bd. of Dental Exam’rs v. Beck*, No. 2017 WL 7202123, at *11 (Tex. App. 2017).

³⁸ *Tex. Off. Admin. Hr’gs, Enf’t Action Against Christian Nino, DDS for Violations of the Dental Practice Act*, Docket No. 504-22-0533, at (Oct. 27, 2022) (Proposal for Decision).

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Matrix.³⁹ Without a more structured approach, the Matrix cannot effectively ensure fairness and transparency in Board decisions.

The Board should apply more weight to aggravating factors such as prior disciplinary history or patient harm in determining sanctions. Consistency in application will also assist in understanding and predicting the Board’s decision. The Matrix should also be modified to explain the weight to be given to these aggravating and mitigating factors and require consideration of aggravating and mitigating factors in every case. These Matrix modifications will help the Board achieve more consistent and measurable sanction determinations.

B. The Disciplinary Matrix Must Weigh Aggravating Factors in Tier Determinations.

The Board is permitted to weigh aggravating and mitigating factors in tier determinations for violations and when evaluating whether conduct violates multiple statute sections.⁴⁰ However, the Matrix lacks explicit guidance mandating such considerations, leading to inconsistent applications. Therefore, the Matrix should be amended to require the consideration of these factors in tier determinations and to clarify whether certain aggravating factors or multiple violations elevate the offense to a higher tier.

The Matrix consists of several charts, and each chart contains a general category of prohibited conduct.⁴¹ There are fourteen general categories of prohibited conduct: not adhering to the standard of care; dishonorable conduct; impermissible designation; diligence in practice; fraud and misrepresentation in obtaining patronage; unlawful advertising; obtaining a license through fraud or misrepresentation; chemical dependency or improper possession or distribution of drugs; violation of a law regulating dentistry; physical or mental incapability of practicing dentistry safely; negligent care causing injury to a patient; disciplinary action against license in another stat; violation of state or federal law in providing dental care; and insanity.⁴² Each chart also lists specific infractions within each general category.⁴³

The Matrix divides violations into three tiers, from least serious to most serious; the first tier has the least serious violations, then the second tier, and the most serious violations fall under the third tier.⁴⁴ The Matrix provides descriptions of the various violations that fall into each tier, but it also states that the Board should make a determination of the appropriate tier after considering aggravating and

³⁹ 44 Tex. Reg. 2868; *See also* TEX. STATE BD. OF DENTAL EXAM’RS, *Disciplinary Matrix*, *supra* note 2.

⁴⁰ *See* Harrison v. Tex. State Bd. of Dental Examiners, No. 03-18-00229-CV, 2020 WL 370886, at *3 (Tex. App.—Austin Jan. 23, 2020, no pet.) (citing 35 Tex. Reg. 8152, 8153–66 (2010)).

⁴¹ 44 Tex. Reg. 2868; *See also* TEX. STATE BD. OF DENTAL EXAM’RS, *Disciplinary Matrix*, *supra* note 2.

⁴² Tex. Occ. Code § 263.002(a) (providing types of conduct that Board has authority to discipline).

⁴³ 44 Tex. Reg. 2868; *See also* TEX. STATE BD. OF DENTAL EXAM’RS, *Disciplinary Matrix*, *supra* note 2.

⁴⁴ 44 Tex. Reg. 2868, at 2876.

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mitigating factors.⁴⁵ Finally, the Board must consider all relevant violations when deciding on sanctions for conduct breaching multiple statutes.⁴⁶

In Beck’s case, the ALJ determined that two sections of the Matrix were applicable: “those involving dishonorable conduct violations, on one hand, and violations of laws regulating dentistry, on the other.”⁴⁷ In the dishonorable conduct section of the Matrix, the ALJ explained that the first tier covers “isolated dishonorable conduct resulting in no adverse patient effects.”⁴⁸ The second tier includes “repeated acts of dishonorable conduct or dishonorable conduct that places a patient or the public at risk of harm,” while the third tier encompasses “repeated acts of dishonorable conduct or acts of dishonorable conduct causing harm to a patient or the public.”⁴⁹

