

STATE OF FLORIDA  
BOARD OF MEDICINE

IN RE: THE PETITION FOR DECLARATORY  
STATEMENT OF HUGO GONZALEZ, M.D.

Final Order No. AHCA-97-0496 Date 5-2-97

FILED

Agency for Health Care Administration  
AGENCY CLERK

By: R.S. Power, Agency Clerk  
Deputy Agency Clerk

FINAL ORDER

This cause came before the Board of Medicine (hereinafter Board) pursuant to §120.565, Fla. Stat., on April 5, 1997, for the purpose of considering the Petition for Declaratory Statement filed on behalf of Hugo Gonzalez, M.D. (hereinafter Petitioner) The Agency for Health Care Administration (hereinafter AHCA) appeared before the Board for the purpose of addressing the interpretation to be made by the Board. Having considered the petition, the arguments submitted by counsel for Petitioner, counsel for AHCA, and counsel for the Board, and being fully advised in the premises, the Board, makes the following findings and conclusions.

FINDINGS OF FACT

1. Petitioner is licensed to practice medicine in Florida pursuant to Chapter 458, Fla. Stat., having been issued license number ME 0034604.
2. Petitioner is a specialist in pulmonary medicine. He is in private practice and maintains hospital privileges at facilities where he practices.
3. In 1993, Petitioner was asked to see a patient in a hospital emergency room where his medical group was "on call" for internal medicine cases. The patient was admitted to the hospital after ingesting an overdose of Tylenol. Petitioner prescribed an antidote and ordered

tests for liver damage. Petitioner also requested a psychiatric consultation, which was performed by another doctor. Petitioner treated the patient for three successive days, after which the patient was discharged from the facility. Petitioner had no further professional contact with the patient.

4. During Petitioner's treatment of the patient, the liver tests and the psychiatric report generated from Petitioner's first contact with the patient were utilized in treating the patient. During the course of treatment, Petitioner generated certain medical records, some of which became part of the patient's hospital chart.

5. Subsequent to the patient's discharge, Petitioner received from the facility copies of certain of the hospital records regarding the patient. These records included a copy of the psychiatric report. Petitioner asserts that it is common practice for this facility to provide "on call" physicians with courtesy copies of hospital records for the physician to maintain in the physician's office.

6. Petitioner has maintained the records provided by the facility.

7. On two different occasions, the patient sent Petitioner releases requesting Petitioner to furnish information about her care to two different state bar associations. Petitioner complied with each of these requests.

8. Subsequently, the patient demanded that a complete copy of the patient's hospital records be provided directly to the patient by Petitioner. The patient had previously been unsuccessful in obtaining these same records from the facility and from her treating psychiatrist, who refused to provide the complete records on the basis that such disclosure was not in the patient's best interest.

9. The patient has now filed a civil lawsuit in federal court naming Petitioner as one of the defendants in an action seeking among other things to compel Petitioner to provide the

patient with a copy of the complete hospital records including the psychiatric report generated as a result of Petitioner's request for a psychiatric consultation.

10. The patient has agreed to dismiss Petitioner from the pending legal action if Petitioner will agree to release the entire hospital record that is currently in Petitioner's possession.

11. The facility at which the patient was treated is also a named defendant in the legal action and has requested that Petitioner not provide the patient with any records from the hospital chart that the facility provided to Petitioner.

12. Petitioner is aware of the provisions of §455.241(1), Fla. Stat., regarding release of patient records. However, he is also aware of the provisions of §394.459(9)(a), Fla. Stat., and §395.3025, Fla. Stat., with regard to release of patient records. At this point, Petitioner is unsure of his legal obligation with regard to the patient's request for a complete copy of those medical records pertaining to the patient that are in Petitioner's possession.

13. Petitioner states that he may be willing to release a complete copy of the patient's medical records directly to the patient if it is determined that Petitioner would not be in jeopardy of having his license to practice medicine in Florida disciplined for complying with the patient's request.

14. Therefore, Petitioner asks the following questions:

a. Are copies of hospital records that are forwarded to a consulting physician governed by the provisions of §455.241, Fla. Stat., or §395.3025, Fla. Stat.?

b. Are records generated by a consulting physician in connection with a hospitalization, and incorporated into the hospital chart, governed by the provisions of §455.241, Fla. Stat., or §395.3025, Fla. Stat.?

c. If the hospital objects to disclosure of hospital records that are

forwarded to a consulting physician or records of the consultant which have been incorporated into the hospital chart, relying on §395.3025(2), Fla. Stat., does that consulting physician have any legal or ethical obligation to honor that objection?

d. Under either statute, does the consulting physician have the discretion to choose whether or not he will furnish records of treatment for mental or emotional conditions directly to the patient, and may he legally and ethically furnish such records to the patient?

e. Are the records of medical treatment for a drug overdose, for which there has also been psychiatric treatment during the same hospital stay, considered to be "records of treatment for mental or emotional conditions" for purposes of §455.241, Fla. Stat., or §395.3025, Fla. Stat.?

15. AHCA did not dispute any of the factual assertions set forth by Petitioner. Neither Petitioner nor AHCA or any other interested person has requested a §120.57(1), Fla. Stat., hearing.

16. This petition was noticed by the Board in Vol. , No. , dated , 1997, of the Florida Administrative Weekly (p. ).

### CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to §120.565, Fla. Stat.
2. The petition filed in this cause is in substantial compliance with the provisions of §120.565, Fla. Stat.
3. The Board finds that Petitioner, Dr. Gonzalez, has the requisite interest to receive a declaratory statement from the Board in that he is a licensed medical doctor who proposes a *stated course of action and requests an interpretation of specific provisions of the law which relate to that stated course of action.*
4. In considering the questions presented by the Petition for Declaratory Statement, the

Board of Medicine specifically limits its interpretation to the provisions of §455.241, Fla. Stat. The Board of Medicine does not exercise any jurisdiction pursuant to those sections of Chapters 394 and 395, Fla. Stat., that are cited in the Petition for Declaratory Statement.

5. With regard to all of the questions raised in the Petition for Declaratory Statement, the Board of Medicine concludes that once a medical record of any type becomes a part of a physician's medical record such, document must be handled and maintained in compliance with §455.241, Fla. Stat. In that regard, the Board of Medicine directs Petitioner to Rule 59R-9.003, F.A.C. Paragraph 3 of that rule provides that:

The medical record shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient. (Emphasis added)

Without commenting on any requirements of §394.459(9)(a), Fla. Stat., or §395.3025, Fla. Stat., the Board of Medicine finds that a hospital record provided to the "on call" physician who treated the patient, must become part of the patient's record maintained pursuant to §455.241, Fla. Stat., and therefore, subject to the requirements of §455.241, Fla. Stat. This would absolutely include any reports of consulting physicians, including psychiatric reports.

