

STATE OF FLORIDA
BOARD OF MEDICINE

Final Order No. DOH- 11-3046-^{FDF}-MQA
FILED DATE - 12-14-11
Department of Health

By: Angela Sanders
Deputy Agency Clerk

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2006-04951
DOAH CASE NO.: 11-0546PL
LICENSE NO.: ME0062525

ALBERT ZAMEK, 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 December 2, 2011, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order (a copy of which is attached hereto as Exhibit A) in the above-styled cause. Petitioner was represented by Diane Kiesling, Assistant General Counsel. Respondent was not present but was represented by Mark Bakay, 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.

FINDINGS OF FACT

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

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

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:

1. Respondent shall pay an administrative fine in the amount of \$5,000.00 to the Board within 30 days from the date this Final Order is filed. Said fine shall be paid by money order or cashier's check.

2. Respondent shall document the completion of six (6) hours of continuing medical education (CME) in the area of ethics within eighteen (18) months from the date this Final Order is filed. These hours shall be in addition to those hours required for biennial renewal of licensure. Respondent shall first submit a written request to the Probation Committee for

approval prior to performance of said CME course(s). 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.

3. Respondent shall document completion of the medical records course sponsored by the Florida Medical Association (FMA) within eighteen (18) months from the date this Final Order is filed.

4. Respondent shall be and is hereby issued a letter of concern by the Board.

MOTION TO ASSESS COSTS

The Board retains jurisdiction in this matter to address the Petitioner's Motion to Assess Costs and Respondent's Response to Petitioner's Motion to Assess Costs at a future time.

(NOTE: SEE RULE 64B8-8.0011, FLORIDA ADMINISTRATIVE CODE. UNLESS OTHERWISE SPECIFIED BY FINAL ORDER, THE RULE SETS FORTH THE REQUIREMENTS FOR PERFORMANCE OF ALL PENALTIES CONTAINED IN THIS FINAL ORDER.)

DONE AND ORDERED this 12th day of December,

2011.

BOARD OF MEDICINE

Crystal A Sanford for
Joy A. Tootle, Executive Director
For GEORGE THOMAS, 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 ALBERT ZAMEK, M.D., 424 90th Street, Surfside, Florida 33154; to Mark Bakay, Esquire, 2431 Aloma Avenue, Suite 254, Winter Park, Florida 32707; to Edward T. Bauer, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Veronica Donnelly, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3253 this 14th day of December, 2011.

Angel Sanders

Deputy Agency Clerk



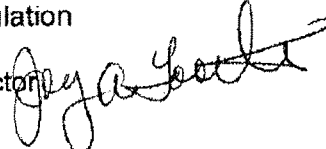
Rick Scott
Governor

H. Frank Farmer, Jr., MD, PhD, FACP
State Surgeon General

INTEROFFICE MEMORANDUM

DATE: December 9, 2011

TO: Cassandra Pasley, BSN, J.D., Bureau Chief
Health Care Practitioner Regulation

FROM: Joy A. Tootle, Executive Director
Board of Medicine 

SUBJECT: Delegation of Authority

This is to advise you that while I am out of the office on Monday December 12, 2011, Crystal Sanford is delegated to serve as acting Executive Director for the Board of Medicine. Ms. Sanford can be reached at (850) 245-4132.

JAT

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)	
MEDICINE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 11-0546PL
)	
ALBERT ZAMEK, M.D.,)	
)	
Respondent.)	
)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on June 8, 2011, by video teleconference at sites in Tallahassee and Port St. Lucie, Florida.

APPEARANCES

For Petitioner: Shirley L. Bates, Esquire
Sharmin R. Hibbert, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Mark Bakay, Esquire
2431 Aloma Avenue, Suite 254
Winter Park, Florida 32707

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the allegations contained in the Administrative Complaint, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On December 27, 2006, Petitioner, Department of Health, Board of Medicine, filed an Administrative Complaint against Respondent, Dr. Albert Zamek. Respondent timely requested a formal hearing to contest the allegations, and, on September 5, 2007, the matter was referred to the Division of Administrative Hearings ("DOAH") and assigned DOAH Case No. 07-4014PL.

On November 7, 2007, the parties filed a Motion to Relinquish Jurisdiction on the basis that a settlement had been reached. On the same date, Administrative Law Judge Larry J. Sartin entered an Order Closing File, with leave to re-open the case in the event the Board of Medicine declined to approve the settlement. The Board of Medicine ultimately rejected the settlement agreement on November 30, 2007.

On October 29, 2010, Petitioner filed a two-count Second Amended Administrative Complaint against Respondent, which alleged that he violated section 458.331(1)(k), Florida Statutes, and section 458.331(1)(m), Florida Statutes. Pursuant to a motion filed by Respondent, this matter was re-opened on February 1, 2011, and assigned DOAH Case No. 11-0546PL.

As noted above, the final hearing in this matter was held before the undersigned on June 8, 2011. During the final hearing, Petitioner presented the testimony of Dr. David Nehme; J.D.; and Respondent, Dr. Albert Zamek. Petitioner introduced three exhibits into evidence, numbered 1-3. Respondent testified on his own behalf and requested leave to submit a late-filed exhibit, which the undersigned granted. On June 9, 2011, Respondent submitted a four-page exhibit that has been admitted as Respondent's Exhibit 1.

