Final Order No. DOH-04-0928-FOF-MQA
FILED DATE - 8-17-04
Department of Health
By: Heather Coleman
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2001-16808
DOAH CASE NO.: 03-0056PL
LICENSE NO.: ME0025019

JOSE ANIBAL CRUZ, M.D.,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on August 6, 2004, in Tallahassee, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order and Exceptions to the Recommended Order, and (copies of which are attached hereto as Exhibits A and B, respectively) in the above-styled cause. Petitioner was represented by Joy Tootle, Assistant General Counsel. Respondent was represented by Jon Pellett, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULINGS ON EXCEPTIONS

The Board reviewed the Respondent's Exceptions and the Petitioner's Response to Respondent's Exceptions and denied the Exceptions. However the Board accepts the Exception in Paragraph

9 of the Recommended Order. The Board determines that Paragraph 9 of the Recommended Order shall read as follows:

> "Dr. Cruz treated M.R. for manic-depression from January 1994 until August 2001. During the time that M.R. was under Dr. Cruz's direct care, Dr. Cruz saw her at least once a month for pharmacological management and brief reality-oriented therapy sessions."

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference with the modification set forth above.

2. There is competent substantial evidence to support the findings of fact as modified.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Administrative Law Judge be ACCEPTED. WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that Respondent's license to practice medicine in the State of Florida is hereby REVOKED.

(NOTE: SEE ATTACHMENT "A" FOR STANDARD TERMS APPLICABLE TO ALL FINAL ORDERS. UNLESS OTHERWISE SPECIFIED BY FINAL ORDER, THE STANDARD TERMS SET FORTH THE REQUIREMENTS FOR PERFORMANCE OF ALL PENALTIES CONTAINED IN THIS FINAL ORDER.)

This Final Order shall take effect upon being filed with the Clerk of the Department of Health.

DONE AND ORDERED this 16 day of AUGUST, 2004.

BOARD OF MEDICINE

Larry McPherson, Jr., Executive Director
for Elisabeth Tucker, M.D., Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to JOSE ANIBAL CRUZ, M.D.,1540 Washington Avenue, Miami Beach, Florida 33139; to Jon Pellett, Esquire, Barr, Murman, et al., 201 E. Kennedy Boulevard, Suite 1700, Tampa, Florida 33602; to Larry J. Sartin, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Ephraim Livingston, and Pamela Page, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3265 this 17 day of August, 2004.

Erica Prine

Deputy Agency Clerk

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE, Petitioner,	)	
vs.	)	Case No. 03-0056PL
JOSE ANIBAL CRUZ, M.D., Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, in Miami, Florida, on April 10 and 11, 2003, and January 28, 2004.

APPEARANCES

For Petitioner: Kim M. Kluck, Esquire
Joy L. Doss, Esquire
Trisah D. Bowles, Esquire
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Jon M. Pellett, Esquire
Barr, Murman, Tonelli, Slother & Sleet, P.A.
201 East Kennedy Boulevard, Suite 1700
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Jose Anibal Cruz, M.D., committed the violations alleged in an Administrative Complaint filed by Petitioner, the Department of Health, on December 30, 2002, and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On or about December 30, 2002, the Department of Health filed a four-count Administrative Complaint against Jose Anibal Cruz, M.D., a Florida-licensed physician, before the Board of Medicine. On or about January 8, 2003, Dr. Cruz, through counsel, mailed a Request for Formal Hearing, indicating that he disputed all material facts alleged in the Administrative Complaint, except those pertaining to jurisdiction and licensure, and requesting a formal administrative hearing pursuant to Section 120.569(2)(a), Florida Statutes (2002). On January 9, 2003, the matter was filed with the Division of Administrative Hearings, with a request that the case be assigned to an administrative law judge. The matter was designated DOAH Case No. 03-0056PL, was initially assigned to Administrative Law Judge Claude B. Arrington, and was later transferred to the undersigned.

The final hearing was scheduled by Notice of Hearing entered January 24, 2003, for April 10 and 11, 2003. Shortly

before commencement of the final hearing, Petitioner Filed Petitioner's Motion to Preclude Respondent's Testimony or Motion in Limine, along with a Memorandum in Support of Motion to Preclude or Motion in Limine. In this Motion Petitioner sought an order prohibiting Respondent from testifying at the final hearing due to the assertion of his right to remain silent, guaranteed by the Fifth Amendment to the United States Constitution, and Article I, Section 9 of the Florida Constitution (hereinafter referred to as the "Fifth Amendment Privilege" or "Privilege"), on some, but not all, of the questions posed by Petitioner during the portion of Respondent's deposition taken on March 25, 2003. Petitioner sought the preclusion of Respondent's testimony as a sanction, relying upon Florida Administrative Code Rule 28-106.206.

When the final hearing commenced on April 10, 2003, it was also learned that Petitioner would require additional time to pursue discovery due to the fact that Respondent had provided newly discovered medical records pertinent to this case just before the commencement of the hearing. The delay in the completion of the final hearing created an opportunity: (1) to review each of the questions for which Respondent had asserted a Fifth Amendment Privilege during his deposition and determine whether the Privilege was properly asserted; (2) to give Petitioner an opportunity to have Respondent answer any

questions for which the Fifth Amendment Privilege was improperly asserted; and (3) to then decide whether any sanctions should be imposed on Respondent.

The March 25, 2003, portion of Respondent's deposition was reviewed and, on April 18, 2003, an Order Concerning Petitioner's Motion to Preclude Respondent's Testimony or Motion in Limine was entered. In this Order, the parties were informed of the legal conclusions[1] reached by the undersigned concerning a respondent's right to assert a Fifth Amendment Privilege in administrative proceedings, the specific questions for which Respondent had asserted the Fifth Amendment Privilege were identified, and, based upon the legal conclusions explained in the Order, the Respondent was informed that he must answer the questions or, if he refused to do so, "appropriate sanctions may be imposed." A ruling on Petitioner's Motion to Preclude Respondent's Testimony or Motion in Limine was reserved until Respondent had had an opportunity to respond to the questions for which the Fifth Amendment Privilege had been asserted and any reasonable follow-up questions by Petitioner.[2]

In response to the April 18, 2003, Order Respondent filed Respondent's Motion for Stay Regarding the April 18, 2003 Order Concerning Petitioner's Motion to Preclude Respondent's Testimony or Motion in Limine. Respondent represented that he intended to file an interlocutory appeal of the April 18, 2003,

Order and, therefore, requested that the case be stayed pending that appeal. Petitioner filed Petitioner's Response to Respondent's Motion for Stay Regarding the April 18, 2003, Order indicating that Petitioner had no objection to a stay of those matters which were directly impacted by the Order.

On April 30, 2003, an Order Granting, in Part, Respondent's Motion for Stay was entered. The Motion was granted "to the extent agreed to by Petitioner." On September 26, 2003, the District Court of Appeal of Florida, Third District, issued an order denying Respondent's petition for writ of certiorari.

After receiving input from the parties, an Amended Notice of Hearing was entered scheduling the remainder of the final hearing for January 28 and 29, 2004.

Prior to the commencement of the final hearing, official recognition was taken of Florida Administrative Code Rules 59R-8.001 (Rev. 6/97), 64B8-8.001 (Rev. 5/98, Rev. 2/00, and Rev. 2.01), and 64B8-9.008, and Section 458.329, Florida Statutes.

At the final hearing Petitioner presented the testimony of Herb Graner, M.R., James Wright, Luis Villa, Martha Garcia, Mercedes Morel, Michele Flores, and Jose A. Melendez. Petitioner's Exhibits 1 through 9 were admitted. Petitioner's exhibits included the deposition testimony of Oscar Santa Maria, taken August 17, 2001, and the deposition testimony of George

Joseph, M.D. Respondent presented the testimony of M.R., Fancisco J. Pages, M.D.; Aurora Thomas; Ms. Morel; Lyudmila Litvinova; Geroge E. Lopez; Julian Nodarse, M.D.; and Ms. Flores. Respondent's Exhibits 1 through 3, 5 through 8, and 12 through 19 were admitted. Respondent's exhibits included the deposition testimony of Manuel Dominguez, M.D., taken April 7, 2003; the deposition testimony of Dr. Joseph, taken March 14, 2003; the deposition testimony of Daisy Quintanilla, taken April 24, 2003; and the deposition testimony of Diana Baralt, M.D., taken Aril 24, 2003. Respondent's Exhibit 4 was marked for identification purposes, but not offered. Respondent's Exhibits 9 through 11 were proffered. Finally, four Joint Exhibits were admitted, including the deposition testimony of Mr. Villa, taken March 27, 2003.

Respondent also intended to offer the testimony of several witnesses who, it was concluded, would provide testimony cumulative to some of Respondent's witnesses who did testify. Rather than require that these witnesses appear, Respondent made a proffer of their testimony which, it was agreed, would be treated as if they had actually testified.

At the conclusion of the final hearing of this matter, it was agreed that all exhibits filed in this matter would be considered confidential due to the inclusion of patient identifying information. All of those exhibits, which will be

released to Petitioner with this Recommended Order, have been treated as confidential by the Division of Administrative Hearings and have not been disclosed.

The two-volume Transcript of the portion of the final hearing conducted on April 10 and 11, 2003, was filed on December 1, 2003, and the one-volume Transcript of the portion of the final hearing conducted on January 28, 2004, was filed on March 8, 2004. The parties, pursuant to agreement, therefore, had until March 19, 2004, to file proposed recommended orders. Both parties timely filed Proposed Recommended Orders, which have been fully considered in entering this Recommended Order.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Health (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for the investigation and prosecution of complaints involving physicians licensed to practice in Florida.

2. Respondent, Jose Anibal Cruz, M.D., is, and was at the times material to this matter, a physician licensed to practice medicine in Florida, having been licensed in Florida since 1975. His license number is 0025019.

3. Dr. Cruz received his medical degree in October 1967. He has been practicing medicine for a period of 36 years, including his time in training.

4. During his career, Dr. Cruz has served as Chief of Geriatric Psychiatry at South Shore Hospital, Miami, Florida, and as Medical Director of the Psychiatric Out-Patient Rehabilitation Program with South Shore Hospital and the University of Miami.

B. Dr. Cruz's Practice.

5. At the times material to this matter, Dr. Cruz specialized in the practice of general psychiatry.[3]

6. At the times material to this matter, Dr. Cruz maintained an office at either 8740 North Kendall Drive, Miami, Florida, or 1540 Washington Avenue, Miami Beach, Florida.[4]

C. Patient M.R.

7. On or about January 4, 1994, Dr. Cruz began providing care to M.R., a female, who was born on May 21, 1962. When she began seeing Dr. Cruz for treatment, she was 31 years of age. When M.R. discontinued receiving treatment from Dr. Cruz on or about August 16, 2001, she was 39 years of age.

8. When M.R. first presented to Dr. Cruz, she had a history of bipolar disorder and manic-depressive disorder. M.R. was considered disabled due to her bipolar disorder. She

complained of symptoms indicative of depression. Dr. Cruz diagnosed M.R. with manic-depressive illness, in remission.

9. Dr. Cruz treated M.R. for manic-depression from January 1994 until August 2001, seeing her at least once a month for pharmacological management[5] and brief reality-oriented therapy sessions.

10. From the beginning of Dr. Cruz's treatment of M.R., he began making inappropriate, flirtatious comments to her, including comments about her hair and physical appearance.

11. Dr. Cruz also began to hug M.R. and on several occasions, he became sexually aroused to a point where M.R. could feel his erect penis.

12. Dr. Cruz eventually began to ask M.R. to bring him pictures of herself wearing a bathing suit or in the nude.

13. After Dr. Cruz moved his office to the Miami Beach location, Dr. Cruz began to masturbate in front of M.R. during her visits.

14. Eventually, Dr. Cruz asked M.R. to perform oral sex on him during her visits, a request that she obeyed.

15. On five occasions, Dr. Cruz hospitalized M.R. in the psychiatric unit at Cedars Medical Center (hereinafter referred to as the "Psychiatric Unit"), where Dr. Cruz regularly performed rounds.

16. Patients in the Psychiatric Unit were monitored on a regular basis. Staff conducted rounds with each patient at 15-minute intervals, beginning on the hour. The nursing station also had an audio monitoring system, which allowed the nurses to listen in on a patient's room. Only one room could be monitored at a time, however.[6]

17. When a physician was with a patient in the Psychiatric Unit, staff generally would not interrupt the physician, although the door to the patient's room was usually left open in case the physician has any difficulty with the patient.

18. Each patient in the Psychiatric Unit had a private room, with a private bathroom. There was a door on the room and the bathroom, but neither could be locked from the inside. If a patient was in the bathroom when staff made rounds, staff would knock on the door, but not open it if the patient responded.

19. During some of the times when M.R. was hospitalized in the Psychiatric Unit, Dr. Cruz would telephone her, tell her when he would be making rounds, and tell her to be in the shower bathing when he arrived. She would comply with his directions and when he arrived, he would enter the bathroom where he would masturbate while watching M.R. bathing.

20. Dr. Cruz would also masturbate in front of M.R. while visiting her in the Psychiatric Unit at times other than when she was instructed to be in the shower.

21. Dr. Cruz's inappropriate behavior eventually progressed to having sexual intercourse with M.R. Dr. Cruz, in order to facilitate their sexual relationship, told M.R. to start coming in as the last patient of the day.[7] After her appointment, M.R. would leave the office, Dr. Cruz would pick her up around the corner from the office, and he would take her to the Starlite East Motel (hereinafter referred to as the "Starlite").

22. On other occasions, Dr. Cruz would have M.R. wait for him at a Winn-Dixie grocery store (hereinafter referred to as the "Grocery Store") located on Northwest 12th Avenue, close to Cedars Medical Center. On these occasions, Dr. Cruz would pick up M.R. and take her to the Starlite.

23. The Starlite, located at 135 Southwest 8th Street, Miami, Florida, is a motel where rooms may be rented by the hour or longer periods of time, including overnight. Greater than three-fourths of the Starlite's guests rent by the hour.

24. On those occasions when Dr. Cruz took M.R. to the Starlite, he would usually park his car in the motel parking lot, leave her in his car, register for a room, using a fictitious name,[8] and then park his car nearer the room.

25. While at the Starlite, Dr. Cruz and M.R. would engage in sexual intercourse.

26. On one occasion, after engaging in sexual intercourse at the Starlite, Dr. Cruz gave M.R. two twenty-dollar bills which he told her to use to buy herself something.[9] M.R. declined taking the money.

27. Dr. Cruz. engaged in sexual intercourse with M.R. on as many as 25 to 30 occasions.

D. Surveillance of Dr. Cruz and M.R.

28. At some time during 2001, M.R. confessed her sexual relationship with Dr. Cruz to a friend, who suggested that what Dr. Cruz was doing was wrong and that she should sue him. M.R. took her friend's advice, selected a law firm out of the phone book, and contacted an attorney.

29. After telling the attorney about her sexual relationship with Dr. Cruz, the attorney hired a private investigator to conduct video surveillance of M.R. and Dr. Cruz.

30. The private investigator arranged a meeting with M.R. during August 2001 to discuss the surveillance. M.R. met with two investigators and discussed her relationship with Dr. Cruz and their routine. It was decided that a rendezvous would be arranged with Dr. Cruz on August 16, 2001, a date on which M.R. had an appointment to see Dr. Cruz to renew a medication prescription. It was expected that M.R. would leave the office and that Dr. Cruz would then pick her up around the corner and take her to the Starlite.