The ALJ determined that Dr. Beck’s dishonorable conduct violations fell “most appropriately in the Second Tier” because he had “treated as many as 50 patients while his license was suspended.”⁵⁰ The ALJ found that the “aggravating factors outweighed the mitigating factors” by double the amount, but also concluded that “there was no harm or even risk of harm shown.”⁵¹ Using the Matrix, the ALJ determined that a second-tier dishonorable conduct violation had a “range of appropriate penalties that included a warning, reprimand, or probated suspension with stipulation; suspension; or revocation.”⁵²

The ALJ also explained that, in the section of the Disciplinary Matrix concerning violations of laws regulating dentistry, “a violation of a stipulation of a prior Board order is a third-tier violation” with a range of appropriate penalties including “reprimand or probated suspension with stipulations (that may include, among other things, enforced suspension until the prior Board orders are complied with); suspension; or revocation.”⁵³ The ALJ concluded that Beck’s recommended sanction of a remedial plan (which is only available for a first-tier violation) was “not in accord” with his second and third-tier violations, and that, “given his large number of prior Board orders evidencing a very cavalier attitude about complying with the Board’s requirements, a sanction more severe than a warning or reprimand was appropriate.”⁵⁴ However, the ALJ ultimately recommended a suspension of Dr. Beck’s license for only four years, and the Board adopted the ALJ’s recommendation.⁵⁵

⁴⁵ *Id.* at 2873.

⁴⁶ *See* *Harrison v. Tex. State Bd. of Dental Exam’rs*, No. 03-18-00229-CV, 2020 WL 370886, at *3 (Tex. App.—Austin Jan. 23, 2020, no pet.) (citing 35 Tex. Reg. 8152, 8153–66 (2010)).

⁴⁷ *Beck*, 2017 WL 7202123, at *1.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at *12.

⁵³ *Beck*, 2017 WL 7202123, at *13.

⁵⁴ *Id.* at *13.

⁵⁵ *Tex. State Bd. of Dental Exam’rs, Enf’t Action Against Beck for Violations of the Tex. Admin. Code*, Docket No. 2017-01048, (Feb. 23, 2018) (Ord. of the Board).

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In Beck’s case, although the ALJ determined that his violations were Second and Third Tier violations, neither the ALJ nor the Board considered all applicable violation sections together in determining a sanction stemming from conduct that constituted a violation of multiple statute sections.⁵⁶ The ALJ separately determined the potential sanctions from violations of dishonorable conduct and laws regulating dentistry fell into second and third-tier violations respectively, but they failed to consider whether Beck’s violations of multiple statute sections would place Beck’s violation in a higher tier or result in more severe sanctions.⁵⁷ Additionally, even though the ALJ recognized that the aggravating factors in Beck’s case outweighed the mitigating factors by double the amount, they seemed to believe that the fact there was no harm or risk of harm shown essentially cancelled out the extreme number of aggravating factors that could warrant a more severe or restrictive Board action and could potentially place the violation into a higher tier with harsher sanctions.⁵⁸

If instead the Board considered certain aggravating factors as part of the tier determinations, along with explicit instructions as to whether those aggravating factors would elevate the violation in a higher tier, the sanction determinations would be more accurate. This would be most evident in cases where the aggravating factors would outweigh the mitigating factors and would warrant more restrictive action. For instance, in Beck’s case, if the Board had been required to consider Beck’s “one or more violations that involve more than one patient” as an aggravating factor into the tier determination for his dishonorable conduct violation, as well as whether his violations of multiple statute sections would place him into a higher tier with more severe sanctions, then the dishonorable conduct violation would become a third-tier violation as “repeated or continuous acts of dishonorable conduct where violations present risk of serious patient harm” because Beck saw over 50 patients while his license was suspended.⁵⁹ Then, considering that Beck would have at least two third-tier violations, one for dishonorable conduct, and one for failure to comply with a law regulating dentists, his sanction would need to reflect a more severe Board action as opposed to a Board action against a license-holder that only had one statute violation.⁶⁰ Under these proposed reformed Matrix requirements, Beck’s license would likely be revoked because these two third-tier violations would warrant a more severe punishment than the enforced suspension Beck was given when considered together with the numerous aggravating factors present in his case.⁶¹

Another issue arising when making tier determinations is the inconsistency of the Board and the ALJ in recognizing and considering that some violations start

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 20.