The final hearing Transcript was filed with DOAH on July 1, 2011. On the same date, both parties filed proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged misconduct.

FINDINGS OF FACT

A. The Parties

1. Respondent, Albert Zamek, M.D. is, and was at all times material to this matter, a physician licensed to practice medicine in Florida, having been issued license number ME62525 on or about July 15, 1992.

2. Petitioner Department of Health has regulatory jurisdiction over licensed physicians such as Dr. Zamek. In

particular, Petitioner is authorized to file and prosecute an administrative complaint, as it has done in this instance, when a panel of the Board of Medicine has found probable cause exists to suspect that the physician has committed one or more disciplinable offenses.

B. The Events of February 2005

3. The events giving rise to this dispute began on Saturday, February 19, 2005, when J.D.—Petitioner's principal witness in this proceeding—received treatment for kidney stones at an emergency room in Port St. Lucie, Florida. At the conclusion of her emergency room visit, J.D. was referred to Drs. John and David Nehme, both of whom specialize in urology, for a follow-up appointment.

4. On February 21, 2005, J.D. spoke with a member of Dr. David Nehme's staff and received an appointment for February 25. J.D. was further advised during the conversation that Dr. Nehme practiced from two locations—one in Port St. Lucie and the other in Stuart—and that J.D.'s appointment would be at the Stuart office.

5. On the day of her appointment, J.D. mistakenly reported to Dr. Nehme's Port St. Lucie office location. At that time, Dr. Nehme was renting a portion of his St. Lucie office to Dr. Zamek.

6. As J.D. approached the office, she observed a sign posted on the front door that bore the names of Drs. David and John Nehme. The sign also read, underneath the Nehmes' names, "Executive Health Care, Albert Zamek."

7. At the time of her appointment on February 25, 2005, J.D. had never met Dr. David Nehme, Dr. John Nehme, or Dr. Zamek.

8. Upon entering the office, J.D. noticed that no receptionist or other clerical person was present. After J.D. announced her presence, an unknown male wearing casual attire—identified by J.D. during the final hearing in this matter as Dr. Zamek—emerged and apologized for the absence of office staff.

9. At that point, J.D. advised that she was a new patient and that she had an appointment to see Dr. David Nehme. No formal introduction was made, and Respondent simply handed J.D. a set of intake forms and asked her to fill them out.

10. After completing the forms, J.D. followed Dr. Zamek (who was now wearing a lab coat, but with no name embroidered on it) to an examination room. Dr. Zamek proceeded to ask J.D. what had happened, how she was feeling, and if she was experiencing any pain. While answering Dr. Zamek's questions, J.D. mentioned that blood had been visible in her urine during the emergency room visit and that she "would like it checked."

Dr. Zamek replied that he was unable to do so because of the absence of support staff that day.

11. As the examination progressed, Dr. Zamek took J.D.'s blood pressure, listened to her breathing, and checked her lower back for pain. While Dr. Zamek did so, J.D. asked him—due to the lack of an introduction and any form of identification on the lab coat—if he was a doctor or a physician's assistant. Dr. Zamek responded that he was a doctor, at which time J.D. inquired if he was John or David—an obvious reference to Drs. John and David Nehme. At that point, Dr. Zamek (whose first name is Albert) falsely stated, "John," which then prompted J.D. to ask if David was his father. Once again, Dr. Zamek falsely replied, "David is my uncle."

12. After the examination was complete, J.D. asked if she could schedule a follow-up appointment so that her urine could be tested. Dr. Zamek, who does not specialize in urology, told J.D. to return on Tuesday, March 1, 2011, but did not provide her with an appointment card.

13. Upon returning home, J.D. examined her notes and discovered that she had mistakenly reported to Dr. David Nehme's office in Port St. Lucie, instead of his office location in Stuart where her appointment was scheduled. J.D. ultimately discovered that the February 25, 2005, examination had been performed by Dr. Zamek.

14. Dr. Zamek did not create any medical records in connection with his February 25, 2005, examination of J.D.

C. Ultimate Findings of Fact

15. Petitioner has established by clear and convincing evidence that during his February 25, 2005, examination of J.D.,¹ Dr. Zamek misled J.D. regarding his identity, and therefore made deceptive and/or untrue representations in or relating to the practice of medicine, in violation of section 458.331(1)(k).

16. Petitioner has also established by clear and convincing evidence that Dr. Zamek failed to create any medical records with respect to the February 25, 2005, examination of J.D., and is therefore in violation of section 458.331(1)(m).

CONCLUSIONS OF LAW

A. Jurisdiction

17. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. The Burden and Standard of Proof

18. This is a disciplinary proceeding in which Petitioner seeks to suspend Respondent's license. Accordingly, Petitioner must prove the allegations in the Second Amended Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc.,

670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); § 458.331(3), Fla. Stat.

19. Clear and convincing evidence:

[R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a 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).

C. Petitioner's Authority to Impose Discipline;
The Charges Against Respondent

20. Section 458.331(2), Florida Statutes, authorizes the Board of Medicine to impose penalties ranging from the issuance of a letter of concern to revocation of a physician's license to practice medicine in Florida if a physician commits one or more acts specified therein.