31. The investigators were positioned outside Dr. Cruz's office on August 16, 2001, at the time of her appointment. Dr. Cruz, however, told M.R. to telephone him later to make arrangements to meet the following day, instead of going to the Starlite the day of her appointment. When she told him she did not have any minutes on her cellular telephone,[10] Dr. Cruz, as he often had before, gave her $50.00 to purchase minutes to be used on the phone.[11]

32. Upon leaving the office, M.R. went to a nearby store where she purchased cellular telephone minutes. One of the private investigators, who was expecting M.R. to be picked up by Dr. Cruz and was, therefore, watching the office that day, followed M.R. When he saw her go into the store, he followed her in. The investigator approached M.R. and she told him that Dr. Cruz had told her that he could not take her to the Starlite that day.

33. M.R. and the investigator left the store and went to lunch, where they were joined by the second investigator. While at lunch, Dr. Cruz called M.R. on her cellular phone and told her that he would pick her up at the Grocery Store the following day, August 17, 2001.[12]

34. After the telephone call with Dr. Cruz ended, M.R. informed the investigators that she had agreed to be picked up the following day at the Grocery Store.

35. On August 17, 2001, the two investigators positioned themselves in the Grocery Store parking lot where they could see M.R., who was sitting on a bench in front of the store. They video recorded M.R. giving a prearranged signal when Dr. Cruz first entered the parking lot, stopping to pick up M.R., and then left. The investigators lost Dr. Cruz in traffic, so they went directly to the Starlite, where they next recorded Dr. Cruz's automobile, with Dr. Cruz and M.R. in it, entering the parking lot.

36. Upon arriving at the Starlite, Dr. Cruz parked his car, leaving M.R. in it, and proceeded to the office. Upon returning from the office, getting into his car, starting the engine, and placing the car in reverse, the investigators drove up behind his car, blocking his exit. One of the investigators went to the passenger side of Dr. Cruz's car, took M.R. out, and then put her in the investigators' car,[13] and they then departed.

E. The Department's Administrative Complaint and Dr. Cruz's Request for Hearing.

37. On December 30, 2002, after investigating M.R.'s allegations, the Department filed a four-count Administrative Complaint against Dr. Cruz alleging that he had: (a) exercised influence within a patient-physician relationship for purposes of engaging a patient in sexual activity in violation of Section 458.331(1)(j), Florida Statutes (Count One); (b) violated the

express prohibition against sexual misconduct set out in Section 458.329, Florida Statutes, and Florida Administrative Code Rule 64B8-9.008 (Count Two); (c) failed to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions in violation of Section 458.331(1)(t), Florida Statutes (Count Three); and (d) failed to keep written medical records justifying the course of treatment of M.R., in that his notes are partially illegible and/or are cursory and generic, in violation of Section 458.331(1)(m), Florida Statutes (Count Four).

38. On or about January 8, 2003, Dr. Cruz, through counsel, mailed a Request for Formal Hearing to the Department, indicating that he disputed all material facts alleged in the Administrative Complaint, except those pertaining to jurisdiction and licensure, and requesting a formal administrative hearing pursuant to Section 120.569(2)(a), Florida Statutes (2002).

39. On January 9, 2003, the matter was filed with the Division of Administrative Hearings, with a request that the case be assigned to an administrative law judge. The matter was designated DOAH Case No. 03-0056PL, was initially assigned to Administrative Law Judge Claude B. Arrington, and was later transferred to the undersigned.

F. Counts One through Three; Sexual Misconduct.

40. The first three counts of the Administrative Complaint are specifically alleged to be based upon the following facts:

a. Demanded oral sex from Patient M.R. under threat of withholding her prescriptions;

b. Engaged in sexual intercourse with Patient M.R.;

c. Masturbated in Patient M.R.'s presence;

d. Invited Patient M.R. to engage in sexual relations with him and a third party;

e. Asked for naked photographs of Patient M.R.; and/or

f. Groped Patient M.R.'s breasts and groin in his office during sessions.

41. All of these factual allegations, except paragraphs a., d., and f. have been proved.

42. Physicians are responsible for maintaining the appropriate physician-patient relationship, a responsibility each physician is responsible for understanding. This relationship involves "boundaries" which the physician should understand are not to be crossed.[14] Engaging in the activities listed in finding of fact 40 b. through c. and e. with M.R. constituted the exercise of influence over M.R. within the patient-physician relationship for the purpose of engaging a patient in sexual activity.

43. Trust plays a significant part in the physician-patient relationship, and especially in the psychotherapist-patient relationship. According to George M. Joseph, M.D., whose testimony has been credited, trust "plays a very important role, probably a prime role, primal important role. . . ."

44. There is also a difference in the "power" of the psychotherapist and the patient. While each has some power, according to Dr. Joseph, the

> doctor, traditionally, is viewed as an individual with, obviously, more of the power.
>
> He is the treating person. He is the one getting paid. He is the one with the knowledge and the experience. And he is the one directing the treatment.
>
> In addition to that, over time in psychotherapy, he acquires the power of the patient's transference, which often pictures him or her in a sort of parental role.

45. Because of the power a psychotherapist has over a patient, that power can be exploited to influence a patient to cross the sexual boundary which the psychotherapist should maintain. When a psychotherapist crosses that sexual boundary and exploits a patient, the trust necessary to maintain a proper psychotherapist-patient relationship is destroyed, the patient may become traumatized, and a patient with depressive illnesses may experience an exacerbation of psychotic or manic symptoms.

46. In this matter, due to the activities described in finding of fact 40 b. through c. and e., Dr. Cruz violated the proper psychotherapist-patient relationship, abused his power over patient M.R., exploited her for his own pleasure, destroyed her trust in him, and caused her emotional distress, nightmares, sleeplessness, confusion, and depression.

47. Dr. Cruz's sexual involvement with M.R. constituted the exercise of influence within a physician-patient relationship for purposes of engaging a patient in sexual activity and constituted sexual misconduct in the practice of medicine.

48. Dr. Cruz's sexual involvement with M.R., as found in finding of fact 40 b. through c. and e., constituted the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

49 As to paragraph a., supra, while the evidence proved that Dr. Cruz had M.R. visit his office once a month in order to obtain a refill of the medications he prescribed for her, the evidence failed to prove that Dr. Cruz threatened to withhold her prescriptions if she refused to perform oral sex on him.[15]

G. Count Four; Dr. Cruz's Medical Records.

50. According to Dr. Joseph, whose opinion[16] with regard to Dr. Cruz's medical notes is accepted:

> The physician's notes are at best only partially legible to this reviewer. The notes appear cursory, and generic. They continually repeat terms such as: "Depressed, anxious, tense, despondent, dejected, hopeless, low self-esteem, sad, helplessness. There appears to be little reference in the notes to current life issues, psychodynamics or specific medication effects.

Deposition Exhibit 2 to Respondent's Exhibit 8.

CONCLUSIONS OF LAW

A. Jurisdiction.

51. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

B. The Charges of the Administrative Complaint.

52. In its Administrative Complaint, the Department has alleged that Dr. Cruz: (a) exercised influence within a patient-physician relationship for purposes of engaging a patient in sexual activity in violation of Section 458.331(1)(j), Florida Statutes (Count One); (b) violated the express prohibition against sexual misconduct set out in Section 458.329, Florida Statutes, and Florida Administrative Code Rule

64B8-9.008 (Count Two); (c) failed to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions in violation of Section 458.331(1)(t), Florida Statutes (Count Three); and (d) failed to keep written medical records justifying the course of treatment of M.R., in that his notes are partially illegible and/or are cursory and generic, in violation of Section 458.331(1)(m), Florida Statutes (Count Four).

53. Section 458.331(1), Florida Statutes, sets out grounds for the discipline of physicians. In pertinent part, the following acts constitute grounds for disciplinary action:

> (j) Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.
>
> . . . .
>
> (m) Failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and

reports of consultations and hospitalizations.

. . . .

(t) . . . the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

. . . .

(x) Violating any provision of this chapter, a rule of the board or department, or a lawful order of the board or department previously entered in a disciplinary hearing or failing to comply with a lawfully issued subpoena of the department.

54. In support of the allegation that Dr. Cruz violated Section 458.331(1)(x), Florida Statutes, the Department alleged that he violated Section 458.329, Florida Statutes, and Florida Administrative Code Rule 64B8-9.008.

C. The Burden and Standard of Proof.

55. The Department seeks to impose penalties against Dr. Cruz through the Administrative Complaint that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. §458.331(3), Fla. Stat. See also Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670

So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

56. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

> . . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

D. The Department's Proof; Sexual Offenses.

57. The Department alleged, in support of Counts One through Three, which relate to Dr. Cruz's sexual relationship with M.R., that Dr. Cruz did the following:

a. Demanded oral sex from Patient M.R. under threat of withholding her prescriptions;

b. Engaged in sexual intercourse with Patient M.R.;

c. Masturbated in Patient M.R.'s presence;

d. Invited Patient M.R. to engage in sexual relations with him and a third party;

e. Asked for naked photographs of Patient M.R.; and/or

f. Groped Patient M.R.'s breasts and groin in his office during sessions.

58. All of these factual allegations, except paragraphs a., d, and f. were proved by the Department clearly and convincingly.[17]

59. The acts which the Department alleged and proved that Dr. Cruz committed with M.R. constitute a violation of Section 458.331(1)(j), Florida Statutes, as alleged in Count One of the Administrative Complaint. Dr. Cruz exercised influence over M.R. within the physician-patient relationship for purposes of engaging her in sexual activity.

60. The acts which the Department alleged and proved that Dr. Cruz committed with M.R. also constitute a violation of Section 458.331(1)(x), Florida Statutes, as alleged in Count Two of the Administrative Complaint, in that his actions constitute a violation of Section 458.329, Florida Statutes, and Florida Administrative Code Rule 64B8-9.008.

61. Section 458.329, Florida Statutes, provides the following:

> The physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of medicine means violation of the physician-patient relationship through which the physician uses said relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of medicine is prohibited.

62. Florida Administrative Code Rule 64B8-9.008, provides the following, in pertinent part, with regard to "sexual misconduct":

> (1) Sexual contact with a patient is sexual misconduct and is a violation of Sections 458.329 and 458.331(1)(j), F.S.
>
> (2) For purposes of this rule, sexual misconduct between a physician and a patient includes, but it is not limited to:
>
> (a) Sexual behavior or involvement with a patient including verbal or physical behavior which
>
> 1. May reasonably be interpreted as romantic involvement with a patient regardless of whether such involvement occurs in the professional setting or outside of it;
>
> 2. May reasonably be interpreted as intended for the sexual arousal or gratification of the physician, the patient or any third party; or

3. May reasonably be interpreted by the patient as being sexual.

. . . .

(3) Sexual behavior or involvement with a patient excludes verbal or physical behavior that is required for medically recognized diagnostic or treatment purposes when such behavior is performed in a manner that meets the standard of care appropriate to the diagnostic or treatment situation.

(4) The determination of when a person is a patient for purposes of this rule is made on a case by case basis with consideration given to the nature, extent, and context of the professional relationship between the physician and the person. The fact that a person is not actively receiving treatment or professional services from a physician is not determinative of this issue. A person is presumed to remain a patient until the patient physician-relationship is terminated.

. . . .

(7) A patient's consent to, initiation of, or participation in sexual behavior or involvement with a physician does not change the nature of the conduct nor lift the statutory prohibition.

. . . .

63. The acts of sexual conduct which Dr. Cruz has been proven to have committed with M.R. constitute prohibited sexual misconduct as prohibited and defined in Section 458.329, Florida Statutes, and Florida Administrative Code Rule 64B8-9.008. These violations, in turn, constitute a violation of Section 458.331(1)(x), Florida Statutes.

64. Finally, turning to the allegation that Dr. Cruz violated Section 458.331(1)(t), Florida Statutes (hereinafter referred to as the "Standard of Care"), as alleged in Count Three of the Administrative Complaint, it is not clear whether the determination of whether a physician has violated the Standard of Care, which previously clearly required a finding of fact to be made by this forum, is a question of law solely within the province of the Board of Medicine (hereinafter referred to as the "Board") to decide. By operation of legislation enacted during the 2003 session of the Florida Legislature, effective September 15, 2003, prior the conclusion of the formal hearing in this case, "[t]he determination of whether or not a licensee has violated the laws and rules regulating the profession, including a determination of the reasonable standard of care, is a conclusion of law to be determined by the board . . . and is not a finding of fact to be determined by an administrative law judge." See Ch. 2003-416, Laws of Florida 2003, Ch. 2003-416, at § 20 (amending Section 456.073(5), Florida Statutes (2002)).

65. The foregoing legislative change suggests that there is no longer any need for an administrative law judge to decide the factual question of whether a physician violated the Standard of Care. The following change in Section

458.331(1)(t), Florida Statutes, however, suggests that such findings are to be made:

> . . . . A recommended order by an administrative law judge or a final order of the board finding a violation under this paragraph shall specify whether the licensee was found to have committed "gross malpractice," "repeated malpractice," or "failure to practice medicine with that level of care, skill, and treatment which is recognized as being acceptable under similar conditions and circumstances," or any combination thereof, and any publication by the board must so specify.

This language specifically requires an administrative law judge to decide the issue despite the language quoted in paragraph 64.

66. Despite the confusion over the role of the administrative law judge in a case such as this, where one of the ultimate issues to be decided is whether a physician has violated the Standard of Care, neither of the parties in this case have argued that the change in the law quoted in paragraph 64 requires any change in the manner in which they presented their evidence, the manner in which the hearing should be conducted, or the appropriate content of this Recommended Order. By their statements and actions at hearing, and in their proposed orders, both parties have agreed that the nature of the evidence to be offered and considered in this case, and the findings to be based thereon, should not be limited by the

above-quoted changes to the determination of whether the Standard of Care has been violated.

67. It is, therefore, concluded that the acts which the Department alleged and proved that Dr. Cruz committed with M.R. constitute a violation of the Standard of Care as alleged in Count Three of the Administrative Complaint.

E. The Department's Proof; Inadequate Records.

68. Count Four of the Administrative Complaint alleges that Dr. Cruz's records concerning his treatment of M.R. were inadequate, in violation of Section 458.331(1)(m), Florida Statutes, "in that his notes are partially illegible and/or are cursory and generic."

69. Based upon the testimony of Dr. Joseph, this charge has also been proved.

F. The Appropriate Penalty.

70. In determining the appropriate punitive action to recommend to the Board in this case, it is necessary to consult the Board's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Board's disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

71. The Board's guidelines are set out in Florida Administrative Code Rule 64B8-8.001 (hereinafter referred to as

the "Disciplinary Guidelines"), which provides, in part, the following:

> (2) Violations and Range of Penalties. In imposing discipline upon applicants and licensees, in proceedings pursuant to Section 120.57(1) and (2), F.S., the Board shall act in accordance with the following disciplinary guidelines and shall impose a penalty within the range correspondent to the violations set forth below. . . .

72. The Disciplinary Guidelines provide the following recommended penalties for the commission, between November 4, 1993, and December 28, 1999, of a first offense violation of the provisions at issue in this case:

a. Section 458.331(1)(j), Florida Statutes, violation: "From one (1) year suspension to revocation . . . and an administrative fine from $250.00 to $5,000.00";

b. Section 458.331(1)(t), Florida Statutes, violation: "From two (2) years probation to revocation . . . and an administrative fine from $250.00 to $5,000.00";

c. Section 458.331(1)(x), Florida Statutes, violation: "From a reprimand to revocation . . . and an administrative fine from $250.00 to $5,000.00"; and

d. Section 458.331(1)(m), Florida Statutes violation: "From a reprimand . . . or two (2) years suspension followed by probation, and an administrative fine from $250.00 to $5,000.00."