6. Section 455.241(1), Fla. Stat., provides in pertinent part that every health care practitioner licensed by the Board of Medicine, upon the request of a patient or the patient's legal representative, shall:

... furnish in a timely manner, without delays for legal review, copies of all reports and ... including x-rays and insurance information. However, when a patient's psychiatric [records], ... are requested by the patient or the patient's legal representative, the practitioner may provide a report of examination and

treatment in lieu of copies of the records. Upon a patient's written request, complete copies of the patient's psychiatric records shall be provided directly to a subsequent treating psychiatrist.

The use of the term "may" in relation to the decision of the practitioner to release copies of the psychiatric records or a report in lieu of the psychiatric records, clearly provides for such decision to be within the professional discretion of each practitioner. Once such records become a part of the medical record maintained by the physician, they fall within the professional discretion provided in §455.241(1), Fla. Stat.

7. The Board of Medicine notes that records of medical treatment for a drug overdose are not in and of themselves "psychiatric" records for the purposes of §455.241, Fla. Stat. However, in a given case, such records might well be, in whole or in part, psychiatric records.

8. Petitioner's exercise of discretion will be reviewed by the Board of Medicine if a legally sufficient complaint is filed in relation thereto. In conducting such a review, the Board of Medicine would look at the matter as a standard of care issue. Depending on the circumstances of an individual case, the Board of Medicine would attempt to determine whether Petitioner's exercise of discretion was appropriate or not.

WHEREFORE, in light of the specific facts set forth in the Petition for Declaratory Statement and adopted herein, the records described in the Petition for Declaratory Statement are clearly part of the medical records Petitioner is required to maintain pursuant to §455.241, Fla. Stat., and pursuant thereto, Petitioner must provide the patient with a copy of the patient's medical record. Whether any of those records are psychiatric records, which may, in the discretion of Petitioner, be replaced with a report of treatment and withheld from the patient, is a discretion to be determined by Petitioner. However, Petitioner should be aware that, if a legally sufficient complaint, the Board of Medicine is authorized to review the

exercise of his professional discretion to determine if he met the appropriate standard of care in deciding either to release the complete copies of all of the patient's records or to release a report of treatment in lieu of copies of psychiatric records that are contained therein.

This Final Order takes effect upon filing with the Clerk of the Agency for Health Care Administration.

DONE AND ORDERED this 22<sup>nd</sup> day of April, 1997.

BOARD OF MEDICINE



EDWARD A. DAUER, M.D.  
CHAIRMAN

**NOTICE OF RIGHT TO JUDICIAL REVIEW**

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO §120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS MAY BE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY ACCOMPANIED BY THE FILING FEES REQUIRED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THIS FINAL ORDER.

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by certified mail to Hugo Gonzalez, M.D., 3661 South Miami Avenue, #1008, Miami, FL 33133-4265, David P. Dittmar, Esquire, 3250 Mary Street, Suite 400, Coconut Grove, FL 33133, and interoffice delivery to Larry McPherson, Jr., Chief Attorney, 2727 Mahan Drive, Tallahassee, Florida 32308-5403, at or before 5:00 p.m., this 2<sup>nd</sup> day of May, 1997.

Vicki R. Ellison

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by United States Mail to Hugo Gonzalez, M.D. c/o David P. Dittmar, Esquire, Dittmar & Hauser, P.A., Continental Plaza, Suite 400, 3250 Mary Street, Coconut Grove, Florida 33133, and by inter office delivery to Larry G. McPherson, Jr., Chief Medical Attorney, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, Florida 32308, this \_\_\_\_\_ day of \_\_\_\_\_, 1997.

\_\_\_\_\_

PETITION FOR DECLARATORY STATEMENT  
PURSUANT TO FLA. STAT. SEC. 120.565

Name of Petitioner: HUGO GONZALEZ, M.D.

Address of Petitioner: c/o DITTMAR & HAUSER, P.A.  
3250 Mary Street, #400  
Coconut Grove, Fl 33133

Name of Agency: Florida Board of Medicine

Statutory provisions on which declaratory statement is sought:  
Fla. Stat. secs. 455.241(1), 395.3025(2), and 394.459(9) (1995).

Description of how these statutory provisions affect petitioner:

Petitioner, a specialist in pulmonary medicine, is in private practice and maintains hospital privileges at facilities where he practices. In 1993, he was asked to see a patient in a hospital emergency room where his medical group was "on call" for internal medicine problems. The patient was admitted to the hospital after ingesting an overdose of Tylenol, and Petitioner prescribed an antidote and tests for liver damage. Petitioner also requested a psychiatric consultation, which was performed by another doctor. Petitioner saw the patient for three successive days, at which time she was discharged. He had no further personal contact with the patient. He generated certain records, some of which became part of the hospital chart, and he also received copies of certain of the hospital records including a report by the psychiatrist.

On two different occasions, the patient sent releases and requested that Petitioner furnish information about her care to two different state bar associations, which he did. Subsequently, she demanded that he furnish the entire record directly to her. She had previously demanded her hospital records from both the hospital and her treating psychiatrist, who refused to furnish the records on the basis that disclosure was not in the patient's best interest.

Before Petitioner responded to her latest request, the patient filed a Federal lawsuit against the hospital, the psychiatrist, the Petitioner, and the Attorney General, claiming that she was impermissibly discriminated against. Her Complaint (copy attached) asserts that the hospital, the psychiatrist, and Petitioner have violated the Americans with Disabilities Act. She asked for a declaration that section 395.3025 (2), which provides that a "licensed facility" may refuse to furnish records

of treatment for mental or emotional conditions except to a psychiatrist, is invalid and that it is also in conflict with section 395.459(9)(a) which permits a former mental patient to designate a person or agency to receive such records and may, she asserts, allow the patient to designate herself as the recipient. She seeks an injunction against the Petitioner, as well as attorneys' fees under the Americans with Disabilities Act.

The Petitioner is placed in a dilemma. The patient asserts that she will dismiss him from the lawsuit if and only if he turns over his complete patient file to her. He believes that his own duty regarding medical records is prescribed by section 455.241(1), which (like section 395.3025(2) for "facilities") allows an individual physician to refuse to furnish records of treatment for mental or emotional conditions except to a psychiatrist, and states that he "may provide" instead a "report of examination and treatment." Petitioner believes that the use of the word "may" renders this decision discretionary with the physician, so that he cannot be compelled to produce records of treatment for mental or emotional conditions except to a psychiatrist. However, he does not know whether he may, legally and ethically, provide such records directly to the patient if he desires to do so. As previously stated, he might be willing to produce his records to the patient if there is no legal or ethical impediment to such production. However, since some of his records are also part of the hospital chart, the choice is not entirely his. The hospital, which is actively defending the case, has requested that nothing which is included within the hospital chart should be produced. Petitioner therefore requests answers to the following questions:

1) Are copies of hospital records that are forwarded to a consulting physician governed by the provisions of section 455.241, or section 395.3025?

2) Are records generated by a consulting physician in connection with a hospitalization, and incorporated into the hospital chart, governed by the provisions of section 455.241 or section 395.3025?

3) If the hospital objects to disclosure of hospital records that are forwarded to a consulting physician or records of the consultant which have been incorporated into the hospital chart, relying on section 395.3025(2), does the consulting physician have any legal or ethical obligation to honor that objection?