21. In its Second Amended Administrative Complaint, Petitioner alleges that Dr. Zamek has committed two acts proscribed by section 458.331(1). Specifically, in Count I, Petitioner alleges that Dr. Zamek violated section 458.331(1)(k), which prohibits a physician from making deceptive, untrue, or fraudulent representations in the practice of medicine. In Count II, Petitioner contends that Dr. Zamek failed to create medical records in connection with his

examination of J.D., and therefore violated section 458.331(1)(m).

22. Whether Dr. Zamek violated these statutes is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995).

D. Count I: Section 458.331(1)(k)

23. As noted above, Petitioner alleges in Count I of the Second Administrative Complaint that Respondent violated section 458.331(1)(k), which provides:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(k) Making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine.

24. In turn, "practice of medicine" is defined as "the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition." § 458.305(3), Fla. Stat.

25. Although Dr. Zamek argues that the evidence was insufficient to demonstrate that he conducted the examination of J.D.—a position the undersigned rejects—Dr. Zamek contends in the alternative that even if a false name was given, such an act

was not in or related to the practice of medicine. In support of this argument, Dr. Zamek cites Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990), in which the court held that false representations made by a physician while applying for staff privileges at various hospitals did not violate the statutory prohibition against "making deceptive, untrue, or fraudulent representations in the practice of medicine." For two reasons, however, the undersigned concludes that Elmariah is not controlling in the instant matter. First, in contrast to Elmariah, Dr. Zamek's false statements were made during a physical examination of J.D., during which Dr. Zamek took a patient history, asked diagnostic questions, checked J.D.'s blood pressure, and physically touched J.D. to determine if she felt any pain near her kidneys. Second, Dr. Zamek fails to recognize that Elmariah was applying the 1983 version of section 458.331(1)(k)—at that time designated as section 458.331(1)(l)—which was later modified in 1986 to expand the range of punishable misconduct. In particular, the statute was amended to add the following language, which is underlined for emphasis: "Making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine." § 458.331(1)(k), Fla. Stat. Indeed, the court in Elmariah suggested that that result

could have been different had the amended version of the statute been applicable:

Although we would not presume to interpret a statute not presently before us, we note that the added language (emphasized) should give pause to those who might assume that actions similar to appellant's remain unpunishable.

Id. at 165, n.1.

26. Based on the findings of fact contained herein, Petitioner has adduced clear and convincing evidence that Dr. Zamek is guilty of making deceptive and/or untrue statements in or relating to the practice or medicine. In particular, the evidence demonstrates that Dr. Zamek, during his February 25, 2005, physical examination of J.D., falsely identified himself as "John" and further stated, again falsely, that David was "his uncle." Such statements led J.D. to erroneously believe that she was being examined by Dr. John Nehme, a physician who practiced with Dr. David Nehme. As such, Dr. Zamek is guilty of Count I of the Second Amended Administrative Complaint.²

E. Count II: Section 458.331(1)(m)

27. Next, Petitioner alleges that Dr. Zamek failed to create any medical records in connection with his examination of J.D., and therefore violated section 458.331(1)(m), which provides that a physician is subject to discipline for:

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.

28. In his Proposed Recommended Order, Dr. Zamek argues that because Petitioner has alleged in the Second Amended Administrative Complaint that he is merely guilty of failing to create records—as opposed to failing to retain possession of records—he cannot be found in violation of section 458.331(1)(m).

29. In support of this argument, Dr. Zamek cites Trevisani v. Department of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005), which involved a situation in which a physician was charged with a violation of section 458.331(1)(m) on the basis that he failed to create certain medical records. Although the Department of Health argued that the administrative complaint could also be read to encompass an alternative theory that the physician failed to retain possession of the documents, the ALJ rejected that interpretation and confined the Department to the argument that the physician had failed to create certain records. Id. at

1108. During the final hearing, the ALJ accepted the physician's testimony that he created the records, notwithstanding the fact that the records could not be located. Based upon that finding, the ALJ dismissed the count charging the physician with violating section 458.331(1)(m). Id. The Board of Medicine subsequently rejected the ALJ's finding in that regard and concluded that the physician was charged not only with the failure to create certain medical records, but also with failure to retain possession of those documents. Id. at 1108-09. As such, the Board found the physician guilty of violating 458.331(1)(m) and imposed discipline. On appeal, however, the First District reversed, holding:

A physician may not be disciplined for an offense not charged in the complaint. In this case, the complaint charged Appellant with failing to properly document certain records and failing to create or complete certain documents. The complaint did make reference to section 458.331(1)(m), Florida Statutes, but it did not contain any specific factual allegations that Appellant failed to retain possession of the medical records. The single reference to the statute without supporting factual allegations was not sufficient to place Appellant on notice of the charges against him Accordingly, we reverse the final order with directions to dismiss the complaint against Appellant.

Id. at 1109.

30. Contrary to Dr. Zamek's suggestion, Trevisani does not stand for the proposition that a violation of section

458.331(1)(m) is limited to situations where a physician fails to retain possession of records that were previously created. Instead, Trevisani simply holds that if the Department of Health confines itself to a theory of failure to create records (based upon the manner in which the administrative complaint is drafted), a physician cannot be found guilty of violating section 458.331(1)(m) where the ALJ finds, based upon competent evidence, that the physician in fact created the records.