73. The Disciplinary Guidelines provide the following recommended penalties for the commission, after December 28, 1999, of a first offense violation of the provisions at issue in this case:

a. Section 458.331(1)(j), Florida Statutes, violation: "From one (1) year suspension and a reprimand and an administrative fine of $5,000.00 to revocation . . . and an administrative fine of $10,000.00";

b. Section 458.331(1)(t), Florida Statutes, violation: "From two (2) years probation to revocation . . . and an administrative fine from $1,000.00 to $10,000.00";

c. Section 458.331(1)(x), Florida Statutes, violation: "From a reprimand to revocation . . . and an administrative fine from $1,000.00 to $10,000.00"; and

d. Section 458.331(1)(m), Florida Statutes violation: "From a reprimand . . . or two (2) years suspension followed by probation, and an administrative fine from $1,000.00 to $10,000.00."

74. Florida Administrative Code Rule 64B8-8.001(3) provides that, in determining the appropriate penalty, the following aggravating and mitigating circumstances are to be taken into account:

> (3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present

in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:

(a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;
(b) Legal status at the time of the *offense: no restraints, or legal* constraints;
(c) The number of counts or separate offenses established;
(d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
(e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
(f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
(g) The involvement in any violation of Section 458.331, F.S., of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure.
(h) Any other relevant mitigating factors.

75. Having carefully considered the facts of this matter in light of the provisions of Florida Administrative Code Rule 64B8-8.001, it is concluded that Dr. Cruz's license to practice medicine in the State of Florida should be revoked.

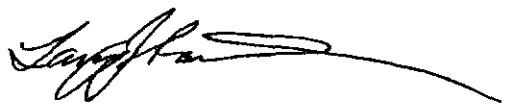
RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the a final order be entered by the Board of Medicine finding that Jose Anibal Cruz, M.D., has violated

Sections 458.331(1)(j), (m), (t), and (x) (by violating Section 458.329, Florida Statutes, and Florida Administrative Code Rule 64B8-9.008) as alleged the Administrative Complaint; and revoking Dr. Cruz's license to practice medicine.

DONE AND ENTERED this 15th day of April, 2004, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of April, 2004.

ENDNOTES

[1]/ The following are the legal conclusions reached in the April 18, 2003, Order:

> 1. First, it is clear that any individual may assert his or her Fifth Amendment Privilege in order to avoid being a witness against oneself in a criminal matter. It does not appear that there is any reasonable fear that any of the questions posed to Respondent in this case, if answered, would expose Respondent to criminal prosecution or

conviction, or has Respondent asserted any argument to the contrary;

2. Second, in addition to the right to assert a Fifth Amendment Privilege in order to avoid being a witness against oneself in a criminal matter, the Privilege may also be asserted in "proceedings 'penal' in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood." State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). This case is a penal proceeding, the nature of which could degrade Respondent's professional standing, professional reputation or livelihood and, therefore, Respondent can assert his Fifth Amendment Privilege in refusing to answer questions which would tend to "incriminate" him in this matter. He cannot, however, selectively assert the Privilege and answer only selective questions, which he has chosen to do here, and then, after having at least partially thwarted Petitioner's discovery efforts, expect to testify freely at the final hearing. Again, Respondent has not asserted any argument to the contrary;

3. Thirdly, the Vining decision does not support the notion that the Fifth Amendment Privilege may be asserted where a respondent fears that the answers given in one administrative proceeding or civil proceeding may lead to another proceeding of a penal nature that may tend to degrade the individual's professional standing, professional reputation or livelihood. In other words, even Respondent has asserted the Privilege because he fears that the answers he gives in this case may lead to further administrative charges, not now being pursued or contemplated by Petitioner. Vining does not extend his right to assert his Fifth Amendment Privilege to questions otherwise relevant to this matter.

Respondent may not, therefore, assert the Privilege in refusing to answer any of the questions posed to him during the March 25, 2003, portion of his deposition because of a fear that other administrative charges may be pursued against him by Petitioner; and

4. Finally, there may be a circumstance where a respondent may assert a Fifth Amendment Privilege to answer only those questions concerning "Williams-Rule" evidence, as asserted by Respondent at the final hearing, but this is not such a case. None of the questions for which Respondent asserted his Privilege can reasonably be construed to apply to Williams-Rule evidence. For example, the Administrative Complaint in this case alleges that Respondent "would enter his office, lock the door behind him, and begin to grope at Patient M.R.'s breasts and groin." He was asked the following question during his deposition to which he asserted a Fifth Amendment Privilege: "Have you ever used the lock on the door to your office?" While it is not impossible that follow up question, assuming Respondent answered "yes" to this question, could lead to questions that only relate to Williams-Rule evidence, this question does not seek to elicit anything other than a fact that is clearly in issue in this matter. While Respondent may assert his Fifth Amendment Privilege to this question, with probable sanctions for doing so being imposed, he may not due so because he believes it relates somehow to Williams-Rule evidence. While only one question has been quoted is this paragraph, the conclusion about this question applies to all of the questions for which Respondent asserted a Fifth Amendment Privilege.

[2]/ No final ruling was entered on Petitioner's Motion to Preclude Respondent's Testimony or Motion in Limine. Respondent ultimately decided not to testify at the final hearing and, therefore, the Motion was considered moot.

[3]/ Dr. Cruz is not board certified in psychiatry.

[4]/ Dr. Cruz's office at Miami Beach is located within a lower socioeconomic neighborhood. Dr. Cruz's patients generally reflect the area in which he practices.

[5]/ While under his care, Dr. Cruz prescribed a number of medications for M.R., including Eskalith, Klonopin, Xanax, Paxil, Floricet, Imitrex, Buspar, Prilosec, Flexeril, and Restoril. According to Dr. Joseph, while he considered Dr. Cruz's medical treatment of M.R. "questionable," it did not violate the standard of care proscribed by Section 458.331(1)(t), Florida Statutes:

> 3. The subject can be considered to have met the standard of care in his management of this patient from the clinical standpoint. Patients with Bipolar Disorder of mixed type may present with multiple symptoms and require various psychotropic medications. I question the justification for the (high) dosing of the benzodiazepines, but there are times when such medications are of value if judiciously used and supervised. . . .
>
> . . . .
>
> 8. The subject prescribed doses of benzodiazepines, which increase over time. He begins with Xanax 0.25mg bid and proceeds to a level of Xanax 2mg tid. This higher dose level is questionable in such a patient. The prescription of analgecis such as Toradol and Fioricet while technically not outside the standard of care are in my opinion questionable.

The evidence in this case, therefore, failed to prove that Dr. Cruz violated Section 458.331(1)(t), Florida Statutes, by his medication prescription to M.R. The evidence likewise failed to prove that M.R. was "addicted" to Xanax as suggested by the Department. M.R.'s testimony in this regard is insufficient to make such a finding.

[6]/ The evidence failed to prove whether M.R.'s room was actually monitored at any time pertinent to this matter.

[7]/ At the times relevant, it was the practice of Dr. Cruz's office to see patients on a first come, first service, basis, even though they had made an appointment. Patients who called to make an appointment for a particular day, therefore, knew they would not be guaranteed a particular time. M.R. would come to the office, sign in, and then be seen by Dr. Cruz when her name was called. This meant that the sign-in times on Dr. Cruz's appointment books do not necessarily correspond to the times when M.R. was actually seen by him.

[8]/ No identification was required for patrons who did not rent for the night. Only patrons who rented a room for the night were required to produce a driver's license, the number of which was noted on the registration card. Because Dr. Cruz rented for less than a night, he was not asked to supply anything to verify the name he used to register.

[9]/ Dr. Cruz has suggested that, given the alleged different boundaries between physicians and patients in the Hispanic community of south Florida, as compared with other areas of the State, that simply giving money to a patient in an effort to help a patient in need was not inappropriate. The evidence in this case proved, however, that the money offered by Dr. Cruz to M.R. was not simply a matter of an effort to help a patient, but part of his more intimate sexual relationship with M.R.

[10]/ The telephone which M.R. owned was a type that required her to purchase "minutes" which could then be used to make and receive telephone calls. The particular service M.R. used recorded the number called from M.R.'s phone, but at the times relevant, did not record the telephone number of any incoming calls. For an incoming telephone call, the record of M.R.'s phone recorded the time that was used up taking the incoming call and simply listed her telephone number as both the originating number and the receiving number.

[11]/ Again, providing money for M.R.'s phone was not an acceptable boundary crossing, but was an inappropriate boundary violation. Dr. Cruz gave M.R. phone money to further their sexual relationship, not out of some charitable motivation.

[12]/ M.R.'s telephone was used twice on August 16, 2001: one call was to telephone information and the other call, which

occurred between 12:36 p.m. and 12:40 p.m., was recorded by her telephone-service provider with her own telephone number as the number receiving the call and the number from which the call was originated. This is consistent with how incoming telephone calls were recorded at that time and corroborates M.R.'s testimony that she received a call from Dr. Cruz that day while at lunch.

Although the investigators did not hear who M.R. was speaking to, one of the investigators, who is fluent in Spanish, overheard M.R. say in Spanish that she would meet the person she was speaking with at the normal place, referring to the Grocery Store.

[13]/ The investigators had been instructed by M.R.'s attorney not to allow M.R. to enter the motel room with Dr. Cruz.

[14]/ Dr. Cruz offered testimony and a proffer concerning cultural differences with respect to the provision of medical care in the community of Miami, specifically the Hispanic community. The testimony and proffer were to the effect that, because of these cultural differences, patients may view their physician and the appropriate patient-physician interaction differently. This testimony and the proffer, which the Department stipulated would be the testimony of those witnesses who were not called due to the cumulative nature of their testimony, was not persuasive and has been rejected as a basis for any finding of fact contrary to the findings made in this Recommended Order.

[15]/ The evidence also failed to prove clearly and convincingly that, although Dr. Cruz increased M.R.'s prescription of Xanax between January of 1994 and May of 2001, that she became both physically and psychologically dependent on Xanax as alleged in paragraph 10 of the Administrative Complaint.

[16]/ While it is true that Dr. Joseph agreed that Dr. Cruz's medical notes did not constitute a "violation of the standard of care," the Department has alleged that Dr. Cruz's notes violate Section 458.331(1)(m), Florida Statutes, and not Section 458.331(1)(t), Florida Statutes. Dr. Cruz's argument on this point in his post-hearing submittal is, therefore, not relevant.

[17]/ In its post-hearing submittal, the Department has alleged other "facts" were proven that support the conclusion that he is guilty of the first three counts of the Administrative Complaint. Those facts, however, not having been specifically

alleged in support of the charges against Dr. Cruz, cannot form the basis for any finding of a disciplinable violation. See, e.g., Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); and Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2nd DCA 1984).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.

A 3

DEC 3 0 2002

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,	)	
	)	
PETITIONER,	)	
	)	
vs.	)	CASE NO. 2001-16808
	)	
JOSE ANIBAL CRUZ, M.D.,	)	
	)	
RESPONDENT.	)	
	)	

ADMINISTRATIVE COMPLAINT

COMES NOW the Petitioner, Department of Health, hereinafter referred to as "Petitioner," and files this Administrative Complaint before the Board of Medicine against Jose Anibal Cruz, M.D., hereinafter referred to as "Respondent," and alleges:

1. Effective July 1, 1997, Petitioner is the state agency charged with regulating the practice of medicine pursuant to Section 20.43, Florida Statutes; Chapter 456, Florida Statutes; and Chapter 458, Florida Statutes.

2. Respondent is and has been at all times material hereto a licensed physician in the state of Florida, having been issued license number ME 0025019. Respondent's last known address is 1540 Washington Avenue, Miami Beach, Florida 33139.

3. Respondent is not board-certified, but specializes in general psychiatry.

4. In or about January of 1994, Patient M.R., a then 31 year-old female, presented to the Respondent complaining of symptoms of manic depression. The Respondent diagnosed her with manic depressive illness in remission. At that time, the

Respondent prescribed Eskalith SR 450 and Xanax.

5. Eskalith contains lithium carbonate and is used in the treatment of manic episodes of manic-depressive illness. Xanax is indicated for the treatment of anxiety disorder.

6. The Respondent continued to treat Patient M.R. for her manic depression from January of 1994, until August of 2001. During the time that Patient M.R. was under his care, the Respondent treated her in his office at least once a month.

7. During that six year period of time, the Respondent prescribed a number of other medications for Patient M.R., including the following: Lithium, Klonipin, Prozac, Restoril, Paxil, Buspar, Xanax, Fioricet, Prilosec, Flexeril, and Imitrex.

8. Beginning in 1997, the Respondent started to make sexual advances toward Patient M.R. in the way of hugging her, kissing her, and asking Patient M.R. for naked pictures of herself.

9. The Respondent's inappropriate behavior escalated to demanding that Patient M.R. perform oral sex on him in his office. Patient M.R. performed oral sex on the Respondent because she was afraid of him and because he refused to refill her prescriptions unless she did what he told her to do.

10. From January of 1994 to May of 2001, the Respondent increased Patient M.R.'s prescription of Xanax from 0.25 mg, once a day, to 2.0 mg, three times a day. Patients can become both physically and psychologically dependent on Xanax, experiencing withdrawal symptoms similar to those associated with sedatives and alcohol.

11. During her psychiatric sessions with the Respondent, the Respondent would enter his office, lock the door behind him, and begin to grope at Patient M.R.'s breasts and groin.

12. While under the Respondent's care, Patient M.R. was hospitalized on six occasions for symptoms related to her depression. On each occasion, the Respondent was the admitting and attending physician. On several occasions at the hospital, the Respondent would come into Patient M.R.'s room, close the door and masturbate in her presence. He also asked her on a number of occasions to participate in a threesome so that he could observe her in a sexual liaison with another female, to which Patient M.R. declined.

13. In October of 1999, Patient M.R. asked the Respondent for an HIV test, as she was concerned that she might have acquired the virus from performing oral sex on the Respondent. The Respondent ordered the test and Patient M.R. was tested for HIV. The negative results were reported by the Scientific Medical Laboratory, Inc., in Miami, Florida.

14. In or about 1999, following the HIV test, the Respondent started taking Patient M.R. to the Starlight East Motel in Miami, Florida, to have sexual intercourse with her. His routine on those occasions was to schedule Patient M.R. as the last appointment of the day and then take her to the motel. At the motel, he would pay for the room as Patient M.R. sat in his car. The Respondent would then go into the hotel room and Patient M.R. would join him there after five to ten minutes.

15. In or about August of 2001, Patient M.R. ceased treating with the

Respondent.

16. Respondent's notations throughout Patient M.R.'s medical records are illegible, cursory, and generic. He makes no reference to Patient M.R.'s current life issues, psychodynamics or the effects of the medications which he has prescribed for her.

17. Section 458.329, Florida Statutes, states that the physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of medicine means violation of the physician-patient relationship through which the physician uses said relationship to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of medicine is prohibited.

18. Rule 64B8-9.008, Florida Administrative Code, states in part that sexual contact with a patient is sexual misconduct, which includes verbal or physical behavior which may reasonably be interpreted as romantic involvement with a patient regardless of whether such involvement occurs in the professional setting or outside of it, may reasonably be interpreted as intended for the sexual arousal or gratification of the physician, the patient or any third party or may be reasonably interpreted as being sexual.