4) Under either statute, does the consulting physician have the discretion to choose whether or not he will furnish records of treatment for mental or emotional conditions directly to the patient, and may he legally and ethically furnish such records to the patient?

5) Are the records of medical treatment for a drug overdose, for which there has also been psychiatric treatment during the same hospital stay, considered to be "records of treatment for mental or emotional conditions" for purposes of section 455.241 or section 395.3025?

Petitioner requests a determination by this Board of his duties in relation to the medical records, as described herein. Essentially, he needs to know whether he may legally and ethically provide to the patient (1) those records which were included in the hospital chart, and (2) those records which were not included in the hospital chart.

  
HUGO GONZALEZ, M.D.,  
Petitioner  
3661 S. Miami Avenue, #1008  
Miami, Fl 33133

November 8, 1996

WE HEREBY CERTIFY that a true and correct copy of this Petition was mailed this 8<sup>th</sup> day of November, 1996, to:

Marm Harris, Executive Director  
Florida Board of Medicine  
1940 N. Monroe Street  
Tallahassee, Fl 32399-0750

Alan Grossman, Esq.  
Office of the Attorney General  
2020 Capital Circle S.E.  
Alexander Building, #308  
Tallahassee, Fl 32308

DITTMAR & HAUSER, P.A.  
Attorneys for Petitioner  
3250 Mary Street, Suite 400  
Coconut Grove, Fl 33133

By:   
HELEN ANN HAUSER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CHRIS DOE,  
Plaintiff,

CASE NO.

96-2191

Magistrate Judge

~~CIV-MORENO~~

DR. CARLOS E. STINCER,  
DR. HUGO GONZALES,  
MERCY HOSPITAL, and BOB  
BUTTENWORTH, ATTORNEY GENERAL  
FOR THE STATE OF FLORIDA,

MAGISTRATE JUDGE  
JOHNSON

Defendants.

SEP 13 7 25 PM '96  
SOUTH DISTRICT OF FLORIDA

COMPLAINT

I. INTRODUCTION

1. This is an action for injunctive relief under Title III of the Americans with Disabilities Act ("ADA"), and for declaratory and injunctive relief under Title II of the ADA. Chris Doe seeks access to her complete medical records for four days at Mercy Hospital, and challenges the refusal of defendants Stincer, Gonzales, and Mercy Hospital to release those records to her. These defendants justify their refusal on the basis of statutory limitations placed by the State of Florida on access to medical records which discriminate against persons with mental disabilities. Therefore, plaintiff challenges this statute under Title II of the Americans with Disabilities Act.

2. All patients in Florida have a legal right to absolute and

unimpeded access to their medical records under § 395.3025, Fla.Stat. The statute permits only one exception: persons who have sought psychiatric treatment or treatment for a "mental or emotional" condition, § 395.3025(2), Fla.Stat. These persons may be denied access to their treatment records at the sole, unreviewable discretion of their therapist. The statute prescribes no standards for a professional refusing a patient access to her records.

3. Section 395.3025(2) does not provide any recourse for a patient to appeal such denial. Under the statute, the only option available to a person wishing to see his or her mental health record is to attempt to retain a psychiatrist (and only a psychiatrist), and ask that the records be sent to him or her. The complete record can be sent to the psychiatrist, but not to the individual to whom the record pertains. If an individual is unable or unwilling to obtain the services of a psychiatrist, the individual can be totally precluded from access to his or her records.

4. The Florida Mental Health Act, more commonly known as the Baker Act, also confers rights on patients in "facilities," as defined at § 394.455 (6), Fla. Stat. The statute provides that the patient's record may be released to "such persons and agencies as designated by the patient or the patient's guardian," § 394.459(9)(a), Fla. Stat., including, presumably, the patient himself or herself. Newly enacted amendments to the statute also permit the patient to have access to his or her own records while hospitalized, subject to certain standards. Thus, presently hospitalized patients under the Baker Act have greater rights of

access to their records than people like Chris Doe, who are not hospitalized pursuant to the Baker Act.

## II. JURISDICTION

5. This court has jurisdiction over these claims pursuant to 28 U.S.C. §1331. It is empowered to provide declaratory relief pursuant to 28 U.S.C. §2201 and §2202.

## III. PARTIES

6. Chris Doe is a practicing attorney with a history of mental disability who is regarded by defendants Mercy Hospital, Gonzalez and Stincer as having a mental disability.

7. Defendant Dr. Carlos Stincer is a psychiatrist who examined and treated Chris Doe at Mercy Hospital between December 28, 1993 and December 31, 1993.

8. Defendant Dr. Hugo Gonzalez is a psychiatrist who examined Chris Doe at Mercy Hospital between December 28, 1993 and December 31, 1993.

9. Defendant Mercy Hospital is a licensed facility within the meaning of § 395.3025. It is also a "facility" within the meaning of the Baker Act.

10. Defendant Bob Butterworth is the Attorney General of the State of Florida and, as such, is its chief law officer and is responsible for enforcing the laws of the State of Florida. He is sued in his official capacity only.

## IV. FACTUAL STATEMENT

11. Plaintiff Chris Doe is an attorney who is admitted to practice in Florida. Plaintiff Doe has a history of anorexia

between the ages of 13 and 16, which has been successfully resolved for the past eight years. Chris Doe has not been in any kind of therapy for any mental condition for at least eight years.

12. Chris Doe is the child of divorced parents, and as an adolescent had difficulty adjusting to a series of stepmothers. Around Christmas, 1993, a dispute occurred between plaintiff and plaintiff's father relating to plaintiff's stepmother. Doe took about 20 Tylenol tablets on December 28, 1993.

13. When Doe's father learned about the number of Tylenols Doe had taken, he called 911. Doe went voluntarily and without restraint to the emergency room at Mercy Hospital.

14. Doe's stomach was pumped. Despite telling Dr. Stincer that she had no intention of committing suicide, and that she was willing to stay at Mercy voluntarily, Doe was held involuntarily pursuant to the Baker Act at Mercy Hospital. Throughout Doe's stay, there was no problem relating to her behavior and no indication of any kind of mental illness. Mercy Hospital did not seek to involuntarily commit Doe when she decided to leave on Dec. 31, 1993.

15. On the basis of the records released thus far to Doe, no diagnosis of mental illness was ever made by either Dr. Stincer or Dr. Gonzalez.

16. During Doe's stay at Mercy Hospital, she was seen once by Dr. Hugo Gonzalez for about fifteen minutes, and either two or three times by Dr. Carlos Stincer for a total of about forty-five minutes. She had never met either doctor before, nor did she have

any subsequent contact with them.

17. Shortly after her discharge, Doe went to Mercy Hospital to request a copy of her records. At the time, the principle reason for her desire to see her records was her concern with the implications of the records for her application to the Florida and Georgia Bars.

18. Although any other patient in Florida has an absolute statutory right to examine his or her treatment records under § 395.3025(1), Doe's request to see her records was denied because, according to correspondence from Mercy Hospital's attorney, "the provisions of this section do not apply to ...records of treatment for any mental or emotional condition at any other licensed facility." § 395.3025(2).