31. Unlike Trevisani, Petitioner in the instant matter is not attempting to advance an alternative theory not alleged in the Second Amended Administrative Complaint. On the contrary, Petitioner has plainly alleged in the charging document—and argues in its Proposed Recommended Order—that Dr. Zamek violated section 458.331(1)(m) based upon a failure to create records. Further, in contrast to Trevisani, this is not a situation where the undersigned has made a finding that the records were created. Indeed, Dr. Zamek admitted during his direct examination by counsel for Petitioner—testimony that the undersigned has accepted—that no records were created.

32. Based upon the findings of fact herein, Petitioner has demonstrated by clear and convincing evidence that Dr. Zamek failed to create any medical records in connection with the February 25, 2005, examination of J.D. Accordingly, Dr. Zamek is guilty of violating section 458.331(1)(m). See Dep't of

Health, Bd. of Med. v. Dozier, Case No. 07-1962PL, 2007 Fla. Div. Adm. Hear. LEXIS 519, *27 (Fla. DOAH Sept. 20, 2007) (finding violation of section 458.331(1)(m) where physician "fail[ed] to document an adequate history"); Dep't of Health, Bd. of Med. v. Waters, Case No. 04-0400PL, 2005 Fla. Div. Adm. Hear. LEXIS 1257, *68-70 (Fla. DOAH Aug. 30, 2005) (concluding that physician violated 458.331(1)(m) by failing to create records that appropriately documented physical exams, patient history, and treatment plans).

F. Penalty

33. In determining the appropriate punitive action to recommend in this case, it is necessary to consult the Board of Medicine's disciplinary guidelines, which impose restrictions and limitations on the exercise of the Board's disciplinary authority under section 458.331. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

34. The Board's guidelines for a violation of section 458.331 are enumerated in Florida Administrative Code Rule 64B8-8.001. As it relates to Dr. Zamek's violation of section 458.331(1)(k), rule 64B8-8.001(2)(k) provides for a penalty range of probation to revocation and a fine of \$1,000 to \$10,000. With respect to Dr. Zamek's violation of section 458.331(1)(m), rule 64B8-8.001(2)(m) calls for penalty ranging

from a reprimand up to a two-year suspension followed by probation, as well as a fine of \$1,000 to \$10,000.

35. Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigation circumstances may be taken into account:

- (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) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.
- (i) Any other relevant mitigating factors.

36. In its Proposed Recommended Order, Petitioner suggests that the appropriate penalty is the issuance of a Letter of Concern, a fine of \$5,000, and a suspension of Respondent's

license "until he has been evaluated by PRN and comes before the board with a recommendation from PRN that he is safe to practice." In addition, Petitioner requests that Respondent be required to attend six hours of continuing medical education in ethics, a recordkeeping course, and pay the costs of prosecution.

37. With two exceptions, the undersigned is in agreement with Petitioner's recommendations. First, the undersigned is unable to reconcile Petitioner's assertion—that Dr. Zamek is presently unfit to practice medicine in the absence of a PRN evaluation—with its decision to wait over three years to refer the matter back to DOAH after the Board of Medicine rejected a settlement agreement between the parties. As such, the undersigned is not inclined to recommend that Dr. Zamek's license be suspended pending a PRN evaluation.

38. Second, with respect to Petitioner's request for the costs of prosecution, even if Petitioner had presented any evidence as to the amount (which it did not), it appears that the issue of costs must be handled by the Board of Medicine. See § 456.072(4), Fla. Stat. ("In addition to any other discipline imposed through final order . . . the board, or the department when there is no board, shall assess costs related to . . . prosecution of the case The board, or the department when there is no board, shall determine the amount of

costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto") (emphasis added).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Board of Medicine:

1. Finding that Respondent violated section 458.331(1)(k), Florida Statutes, as charged in Count I of the Second Amended Administrative Complaint;
2. Finding that Respondent violated section 458.331(1)(m), Florida Statutes, as charged in Count II;
3. Issuing a Letter of Concern;
4. Imposing a fine of \$5,000;
5. Requiring Respondent to attend six hours of continuing medical education in ethics; and
6. Requiring Respondent to attend the course "Quality Medical Record Keeping for Health Care Professionals."

DONE AND ENTERED this 28th day of July, 2011, in
Tallahassee, Leon County, Florida.



EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of July, 2011.

ENDNOTES

¹ The finding that Dr. Zamek examined J.D. on February 25, 2005, is based solely on the testimony of J.D, which the undersigned credits over that of Dr. Zamek's.

² In Department of Health, Board of Medicine v. Cohen, DOAH Case No. 10-3101, 2010 Fla. Div. Adm. Hear. LEXIS 105 (Fla. DOAH Sept. 14, 2010), it was determined that the physician's mere act of checking a person's blood pressure (at the conclusion of which the physician committed a sexual assault upon the patient) constituted the practice of medicine, thereby authorizing the imposition of discipline for the physician's misconduct.