COUNT ONE-EXERCISING INFLUENCE IN PATIENT/PHYSICIAN RELATIONSHIP

19. Petitioner realleges and incorporates paragraphs one (1) through eighteen (18), as if fully set forth herein this Count One.

20. Respondent exercised influence within a patient-physician relationship for purposes of engaging a patient in sexual activity, in that Respondent did one or more of the following:

a. Demanded oral sex from Patient M.R. under threat of withholding her prescriptions;

b. Engaged in sexual intercourse with Patient M.R.;

c. Masturbated in Patient M.R.'s presence;

d. Invited Patient M.R. to engage in sexual relations with him and a third party;

e. Asked for naked photographs of Patient M.R.; and/or

f. Groped Patient M.R.'s breasts and groin in his office during sessions.

21. Based on the foregoing, Respondent violated Section 458.331(1)(j), Florida Statutes, by exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.

COUNT TWO-SEXUAL MISCONDUCT

22. Petitioner realleges and incorporates paragraphs one (1) through eighteen (18), as if fully set forth herein this Count Two.

23. Respondent violated the express prohibition against sexual misconduct stated in Section 458.329, Florida Statutes, and Rule 64B-9.008, Florida Administrative Code, in doing one or more of the following:

a. Demanding oral sex from Patient M.R. under threat of withholding her prescriptions;

b. Engaging in sexual intercourse with Patient M.R.;

c. Masturbating in Patient M.R.'s presence;

d. Inviting Patient M.R. to engage in sexual relations with him and a third party;

e. Asking for naked photographs of Patient M.R.; and/or

f. Groping Patient M.R.'s breasts and groin in his office during sessions.

24. Based on the foregoing, Respondent violated Section 458.331(1)(x), Florida Statutes, by violating any provision of Chapter 458, Florida Statutes, a rule of the board or department, or a lawful order of the board or department previously entered in a disciplinary hearing or failing to comply with a lawfully issued subpoena of the department.

COUNT THREE-FAILURE TO MEET STANDARD OF CARE

25. Petitioner realleges and incorporates paragraphs one (1) through eighteen (18), as if fully set forth herein this Count Three.

26. Respondent failed to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being

acceptable under similar conditions and circumstances in that the Respondent engaged in one or more of the following with Patient M.R. during the time that he was treating her for depression and bipolar disorder:

a. Demanding oral sex from Patient M.R. under threat of withholding her prescriptions;

b. Engaging in sexual intercourse with Patient M.R.;

c. Masturbating in Patient M.R.'s presence;

d. Inviting Patient M.R. to engage in sexual relations with him and a third party;

e. Asking for naked photographs of Patient M.R.; and/or

f. Groping Patient M.R.'s breasts and groin in his office during sessions.

27. Based on the foregoing, Respondent has violated Section 458.331(1)(t), Florida Statutes, by failing to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

COUNT FOUR-INADEQUATE MEDICAL RECORDS

28. Petitioner realleges and incorporates paragraphs one (1) through eighteen (18), as if fully set forth herein this Count Four.

29. Respondent failed to keep written medical records justifying the course of treatment of Patient M.R., in that Respondent's notes are partially illegible and/or are cursory and generic.

30. Based on the foregoing, Respondent violated Section 458.331(1)(m), Florida Statutes, by failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

COSTS

31. Petitioner has incurred costs related to the investigation and prosecution of this matter.

32. Pursuant to Section 456.072(4), Florida Statutes, the Board shall assess costs related to the investigation and prosecution of a disciplinary matter on a respondent in addition to any other discipline imposed.

WHEREFORE, the Petitioner respectfully requests that the Board of Medicine enter an order imposing one or more of the following penalties, in addition to the assessment of the costs related to the investigation and prosecution of this case as provided for in Section 456.072(4), Florida Statutes (2001):

a) Revocation of Respondent's license;

b) Suspension of Respondent's license for an appropriate period of time;

d) Imposition of an administrative fine;

e) Issuance of a reprimand;

f) Placement of the Respondent on probation;

g) Administrative costs, and/or any other relief that the Board deems appropriate.

SIGNED this 30th **day of** December, **2002**

John O. Agwunobi, M.D., M.B.A.
Secretary, Department of Health

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
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PCP: December 26, 2002
PCP Members: George El-Bahri, Laura Davis, John Beche

Jose Anibal Cruz – 2001-16808

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

JOSE ANIBAL CRUZ, M.D.,

Respondent.

DOH CASE NO.: 2001-16808
Related to:
DOAH Case No.: 2003-0056PL

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Comes Now, the Respondent, JOSE ANIBAL CRUZ, M.D., through his undersigned counsel, and pursuant to Section 120.57, Florida Statutes and Uniform Rule 28-106.217, Florida Administrative Code files his written Exceptions to the Recommend Order of the Administrative Law Judge issued on April 15, 2004 as follows:

PRELIMINARY STATEMENT

Respondent is a licensed psychiatrist in the State of Florida and has been licensed since 1975. He has no prior discipline after more than 30 years in practice including his time in training.

Respondent voluntarily restricted his license in December 2001 and remains in full compliance with the terms of the voluntary restriction. Copies of the Voluntary Restriction and monthly monitoring reports through the date of the January 28, 2004 formal hearing are included in the record before this Board.

During the time this case has been pending, Respondent has been permitted to continue to practice medicine under the terms of the voluntary restriction.

Because the findings of fact of the Recommended Order issued by the Administrative Law Judge is, in part, based on credibility determinations, Respondent recognizes under Section 120.57, Florida Statutes that this Board cannot overturn the findings of the Administrative Law Judge unless those findings are not supported by competent substantial evidence.

Respondent asserts that certain findings of the Administrative Law Judge are not based on competent substantial evidence in the record and that the fairness of the proceedings below were tainted by the conduct of the Petitioner to the prejudice of the Respondent.

REQUIREMENTS OF CHAPTER 120, FLORIDA STATUTES

In considering the recommended order and the recommendations for penalty including the issues of what costs[1], if any to impose, the Board of Medicine is confined solely to the record established at the formal hearing. Ong v. Department of Professional Regulation, 565 So.2d 1384, 1387 (Fla. 5th DCA 1990); School Board of Leon County v. Weaver, 556 So.2d 443, 445 (Fla. 1st DCA 1990); Linkous v. Department of Professional Regulation, 417 So.2d 802, 803 (Fla. 5th DCA 1982). The Board of Medicine is not authorized to receive additional evidence other than that already presented and evaluated by the Administrative Law Judge. Ong; School Board of Leon County. Nor can the Board discipline a licensee for matters not charged in the Administrative Complaint or on the basis of evidence erroneously admitted. Ghani v. Department of Health, 714 So.2d 1113 (Fla. 1st DCA 1998); Kunen v. Department of Business and Professional Regulation, 642 So.2d 60 (Fla. 3d DCA 1994).

[1] This case arose in 2001 and before the recent changes to Section 456.072(4), Florida Statutes, effective September 15, 2003. Administrative Complaint was filed December 30, 2002.

Additionally, in license revocation proceedings, strict construction of statutes and specificity of the charges is required. Davis v. Department of Professional Regulation, 457 So.2d 1074, 1076-1078 (Fla. 1st DCA 1984); Lewis v. Criminal Justice Standards and Training Commission, 462 So.2d 528, 530 (Fla. 1st DCA 1985); Hunter v. Department of Professional Regulation, 458 So.2d 842, 844 (Fla. 2d DCA 1984). If there is any doubt, it is resolved in favor of the Respondent and against the regulatory agency. Id.

In determining whether to adopt the recommended order of the Administrative Law Judge, under Section 120.57(1)(l), Florida Statutes, the Board of Medicine "...may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the [Board] must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

The [Board] may not reject or modify the findings of fact unless the [it] first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law...."

COMPETENT SUBSTANTIAL EVIDENCE

Competent substantial evidence is defined as that evidence supporting an ultimate finding which is sufficiently relevant and material such that a reasonable mind would accept it as adequate to support the conclusion reached. De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). To help guide the Board in what constitutes competent substantial evidence, the First District Court of Appeal has stated that:

> "If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's findings unless there is no competent substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion." Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281-1282 (Fla. 1st DCA 1985); Gross v. Department of Health, 819 So.2d 997, 1000-1001 (Fla. 1st DCA 2002).

However, where as here, there is no evidence in the record to support some of the factual findings made by the Administrative Law Judge or the findings are unclear, it is appropriate for the Board of Medicine to either reject those findings as not supported by competent substantial evidence in the record or in this case, remand the case to the Administrative Law Judge for reconsideration and clarification of the record in light of the rejected or unclear findings.

RESPONDENT'S GENERAL EXCEPTIONS[2]

Respondent takes exception to the Administrative Law Judge's consideration of testimony and evidence outside of the express charges of the Administrative Complaint. Said testimony and evidence was not relevant to the express allegations of the Administrative Complaint and should have been rejected as irrelevant. Ghani

Additionally, Respondent takes exception to any findings by the Administrative Law Judge related to incidents or events of wrongful conduct alleged to have been committed by Respondent prior to 1997. Said events were outside of the express charges of the Administrative Complaint.

Respondent takes specific exception to findings of fact 10, 11, 12, 13 and 14 found at page 9 of the recommended order to the extent that the Administrative Law Judge suggests the wrongful conduct occurred before 1997. To the extent that the same deficiency might be present in **finding of fact 21** found at page 11 of the recommended order, Respondent takes exception as well.

Paragraph 8 of the Administrative Complaint filed on December 30, 2002 sets forth the time frame for when the alleged wrongful conduct began to occur. It stated the following:

> 8. Beginning in 1997, the Respondent started to make sexual advances toward Patient M.R. in the way of hugging her, kissing her, and asking Patient M.R. for naked pictures of herself.

Paragraph 9 of the Administrative Complaint filed on December 30, 2002 sets forth the manner in which there was escalation of the behavior after 1997. It stated the following:

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[2] References to the record at formal hearing will be designated as "Jx" for Joint Exhibits; "Px" for Petitioner's Exbibits; and "Rx" for Respondent's Exhibits followed by the page number upon

9. The Respondent's inappropriate behavior escalated to demanding that Patient M.R. perform oral sex on him in his office. Patient M.R. performed oral sex on the Respondent because she was afraid of him and because he refused to refill her prescriptions unless she did what he told her to do.

At no time prior to or during the formal hearing held April 10-11, 2003, including the remainder of the hearing held January 28, 2004, did the Department of Health seek to revise, amend or alter the allegations made in the Administrative Complaint. It cannot do so now.

Finding of Fact Number 10 found at page 9 of the recommended order falls outside of the express charges of the Administrative Complaint and should be stricken. Ghani, Maddox v. Department of Professional Regulation, 592 So.2d 717 (Fla. 1st DCA 1991), review denied, 601 So.2d 552 (Fla. 1992).

Findings of Fact Number 11, 12, 13 and 14 found at page 9 of the recommended order are incomplete and do not reference the specific time period in which the wrongful conduct occurred. However, in context of the recommended order, it appears the Administrative Law Judge is referencing wrongful conduct occurring prior to 1997 and therefore, they should be stricken or at the very least, the matter should be remanded to the Administrative Law Judge for additional supplemental findings concerning the time period in which the referenced conduct occurred. Ghani, Maddox. To the extent the same deficiency is present in finding of fact number 21, this Board should remand the matter to the Administrative Law Judge for clarification.

Under the circumstances, it is appropriate for this Board to strike the referenced paragraphs and/or remand this matter to the Administrative Law Judge for reconsideration of the record.

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which the reference relates, as may be appropriate.

Respondent also takes exception to the manner in which Petitioner prosecuted this matter. Specifically, Respondent takes exception to Petitioner's misleading responses in discovery and its withholding of certain material from the Respondent during discovery - a videotape - and Petitioner's attempt to surprise the Respondent with the same material during the course of his March 5, 2003 deposition.

Petitioner's conduct was outrageous and prejudiced the Respondent and the fairness of the proceedings.

That the fairness of the proceedings was impacted is evident by the Administrative Law Judge concerns over Respondent's objections to the questions posed at his follow-up March 25, 2003 deposition. (See discussion of the Administrative Law Judge at pages 2 to 5 of the recommended order and endnotes 1 and 2 found at pages 32 to 33 of the recommended order to which Respondent takes exception for the reasons expressed in his general exceptions).

Respondent's objections to the questions posed at his deposition of March 25, 2003 were necessitated by Petitioner's attempted surprise use of materials not previously disclosed and by Petitioner's efforts to inquire into matters not charged in this proceeding. See Respondent's Emergency Motion for Protective Order, Motion to Compel, Motion in Limine and Request for Sanctions filed with the Division of Administrative Hearings on March 24, 2003 and T. Vol. I April 10, 2003; pgs. 3 - 9. The questions posed by the Petitioner at the March 25, 2003 deposition, in part, concerned irrelevant matters not charged in the Administrative Complaint, and they concerned a matter not properly noticed as "Williams Rule[3]" but for which Respondent could be

[3] See requirements of Section 120.57(1)(d), Florida Statutes. Petitioner never gave Notice under this Section of its intent to use any similar fact evidence.

subject to prosecution in other proceedings - implicating Vining v. Florida Real Estate Commission, 281 So.2d 487 (Fla. 1973) and Kozerowitz v. Florida Real Estate Commission, 289 So.2d 391 (Fla. 1974). The questions posed by Petitioner at the March 25, 2003 follow-up deposition, in part, related to the "last link" in the prosecution of that other uncharged matter. Respondent was unable to defend the matter at formal hearing due to Petitioner's willful non-compliance with the discovery rules and their subsequent blocks in Respondent's efforts to seek further discovery after the withheld materials were made known to the Respondent.

Nonetheless, following his unsuccessful appeal of the Administrative Law Judge's April 18, 2003 Order, Respondent complied with the Administrative Law Judge's April 18, 2003 Order. He answered the questions posed by the Petitioner on December 18, 2003 and before the formal hearing resumed on January 28, 2004.

The Administrative Law Judge did not discuss Respondent's compliance with the April 18, 2003 Order nor his answers to the questions, which were given at his subsequent deposition conducted on December 18, 2003. This deposition was conducted after the Third District Court of Appeal denied Respondent's request for review on September 26, 2003 but was not offered into evidence at the formal hearing. Ultimately, Respondent did not testify at the formal hearing rendering the issue of whether he should be permitted to testify moot. However, Petitioner's outrageous conduct in failing to disclose material and then attempting to use that material to surprise the Respondent should not be condoned and this matter should be remanded for a new formal hearing.

RESPONDENT'S EXCEPTIONS TO FINDINGS OF FACT

Respondent takes exception to the following findings of fact and requests that they be stricken from the recommended order:

Exception 1. Page 9, paragraph 9 of the Recommended Order, that portion of the sentence stating: "...from January 1994 until August 2001, seeing her at least once a month for pharmacologic management..."

There is no competent evidence to support the Administrative Law Judge's conclusion that M.R. saw the Respondent at a frequency of once a month during the entire seven (7) years period.