19. Nevertheless, Doe persisted in her efforts to see her records. She met with Sylvia Ortis, Director of Health Information Management and Medical Staff Services at Mercy Hospital. Ms. Ortis released some, but not all, of Doe's records. Some of the records that were turned over to Doe had white-out over information related to diagnosis. The records contained no psychiatric notes written by either Dr. Gonzalez or Dr. Stincer.

20. Ms. Ortis gave Doe different reasons at different times for the refusal to release the entire record. Ultimately, Ortis stated that Dr. Stincer felt that doing so would compromise Doe's mental health. Despite Doe's written request, Dr. Stincer has never informed Doe of the basis for his refusal to release her complete records with her.

5

**RECEIVED**

SEP 5 1996

21. Doe is admitted to practice in Florida, and is waiting to take the Georgia Bar after having passed Georgia's character and fitness requirements. Doe was required to submit to a psychiatric evaluation prior to admission to the Florida Bar.

22. On June 19, 1996, Doe once again wrote for a complete copy of her records to Mercy Hospital and Dr. Gonzalez. She also wrote to the psychiatrist who had evaluated her for the Florida Board of Bar Examiners, asking for a complete copy of her evaluation records. The psychiatrist who evaluated her for the Board of Bar Examiners responded promptly, enclosing all records. Although postal receipts show that her correspondence reached defendants Mercy Hospital and Gonzalez over a month ago, neither defendant has responded to her. Her correspondence to them is attached as Exhibit A.

23. Ms. Doe is a person with a disability under the Americans with Disabilities Act because she has a history of mental disability and is regarded as having a mental disability. She is otherwise entitled as a citizen of the State of Florida to have full and unimpeded access to her treatment records.

#### V. STATUTORY FRAMEWORK

##### A. Section 395.3025

24. Section 395.3025 applies to "any licensed facility" in the State of Florida. A "licensed facility" is defined as "a hospital or ambulatory surgical center licensed in accordance with [Chapter 395]," Fla. Stat. § 395.002(17).

25. In relevant part, the statute states as follows:

Any licensed facility shall, upon written request, and only after discharge of the patient, furnish, in a timely manner, without delays for legal review, to any person admitted therein for care and treatment or treated thereat...or to anyone designated by such person in writing, a true and correct copy of all patient records, including X-Rays, and insurance information concerning such person, which records are in the possession of the licensed facility, provided the person requesting such records agrees to pay a charge.

...The licensed facility shall further allow any such person to examine the original records in its possession; or microforms or other suitable reproductions of the records, upon such reasonable terms as shall be imposed to assure that the records will not be damaged, destroyed or altered.

Id.

26. Except as explained in the following paragraphs, the right of a patient to have access to his or her medical records is not subject to the discretion of the health care provider. Nor is the patient required to obtain the assistance of a medical professional in order to gain access to his or her records.

27. The statute also contains the following exception:

The provisions of this section do not apply to records maintained at any licensed facility the primary function of which is to provide psychiatric care to its patients, or to records of treatment for any mental or emotional condition at any other licensed facility. A licensed facility which receives a request by a patient or a patient's legal representative for a copy of any such record may provide a report of examination and treatment in lieu of a copy of the record. Upon the signed written request of a patient that a psychiatric record or other record of treatment for a mental or emotional condition, be provided to a psychiatrist as defined in 394.455, the facility shall provide a copy of the patient's record to such psychiatrist and shall not require further application therefor.

§ 395.3025(2).

28. The statute does not provide any standard for refusal by

the facility to give the patient his or her treatment record. The statute permits the facility to legally refuse all such requests, without individual analysis or judgment, simply on the basis that the records requested are mental health records.

**B. Section 394.459**

29. The Florida Mental Health Act, or Baker Act, also governs the rights of patients who receive mental health treatment. The applicable language in the Baker Act governs all "facilities," defined as "any state-owned or state-operated hospital... designated by the department [of Health and Rehabilitative Services] to be utilized for the evaluation, diagnosis, care, treatment, training or hospitalization of persons who are mentally ill, any other hospitals within the state approved and designated for such purpose by the department." § 394.455(6)(emphasis and bracketed material added).

30. The Baker Act requires all facilities to keep patient records confidential, except that "The record may be released to such persons and agencies as designated by the patient..." § 394.459(9)(a). There are no exceptions to this right, which presumably permits the patient to designate him or herself as the person to receive the record.

**C. The Americans with Disabilities Act**

31. The Americans with Disabilities Act was passed on July 26, 1990. The purpose of the Act was "to provide a clear and comprehensive national mandate for the elimination of

discrimination against individuals with disabilities." 42 U.S.C. §12101(b).

32. The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; or a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. §12102(2).

1. Title III of the ADA

33. Title III of the ADA prohibits discrimination against persons with disabilities by public accommodations. Health care providers such as hospitals and doctors are "public accommodations" within the meaning of Title III of the ADA, 42 U.S.C. 12181(7)(f).

34. Title III of the ADA and its regulations prohibit public accommodations from (a) unnecessarily imposing burdens and requirements on individuals with disabilities that are not placed on others, 28 C.F.R. 36.301 (App.B); from providing services or privileges to individuals with disabilities that are different, separate, or not equal to those provided to individuals who are not disabled or not perceived as disabled, 42 U.S.C. 12182(b)(1)(A)(ii) and (iv), 28 C.F.R. 36.202(b) and (d).

35. Title III and its regulations also prohibit public accommodations from directly or indirectly use " standards, criteria, or methods of administration that have the effect of discriminating on the basis of disability, or perpetuate the discrimination of others who are subject to common administrative

RECEIVED

SEP 5 1996

SEP. 04.96 16:23

FPIC

control." 42 U.S.C. 12182(b)(1)(D); 28 C.F.R. 36.204.

2. Title II of the ADA

36. Title II of the ADA prohibits discrimination on the basis of disability by public entities, including states, through policies or statutes. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132.

37. Actions prohibited as discrimination under the ADA include exclusion of people with disabilities from services or benefits, placing extra burdens on persons with disabilities to qualify for services or benefits, and overprotective rules and policies based on myths and stereotypes about disabilities. 42 U.S.C. § 12182(A) and (C); 28 C.F.R. 130. The statute challenged here discriminates against people with disabilities in each of these ways.

38. The State of Florida and the Attorney General are public entities under Title II. If the exception to § 395.3025 which allows facilities to deny access to records solely to people seeking access to mental health records burdens persons with mental disabilities or persons who are perceived as having mental disabilities, it violates the requirements of Title II of the ADA.

CLAIMS

COUNT I

Title III of the Americans with Disabilities Act

39. The plaintiffs incorporate paragraphs 1 - 38.

48. Except for individuals who are receiving treatment from mental health professionals, individuals who receive health care treatment in Florida have an absolute right to access to and copies of their health care records.

49. Defendants Stinson, Gonzalez, and Navy Hospital have violated Title XIX of the ADA by refusing, on the basis of history of mental disability and/or perceived mental disability, to permit Plaintiff Doe to examine, copy, or have access to her complete treatment records.