COPIES FURNISHED:

Mark Bakay, Esquire
2431 Aloma Avenue, Suite 254
Winter Park, Florida 32707

Shirley R. Bates, Esquire
Sharmin R. Hibbert, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Joy Tootle, Executive Director
Board of Medicine
Department of Health
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701

Nicholas W. Romanello, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

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.

RN-01

STATE OF FLORIDA
DEPARTMENT OF HEALTH

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Angel Sanders
DATE NOV 01 2010

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOH Case No. 2006-04951

ALBERT ZAMEK, M.D.,

Respondent.

_____ /

SECOND AMENDED ADMINISTRATIVE COMPLAINT

COMES NOW, Petitioner, Department of Health, by and through its undersigned counsel, and files this Administrative Complaint before the Board of Medicine against Respondent, Albert Zamek, M.D., and in support thereof alleges:

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

2. At all times material to this Complaint, Respondent was a licensed physician within the State of Florida, having been issued license

number ME 62525.

3. Respondent's address of record is 424 90th Street, Surfside, Florida 33154.

4. On or about February 19, 2005, Patient J.D., a 58 year-old female was referred to David Nehme, M.D., a urologist, for a consultation after she passed a kidney stone.

5. David Nehme, M.D. has two offices. One office is located at 528 East Osceola Street, Stuart, Florida and the other office is located at 1701 S.E. Hillmoore Street, Port St. Lucie, Florida.

6. On or about February 2005, Respondent subleased office space from David Nehme, M.D. at the Port St. Lucie location. The agreement allowed Respondent to use the office when David Nehme, M.D. and John Nehme, M.D. were not using the office.

7. On or about February 25, 2005, Patient J.D. presented to David Nehme's office in Port St. Lucie.

8. On or about February 25, 2005, Respondent was the only physician at the Port St. Lucie office.

9. On or about February 25, 2005, Patient J.D. arrived at the Port

St. Lucie office and advised Respondent that she was there for an appointment with David Nehme, M.D.

10. Respondent told Patient J.D. to fill out a new patient information form and escorted Patient J.D. to an examination room, without introducing himself.

11. On or about February 25, 2005, Respondent took a history from Patient J.D. and asked her how she was feeling.

12. Because Respondent was not wearing a nametag, Patient J.D. inquired as to whether he was John or David, meaning either John Nehme, M.D. or David Nehme, M.D.

13. Respondent replied that he was John and stated that David is his uncle.

14. On or about February 25, 2005, Respondent examined Patient J.D. by taking her blood pressure and placing his hands on her back.

15. Respondent concluded the office visit by giving Patient J.D. another appointment for March 1, 2005.

16. On or about February 25, 2005, Respondent did not document any part of his examination of Patient J.D.

17. Respondent never revealed his true identity to Patient J.D.

18. Respondent does not specialize in urology.

19. When Patient J.D. learned that she was not examined by either John Nehme, M.D. or David Nehme, M.D., she returned to the Port St. Lucie office to discuss this with Respondent.

20. On or about March 1, 2005, Patient J.D. saw Respondent at the Port St. Lucie office and recognized him as the person who examined her on February 25, 2005.

COUNT I

21. Petitioner realleges and incorporates paragraphs one (1) through twenty (20) as if fully set forth herein.

22. Section 458.331(1)(k), Florida Statutes (2004), provides that making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine constitutes grounds for disciplinary action by the Board of Medicine.

23. Respondent made a deceptive, untrue or fraudulent representation related to the practice of medicine and/or or employed a trick or scheme in the practice of medicine when he pretended to be David Nehme, M.D. and/or John Nehme, M.D.

24. Based on the foregoing, Respondent violated Section 458.331(1)(k), Florida Statutes (2004), by making deceptive, untrue, or fraudulent representations in or related to the practice of medicine and/or employing a trick or scheme in the practice of medicine when he pretended to be David Nehme, M.D. and/or John Nehme, M.D.

COUNT TWO

25. Petitioner realleges and incorporates paragraphs one (1) through twenty (20) as if fully set forth herein.

26. Section 458.331(1)(m), Florida Statutes (2004), provides that failing to keep legible medical records 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.

27. Respondent failed to keep legible medical records pursuant to Section 458.331(1)(m), when he did not document any part of his examination of Patient J.D., on or about February 25, 2005.

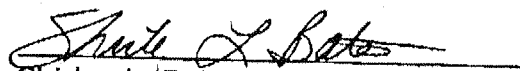
28. Based on the foregoing, Respondent violated Section 458.331(1)(m), Florida Statutes (2004), by failing to keep legible medical records that justify the course of treatment of the patient, including,

but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

WHEREFORE, Petitioner respectfully requests that the Board of Medicine enter an order imposing one or more of the following penalties: permanent revocation or suspension of Respondent's license, restriction of practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, corrective action, refund of fees billed or collected, remedial education and/or any other relief that the Board deems appropriate.

SIGNED this 29th day of October, 2010.

Ana M. Viamonte Ros, M.D., M.P.H.
State Surgeon General



Shirley L. Bates
Assistant General Counsel
DOH Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, FL 32399-3265
Florida Bar No.: 946331
(850)245-4640 Ext 8244
(850) 245-4681 Facsimile

SB/
PCP Date: October 29, 2010
PCP Members: El-Bahri, & Nuss

**STATE OF FLORIDA
DEPARTMENT OF HEALTH**

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOH Case Number 2006-04951

DOAH Case Number 11-0546PL

ALBERT ZAMEK, M.D.,

Respondent.