Respondent's medical records for M.R. admitted as Joint Exhibits 1 and 2 show M.R. visited the Respondent at his offices or requested a prescription from Respondent on only the following dates:

1994	1995	1996	1997	1998	1999	2000	2001
01/01/94						01/10/00	01/15/01
02/03/94	02/13/95			02/16/98		02/28/00	02/21/01
03/01/94	03/13/95	03/04/96		03/09/98		03/22/00	
03/08/94							
04/21/94						04/26/00	04/02/01
05/16/94			05/12/97			05/10/00	05/30/01
			05/27/97				
06/20/94			06/10/97		06/16/99	06/12/00	06/27/01
					06/30/99		
07/18/94				07/06/98		07/10/00	07/16/01
						07/31/00	
08/15/94					08/04/99	08/09/00	08/16/01
						08/30/00	
					09/08/99	09/11/00	
		10/22/96	10/13/97		10/13/99	10/23/00	
					11/10/99		
					12/15/99		

Additionally, M.R. testified at the formal hearing that she was not under the Respondent's care continuously from January 1994 to August 2001. She specifically indicated that she left the Respondent's care and then resumed his care after she returned from New Jersey. "...in '90 something, because there was a gap there where I left to New

Jersey for a year..." (T. Vol. I. April 10, 2003; pgs. 64, 100). M.R. could not remember when she left for New Jersey nor could she remember when she returned from New Jersey. (T. Vol. I April 10, 2003; pgs. 64, 100). Throughout her testimony, she indicated that she had a poor memory and could not remember dates. (T. Vol. I April 10, 2003; pgs. 59-164). Given M.R.'s acknowledged poor memory and the contradictory information in the medical records admitted at the formal hearing, M.R.'s testimony could not form the basis for clear and convincing evidence to support the violations alleged. Hasbun v. Department of Health, 701 So.2d 1235 (Fla. 3d DCA 1997); Hammesfar v. Department of Health, _So2d_, 2004 WL 592159 (Fla. 2d DCA March 26, 2004).

Exception 2. Page 9, paragraph 15 of the Recommended Order, that portion of the sentence stating: "On five occasions[4], Dr. Cruz hospitalized M.R. in the psychiatric unit at Cedars Medical Center..."

Although there is competent evidence to support the Administrative Law Judge's conclusion that Respondent admitted M.R. to Cedars on five occasions, the number of admissions by M.R. to Cedars after 1997 was at least six and M.R. testified that the number was actually greater.

The only direct evidence offered by Petitioner to support the number of admissions by M.R. to Cedars Medical Center was Petitioner's Exhibits 1a through 1d. These exhibits specifically reference six admissions by M.R. to Cedars Medical Center - (1) January 3, 1998 to January 9, 1998 - Admitting Physician Dr. Magaly Alonso/Attending Dr. Cruz; (2) August 16 to August 20, 1998 admission - Admitting/Attending Physician Dr. Cruz;

[4] Petitioner specifically alleged at paragraph 12 of the Administrative Complaint filed December 30, 2002 that M.R. was hospitalized on six occasions and that the Respondent was the admitting and attending physician for each admission. The records admitted show that Respondent was both the attending and admitting physician for all admissions but the January 1998 admission.

(3) October 17, 1999 to October 28, 1999 admission - Admitting/Attending Physician Dr. Cruz; (4) May 26, 2000 to June 1, 2000 admission - Admitting/Attending Physician Dr. Cruz ; (5) June 4, 2000 to June 8, 2000 admission - Admitting/Attending Physician Dr. Cruz; and (6) August 18, 2000 to August 25, 2000 admission - Admitting/Attending Physician Dr. Cruz. (See T. Vol. I April 10, 2003 pg. 44). Petitioner's Exhibit 1b also contains records from Baptist Hospital for August 20, 2001 (circled numbered pages 575-596) but these records were not relevant to the express charges of the Administrative Complaint, post-dated M.R.'s care with the Respondent, and concerned care rendered by others not the Respondent. It should not have been included with the exhibits admitted at the formal hearing. The same is true for Petitioner's Exhibit 1d as it also contains records from Mercy Hospital for August 20, 2001 to August 25, 2001 (circled numbered pages 1146-1246) but these records were not relevant to the express charges of the Administrative Complaint, post-dated M.R.'s care with the Respondent, and concerned care rendered by others not the Respondent. It should not have been included with the exhibits admitted at the formal hearing. As evidenced by both sets of records, Respondent was not the admitting or attending physician when M.R. was admitted to Baptist or Mercy Hospital.

Also, when asked about the number of admissions occurring during the time M.R. was under the care of the Respondent, M.R. could only state that she was admitted to the hospital on a number of occasions without recalling the specific number. Her express statement when asked to quantify the number of admissions was "A lot." (T. Vol. I April 10, 2003; pg. 66, line 16). When asked whether this was more than five, she testified that it was greater than five occasions. (T. Vol. I April 10, 2003; pg. 66). Later, when asked,

M.R. testified that during the time she was under Respondent's care, she was admitted to the hospital almost every two months and that this frequency of admissions was during the entire time of her care by Respondent. (T. Vol. I April 10, 2003, pg. 119). Only the records for six admissions were placed in evidence contradicting the testimony given by M.R. that she was admitted almost every two months during the entire time she was under Respondent's care. (T. Vol. I April 10, 2003; pg. 119).

Exception 3. Page 10, paragraph 16, endnote 6 at page 36 stating: "The evidence failed to prove whether M.R.'s room was actually monitored at any time pertinent to this matter."

There is no competent evidence to support this conclusion by the Administrative Law Judge. In fact, the evidence was to the contrary[5].

The excerpted hospital records for Cedars Medical Center admitted into evidence as Petitioner's Exhibits 1a - 1d contain logs completed by the personnel of Cedars Medical Center showing that they conducted continuous visual monitoring checks of M.R. every 15 minutes from the time she was admitted to the time she was discharged. These monitoring checks including visual monitoring of M.R. from 12:45 p.m. to 2:00 p.m. every 15 minutes during the dates of her admission[6].

The monitoring logs are entitled "Psychiatric Intensive Watch Sheet" and they are time, dated, and initialed by the staff of Cedars and coded as to the location and behavior

[5] The reference in the endnote is not specific and in context, it could also relate to the system of audio monitoring available at the nurse's station at Cedars Medical Center. There was no evidence offered on whether or not M.R.'s room was also monitored during the time pertinent to this case through use of the audio system. However, the Administrative Law Judge's statement is unclear and should be remanded for clarification if not stricken.

[6] M.R. testified that the time Respondent would ask her to be in the shower was 1:00 p.m. and that she would stay there until he arrived. (T. Vol. I April 10, 2003;pg. 117). She was never noted by the staff to be in the shower between 12:45 p.m. and 1:00 p.m. on any date of admission.

of M.R. at the time of each monitoring check. The logs represent continuous monitoring of Patient M.R. by the Cedars medical staff every fifteen minutes during her inpatient hospitalizations. The logs are found in the Petitioner's Exhibits 1a through 1d at the circled numbered pages 309 to 315 for the January 3, 1998 to January 9, 1998 admission; circled numbered pages 159 to 163 for the August 16 to August 20, 1998 admission; circled numbered pages 371 to 379 and 381 to 382 for the October 17, 1999 to October 28, 1999 admission; circled numbered pages 666 to 672 for the May 26, 2000 to June 1, 2000 admission; circled numbered pages 920 to 924 for the June 4 to June 8, 2000 admission; and circled numbered pages 966 to 973 for the August 18, 2000 to August 25, 2000 admission.

These logs show that Patient M.R. was generally either in her room at 1:00 p.m. each day of admission or was at the nursing station or one of the halls/dinning halls and occasionally, she would be in the treatment/therapy room or on at least one occasion, the smoking room. With the exception of the date of August 16, 1998 at 1:30 p.m. (P1a; circled numbered page 163), M.R. was not noted by the Cedars Medical Staff to have ever been in her bathroom at or around 1:00 p.m. during any admission. See logs at pages previously referenced. Even with this single exception, M.R. was out of the bathroom by the next staff visit at 1:45 p.m. (P1a; circled numbered page 163),

Additionally, Petitioner's Exhibits 1a through 1d contain numerous entries by the healthcare providers attending to Patient M.R. indicating continuous interaction with M.R. throughout her hospitalizations with said interactions also time, dated, and initialed as to when events and interactions with M.R. occurred.

Exception 4. Page 11, paragraph 24 of the Recommended Order, that part stating: "On those occasions when Dr. Cruz took M.R. to the Starlite, he would ...register for a room, using a fictitious name, and then park his car nearer the room."

There is no competent evidence that Dr. Cruz ever registered at the Starlite, using a fictitious name, or moved his car after registering to be nearer the room.

M.R. testified that the routine used by Dr. Cruz for each time they went to the Starlite was the same except on the last time they went, August 17, 2001. (T. Vol. I pg. 78-80; 102-105). M.R. indicated that "He would drive, go to the office, park the car, and tell me not to get out of the car. Then he would come back with the key. Then I would get out of the car with him, and we'd go to the room together." (T. Vol. I April 10, 2003; pg. 102) She went on to say that Dr. Cruz always used this routine when they went to the Starlite. (T. Vol. I April 10, 2003; pg. 102). She said it never varied except for August 17, 2001. (T. Vol. I April 10, 2003; pgs. 102-103). Then she backed off her statement slightly and indicated at first, it would always be the same parking spot where he parked his car each time they went to the motel and then a few moments later, she changed her testimony, that he would sometimes park in one of the same two spaces. (T. Vol. I April 10, 2003; pg. 103-104). M.R. did not testify that Dr. Cruz ever registered using a fictitious name or after returning from the office, he would move his car to be near the parking space. In fact, she testified that since it was not his routine, his backing the car out of the space on August 17, 2001 surprised her. (T. Vol. I April 10, 2003; pg. 104-105). According to M.R., Dr. Cruz was already parked in one of the two spaces he used when they would routinely go to the motel. (T. Vol. I April 10, 2003; pg. 104-105).

Ms. Martha Garcia, the motel operator, testified that persons renting a room for greater than 6 hours (what she defined as equaling a full day) were required to provide identification but that in the past, rather than require identification, they would record the person's car tag number on the registration card. (T. Vol I April 10, 2003; pg. 271, 276, 277).

There was no testimony by any witness that Dr. Cruz registered at the motel under a fictitious name or if he did register, failed to provide identification to the motel clerk, or rent a room for less than 6 hours at a time during any of the occasions he allegedly took M.R. to the motel. None of the investigators who conducted the video surveillance on August 17, 2001 could state that Dr. Cruz registered at the motel, paid any amount for the room, registered under a fictitious name, failed to provide the motel clerk with identification, or rented a room for less than 6 hours. (See J3; P6 at pg. 14; T. Vol. I April 10. 2003; pgs. 166-263). At most, the witnesses could state that Dr. Cruz went to the motel office and then returned to his car. There is no registration in card admitted at the formal hearing that bears Respondent's name or any other identifying information. (P5 & R5). There was no registration card admitted at the formal hearing for August 17, 2001 bearing the Respondent's name or any name for the time period referenced on the videotapes of the surveillance. (P4; P5; P6; R5).

Exception 5. Page 11, paragraph 24, endnote 8 found at page 36 of the Recommended Order, that part stating: "...Because Dr. Cruz rented for less than a night, he was not asked to supply anything to verify the name he used to register."

There is no competent evidence that Dr. Cruz rented for less than a night on August 17, 2001 or for any other period of time. Nor was there any competent evidence that

assuming Dr. Cruz did register, he was not asked to supply anything to verify the name he used to register. See discussion with respect to Exception Number 4 above.

Exception 6. Page 13, paragraph 31, endnote 10 found at page 36 of the Recommended Order, that part stating: "....For an incoming telephone call, the record of M.R.'s phone recorded the time that was used up taking the incoming call and simply listed her telephone number as both the originating number and the receiving number."

This reference is to the testimony of Herb Graner, a representative of Verizon. Mr. Graner testified that at the time, for prepaid cellular phones, Verizon did not have the ability to track incoming phone calls. (T. Vol. I April 10, 2003; pgs. 55-57). Further, that incoming phone calls would be identified on the owner's bill with the notation "incoming" on their bill. (T. Vol. I April 10, 2003; pg. 56). If the originating number and recipient number were the same on the bill, it was another way to check voice mail "or it could be an incoming call." (T. Vol. I April 10, 2003; pg. 56-57). Mr. Graner did not testify that the only explanation for the originating number and recipient number being recorded as the same number was that the phone received an incoming call.

Additionally, M.R. testified that her cellular number was (786-423-0131[7]) and in reviewing the Verizon records, "And this 786-423 – that's me getting my messages, again...." (T. Vol. I April 10, 2003; pg. 138).

Therefore, there is not competent substantial evidence to support this finding by the Administrative Law Judge.

[7] M.R. also testified that at the time of the formal hearing, she had thrown out the phone and that the number was no longer hers. (T. Vol. I April 10, 2003; pg. 135).

Additionally, M.R. testified that within a few minutes of activating her phone, she received the call from the Respondent. That this occurred while she was in the car with James Wright and Luis Villa. (T. Vol. I April 10, 2003; pg. 75-76). In her words, "When I went to the car of Jim Wright, right away, he called. Jim Wright heard him and everything." (T. Vol. I April 10, 2003; pg. 75). She further went on to say they went to Denny's after she got the call. (T. Vol. I April 10, 2003; pg. 76-77). James Wright testified that M.R. received a call while she was in his car and before they got to the Denny's for lunch. He also indicated that Luis Villa was with them in the car. (T. Vol. I April 10, 2003; pg. 214). He did not remember M.R. receiving any calls while they were at the Denny's. (T. Vol. I April 10, 2003; pg. 214). Luis Villa thought the call occurred while they were at the Denny's during lunch. (T. Vol. I April 10, 2003; pg. 222). He also indicated that he caught up with M.R. at the Radio Shack about 7 minutes after she left Dr. Cruz's office - she had left his office at about 11:45 a.m. on August 16, 2001. (J3 pgs. 36-37). He also recalled that M.R.'s telephone call occurred while they were at the Denny's but that she could have made it up as to whom she was speaking. Nonetheless, he believed she was speaking to someone. (J3 pgs. 37-38). He could not recall if she received a phone call or if she placed the call only that she had used it after it was allegedly reactivated. (J3 pgs. 17-18).

Exception 7. Page 13, paragraph 33 of the Recommended Order stating: "M.R. and the investigator left the store and went to lunch, where they were joined by the second investigator. While at lunch, Dr. Cruz called M.R. on her cellular phone and told her that he would pick her up at the Grocery Store the following day, August 17, 2001."

There is no competent evidence that M.R. and the investigator whom she met at the Radio Shack went to lunch where they were joined by the second investigator. Additionally, other than Luis Villa's unclear testimony as to whether M.R. made a call or received a call while they were at lunch, there is no testimony that Dr. Cruz called M.R. while they were at the Denny's.

The testimony of the witnesses were contrary to these findings.

See discussion with respect to Exception 6 above and also, please note that each witness, M.R., James Wright, Luis Villa, and Oscar Santa Maria, testified that M.R. left the store and got into James Wright's car along with Luis Villa and that Oscar Santa Maria, the third investigator joined them for lunch at the Denny's. (J3 pgs. 16-18, 35-38; P6 pg. 10; T. Vol. I April 10, 2003; pgs. 75-77, 92-98, 214).

Exception 8. Page 13, paragraph 33, endnote 12, that part found on page 37 of the Recommended Order stating: "This is consistent with how incoming telephone calls were recorded at that time and corroborates M.R.'s testimony that she received a call from Dr. Cruz that while at lunch."

There is no competent substantial evidence to support this finding by the Administrative Law Judge.

See discussion for Exceptions 6 and 7 above.