COUNT II

Title IX of the Americans with Disabilities Act

41. Plaintiff incorporated by reference paragraphs 1-48.

42. Defendant Butterworth violates Title IX of the ADA by enforcing legislation which grants individuals receiving health care treatment in Florida a legal right of access to their treatment records and explicitly accords persons with disabilities such as the plaintiff lesser rights on the basis of their disabilities.

43. Defendant Butterworth violates Title IX of the ADA by enforcing laws which impose added burdens on individuals seeking access to their treatment records solely on the basis of mental disability, a history of mental disability, or a perception that the individual is disabled.

44. Defendant Butterworth violates Title IX of the ADA by enforcing legislation which excludes individuals who cannot afford to or do not wish to secure the assistance of a psychiatrist from

ASSOCIATES IN PULMONARY MEDICINE, P.A.

10001 PAPERBOWL DRIVE, SUITE 200, WEST PALM BEACH, FLORIDA 33411-1000  
TEL: 561-833-1100 FAX: 561-833-1101

August 30, 1996

10001 PAPERBOWL DRIVE  
SUITE 200, WEST PALM BEACH, FLORIDA 33411-1000

10001 PAPERBOWL DRIVE  
SUITE 200, WEST PALM BEACH, FLORIDA 33411-1000

James K. Green Esq.  
One Clearlake Centre #1602  
240 Australian Avenue South  
West Palm Beach, Fla. 33401

Re: Chris Doe

Dear Mr. Green:

We are unable to honor your request for medical records for your client Chris Doe due to the fact that we do not have a patient with such name.

In order for us to send you these records you would have to give us her real name, social security and date of birth.

Once we have this information we would be more than happy to honor your request.

Sincerely yours,

*Julie Alameda*  
Julie Alameda,  
Office Manager

having access to their complete treatment records solely on the basis of mental disability, a history of mental disability, or a perception that the individual is disabled.

45. Defendant Butterworth violates Title II of the ADA by enforcing legislation which screens out or tends to screen out a class of individuals with disabilities from fully and equally enjoying access to their treatment records which is available to other medical patients, solely on the basis of mental disability, a history of mental disability, or a perception that the individual is disabled.

46. Defendant Butterworth violates Title II of the ADA by enforcing legislation which creates a separate program of accessing records for persons with disabilities solely on the basis of mental disability, a history of mental disability, or a perception that the individual is disabled.

47. Defendant Butterworth violates Title II of the ADA by enforcing legislation which makes access to records less effective for persons with mental disabilities, a history of mental disability, or a perception that the individual is disabled.

48. Defendant Butterworth has also violated his affirmative obligations under Title II of the ADA to make reasonable accommodations in policies, practices and procedures where necessary to avoid discrimination on the basis of disability, by failing to take steps to eliminate the disparity between the rights of access to treatment records of persons with mental disabilities, a history of mental disability, or a perception that the individual

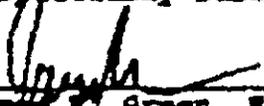
is disabled.

**RELIEF**

Wherefore, plaintiff prays that this Court:

1. Assume jurisdiction over this action.
2. Declare that § 398.3028(2), Fla. Stat., violates Title II of the ADA.
4. Grant a permanent injunction enjoining the enforcement of § 398.3025 (2), Fla. Stat., or promulgation in the future of any regulations, rules, policies, procedures, or guidelines which are based on or rely on § 398.3025(2), Fla. Stat.
6. Order the defendants Mercy Hospital, Gonzalez, and Stinger to immediately provide plaintiff Doe with complete access to her treatment records, unabridged and unredacted.
7. Award plaintiff her cost and reasonable attorneys' fees.
8. Award plaintiff such other and further relief as the Court may deem just and proper.

Respectfully submitted,

  
James K. Green, Esq.  
James K. Green, P.A.  
One Clearlake Centre, Suite 1602  
250 Australian Avenue South  
West Palm Beach, FL 33401  
561-659-2029

Susan Stefan  
University of Miami  
School of Law  
P.O. Box 248087  
Coral Gables, Florida 33124  
305-284-2672  
Cooperating Attorneys for the American  
Civil Liberties Union Foundation of  
Florida, Inc.

13

**RECEIVED**

SEP 5 1996

## Request For Policy Information

Name: Hugo F. Gonzalez M.D.  
 Location: Miami

Claimant's Name: Chris Doe

License: P34604

Date Incident Reported 09/04/1996	Date File Requested 09/06/1996	Date File Sent 9/10/96
Date of Treatment 12/28/1993	Coverage YES	Type of Policy REGULAR

Corporate Coverage? (Y/N) YES

Corporate Name: ASSOCIATES IN PULMONARY Medicine, PA

Policy Number: 5338      Plan Number: 001

Policy Form: FPEC USG      Policy Endorsements: N

Policy Effective Date: 01/01/1996      Policy Expiration Date: 01/01/1997

Policy Period:      Retro Date: 07/01/1983

Class: 28      Covered Specialty: PULMONARY DISEASES - NO SURGERY

ISO Code: 80269

Policy Limits(per Claim): \$250,000      Annual Aggregate Limits: \$750,000

Policy Limit at Inception Date Of Coverage:

Limit	Limit	Limit
To: \$250,000	To:	To:
Date: 01/01/1993-1994	Date:	Date:

Tail Effective Date: N/A

Tail effective until:

A96-17396-93

Paci

*Chris*  
01/01/96

Birthdate: 09/09/1952

Board Certified?: Y Year Board Certified: 1984

Foreign Medical Graduate? NO

Country Where Primary Med. Ed. Rec'd: USA

Hospital Program: -

Deductible (Y/N?) NO

Deductible Amount? 0

Agent (Y/N?) NO

Agency/Agent No. N/A

Original Coverage Effective Date of Contiguous Policies?

Date Reviewed: 9/10/95  
PFR-4(5/95)

Reviewed by: B. Hatcher

INITIAL CLAIM REPORT

Date reported 9/4/96 Reported by: Nubia (Sec)  
Report taken by: ER

Type of report: ( ) Notice of Intent Date of Letter \_\_\_\_\_  
Date received by insured: \_\_\_\_\_  
( ) Claimant control (X) Record Request ( ) Precautionary

Insured: Hugo Gonzalez Specialty: pulmonary  
Address: 3661 S Miami Ave, ste 1008  
Miami 33133 Telephone # (305) 854-2284

Claimant Kris Doe (Alia) Age/DOB \_\_\_\_\_  
Occupation: \_\_\_\_\_ Marital Status: M S D W \_\_\_\_\_

Date of Incident: 12/30/93 County of Incident: DADE

Hospital/Location of Incident: Mercy Hosp

Plaintiff Attorney James Green

Address: 250 Australian Ave. South # 1602  
WPR 33401 Telephone # (561) 659-2029

Other parties/Specialties: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Description of Incident:

- (D) was on call in ER when pt presented w/ drug overdose! pt recovered and (D) referred pt to psychiatrist.