**MOTION TO ASSESS COSTS
IN ACCORDANCE WITH SECTION 456.072(4)**

COMES NOW the Department of Health, by and through undersigned counsel, and moves the Board of Medicine for the entry of a Final Order assessing costs against the Respondent for the investigation and prosecution of this case in accordance with Section 456.072(4), Florida Statutes (2003). As grounds therefore, the Petitioner states the following:

1. At its next regularly scheduled meeting, the Board of Medicine will take up for consideration the above-styled disciplinary action and will enter a Final Order therein.

2. Section 456.072(4), Florida Statutes (2003),¹ states as follows:

¹ Ch. 2003-416, § 19, Laws of Fla., effective September 15, 2003, amended Section 456.072(4), Florida Statutes (2003), to include the underlined language.

In addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, pursuant to this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is not board, shall assess costs related to the investigation and prosecution of the case. Such costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is no board, shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto. . . . (emphasis added)

3. The investigation and prosecution of this case has resulted in costs in the total amount of \$17,364.16, based on the following itemized statement of costs:

- a. Total costs for Complaints \$39.88
- b. Total costs for Investigations \$4,525.37
- c. Total costs for Legal \$12,058.08
- d. Total costs for expenses \$740.83
- e. Total costs for Compliance \$0

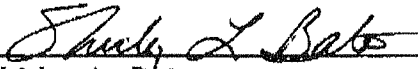
Therefore, the Petitioner seeks an assessment of costs against the Respondent in the amount of \$17,364.16, as evidenced in the attached affidavit. (Exhibit A).

4. Should the Respondent file written objections to the assessment of costs within ten (10) days of the date of this motion specifying the grounds for the objections and the specific elements of the costs to which the objections are made, the Petitioner requests that the Board determine the amount of costs to be assessed based upon its consideration of the affidavit attached as Exhibit A and any timely-filed written objections.

5. Petitioner requests that the Board grant this motion and assess costs in the amount of \$17,364.16 as supported by competent, substantial evidence. This assessment of costs is in addition to any other discipline imposed by the Board and is in accordance with Section 456.072(4), Florida Statutes (2003).

WHEREFORE, the Department of Health requests that the Board of Medicine enter a Final Order assessing costs against the Respondent in the amount of \$17,364.16.

Respectfully submitted,


Shirley L. Bates
Assistant General Counsel
Florida Bar No. 946311
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way Bin-C-65
Tallahassee, Florida 32399-3265
(850) 245-4640, Ext. 8244

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Assess Costs has been furnished via certified mail to Mark Bakay, Esquire, 2431 Aloma Avenue, Suite 254, Winter Park, Florida 32707, this 10th day of August, 2011.


Shirley L. Bates
Assistant General Counsel

AFFIDAVIT OF FEES AND COSTS EXPENDED

STATE OF FLORIDA
COUNTY OF LEON:

BEFORE ME, the undersigned authority, personally appeared **ELISA M. FLOYD** who was sworn and states as follows:

- 1) My name is Elisa M. Floyd.
- 2) I am over the age of 18, competent to testify, and make this affidavit upon my own personal knowledge and after review of the records at the Florida Department of Health (DOH).
- 3) I am a Regulatory Program Administrator (RPA for the Consumer Services and Compliance Management Unit for DOH. The Consumer Services Unit is where all complaints against Florida health care licensees (e.g., medical doctors, dentists, nurses, respiratory therapists) are officially filed. I have been in my current job position for more than one year. My business address is 4052 Bald Cypress Way, Bin C-75 Tallahassee, Florida 32399-3275.
- 4) As a RPA of the Consumer Services and Compliance Management Unit, my job duties include reviewing data in the Time Tracking System and verifying that the amounts correspond. The Time Tracking System is a computer program which records and tracks DOH's costs regarding the investigation and prosecution of cases against Florida health care licensees.
- 5) As of today, DOH's total costs for investigating and prosecuting DOH case number 2006-04951 (Department of Health v Albert Zamek, M.D.) are seventeen thousand three hundred sixty-four dollars and sixteen cents (\$17,364.16).
- 6)
- 7) The costs for DOH case numbers 2006-04951 (Department of Health v Albert Zamek, M.D.) are summarized in Exhibit 1 (Cost Summary Report), which is attached to this document.
- 8) The itemized costs and expenses for DOH case numbers 2006-04951 (Department of Health v Albert Zamek, M.D.) are detailed in Exhibit 2 (Itemized Cost Report and Itemized Expense Report and receipts), which is attached to this document.
- 9) The itemized costs as reflected in Exhibit 2 are determined by the following method: DOH employees who work on cases daily are to keep track of their time in six-minute increments (e.g., investigators

and lawyers). A designated DOH employee in the Consumer Services Unit, Legal Department, and in each area office, inputs the time worked and expenses spent into the Time Tracking System. Time and expenses are charged against a state health care Board (e.g., Florida Board of Medicine, Florida Board of Dentistry, Florida Board of Osteopathic Medicine), and/or a case. If no Board or case can be charged, then the time and expenses are charged as administrative time. The hourly rate of each employee is calculated by formulas established by the Department. (See the Itemized Cost Report)

10) Elisa M. Floyd, first being duly sworn, states that she has read the foregoing Affidavit and its attachments and the statements contained therein are true and correct to the best of her knowledge and belief.