⁵⁹ *Beck*, 2017 WL 7202123, at *15.

⁶⁰ *Id.*

⁶¹ *See* 44 Tex. Reg. 2868, 2876; *See also* TEX. STATE BD. OF DENTAL EXAM’RS, *Disciplinary Matrix*, *supra* note 2.

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above the first tier and may be elevated by the presence of aggravating factors.⁶² In *Kim v. State Bd. of Dental Examiners*, the Board rejected the ALJ’s sanction recommendation because the ALJ placed the violation in the first tier instead of second tier.⁶³

In *Kim*, the Austin Court of Appeals assessed a Board sanction against Dr. Kim because he failed to report to the Board that his patient had been hospitalized shortly after he treated her.⁶⁴ The court found that the Matrix chart at issue pertained to violations of a law “relating to the regulation of dentists.”⁶⁵ The court also found that, although the chart did not list the failure to report required under subsection 108.6(2) of Title 22 of the Administrative Code, the chart contained a catch-all provision for the violation “of another law regulating dentists” and specified that this type of violation is potentially a first through third-tier violation.⁶⁶

The court’s primary objective in *Kim* was to determine whether the Board correctly construed its own Matrix when deciding the appropriate sanctions to impose on a license holder.⁶⁷ Although the ALJ believed the violation was a first-tier offense because no evidence was introduced regarding the aggravating and mitigating factors listed in the Matrix, and because there was no evidence that such violation would pose any threat to public safety, the court sided with the Board in determining that it was a second-tier violation functioning as “another law regulating dentists.”⁶⁸ The court explained that the chart which addressed violations of “laws regulating dentists” contained entries for first, second, and third-tier violations of laws regulating dentists, and that the type of violation at issue in this case could potentially fall under any of the tiers.⁶⁹

Importantly, the court concluded that even though the Board did not mention any of the aggravating factors listed in the Matrix when it changed the suggested ALJ sanction, it did not believe that the absence of those factors compelled a conclusion that the conduct must be a first-tier violation, as urged by the ALJ.⁷⁰ In fact, the court pointed out that the Matrix mandated that the punishment level for certain types of violations starts above the first tier and may be further elevated by the presence of aggravating factors.⁷¹ Given the manner in which agency rules were construed by appellate courts and considering the failure to explicitly specify the type of sanction to impose for the violation as issue, , the Court could not conclude that the Board misapplied the language of the Matrix when it determined the type of failure to report at issue in the case was a second-

⁶² *Kim v. State Bd. of Dental Examiners*, No. 03-13-00499-CV, 2015 WL 410339, at *2 (Tex. App.—Austin Jan. 30, 2015, no pet.).

⁶³ *Id.* at *4.

⁶⁴ *Id.*

⁶⁵ *Id.* at *2; Tex. Occ. Code § 263.002 (a) (10).

⁶⁶ *Kim*, 2015 WL 410339, at *2.

⁶⁷ *Id.*

⁶⁸ *Id.* at *4.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

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tier violation.⁷²As a result, the court found that, under the Matrix, Dr. Kim was subject to a sanction for his conduct, and that when it imposed the sanction at issue, the Board had chosen one of the permissible sanctions authorized by the chart at issue for second-tier violations.⁷³

The outcome in *Kim* is a perfect example of the ambiguity and confusion caused by the current Matrix. In *Kim*, the court highlighted the understanding that the Board’s discretion in determining penalties , and reiterated that sanction recommendations are not presumptively binding on the board like finding of fact and conclusion of law are on agencies.⁷⁴ Further, the court provided rare guidance since the Matrix’s inception in 2010: a lack of aggravating factors alone does not justify a first-tier classification. The court’s idea that the absence of aggravating factors does not compel a first-tier determination opens the door for the Board to clarify the issue. Aggravating factors must be considered in all tier determinations, and the Board would be well advised to specify whether certain aggravating factors elevate violations to higher tiers.