- pt only gave an alias ~~to~~ while at hospital.  
(D) vaguely remembers pt but cannot retrieve records because plaintiff will not disclose ~~pro~~ real name. plaintiff's Atty is threatening suite but will not cooperate w/ (D) in naming the pt.

- (D) does not know what to do at this point!

- (D) faxing over correspondence from (A)



June 19, 1996

Hugo S. Gonzalez, M.D.  
Mercy Professional Building  
3661 South Miami Avenue Suite 1008  
Miami, FL 33133

Attention: Records Custodian

Via Certified Mail # Z 039 630 838. Return Receipt Requested

Patient:   
D/O/B: 1-30-69

Dear Dr. Gonzalez or appropriate Records Custodian:

I was seen by you at Mercy Hospital from 12-28-93 through 12-31-93. In accordance with Florida Statutes Section 394.459(9)(a) and Section 395.3025(1), please forward to me a true and correct copy of all patient records, including psychiatric notes, that you have in your possession pertaining to me.

By signing below, I hereby agree to pay you a reasonable fee for such copies in accordance with the statutory sections mentioned above. If you require payment in advance, please contact me and I will arrange for delivery of a check to your office.

Thank you very much for your prompt attention to this matter.

Very truly yours,



PX-A

PX-A

[Redacted]

Very truly yours,

Thank you in advance for your prompt attention to this request.

By signing below, I guarantee payment of a reasonable fee for the copying of such records. If Mercy Hospital requires payment in advance, please notify me as soon as that I can arrange to have a check forwarded to you.

If the non-release of the record or portion of the record is in accordance with any policy of Mercy Hospital, please provide me with a copy of such policy.

1. Identify the record or portion of a record that Mercy Hospital refuses to provide, and,
2. Identify the name of the person who has reviewed this request and the basis upon which the decision not to release the record or portion of the record is being made, and,
3. If the non-release of the record or portion of the record is in accordance with any policy of Mercy Hospital, please provide me with a copy of such policy.

With respect to any records or portions of records that Mercy Hospital will not release to me, please:

This letter is in follow-up to my previous correspondence to and from you. Pursuant to Florida Statutes 394.459(2)(a) and 395.3025(1) I hereby request that Mercy Hospital provide me with a true, correct and unredacted copy of each and every patient record, including any psychiatric notes, generated in connection with my hospitalization at Mercy Hospital from 12-28-93 through and including 12-31-93.

Dear Mr. Fishman:

Request for Patient Records of [Redacted] O/B 1-30-69) Pursuant to F.S. 394.459(2)(a) and 395.3025(1) generated in connection with my treatment at Mercy Hospital from 12-28-93 through 12-31-93.

Via Certified Mail # Z 039 620 837 Return Receipt Requested

Lewis W. Fishman, Esq.  
Lewis Fishman, P.A.  
Two Dorian Center  
Suite 1121  
9130 S. Dadeland Boulevard  
Miami, FL 33156

670-2100

June 19, 1996

[Redacted]

## ASSOCIATES IN PULMONARY MEDICINE, P.A.

MERCY PROFESSIONAL BUILDING, 3881 SOUTH MIAMI AVE., SUITE 1008, MIAMI, FLA. 33133-4268  
TELEPHONE: 894-2184JOSE A. SALAZAR, M.D.  
ALFONSO U. COCNER, M.D.

August 30, 1996

HUGO P. GONZALEZ, M.D.  
ERNESTO E. FONTS, M.D.James K. Green Esq.  
One Clearlake Centre #1602  
250 Australian Avenue South  
West Palm Beach, Fla. 33401

Re: Chris Doe

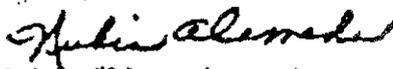
Dear Mr. Green:

We are unable to honor your request for medical records for your client Chris Doe due to the fact that we do not have a patient with such name.

In order for us to send you these records you would have to give us her real name, social security and date of birth.

Once we have this information we would be more than happy to honor your request.

Sincerely yours,

  
Nubia Alameda,  
Office Manager

DEPUTY CLERK

BARBARA RAILSBACK

CLERK

Carlos Juenke

DATE

AUG 7 1996

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of the summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

Cooperating Attorneys for the American Civil Liberties Union Foundation of Florida, Inc.

James K. Green, Esq.  
James K. Green, P.A.  
One Clearlake Centre, #1602  
250 Australian Avenue South  
West Palm Beach, FL 33401  
561/659-2029  
Susan Stearn  
University of Miami  
School of Law  
P.O. Box 248087  
Coral Gables, FL 33124  
305/284-2672

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

TO: (Name and address of defendant)  
DR. BUGO GONZALEZ  
c/o Mercy Hospital  
3663 S. Miami Avenue  
Miami, Florida 33133

Defendants -

DR. CARLOS E. STINER, DR. BUGO GONZALEZ, MERCY HOSPITAL, and BOB BUTTERWORTH, ATTORNEY GENERAL FOR THE STATE OF FLORIDA, in his official capacity,

v.

Plaintiff,

CHRIS DOB,

SOUTHERN

DISTRICT OF

FLORIDA

United States District Court

SUMMONS IN A CIVIL CASE

CASE NUMBER

96-2191

CIV-MORENO

MAGISTRATE JUDGE

JOHNSON

Handwritten signature and date: 8/27/96

not apply to referrals for such designated health services and other items or services occurring before October 1, 1996."

<sup>1</sup>Note.--The Department of Health and Rehabilitative Services was redesignated as the Department of Children and Family Services by s. 5, ch. 96-403, and the Department of Health was created by s. 8, ch. 96-403.

<sup>1</sup>Note.--Section 395.0185(2), as amended by s. 10, ch. 92-289, provides for adoption of rules by the Agency for Health Care Administration rather than the Department of Health and Rehabilitative Services. The Department of Health and Rehabilitative Services was redesignated as the Department of Children and Family Services by s. 5, ch. 96-403, and the Department of Health was created by s. 8, ch. 96-403.

#### **455.237 Kickbacks prohibited.--**

(1) As used in this section, the term "kickback" means a remuneration or payment back pursuant to an investment interest, compensation arrangement, or otherwise, by a provider of health care services or items, of a portion of the charges for services rendered to a referring health care provider as an incentive or inducement to refer patients for future services or items, when the payment is not tax deductible as an ordinary and necessary expense.

(2) It is unlawful for any health care provider or any provider of health care services to offer, pay, solicit, or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients.

(3) Violations of this section shall be considered patient brokering and shall be punishable as provided in s. 817.505.

History.--s. 8, ch. 92-178; s. 2, ch. 96-152.

#### **455.239 Designated health care services; licensure required.--**

(1) An entity, as defined in s. 455.236, which furnishes designated health care services may not operate in this state unless licensed by the Department of Health and Rehabilitative Services pursuant to subsection (2).

(2) The department shall adopt rules for licensing requirements for designated health care services including, but not limited to, rules providing for:

(a) A licensure fee of not less than \$400 and not more than \$1,500 to be assessed annually;

(b) Parameters of quality with respect to the provision of ancillary services by respective entities;

(c) Periodic inspection of the facilities of an entity for the purpose of evaluating the premises, operation, supervision, and procedures of the entity to ensure compliance with quality parameters as established in department rules; and

(d) The submission by an entity of information on its ownership, including identification of the owners who are health care providers, as defined in s. 455.251, and each investor's percentage of ownership.