Exception 9. Page 13, paragraph 33, endnote 12, that part found on page 37 of the Recommended Order stating: "...one of the investigators, who is fluent in Spanish, overheard M.R. say in Spanish that she would meet the person she was speaking with at the normal place, referring to the Grocery Store."

There is not competent evidence to support this finding by the Administrative Law Judge.

Luis Villa, the investigator who overheard the call, testified that "She was talking to the person on the phone. I didn't know who it was at first, and basically she was talking in Spanish and she was talking to him, she said to him - - she said to him 'I'll meet you at the same place' or words to that effect, or 'Okay, not today.' That was about it." (J3 pg. 17-18). James Wight testified that he did not speak Spanish and could only understand that M.R. was having a conversation. (T. Vol. I April 10, 2003; pg. 177). It was after the conversation that according to James Wright, M.R. said it was Dr. Cruz and that he was going to meet her at the Winn Dixie the next day. (T. Vol. I April 10, 2003; pg. 177).

Exception 10. Page 18, paragraph 46 of the Recommended Order, that part stating: "...and caused her emotional distress, nightmares, sleeplessness, confusion, and depression."

There is no competent evidence to support this finding by the Administrative Law Judge.

While Respondent does not dispute that sexual misconduct with a patient can cause the harm listed by the Administrative Law Judge[8], there was no evidence presented that M.R. suffered emotional distress, nightmares, sleeplessness, confusion, and depression as a direct result of the wrongful conduct found by the Administrative Law Judge.

Dr. George Joseph did not testify that the symptoms M.R. experienced were caused by the wrongful conduct found by the Administrative Law Judge. He actually noted that the stressors in M.R.'s life and her manic-depressive (Bipolar) disorder could cause her

symptoms including the requirement for her to be hospitalized outside of any allegation of sexual misconduct. (Deposition testimony of Dr. Joseph January 12, 2004, P7, pgs. 19-20, 29-32).

Exception 11. Page 19, paragraph 50 and endnote 16 found at page 37 of the Recommended Order to the extent that the Administrative Law Judge suggests the Respondent violated Section 458.331(1)(m), Florida Statutes and that the issue of whether a physician violated the standard of care the care provided is not relevant to whether medical records justified the care.

The review of this matter by Dr. Joseph was retrospective and involved only a review of medical records and other information furnished to him by the Department of Health. (P7 & R8). Dr. Joseph concluded that as far as Respondent's medication management and care of M.R.'s bipolar condition, Respondent did not violate the standard of care. (P7 & R8) He had no opinion on whether Respondent committed the wrongful conduct. (P7 & R8). For Dr. Joseph to conclude that Respondent did not violate the standard of care, from review of the records, which he noted were partially illegible and cursory, Dr. Joseph by necessity had to conclude that the medical records justified the care rendered by Dr. Cruz; i.e., they conformed to the standard of care. (R8 pg. 46-47). Therefore, no violation of Section 458.331(1)(m), Florida Statutes was proven other than to show that they were partially illegible and cursory. There was no testimony that the records by being partially illegible and/or cursory was a violation of Section 458.331(1)(m), Florida Statutes.

Exception 12. Page 28, paragraph 69 of the Recommended Order stating: "Based upon the testimony of Dr. Joseph, this charge has also been proved."

[8] See deposition testimony of Dr. Joseph January 12, 2004, P7, pgs. 19-20, 29-32.

Although Dr. Joseph did find Respondent's notes partially illegible and cursory, he never concluded that the Respondent's medical records failed to justify the care he rendered to M.R. His testimony was that Respondent's care of M.R.'s bipolar condition and his management of her medications was within the standard of care. (P7 and R8). This finding and conclusion by the Administrative Law Judge should be stricken.

Given the errors made by the Administrative Law Judge, it is appropriate for this Board to reject the above stated factual findings, endnotes, and conclusions of law and remand this matter for reconsideration of the record, clarification, and/or a new hearing.

WHEREFORE, Respondent respectfully requests that the Board of Medicine accept the Respondent's exceptions to the recommended order, strike/reject those portions of the recommended order described above, and remand the case to the Administrative Law Judge for reconsideration and clarification of the record and/or a new hearing.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SEVRICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by telephone facsimile and overnight courier to: the Board of Medicine c/o Larry G. McPherson, Board Director - Attention Crystal List, Program Supervisor, Department of Health, 4052 Bald Cypress Way, Bin C 03, Tallahassee, Florida 32399, facsimile (850) 488-9325; to Joy L. Doss, Assistant General Counsel, Practitioner Regulation - Legal, Department of Health, 4052 Bald Cypress Way, Bin # C65, Tallahassee, Florida 32399, facsimile (850) 414-1989; and to Ed Tellechea, Assistant Attorney General and Board Counsel, Board of Medicine, Office of the Attorney General, the Capitol PL-01, Tallahassee, Florida 32399; (850) 922-6425 and that the original has been furnished by true and correct facsimile copy and overnight courier to: MQA- Clerk for the Department of Health at 4052 Bald Cypress Way, Bin C01, Tallahassee, Florida 32399-1701, facsimile (850) 414-7189 this April 30, 2004.

7819 to

Jon M. Pellett

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Heather Coleman
DATE 5-10-04

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs.

DOH Case No. 2001-16808
DOAH Case No. 03-0056PL

JOSE ANIBAL CRUZ, M.D.,

Respondent.

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner, the Department of Health, pursuant to Rule 28-106.217, Florida Administrative Code, files this response in opposition to Respondent's Exceptions to the Recommended Order and states:

INTRODUCTION

On December 30, 2002, the Department of Health filed an Administrative Complaint against Respondent alleging violations of Section 458.331(1)(j), (x), (t), and (m), Florida Statutes, for exercising influence in a patient/physician relationship for purposes of engaging a Patient, M.R., in sexual activity, sexual misconduct, failing to practice within standard of care, and failing to keep legible medical records that justify the course of treatment of M.R.

On January 8, 2003, Respondent, through counsel, filed a request for a formal hearing, indicating that he disputed the allegations of fact contained in

the Administrative Complaint and requesting a formal administrative hearing pursuant to Section 120.569(2)(a), Florida Statutes.

Shortly before the commencement of the final hearing, Petitioner filed Petitioner's Motion to Preclude Respondent's Testimony or Motion in Limine, seeking to prevent the Respondent from testifying at the final hearing due to his assertion of his right to remain silent, guaranteed by the Fifth Amendment to the Constitution, and Article I, Section 9 of the Florida Constitution, on selective questions posed by the Petitioner during a portion of the Respondent's deposition taken March 25, 2003.

The final hearing was held April 10 and 11, 2003, in Miami, Florida before Larry J. Sartin, Administrative Law Judge. However, due to the presentation of additional discovery materials immediately prior to the hearing by the Respondent to the Petitioner, it was determined that the hearing would not be completed at that time.

The delay in the completion of the final hearing allowed Administrative Law Judge Larry J. Sartin an opportunity to review the questions for which the Respondent asserted a Fifth Amendment privilege and to determine whether the privilege was properly asserted, to allow the Respondent the opportunity to answer any questions for which the Fifth Amendment privilege was improperly asserted, and to decide whether any sanctions should be imposed on Respondent. On April 18, 2003, Larry J. Sartin, Administrative Law Judge, issued an Order Concerning Petitioner's Motion to Preclude Respondent's Testimony or

Motion in Limine requiring the Respondent to answer specific questions posed by the Petitioner during the March 25, 2003 deposition.

On May 19, 2003, the Respondent filed a Petition for Writ of Common Law Certiorari with the Third District Court of Appeal to review the ruling. On June 3, 2003, this matter was placed in abeyance until the resolution of all matters relating to the April 18, 2003 order. On or about September 26, 2003, the Third District Court of Appeal denied Respondent's petition. The remainder of the administrative hearing was set for January 14 and 15, 2004. Pursuant to a joint agreement among the parties and Larry J. Sartin, Administrative Law Judge, the hearing was rescheduled and held January 28, 2004.

At the formal hearing, Petitioner presented the testimony of Herb Graner, M.R., Private Investigator James Wright, Private Investigator Luis Vila, Martha Garcia, Mercedes Moral, Michele Flores, and Jose A. Melendez. Respondent offered the testimony of Francisco J. Pages, M.D., Lyudmila Litvinova, George E. Lopez, Julian Nodarse, M.D, and Michele Flores. Both parties offered into evidence numerous exhibits that were also considered by the Administrative Law Judge (ALJ).

On April 15, 2004, Larry J. Sartin, Administrative Law Judge, issued a Recommended Order finding that Respondent exercised influence over M.R. within the physician-patient relationship for purposes of engaging her in sexual activity, engaged in sexual misconduct, failed to practice within the standard of care, and failed to keep legible medical records for M.R., violating Section

458.331(1)(j), (m), (t), and (x), Florida Statutes, and recommending that Respondent's license to practice medicine be revoked.

On April 30, 2004, Respondent filed exceptions to the recommended order, citing general exceptions, exceptions to the manner in which the proceedings were conducted, and specific exceptions to findings of fact and conclusions of law. For the reasons which follow, Respondent's exceptions should be denied.

STANDARD OF REVIEW

1. Section 120.57(1)(k), Florida Statutes, authorizes the submission of exceptions to a recommended order. Parties may file exceptions to both findings of fact and conclusions of law contained within the recommended order. Any party may then file responses to the opposing party's exceptions. Rule 28-106.217, Florida Administrative Code.

2. Section 120.57(1)(l), Florida Statutes, provides that the Board may not reject or modify the findings of fact unless the Board first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

3. Competent substantial evidence is defined as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. Stated more clearly, it is such relevant evidence as a

reasonable mind would accept as adequate to support a conclusion. De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

4. It is the role of the ALJ to consider all evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from evidence, and reach ultimate findings of fact based on substantial competent evidence. Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607 (Fla. 1st DCA 1993); Helfetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

5. When determining whether to reject or modify findings of fact in a recommended order, the Board is not permitted to re-weigh the evidence, judge the credibility of witnesses, or to interpret the evidence, as those are evidentiary matters solely within the province of the ALJ as the finder of fact. Gross v. Dept. of Health, 819 So.2d 997, 1001 (Fla. 5th DCA 2002). The Board may not re-evaluate the quantity and quality of the evidence beyond a determination of whether the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996).

6. The Board may not reject or modify conclusions of law unless it states with particularity its reasons for doing so and makes a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Section 120.57(1)(l), Florida Statutes.

RESPONSE TO RESPONDENT'S GENERAL EXCEPTIONS

1. Respondent excepts to Paragraph 10 that states: "From the beginning of Dr. Cruz's treatment of M.R., he began making inappropriate, flirtatious comments to her, including comments about her hair and physical appearance." Respondent asserts that the finding falls outside of the express charges of the Administrative Complaint. Respondent argues that Paragraph 8 of the Administrative Complaint, filed on December 30, 2002, sets forth the time frame for when the alleged wrongful conduct began to occur. Respondent's exception to this finding is not material to the ultimate issues in this case.

To the extent that Petitioner asserted that other "facts," not specifically alleged in the Administrative Complaint, were proven that support the conclusion that Respondent was guilty of exercising influence in a patient/physician relationship, sexual misconduct, and practicing below the standard of care, the ALJ, in the Recommended Order, stated, in Endnote 17, that "facts . . . not having been specifically alleged in support of the charges against Dr. Cruz, cannot form the basis for any finding of a disciplinable violation." The ALJ's assertion in Endnote 17 should be sufficient to assure the Board that the ALJ's findings and conclusions were not based upon facts that were not appropriately and specifically alleged in the Administrative Complaint.

Furthermore, an Administrative Complaint is not required to fulfill the technical niceties of a legal pleading. The Administrative Complaint must be specific enough to inform the accused with reasonable certainty of the nature of

the charges. Ghani v. Department of Health, 714 So.2d 113 (Fla. 1st DCA, 1998). Here, the Department's Administrative Complaint was clearly specific enough to inform the Respondent, with reasonably certainty, of the nature of the charges. The fact that "Respondent made inappropriate, flirtatious comments to her, including comments about her hair and physical appearance" was not specifically alleged as substantiating a violation of Section 458.331(1)(j), (t), or (x), Florida Statutes. As it was not a fact alleged specifically as a substantive violation of 458.331(1)(j), (t), or (x), Florida Statutes, it need not have been specifically alleged in the Administrative Complaint. This fact is not material to the ultimate issues in this case.

Respondent asks the Board to re-weigh the evidence and judge the credibility of the testimony presented. When determining whether to reject or modify findings of fact in a recommended order, the Board is not permitted to re-weigh the evidence, judge the credibility of witnesses, or to interpret the evidence, as those are evidentiary matters solely within the province of the ALJ as the finder of fact. Gross v. Dept. of Health, 819 So.2d 997, 1001 (Fla. 5th DCA 2002). There does exist competent substantial evidence to support the ALJ's finding that from the beginning of Respondent's treatment of M.R., he began making inappropriate, flirtatious comments to her, including comments about her hair and physical appearance. (Tr., p. 62).

Based upon the foregoing reasons, the Board should deny Respondent's exception.

2. Respondent also takes exception to the extent that Paragraphs 11, 12, 13, 14, and 21 are incomplete in that they do not reference the specific time period in which the wrongful conduct occurred.

It is the role of the ALJ to consider all evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from evidence, and reach ultimate findings of fact based on substantial competent evidence. Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607 (Fla. 1st DCA 1993); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Although a specific date is not referenced in the aforementioned findings of fact, there exists competent substantial evidence in the record to support the ALJ's findings. Furthermore, the fact that a specific date is not referenced is irrelevant to the ultimate issues in this case. Based on the foregoing, the Board should deny Respondent's exception.

3. Respondent also takes exception to the manner in which Petitioner prosecuted this manner.

The discovery issues raised by the Respondent concerning the videotape, relating to another matter entirely, were resolved at the formal hearing by the ALJ. At the formal hearing, Respondent argued that he had been prejudiced by Petitioner's failure to disclose this videotape during discovery. At that time, the ALJ made a determination that because the videotape was not going to be offered into evidence Respondent had not been prejudiced by the withholding of

the videotape by the Petitioner. The ALJ then indicated to both parties that should the videotape be offered into evidence for any purpose he would reconsider his ruling. The ALJ further stated that he would not allow the videotape into evidence unless there was some effective means to eliminate any possible prejudice to the Respondent by not having been provided the tape earlier during discovery. (Tr., pp. 7-8). The videotape was never offered into evidence.

The ALJ has already visited and ruled on this discovery issue excepted to by Respondent. It is clear that the ALJ determined, after argument from both Petitioner and Respondent, that Respondent had not been prejudiced by Petitioner's withholding of the videotape, which was unrelated to this case, from Respondent.

The Board may not reject or modify the findings of fact unless the Board first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Section 120.57(1)(l), Florida Statutes. Respondent failed to articulate with specificity how the proceedings on which the findings were based did not comply with essential requirements of law. It is clear, by review of the record, that the proceedings were conducted fairly and in accordance with the requirements of law. Based upon the foregoing, Respondent's exception should be denied.

RESPONSE TO RESPONDENT'S EXCEPTIONS TO FINDINGS OF FACT

1. Respondent takes exception to the portion of Paragraph 9 that states: "from January 1994 until August 2001, seeing her at least once a month for pharmacologic management." Respondent asserts that there is no competent evidence to support the ALJ's conclusion that M.R. saw the Respondent at a frequency of once a month during the entire seven year period M.R. was under the care of Respondent.