FURTHER AFFIANT SAYETH NOT.

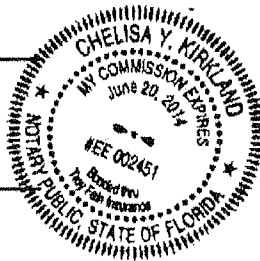
Elisa M. Floyd
Elisa M. Floyd, Affiant

State of Florida
County of Leon

Sworn to and subscribed before me this 10 day of August, 2011,
by Elisa M. Floyd, who is personally known to me.

Chelisa Y. Kirkland
Notary Signature

Chelisa Y. Kirkland
Name of Notary/Printed



Stamp Commissioned Name of Notary Public:

Division of
Medical Quality Assurance



*** CONFIDENTIAL ***

Time Tracking System
Itemized Expense by Complaint

Complaint 200604951

Report Date: 08/10/2011

Page 1 of 1

Staff Code	Expense Date	Expense Amount	Expense Code	Expense Code Description
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PROSECUTION SERVICES UNIT

HILL61B	06/20/2011	\$903.51	131400	COURT REPORTING
HILL61B	02/15/2011	\$60.00	133100	LEGAL & OFFICIAL ADVERTISEMENTS
HILL48B	09/10/2007	\$9.35	230000	PRINTING & REPRODUCTION
HILL61B	06/09/2011	\$431.48	261010	TRAVEL - EMLOYEE - IN FLA
HILL71B	06/09/2011	\$240.00	261010	TRAVEL - EMLOYEE - IN FLA

SubTotal	\$1,644.34
Total Expenses	\$1,644.34

Jan. 23. 2008

Secretary of State
 Division of Library & Information Services
 Administrative Code
 Tallahassee, FL 32399-0250



To: Department of Health
 Barbera Sample-Poole
 850-245-4640 ext-8130

Invoice Number: 70-1283

This Invoice Number must appear on all checks or correspondence regarding this invoice.

Invoice Date: 09/07/07

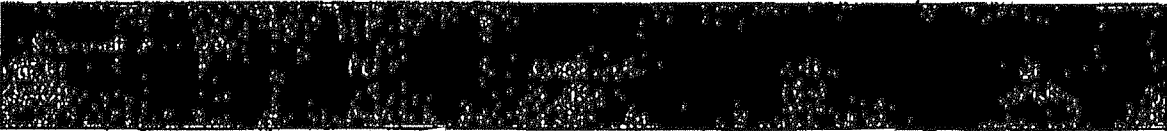
DO 547985

Qty	Description	Cost per Unit	Amount
1	Certified copy of Section 458.331, F.S. (2004) 2006-04951 HLL48B 230000 11/15/08 9/14/07 RECEIVED 11/16/08 Donna Brown HEALTH BROWN	9.35	\$9.35
FEID #1 EO: PA OCA: MQAPS			Total Amount Due: \$9.35

Please pay this invoice within 15 days and return the remittance copy with your payment
 If you have questions concerning this invoice, please call 850 245-6270



State of Florida Agencies please pay by Journal Transfer to SAMAS Account Code
 45-60-2-572001-45400100-00
 BF Category 001903



Fiscal Copy

7905

12/21

INVOICE

Invoice No.	Invoice Date	Job No.
56266	6/17/2011	84223
Job Date	Case No.	
6/8/2011	11-0546PL	
Case Name		
Dept of Health, Bd of Medicine vs Albert Zamek, M.D.		
Payment Terms		
Due upon receipt		

55 S.E. OSCEOLA STREET
 SUITE 201
 STUART, FL 34994
 PHONE: (888)850-0050 FAX: (772)283-0338
 WWW.ATLANTICREPORTING.COM

SHIRLEY L. BATES, ESQ
 FLORIDA DEPARTMENT OF HEALTH
 4052 Bald Cypress Way, Bin C-65
 Tallahassee, FL 32399

*Phyllis Eudson
 PH411-3 EIDSON
 DOS 6/20/11*

Original & One Copy Of The Hearing Before
 Hon. John G Van Laningham
 Full Day Per Diem
 TRIPS - Ground
 ACCOUNT NUMBER 051901

I certify, by evidence of my signature below, the above information is true and correct; the goods and services have been satisfactorily received and payment is now due. I understand that the office of the State Chief Financial Officer reserves the right to require additional documentation and/or conduct periodic post audits.

Pages	70	4.00	506.00
		360.00	360.00
		7.51	7.51
		0.00	0.00
TOTAL DUE >>>			\$903.51

Start time 9:00 am - 12:45 am - 1:00 pm - 3:25 pm
 REPORTER: SONOL

All invoices not paid within 30 days of invoice date are subject to service charge of 1.5% per month. Payment for contingent on client reimbursement. If turned over for collection, you agree to pay all collection costs and attorney fees.