History.--s. 10, ch. 92-178.

<sup>1</sup>Note.--No such section exists. The definition of "health care provider" appears in s. 455.236.

**455.24 Advertisement by a health care provider of free or discounted services; required statement.--**In any advertisement for a free, discounted fee, or reduced fee service, examination, or treatment by a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, chapter 464, chapter 466, chapter 474, or chapter 486, the following statement shall appear in capital letters clearly distinguishable from the rest of the text: **THE PATIENT AND ANY OTHER PERSON RESPONSIBLE FOR PAYMENT HAS A RIGHT TO REFUSE TO PAY, CANCEL PAYMENT, OR BE REIMBURSED FOR PAYMENT FOR ANY OTHER SERVICE, EXAMINATION, OR TREATMENT WHICH IS PERFORMED AS A RESULT OF AND WITHIN 72 HOURS OF RESPONDING TO THE ADVERTISEMENT FOR THE FREE, DISCOUNTED FEE, OR REDUCED FEE SERVICE, EXAMINATION, OR TREATMENT.** However, the required statement shall not be necessary as an accompaniment to an advertisement of a licensed health care provider defined by this section if the advertisement appears in a classified directory the primary purpose of which is to provide products and services at free, reduced, or discounted prices to consumers and in which the statement prominently appears in at least one place.

History.--s. 1, ch. 84-161; s. 1, ch. 85-7; s. 6, ch. 86-90; s. 13, ch. 89-124; s. 31, ch. 92-149.

#### **455.241 Patient records; report or copies of records to be furnished.--**

(1) Any health care practitioner licensed by the department or a board within the department who makes a physical or mental examination of, or administers treatment or dispenses legend drugs to, any person shall, upon request of such person or the person's legal representative, furnish, in a timely

manner, without delays for legal review, copies of all reports and records relating to such examination or treatment, including X rays and insurance information. However, when a patient's psychiatric, chapter 490 psychological, or chapter 491 psychotherapeutic records are requested by the patient or the patient's legal representative, the practitioner may provide a report of examination and treatment in lieu of copies of records. Upon a patient's written request, complete copies of the patient's psychiatric records shall be provided directly to a subsequent treating psychiatrist. The furnishing of such report or copies shall not be conditioned upon payment of a fee for services rendered.

(2) Except as otherwise provided in s. 440.13(2), such records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, such records may be furnished without written authorization to any person, firm, or corporation that has procured or furnished such examination or treatment with the patient's consent or when compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff. Such records may be furnished in any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records. Except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given. The department or the Agency for Health Care Administration, as appropriate, may obtain patient records pursuant to a subpoena without written authorization from the patient if the department or the Agency for Health Care Administration and the probable cause panel of the appropriate board, if any, find reasonable cause to believe that a practitioner has excessively or inappropriately prescribed any

controlled substance specified in chapter 893 in violation of this chapter or any professional practice act or that a practitioner has practiced his profession below that level of care, skill, and treatment required as defined by this chapter or any professional practice act; provided, however, the patient record obtained by the department or the agency pursuant to this subsection shall be used solely for the purpose of the department or the agency and the appropriate regulatory board in disciplinary proceedings. The record shall otherwise be confidential and exempt from s. 119.07(1). This section does not limit the assertion of the psychotherapist-patient privilege under s. 90.503 in regard to records of treatment for mental or nervous disorders by a medical practitioner licensed pursuant to chapter 458 or chapter 459 who has primarily diagnosed and treated mental and nervous disorders for a period of not less than 3 years, inclusive of psychiatric residency. However, the practitioner shall release records of treatment for medical conditions even if the practitioner has also treated the patient for mental or nervous disorders. If the department or the agency has found reasonable cause under this section and the psychotherapist-patient privilege is asserted, the department or the agency may petition the circuit court for an in camera review of the records by expert medical practitioners appointed by the court to determine if the records or any part thereof are protected under the psychotherapist-patient privilege.

(3) All patient records obtained by the department or the Agency for Health Care Administration and any other documents maintained by the department or the agency which identify the patient by name are confidential and exempt from s. 119.07(1) and shall be used solely for the purpose of the department or the Agency for Health Care Administration and the appropriate regulatory board in its investigation, prosecution, and appeal of disciplinary proceedings. The records shall not be available to the public as part of the record of investigation for and prosecution in disciplinary proceedings made available to the public by the department or the Agency for Health Care Administration or the appropriate board.

(4) A health care practitioner furnishing copies of reports or records pursuant to this section shall charge no more than the actual cost of copying, including reasonable staff time, or the amount specified in administrative rule by the appropriate board.

History.—s. 1, ch. 79-302; s. 1, ch. 82-22; s. 1, ch. 83-108; s. 81, ch. 83-218; ss. 14, 119, ch. 83-329; s. 2, ch. 84-15; s. 41, ch. 85-175; s. 4, ch.

87-333; s. 9, ch. 88-1; s. 2, ch. 88-208; s. 14, ch. 88-219; s. 6, ch. 88-277; s. 10, ch. 88-392; s. 2, ch. 89-85; s. 14, ch. 89-124; s. 28, ch. 89-289; s. 1, ch. 90-263; s. 11, ch. 91-137; s. 6, ch. 91-140; s. 12, ch. 91-176; s. 4, ch. 91-269; s. 62, ch. 92-33; s. 32, ch. 92-149; s. 23, ch. 93-129; s. 315, ch. 94-119; ss. 90, 91, ch. 94-218; s. 308, ch. 96-406.

**455.2415 Communications confidential; exceptions.**--Communications between a patient and a psychiatrist, as defined in s. 394.455(23), shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative. Provision of psychiatric records and reports shall be governed by s. 455.241.

Notwithstanding any other provisions of this section or s. 90.503, where:

- (1) A patient is engaged in a treatment relationship with a psychiatrist;
- (2) Such patient has made an actual threat to physically harm an identifiable victim or victims; and
- (3) The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out that threat.

the psychiatrist may disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency. No civil or criminal action shall be instituted, and there shall be no liability on account of disclosure of otherwise confidential communications by a psychiatrist in disclosing a threat pursuant to this section.

**History.**--s. 10, ch. 88-1; s. 33, ch. 92-149; s. 43, ch. 96-169.

<sup>1</sup>**Note.**--Subsection (24) defines "psychiatrist."

**455.2416 Practitioner disclosure of confidential information; immunity from civil or criminal liability.**--

(1) A practitioner regulated through the Division of Medical Quality Assurance of the department shall not be civilly or criminally liable for the disclosure of otherwise confidential information to a sexual partner or a needle-sharing partner under the following circumstances:

(a) If a patient of the practitioner who has tested positive for human immunodeficiency virus discloses to the practitioner the identity of a sexual partner or a needle-sharing partner;

(b) The practitioner recommends the patient notify the sexual partner or the needle-sharing partner of the positive test and refrain from engaging in sexual or drug activity in a manner likely to transmit the virus and the patient refuses, and the practitioner informs the patient of his intent to inform the sexual partner or needle-sharing partner; and

(c) If pursuant to a perceived civil duty or the ethical guidelines of the profession, the practitioner reasonably and in good faith advises the sexual partner or the needle-sharing partner of the patient of the positive test and facts concerning the transmission of the virus.