In the argument supporting Respondent's exception, Respondent asserts that M.R.'s testimony could not form the basis for clear and convincing evidence to support the violations alleged. Respondent clearly proposes that the Board re-weigh the evidence presented at the formal hearing and judge the credibility of M.R.'s testimony. Petitioner reminds the Board that the Board is not permitted to re-weigh the evidence, judge the credibility of witnesses, or to interpret the evidence, as those are evidentiary matters solely within the province of the ALJ as the finder of fact. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

There is competent substantial evidence to show that while M.R. was under the direct care of Respondent, Respondent would see M.R. at least once a month for pharmacological management and brief-reality oriented therapy sessions. (Joint Exhibit 1). However, Petitioner agrees with Respondent that the ALJ's phrasing of the finding of fact may be misinterpreted. Therefore, although

Respondent's exception is not material to the ultimate issues in this case, Petitioner proposes that Paragraph 9 be clarified and amended to read:

"Dr. Cruz treated M.R. for manic-depression from January 1994 until August 2001. During the time that M.R. was under Dr. Cruz's direct care, Dr. Cruz saw her at least once a month for pharmacological management and brief reality-oriented therapy sessions."

2. Respondent takes exception to the portion of Paragraph 15 that states: "On five occasions, Dr. Cruz hospitalized M.R. in the psychiatric unit at Cedars Medical Center." Respondent argues that M.R. was admitted to Cedars on at least six different occasions. Respondent does, however, concede that there is competent evidence to support the ALJ's conclusion that Respondent admitted Patient M .R. to Cedars on five occasions.

Although Respondent may be technically correct regarding the total number of occasions that M.R. was admitted to Cedars Medical Center, the number of occasions the ALJ concluded that the Respondent admitted M.R. to Cedars Medical Center is accurate. As conceded by the Respondent, there is competent substantial evidence that the Respondent admitted M.R. to Cedars Medical Center, on five occasions. On one of the six occasions Respondent references, M.R. was admitted to Cedars Medical Center, not by the Respondent but by Dr. Magaly Alonso. On that occasion, Respondent was the attending physician. (Petitioner's Exhibit 1A, 1B, 1C, 1D). Therefore, with competent substantial evidence to support the ALJ's finding that Respondent admitted M.R.

to Cedars Medical Center on five occasions, the Board should deny Respondent's exception.

3. Respondent takes exception to Paragraph 16 Endnote 6 that states: "the evidence failed to prove whether M.R.'s room was actually monitored at any time pertinent to this matter." Respondent asserts that there is no competent evidence to support this conclusion by the ALJ. Respondent's Footnote 5, however, points out that Endnote 6 of the Recommended Order could also refer to the system of audio monitoring available at the nurse's station at Cedars Medical Center. Respondent then concedes that there was no evidence offered on whether or not M.R.'s room was also monitored during the time pertinent in this case.

It is the ALJ's function to consider all the evidence, resolve conflicts and reach ultimate findings of fact. Helfetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985). The weighing of evidence and the judging of the credibility of witnesses are solely the prerogative of the ALJ as the finder of fact. Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607 (Fla. 1st DCA 1993). After considering all the evidence, the ALJ found that the evidence failed to prove whether M.R.'s room was actually monitored at any time pertinent to this matter. The Board may not re-weigh the evidence, and with competent substantial evidence supporting the ALJ's finding the Board must deny Respondent's exception.

4. Respondent takes exception to the portion of Paragraph 24 that states: "On those occasions when Dr. Cruz took M.R. to the Starlite, he would... register for a room, using a fictitious name, and then park his car nearer the room." Respondent asserts that there is no competent evidence that Dr. Cruz ever registered at the Starlite, using a fictitious name, or moved his car after registering to be nearer the room.

At the formal hearing, Petitioner presented the testimony of M.R. who testified extensively on her relationship with the Respondent and discussed in detail her numerous encounters with the Respondent at the Starlite. (Tr., pp. 69-129). It can be reasonably inferred that in order to rent a room at the Starlite on those occasions Respondent would have had to register with the hotel office. M.R. further testified that on August 17, 2001 Respondent took her to the Starlite motel, entered the office and returned with a room key. (Tr. pp. 69-80,100-107). It can also be reasonably inferred that on August 17, 2001, in order for the Respondent to have obtained a room key, the Respondent must have registered with the hotel office.

Petitioner also presented the testimony of the private investigators, who conducted video surveillance of the Respondent and M.R. on August 17, 2001. It was their testimony that the Respondent took M.R. to the Starlite, entered the hotel office, and then returned a few minutes later and began to move the car. (Tr. 179-184; Petitioner's Exhibit 4; Petitioner's Exhibit 6). It can be reasonably

inferred from the testimony presented that on August 17, 2001 Respondent registered at the Starlite motel.

A review of the August 17, 2001 registration cards and the registration cards from other dates on which the Respondent took M.R. to the Starlite reveal that Respondent did not provide his real name when registering for the motel rooms. (Respondent's Exhibit 5; Petitioner's Exhibit 5). It can be reasonably inferred that because the Respondent did not provide his real name he must have used a fictitious name when registering.

Petitioner also offered into evidence two videotapes which corroborated both the testimony of M.R. and of the private investigators, who were conducting surveillance on August 17, 2001, and provided the ALJ with an unambiguous picture of the Respondent's actions while at the Starlite on August 17, 2001. (Petitioner's Exhibit 4; Petitioner's Exhibit 6).

Respondent's exception asks this Board to re-weigh the evidence and make a determination as to whether the Respondent ever registered at the Starlite, using a fictitious name, and to determine Respondent's parking habits while at the Starlite. The weighing of evidence and judging of the credibility of witnesses are solely the prerogative of the ALJ as the finder of fact. Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607 (Fla. 1st DCA 1993). There exists competent substantial evidence to support the ALJ's finding of fact. Therefore, Respondent's exception should be denied.

5. Respondent takes exception to Paragraph 24 endnote 8 that states: "Because Dr. Cruz rented for less than a night, he was not asked to supply anything to verify the name he used to register." Respondent asserts that there is no competent evidence that Dr. Cruz rented for less than a night on August 17, 2001 or for any other period of time and that there is no competent evidence that assuming Dr. Cruz did register, he was not asked to supply anything to verify the name he used to register. Respondent asks the Board to re-weigh the evidence and judge the credibility of the witnesses presented at the formal hearing.

At the formal hearing, an employee of the Starlite testified that the Starlite rents rooms both by the hour and by the day. The employee further testified that more than three-quarters of the guests of the Starlite rent by the hour. If the patron does not rent for the purposes of staying overnight, the Starlite does not require them to provide identification. It is only if the patron does rent for the night that the hotel staff notes the patron's driver's license number on the registration card. (Tr., pp. 326, 329, 331. 333, 346).

By absence of a Starlite registration card with the Respondent's name and driver's license number, it can be reasonably inferred that the Respondent never rented for the purposes of staying overnight, which is corroborated by M.R.'s testimony. (Petitioner's Exhibit 5). Furthermore, based upon the practice of the hotel to not ask patrons to show identification when renting for less than a night, it can also reasonably be inferred that because the Respondent never rented for

the purposes of staying overnight Respondent was never asked to provide identification.

M.R. testified that the Respondent had taken her to the Starlite motel on numerous occasions in order to engage in sexual relations. (Tr., pp. 73, 127). It can be reasonably inferred that in order to obtain a room from the Starlite Respondent had to register with the motel office. Based on the extensive testimony of M.R., concerning her relationship with the Respondent and their encounters at the Starlite motel, it can be reasonably inferred that Respondent did not rent for a night at the Starlite. Therefore, he was never required by hotel staff to provide photo identification, verifying the name he used to register. (Tr. pp.69-129).

It is the ALJ's function to consider all the evidence, resolve conflicts and reach ultimate findings of fact. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985). The weighing of evidence and the judging of the credibility of witnesses are solely the prerogative of the ALJ as the finder of fact. Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607 (Fla. 1st DCA 1993). There exists competent substantial evidence in the record to show that on August 17, 2001 and on numerous other occasions Respondent rented a room at the Starlite for less than a night. There is also competent substantial evidence to show that the Respondent, because he never rented a room for the purposes of staying overnight, was never required to

provide identification, verifying the name he used to register. Based on the foregoing, Respondent's exception should be denied.

6. Respondent takes exception to the portion of Paragraph 31 Endnote 10 that states: "for an incoming telephone call, the record of M.R.'s phone recorded the time that was used up taking the incoming call and simply listed her telephone number as both the originating number and the receiving number." Respondent asserts that there is no competent substantial evidence to support the finding by the ALJ.

At the formal hearing, Petitioner presented the testimony of Herb Graner a representative of Verizon Wireless who testified that, at the time material to this matter, Verizon Wireless, M.R.'s cellular phone provider, did not have the capacity or the ability to record or register incoming cellular phone calls. However, Mr. Graner testified that when a cellular phone subscriber receives an incoming call, the mobile number of the subscriber appears in both the call originating phone number column and the call recipient phone number column. (Tr., pp. 52, 56-57; Petitioner's exhibit 3)

Petitioner also offered M.R.'s Verizon Wireless Cellular phone bill that indicates a call took place on August 16, 2001 beginning at 12:36 p.m. and ending at 12:40 p.m., that was recorded with M.R.'s own telephone number in both the originating phone number column and the call recipient phone number column, which is an indicator of an incoming call. (Petitioner's Exhibit 3).

Petitioner presented the testimony of M.R. who testified that on August 16, 2001, while in the presence of the investigators, she received an incoming call on her cellular phone from the Respondent. (Tr., pp. 75-76)

Petitioner also presented the testimony of James Wright, one of the private investigators, who indicated that around lunchtime August 16, 2001 M.R., while in the presence of the private investigators, received an incoming call on her cellular phone, corroborating the cellular phone records indicating an incoming call. (Tr., p. 177).

The weighing of evidence and judging of the credibility of witnesses are solely the prerogative of the ALJ as the finder of fact. Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607 (Fla. 1st DCA 1993). There exists competent substantial evidence to support the ALJ's finding of fact. Therefore, Respondent's exception should be denied.

7. Respondent takes exception to Paragraph 33 that states "M.R. and the investigator left the store and went to lunch, where they were joined by the second investigator. While at lunch Dr. Cruz called M.R. on her cellular phone and told her that he would pick her up at the Grocery Store the following day, August 17, 2001." Respondent asks the Board to re weigh the evidence and judge the credibility of witnesses presented at the formal hearing.

At the formal hearing, Petitioner offered the testimony of Luis Vila, one of the private investigators who conducted surveillance of the Respondent and M.R., who testified that on August 16, 2004, while meeting with M.R., he

overheard M.R. on her cellular phone and heard her say that she would meet the caller at the same place, or words to that effect. (Joint Exhibit, pp. 17-19). Mr. Vila further testified that immediately following the cellular phone conversation, M.R. stated that the caller was the Respondent and that he wanted her to meet her in the Winn Dixie parking lot the following day, August 17, 2001. (Joint Exhibit pp. 17-19).

Petitioner also presented the testimony of James Wright, another private investigator, who testified that on August 16, 2001, while the investigators were meeting with M.R., M.R. received a cellular phone call. Mr. Wright testified that following the call M.R. indicated to the investigators that it was the Respondent who had called and that they had arranged to meet at the Winn Dixie the next day. (Tr., p. 177).

Petitioner also presented the testimony of M.R. who testified that on August 16, 2001, while in the presence of the investigators, she received a call on her cellular phone from the Respondent. M.R. testified that it was at that time that the Respondent requested she meet him in the Winn Dixie parking lot the following day. (Tr., pp. 75-76).

Petitioner also offered into evidence M.R.'s Verizon Wireless Cellular phone bill. The cellular bill indicates a call took place on August 16, 2001, beginning at 12:36 p.m. and ending at 12:40 a.m., that was recorded with M.R.'s own telephone number in both the originating phone number column and the

call recipient phone number column, which is an indicator of an incoming call. (Petitioner's Exhibit 3).

The weighing of evidence and judging of the credibility of witnesses are solely the prerogative of the ALJ as the finder of fact. Maruccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607 (Fla. 1st DCA 1993). Based on the foregoing, there exists competent substantial evidence in the record to support the ALJ's finding. Therefore, the Board must reject Respondent's exception.

8. Respondent takes exception to Paragraph 33 Endnote 12 that states "This is consistent with how incoming telephone calls were recorded at that time and corroborates M.R.'s testimony that she received a call from Dr. Cruz that day while at lunch." Respondent asks the Board to re-weigh the evidence and judge the credibility of the witnesses presented at the formal hearing.

As stated above, Mr. Graner, a representative of Verizon Wireless, testified that when a cellular phone subscriber receives an incoming call, the mobile number of the subscriber appears in both the call originating phone number column and the call recipient phone number column. (Tr., pp. 52, 56-57).

Petitioner presented the testimony of Luis Vila, one of the private investigators, who testified that on August 16, 2004 he overheard M.R. on her cellular phone and heard her say that she would meet the caller at the same place, or words to that effect. (Joint Exhibit, pp. 17-19) Mr. Vila further testified

that immediately following the cellular phone conversation, M.R. stated that the caller was the Respondent and that he wanted her to meet her in the Winn Dixie parking lot the following day, August 17, 2001. (Joint Exhibit pp. 17-19).

Petitioner also presented the testimony of James Wright, another private investigator, who testified that on August 16, 2001, while the investigators were meeting with M.R., M.R. received a cellular phone call. Mr. Wright testified that following the call M.R. indicated to the investigators that it was the Respondent who had called and that the Respondent had requested that she meet him at the Winn Dixie the next day. (Tr., p. 177).

Petitioner also presented the testimony of M.R. who testified that on August 16, 2001, while in the presence of the investigators, she received a call on her cellular phone from the Respondent. M.R. testified that it was at that time that the Respondent requested she meet him in the Winn Dixie parking lot the following day. (Tr., pp. 75-76).

Petitioner also offered into evidence M.R.'s Verizon Wireless Cellular phone bill. The cellular bill indicates a call took place on August 16, 2001, beginning at 12:36 p.m. and ending at 12:40 p.m., that was recorded with M.R.'s own telephone number in both the originating phone number column and the call recipient phone number column, which is an indicator of an incoming call. (Petitioner's Exhibit 3).

It is the role of the ALJ to consider all evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from

evidence, and reach ultimate findings of fact based on substantial competent evidence. Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607 (Fla. 1st DCA 1993). Based on the foregoing and evidence, found within the record, there exists competent substantial evidence to support the ALJ's finding. Therefore, the Board must reject Respondent's exception.

9. Respondent takes exception to Paragraph 33, Endnote 12, the portion that states " one of the investigators, who is fluent in Spanish, overheard M.R. say in Spanish that she would meet the person she was speaking with at the normal place, referring to the Grocery Store." Respondent asks the Board to re-weigh the evidence and judge the credibility of witnesses.

At the formal hearing, Petitioner offered the testimony of Mr. Vila, a private investigator, who was fluent in Spanish, who testified that on August 16, 2004 he overheard M.R. on her cellular phone and heard her say, in Spanish, that she would meet the caller at the same place, or words to that effect. (Joint Exhibit, pp. 17-18). Mr. Vila further testified that immediately following the cellular phone conversation, M.R. stated that the caller was the Respondent and that he wanted her to meet him in the Winn Dixie parking lot the following day, August 17, 2001. (Joint Exhibit pp. 17-19).

Petitioner also presented the testimony of Mr. Wright who testified that on August 16, 2001, while the private investigators were meeting with M.R., M.R. received a cellular phone call. Mr. Wright testified that immediately following the

call M.R. indicated to the investigators that it was the Respondent who had called and that the Respondent had requested that she meet him at the Winn Dixie the next day. (Tr., p. 177).