The *Kim* decision, while informative about tier determinations, may lead to more confusion. The court’s decision that Kim’s failure to report fell under the catch-all provision “of another law regulating dentists” works just as the name implies—including certain actions not specifically categorized in the chart.⁷⁵ The Matrix should be amended to provide examples of prohibited actions in each tier so that the Board, the ALJ, and the courts can easily determine the tier of each violation. Additionally, the Matrix should be amended to explain which aggravating factors elevate violations to a second-tier baseline. starting above the first tier. Without these explanations, no purposeful sanction determinations can be made because courts cannot conclude the Board misapplied the language of their own Matrix.

The Matrix also requires clarification on how the Board should evaluate all relevant violation sections when determining a sanction for conduct that violates multiple statutory provisions.⁷⁶ This part of the Matrix is vague and provides no guidance to the Board in using the Matrix when sanctioning conduct that violates multiple statute sections. The Board is instructed to consider aggravating and mitigating factors as well as conduct that violates multiple statute sections, but is provided little to no guidance on how these factors should weigh into tier or sanctioning determinations.⁷⁷ The Matrix should be amended to explain the basics of how these aggravating factors, mitigating factors, and conduct violating multiple statute sections should be considered, providing examples of how certain factors or conduct may result in a higher tier violation Without these changes, it will be

⁷² *Kim*, 2015 WL 410339, at *5.

⁷³ *Id.*

⁷⁴ *Id.* at *3.

⁷⁵ *Id.* at *3, *6.

⁷⁶ 35 Tex. Reg. 8152, 8154 (adopted Aug. 10, 2010; effective Sept. 3, 2010) (Tex. State Bd. Dental Exams, Disciplinary Matrix) (adopted in accordance with Tex. Occ. Code Ann. §§ 263, 265-66).

⁷⁷ *Id.*

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difficult for the Board to make consistent and predictable sanctioning determinations.

For instance, in Beck’s case, the Board and the ALJ found that the aggravating factors outweighed the mitigating factors, which led to the recommendation to suspend his license.⁷⁸ Although the revocation of Beck’s license would ignore his many years of experience and training, the Board and the ALJ also found Beck’s large number of prior Board orders evidenced his “cavalier” attitude towards disciplinary actions from the Board.⁷⁹ Thus, a first-tier sanction would not be in accord with Beck’s second-tier violations and third-tier violations.⁸⁰ However, the Board and the ALJ did not explain whether the aggravating factors led to a higher tier determination in Beck’s case, or whether those second and third-tier violations considered together could tip the scale towards revocation of his license.

Additionally, although the Board in Beck’s case ultimately adopted the ALJ’s recommendation of an enforced suspension of his license, the case had only been brought to the ALJ because the Board originally wished to revoke Beck’s license for practicing dentistry while his license was suspended.⁸¹ The only explanation given supporting the non-revocation of Beck’s license was his many years of experience and training, but those years of experience were blemished with multiple Board actions against Beck, and Beck’s violation of at least one Board order.⁸² While numerous facts seem to point to revocation, Beck’s license was only placed on enforced suspension for four years without explaining how the aggravating factors should warrant a higher tier determination, or how a violation of multiple statute sections could affect which tier the violations fell into. Due to this lack of explanation about these determinations in Beck’s case, there is no way to predict how the Board will decide a future case with similar facts.

Because the Matrix does not require aggravating factors to be considered in every tier determination, and because the Matrix is not clear on whether the existence of certain aggravating factors or conduct constituting a violation of multiple statutory sections will elevate a violation to a higher tier, the Matrix should be amended to explicitly state that aggravating factors *must* be considered in determining which tier violations fall under as well as to explain whether certain aggravating factors and conduct constituting a violation of multiple statutory sections can place a violation in a higher tier. If these changes are made to the Matrix, the Matrix can be better applied in practice. As a result, more purposeful and consistent sanctioning determinations will ensue.

IV. CONCLUSION

⁷⁸ *Beck*, 2017 WL 7202123, at *12.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at *15–16.

⁸² *Id.*

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Because the Matrix has not been taking aggravating factors into account when tier determinations are made, and because aggravating factors are not being weighed heavily or consistently enough to have a significant impact on sanction determinations, changes must be made to the Matrix for it to have a purposeful effect on disciplinary actions for license holders.