However, any notification of a sexual partner or a needle-sharing partner pursuant to this section shall be done in accordance with protocols developed pursuant to rule of the Department of Health and Rehabilitative Services.

(2) Notwithstanding the foregoing, a practitioner regulated through the Division of Medical Quality Assurance of the department shall not be civilly or criminally liable for failure to disclose information relating to a positive test result for human immunodeficiency virus of a patient to a sexual partner or a needle-sharing partner.

**History.**--s. 43, ch. 88-380; s. 12, ch. 89-350.

**455.242 Disposition of records of deceased practitioners or practitioners relocating or terminating practice.**--Each board created under the provisions of chapter 457, chapter 458, chapter 459, chapter 460, chapter 461, chapter 463, chapter 464, chapter 465, chapter 466, chapter 474, part I of chapter 484, chapter 486, chapter 490, or chapter 491, and the department under the provisions of chapter 462, shall provide by rule for the disposition, under said chapter, of the medical records or records of a psychological nature of practitioners which are in existence at the time the practitioner dies, terminates practice, or relocates and is no longer available to patients and which records pertain to the practitioner's patients. The rules shall provide that the records be retained for at least 2 years after the practitioner's death, termination of practice, or relocation. In the case of the death of the practitioner, the rules shall provide for the disposition of such records by the estate of the practitioner.

**History.**--s. 1, ch. 79-302; s. 11, ch. 88-1; s. 11, ch. 88-392; s. 15, ch. 89-124; s. 16, ch. 91-137; s. 34, ch. 92-149.

CHAPTER 59R-9  
STANDARDS OF PRACTICE FOR MEDICAL DOCTORS

- 59R-9.003 Standards for Adequacy of Medical Records.
- 59R-9.005 HIV/AIDS: Knowledge of Antibody Status; Action to be Taken.
- 59R-9.007 Standards of Practice.
- 59R-9.008 Sexual Misconduct.
- 59R-9.009 Standard of Care for Office Surgery.
- 59R-9.010 Interpretation of Diagnostic Imaging Tests or Procedures.
- 59R-9.011 Itemized Patient Billing.

However, when such examinations, tests, procedures, or treatments are pursuant to a court order or rule or are conducted as part of an independent medical examination pursuant to Sections 440.13 or 627.736(7), Florida Statutes, the record maintenance requirements of Section 455.241, Florida Statutes, and this rule do not apply. Nothing herein shall be interpreted to permit the destruction of medical records that have been made pursuant to any examination, test, procedure, or treatment except as permitted by law or rule.

*Specific Authority 458.309 FS. Law Implemented 455.241, 458.331(1)(g), (h), (k), (m), (n), (o), (p), (q), (r) FS. History—New 1-1-92, Formerly 21M-27.003, Amended 1-12-94, Formerly 61F6-27.003, Amended 9-3-95.*

**59R-9.005 HIV/AIDS: Knowledge of Antibody Status; Action to be Taken.** The Board of Medicine strongly urges all licensees under its jurisdiction who are involved in invasive procedures to undergo testing to determine their HIV status. In the event a licensee tests positive, the licensee must enter and comply with the requirements of the Physician Recovery Network.

*Specific Authority 458.309, 455.2224 FS. Law Implemented 455.2224, 458.331(1)(s) FS. History—New 9-15-92, Formerly 21M-27.003, 61F6-27.003.*

**59R-9.007 Standards of Practice.** The Board of Medicine interprets the standard of care requirement of Section 458.331(1)(i), Florida Statutes, and the delegation of duties restrictions of Section 458.331(1)(w), Florida Statutes, with regard to surgery as follows:

(1) The ultimate responsibility for diagnosing medical and surgical problems is that of the licensed doctor of medicine or osteopathy who is to perform the surgery. In addition, it is the responsibility of the operating surgeon or an equivalently trained doctor of medicine or osteopathy or a physician practicing within a Board approved postgraduate training program to explain the procedure to and obtain the informed consent of the patient. It is not necessary, however, that the operating surgeon obtain or witness the signature of the patient on the written form evidencing informed consent.

(2) Management of postsurgical care is the responsibility of the operating surgeon.

(3) The operating surgeon can delegate discretionary postoperative activities to equivalently trained licensed doctors of medicine or osteopathy or to physicians practicing within Board approved postgraduate training programs. Delegation to any health care practitioner is permitted only if the other practitioner is supervised by the operating surgeon or an equivalently trained licensed doctor of medicine or osteopathy or a physician practicing within a Board approved postgraduate training program.

(4) The rule shall have no application to anesthesia-related activities performed in accordance with Florida law.

*Specific Authority 458.309 FS. Law Implemented 458.331(1)(i), (w) FS. History—New 11-28-91, Formerly 21M-20.015, 21M-27.007, 61F6-27.007.*

**59R-9.003 Standards for Adequacy of Medical Records.**

(1) Medical records are maintained for the following purposes:

(a) To serve as a basis for planning patient care and for continuity in the evaluation of the patient's condition and treatment.

(b) To furnish documentary evidence of the care of the patient's medical evaluation, diagnosis, and change in condition.

(c) To document communication between the physician responsible for the patient and any other health care professional who contributes to the patient's care.

(d) To assist in protecting the legal interest of the patient, the hospital, and the practitioner possible for the patient.

(2) A licensed physician shall maintain patient medical records in a legible manner and with sufficient detail to clearly demonstrate why the use of treatment was undertaken or why an alternate indicated course of treatment was not undertaken.

(3) The medical record shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the cause and results of treatment accurately, by including, at a minimum, patient history; examination results; test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of orders or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in rendering the appropriate treatment of the patient.

(4) All entries made into the medical records shall be accurately dated and timed. Late entries are permitted, but must be clearly and accurately identified as late entries and dated and timed accurately when they are entered into the record. However, office records do not need to be timed, dated.

(5) In situations involving medical examinations, tests, procedures, or treatments performed by an employer, an insurance company, or other third party, appropriate medical records shall be maintained by the physician and shall be subject to Section 455.241, Florida Statutes.

RECEIVED

20 1997

tion for

seeks the

uses the

physician

S.?

1 a

visions of

warded to a

ted into the

physician

tion to

ional

th records

there has

be

PROCEDURES

97 MAR 17

RECE

RECEIVED

MAR 11 PM 3:45

OFFICE OF STATE  
LICENSING  
FLORIDA

The Board will consider this petition at its meeting on April 5, 1997, in Ft. Lauderdale, Florida. Copies of the petition may be obtained from Marm Harris, Executive Director, Board of Medicine, 1940 North Monroe Street, Tallahassee, Florida 32399-0750.