Tax ID: 00-2730896

Phone: 850-245-1640 Fax: 850-410-1146

Please detach bottom portion and return with payment

SHIRLEY L. BATES, ESQ
 FLORIDA DEPARTMENT OF HEALTH
 4052 Bald Cypress Way, Bin C-65
 Tallahassee, FL 32399

Job No. : 84223 BU 10 12-PSL
 Case No. : 11-0546PL
 Case Name : Dept of Health, Bd of Medicine vs Albert Zamek, M.D.
 Invoice No. : 56266 Invoice Date : 6/17/2011
 Total Due : \$ 903.51

PAYMENT WITH CREDIT CARD

Cardholder's Name: *Phyllis Eudson FL Dept. of Health*
 Card Number: *[REDACTED]*
 Exp. Date: *[REDACTED]* Phone #: *850 245 4640*
 Billing Address: *4052 BALD CYPRESS WAY*
 Zip: *32399* Card Security Code: *[REDACTED]*
 Amount to Charge: *903.51*
 Cardholder's Signature: *Phyllis Eudson*

Remit To: ATLANTIC REPORTING
 55 S.E. OSCEOLA STREET
 SUITE 201
 STUART, FL 34994

DAE 7906

COMMUNITY NEWSPAPERS

2295319

P. O. BOX #31976
SOUTH MIAMI, FL 33156
Phone: 305 666-1177

PLEASE RETURN
PORTION WITH YR
COMMENT

INVOICE
NUMBER/TYPE
Page: 254299 254299

TERMS: DUE ON RECEIPT
DATE: 02/10/2011 02/10/2011

RETAIL FOR PORTION FOR YOUR RECORDS
PLEASE RETURN
PORTION WITH YR
COMMENT
IC
AGENCY 1940
AGENCY FEE
L

DATE: 02/10/2011

TIME: 10:00 AM

1 69.00 LEVEL HUT: ALBERT ZARON, MD

69.00

11 FEB 15 AM 9:27
FACILITATOR REGULATION
LEGAL

*Tony H
Tony H
2-16-11*

*Dennis S. Brown
2-17-11*

Item	Description	Amount	Total
	AGENCY FEE	69.00	69.00
	OUTSTANDING:	69.00	69.00

1-2-15-11 ...

7907

(L)

2295319

11 FEB 15 AM 9:27
PRACTITIONER REGULATION
LEGAL

A FREE AND INDEPENDENT NEWSPAPER VOICE

COMMUNITY NEWSPAPERS
PUBLISHED MONDAY
MIAMI, MIAMI-DADE, FLORIDA

STATE OF FLORIDA
COUNTY OF MIAMI-DADE:

Before the undersigned authority personally appeared **GEORGIA TAIT** who on oath says she is **OFFICE MANAGER** of Legal Advertising of Community Newspapers, published Monday at Miami-Dade, Florida; that the attached copy of advertisement, being a Legal Advertisement of Notice in the Matter of

NOTICE OF ACTION
THE LICENSE TO PRACTICE MEDICINE OF
ALBERT ZAMEK, M.D.
CASE NO.: 2006-04951

in the XXXXX Court, was published in said newspaper in the issue of

01/17, 01/24, 01/31, 02/07/2011

Affiant further says that the said Community Newspaper, published at Miami-Dade County, Florida, and that the newspaper has heretofore been continuously published in said Miami-Dade County, Florida, and has been entered as second class mail matter at the post office in Miami, Florida, Miami-Dade County, and additional mailing offices, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that she has neither paid nor promised any person, firm or corporation any rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

PROOF OF PUBLICATION -

AFFIANT Jesus C. Toledo

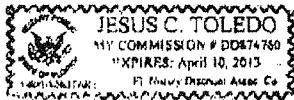
Sworn to and subscribed before me this

7TH day of FEBRUARY 2011

JESUS TOLEDO

[Signature]
(Print or type or stamp commissioned name of Notary Public)

(SEAL)



My Commission Expires: _____

Personally known

Community Newspapers
8798 E. W. 62nd Avenue
South Miami, Florida 33143
Phone: 305-255-1222 Fax: 305-255-1999 Email: info@cn.com

NOTICE OF ACTION
BEFORE THE BOARD OF
MEDICINE

IN RE: The license to practice medicine of

Albert Zamek, M.D.
424 90th Street
Surfside, Florida 33154

CASE NO.: 2008-04951
LICENSE NO.: ME 82825

The Department of Health has filed an Administrative Complaint against you, a copy of which may be obtained by contacting Shirley Bates, Assistant General Counsel, Prosecution Services Unit, 4062 Bald Cypress Way, Bin 4C85, Tallahassee, Florida 32308-3265, (850) 245-4840.

If no contact has been made by you concerning the above by February 21, 2011, the matter of the Administrative Complaint will be presented at an ensuing meeting of the Board of Medicine in a formal proceeding. In accordance with the Americans with Disabilities Act, persons needing a special accommodation to participate in this proceeding should contact the individual or agency sending notice not later than seven days prior to the proceeding at the address given on the notice. Telephone: (850) 245-4840, 1-800-955-8771 (TDD) or 1-800-955-8770 (V), via Florida Relay Service.
01/17, 01/24, 01/31, 02/07/11

7908

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