Petitioner also presented the testimony of M.R. who testified that on August 16, 2001, while in the presence of the investigators, she received a call on her cellular phone from the Respondent. M.R. testified that it was at that time that the Respondent requested she meet him in the Winn Dixie parking lot the following day. (Tr., pp. 75-76).

Petitioner also offered into evidence M.R.'s Verizon Wireless Cellular phone bill. The cellular bill indicates a call took place on August 16, 2001, beginning at 12:36 p.m. and ending at 12:40 p.m., that was recorded with M.R.'s own telephone number in both the originating phone number column and the call recipient phone number column, which is an indicator of an incoming call. (Petitioner's Exhibit 3).

The weighing of evidence and judging of the credibility of witnesses are solely the prerogative of the ALJ as the finder of fact. Martuccio v. Department of Professional Regulation, Board of Optometry, 622 So.2d 607 (Fla. 1st DCA 1993). Based on the foregoing evidence from the record, there exists competent substantial evidence to support the ALJ's finding. Therefore, the Board must reject Respondent's exception.

10. Respondent takes exception to the portion of Paragraph 46 that states: "and caused her emotional distress, nightmares, sleeplessness, confusion,

and depression." Respondent argues that there is no competent evidence to support this finding by the ALJ. Respondent asks the Board to re-weigh the evidence presented and judge the credibility of the testimony of M.R.

At the formal hearing, when asked how the sexual relationship with the Respondent affected her, M.R. testified that she suffered from nightmares, sleeplessness, confusion, and depression. (Tr., p. 85, 121).

The Board is not permitted to re-weigh the evidence, judge the credibility of witnesses, or to interpret the evidence, as those are evidentiary matters solely within the province of the ALJ as the finder of fact. Gross v. Dept. of Health, 819 So.2d 997, 1001 (Fla. 5th DCA 2002). The Board may not re-evaluate the quality and quantity of the evidence beyond a determination of whether the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996). The ALJ's finding that, as a result of Respondent's violation of the psychotherapist-patient relationship and his exploitation of M.R., M.R. suffered emotional distress, nightmares, sleeplessness, confusion, and depression is based upon competent substantial evidence. Therefore, the Board should deny Respondent's exception.

RESPONSE TO RESPONDENT'S EXCEPTIONS TO CONCLUSIONS OF LAW

1. Respondent takes exception to Paragraph 50 and Endnote 16 to the extent that the ALJ suggests that Respondent violated Section 458.331(1)(m), Florida Statutes, and that the issue of whether a physician

violated the standard of care provided is not relevant to whether medical records justified the care.

As stated by the ALJ, the issue of whether Respondent violated the standard of care is not relevant to whether Respondent's medical records violated Section 458.331(1)(m), Florida Statutes. Petitioner did not allege that Respondent's medical records violated Section 458.331(1)(t), Florida Statutes, by failing below the standard of care. Rather, Petitioner alleged in the Administrative Complaint that Respondent's medical records violated Section 458.331(1)(m), Florida Statutes. Failing to keep legible medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations constitutes grounds for disciplinary action by the Board of Medicine. Section 458.331(1)(m), Florida Statutes.

At the formal hearing, Petitioner's expert, Dr. Joseph, testified that Respondent's medical records for M.R. are illegible, cursory, or lacking in substance, and appear generic. Dr. Joseph opined that the medical records appeared interchangeable and failed to indicate what was happening with M.R. between the sessions. (Petitioner's exhibit 7, 46-47). Petitioner also admitted

M.R.'s medical records into evidence for the ALJ's review and consideration. (Joint Exhibit 1).

The Board may not reject or modify conclusions of law unless it states with particularity its reasons for doing so and makes a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Section 120.57(1)(l), Florida Statutes. The ALJ found that the Petitioner proved clearly and convincingly that the Respondent's medical records for M.R. violated Section 458.331(1)(m), Florida Statutes. This conclusion of law is consistent with the evidence and testimony presented concerning Respondent's medical records for M.R. Respondent fails to articulate a substituted conclusion of law that is as or more reasonable than that made by the ALJ. Therefore, the Respondent's exception should be denied.

2. Respondent takes exception to Paragraph 69 that states "Based upon the testimony of Dr. Joseph, this charge has also been proved."

Petitioner's expert, Dr. Joseph, testified that Respondent's medical records for M.R. are illegible, cursory, or lacking in substance, and appear generic. Dr. Joseph opined that the medical records appeared interchangeable and failed to indicate what was happening with M.R. between the sessions. (Petitioner's exhibit 7, pp. 46-47).

The Board may not reject or modify conclusions of law unless it states with particularity its reasons for doing so and makes a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or

modified, Section 120.57(1)(l), Florida Statutes. The ALJ's finding that the Petitioner proved clearly and convincingly that Respondent's medical records for Patient M.R. violated Section 458.331(1)(m), Florida Statutes, is consistent with the evidence and testimony presented concerning Respondent's medical records for M.R. Respondent fails to articulate a substituted conclusion of law that is as or more reasonable than that made by the ALJ. Therefore, the Respondent's exception should be denied.

WHEREFORE, Petitioner requests that Respondent's Exceptions to The Recommended Order be denied, with the exception of the clarification in Paragraph 9.

Joy L. Dodds
Assistant General Counsel
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4052 Bald Cypress Way, Bin C-65
Tallahassee, FL 32399-3265
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Response to Respondent's Exceptions to the Recommended Order, was served via facsimile and United States Mail, to counsel for Respondent, Jon Pellet, Esquire, of Barr, Murman, Tonelli, Slother & Sleet, 201 East Kennedy Boulevard, Suite 1700,Tampa, Florida 33602, this 10th day of May 2004.

Joyce L. Doss
Assistant General Counsel

ATTACHMENT A
STANDARD TERMS APPLICABLE TO ALL FINAL ORDERS

The following are the standard terms applicable to all Final Orders, including supervision and monitoring provisions applicable to licensees on probation.

A. COMPLIANCE WITH STATE AND FEDERAL LAWS AND RULES. Respondent shall comply with all state and federal statutes, rules and regulations pertaining to the practice of medicine, including Chapters 456, 458, 893, Florida Statutes, and Rule Chapter 64B8, Florida Administrative Code. If Respondent is subject to criminal probation, Respondent shall comply with all terms and conditions of said criminal probation.

B. PAYMENT OF FINES AND COSTS. Unless otherwise directed by Final Order, all fines and costs shall be paid by check or money order made payable to the Board and sent to DOH/Client Services, P.O. Box 6320, Tallahassee, Florida 32314-6320, WITHIN 30 DAYS OF THE FILING OF THE FINAL ORDER. The Board/Compliance office does NOT have the authority to change the terms of payment of any fine imposed by the Board.

C. ADDRESSES. Respondent must keep current residence and practice addresses on file with the Board. Respondent shall notify the Compliance Office, in writing, within 10 days of

any changes of those addresses. Furthermore, if the Respondent's license is on probation, the Respondent shall notify the Compliance Office within 10 days in the event that Respondent leaves the active practice of medicine in Florida.

D. COMPLIANCE ADDRESS. Unless otherwise directed, all reports, correspondence and inquiries shall be sent to: DOH, Client Services Unit, 4052 Bald Cypress Way, Bin #C01, Tallahassee, Florida 32399-3251, Attn: Medical Compliance Officer.

E. CONTINUITY OF PRACTICE

1. TOLLING PROVISIONS. In the event the Respondent leaves the State of Florida for a period of 30 days or more or otherwise does not or may not engage in the active practice of medicine in the State of Florida, then certain provisions of the requirements in the Final Order shall be tolled and shall remain in a tolled status until Respondent returns to the active practice of medicine in the State of Florida. Respondent shall notify the Compliance Officer 10 days prior to his/her return to practice in the State of Florida. Unless otherwise set forth in the Final Order, the following requirements and only the following requirements shall be tolled until the Respondent returns to active practice:

a. The time period of probation shall be tolled.

b. The provisions regarding supervision whether direct

or indirect by the monitor/supervisor, and required reports from the monitor/supervisor shall be tolled.

c. The requirement for quality assurance review of Respondent's practice shall be tolled.

d. Any provisions regarding community service shall be tolled.

e. Any requirements regarding lectures on the subject of wrong-site surgery.

2. ACTIVE PRACTICE. In the event that Respondent leaves the active practice of medicine for a period of one year or more, the Respondent may be required to appear before the Board and demonstrate the ability to practice medicine with reasonable skill and safety to patients prior to resuming the practice of medicine in the State of Florida.

F. COMMUNITY SERVICE AND CONTINUING EDUCATION UNITS. Unless otherwise directed by Final Order, all community service requirements, continuing education units/courses must be completed, and documentation of such completion submitted to DOH/Client Services, at the address set forth in paragraph D., WITHIN ONE YEAR OF THE DATE OF THE FINAL ORDER.

1. DEFINITION OF COMMUNITY SERVICE. "Community service" shall be defined as the delivery of medical services directly to patients, or the delivery of other volunteer services to an entity which is exempt

from federal taxation under 26 U.S.C. s. 501(c)(3), without fee or cost to the patient or the entity, for the good of the people of the State of Florida. Community service shall be performed outside the physician's regular practice setting.

2. CONTINUING EDUCATION. Continuing education imposed by Final Order shall be in addition to those hours required for biennial renewal of licensure. Unless otherwise approved by the Board or the Chairperson of the Probation Committee, said continuing education courses shall consist of a formal live lecture format.

G. PROBATION TERMS. If probation was imposed by the Final Order, the following provisions are applicable.

1. DEFINITIONS:

a. INDIRECT SUPERVISION is supervision by a monitoring physician (monitor), as set forth in the Final Order, whose responsibilities are set by the Board. Indirect supervision does not require that the monitor practice on the same premises as the Respondent. However, the monitor shall practice within a reasonable geographic proximity to Respondent, which shall be within 20 miles unless otherwise approved by the Board and shall be readily available for consultation. The monitor shall be board-certified in the Respondent's specialty

area unless otherwise approved by the Board or its designee.

b. DIRECT SUPERVISION is supervision by a supervising physician (supervisor), as set forth in the Final Order, whose responsibilities are set by the Board. Direct supervision requires that the supervisor and Respondent work in the same office. The supervisor shall be board-certified in the Respondent's specialty area unless otherwise approved by the Board or its designee.

c. PROBATION COMMITTEE or "Committee" are members of the Board of Medicine designated by the Chair of the Board to serve as the Probation Committee.

2. REQUIRED SUPERVISION.

a. If the terms of the Final Order include indirect monitoring of the licensee's practice (monitoring) or direct monitoring of the licensee's practice (supervision), the Respondent shall not practice medicine without an approved monitor/supervisor, as specified by the Final Order, unless otherwise ordered by the Board.

b. The monitor/supervisor must be licensed under Chapter 458, Florida Statutes, in good standing, and without restriction or limitation on his/her license.

In addition, the Board or Committee may reject any proposed monitor/supervisor on the basis that he/she has previously been subject to any disciplinary action against his/her medical license in this or any other jurisdiction, is currently under investigation, or is the subject of a pending disciplinary action. The monitor/supervisor must be actively engaged in the same or similar specialty area unless otherwise approved by the Board or Committee and be practicing within a reasonable distance of the Respondent's practice, a distance of no more than 20 miles unless otherwise specifically provided for in the Final Order. The monitor/supervisor must not be a relative or employee of the Respondent. The Board, Committee or designee may also reject any proposed monitor/supervisor for good cause shown.

3. TEMPORARY APPROVAL. The Board confers authority on the Chair of the Probation Committee to temporarily approve Respondent's monitor/supervisor. To obtain this temporary approval, Respondent shall submit to the Compliance Officer the name and curriculum vitae of the proposed monitor/supervisor. This information shall be furnished to the Chair of the Probation Committee by way of the Compliance Officer, within 48

hours after Respondent receives the Final Order in this matter. This information may be faxed to the Compliance Officer at (850) 414-0864, or may be sent by overnight mail to the Compliance address as set forth in paragraph D. above. In order to provide time for Respondent's proposed supervisory/monitoring physician to be approved or disapproved by the Chair of the Probation Committee, Respondent shall be allowed to practice medicine while approval is being sought, but only for a period of five working days after Respondent receives the Final Order. If Respondent's supervising/monitoring physician has not been approved during that time frame, then Respondent shall cease practicing until such time as the supervising/monitoring physician is temporarily approved. In the event that the proposed monitoring/supervising physician is not approved, then Respondent shall cease practicing immediately. Should Respondent's monitoring/supervising physician be approved, said approval shall only remain in effect until the next meeting of the Probationer's Committee. Absent said approval, Respondent shall not practice medicine until a monitoring/supervising physician is approved. Temporary approval shall only remain in

effect until the next meeting of the Probation Committee.

4. FORMAL APPROVAL. Respondent shall have the monitor/supervisor with him/her at the first probation appearance before the Probation Committee. Prior to consideration of the monitor/supervisor by the Committee, the Respondent shall provide the monitor/supervisor a copy of the Administrative Complaint and the Final Order in this case. Respondent shall submit a current curriculum vitae, a description of current practice, and a letter agreeing to serve from the proposed monitor/supervisor to the Compliance Officer no later than fourteen days before the Respondent's first scheduled probation appearance. Respondent's monitor/supervisor shall also appear before the Probation Committee at such times as directed by the Committee. It shall be the Respondent's responsibility to ensure the appearance of his/her monitor/supervisor as directed. Failure of the monitor/supervisor to appear as directed shall constitute a violation of the terms of the Final Order and may subject the Respondent to additional disciplinary action.

5. CHANGE IN MONITOR/SUPERVISOR. In the event that

Respondent's monitor/supervisor is unable or unwilling to fulfill his/her responsibilities as a monitor/supervisor as described above, the Respondent shall immediately advise the Compliance Office of this fact. Respondent shall immediately submit to the Compliance Office the name of a temporary monitor/supervisor for consideration. Respondent shall not practice pending approval of this temporary monitor/supervisor by the Chair of the Probation Committee. Furthermore, Respondent shall make arrangements with his/her temporary monitor/supervisor to appear before the Probation Committee at its next regularly scheduled meeting for consideration of the monitor/supervisor by the Committee. Respondent shall only practice under the supervision of the temporary monitor/supervisor (approved by the Chair) until the next regularly scheduled meeting of the Probation Committee whereat the issue of the Committee's approval of the Respondent's new monitor/supervisor shall be addressed.

6. REPORTS.

a. If directed by Final Order, probation reports, in affidavit form, shall be submitted by the Respondent and shall contain the following:

(1) Brief statement of why physician is on probation.

(2) Practice location.

(3) Describe current practice (type and composition).

(4) Brief statement of compliance with probationary terms.

(5) Describe relationship with monitoring/supervising physician.

(6) Advise Compliance Officer of any problems including office incident reports filed; loss or restriction of hospital staff privileges; loss or restriction of DEA registration; or any Medicare/Medicaid program exclusions, restrictions or limitations.

b. MONITOR/SUPERVISOR REPORTS. If directed by Final Order, monitor/supervisor reports, in affidavit form shall include the following:

(1) Brief statement of why physician is on probation.

(2) Description of probationer's practice.

(3) Brief statement of probationer's compliance with terms of probation.

(4) Brief description of probationer's relationship with monitoring physician.

(5) Detail any problems which may have arisen with probationer.