

STATE OF FLORIDA
BOARD OF MEDICINE

Final Order No. DOH-97-076 Date 7-22-97
FILED

IN RE: THE PETITION FOR
DECLARATORY STATEMENT
OF ROBERT STEINBERG, M.D.

Department of Health
AGENCY CLERK

By Stephanie G. O'Neil
Deputy Agency Clerk

FINAL ORDER

THIS CAUSE came before the Board of Medicine (hereinafter "Board") pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code, on June 6, 1997, for the purpose of considering the Petition for Declaratory Statement filed on behalf of Robert Steinberg (hereinafter "Petitioner"). The Agency for Health Care Administration (hereinafter "AHCA") appeared before the Board for the purpose of participating in the resolution of the Petition. Having considered the Petition, the argument submitted by counsel for the Petitioner, the position set forth by AHCA, and otherwise being fully advised in the premises, the Board makes the following findings and conclusions:

FINDINGS OF FACT

1. Petitioner, Robert Steinberg, is a physician licensed in the State of Florida who practices in the area of psychiatry.
2. Petitioner is currently treating another Florida-licensed physician (hereinafter "Patient"), for severe anxiety incident to the break up of the Patient's marriage, and other domestic matters. The Patient is not currently practicing medicine because of his condition and does not intend to resume the practice of medicine until his psychiatric condition is resolved. It is possible that the Patient's condition is so severe that he may be "impaired" as that term is used in Section 458.331(1)(s), Florida Statutes.

3. Petitioner recently inquired of the Physician Recovery Network (hereinafter "PRN") in order to access the treatment options available to the Patient. PRN advised Petitioner of the requirements of Section 458.331(1)(e), Florida Statutes, regarding the requirement that licensees report to AHCA any person they know to be in violation of Chapter 458, Florida Statutes, or the rules of the Board.

4. Petitioner is concerned that the requirement of Section 458.331(1)(e), Florida Statutes, may cause a conflict with other statutory requirements placed upon physicians. Specifically, Petitioner is concerned about the confidentiality requirements of Section 455.2415, and 455.241(2), Florida Statutes.

5. Petitioner inquired of the American Medical Association (hereinafter "AMA") as to how this conflict might be resolved under the AMA's Code of Ethics. The AMA's Ethics Standards Division informally advised Petitioner that in its opinion, where the Patient is not practicing medicine and therefore not placing any patients in imminent danger, the interest in maintaining the confidentiality of the Patient's communications prevails and that the Petitioner should not report the Patient. However, if the Patient resumes the practice of medicine and due to any impairment places patients at risk of serious injury, the balance of consideration switches in favor of reporting the impaired physician.

6. No party has asserted that there is any dispute of the facts as set forth in the Petition filed in this cause. Neither AHCA, or any other interested person has requested a hearing pursuant to Section 120.57, Florida Statutes.

7. This Petition was noticed by the Board in Volume 23, No. 21, dated May 23, 1997, of the Florida Administrative Weekly (p. 2636).

CONCLUSIONS OF LAW

1. The Board Has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.
2. The Petition filed in this cause is in substantial compliance with the provisions of Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.
3. Section 458.331(1)(s), Florida Statutes, provides in pertinent part that it is grounds for disciplinary action by the Board if a licensee is:
 - ... unable to practice medicine with reasonable skill and safety to patients by reason of illness . . . or as a result of any mental or physical condition.
4. Section 458.331(1)(e), Florida Statutes, provides grounds for disciplinary action by the Board whenever a licensee fails to:
 - ... report to the department [AHCA] any person who the licensee knows is in violation of this chapter . . . A treatment provider approved pursuant to s. 455.261 shall provide the department or consultant with information in accordance with the requirements of s. 455.261(3),(4),(5), and (6).
5. These two provisions, when read together, clearly appear to require any licensee who knows of another licensee's impairment, to report such knowledge to AHCA. Nothing in either statutory provision addresses the circumstances of a physician/patient relationship between the two licensees.
6. Furthermore, Section 455.241(2), Florida Statutes, provides in pertinent part that:
 - ... the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient. . . . Except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential

and may be disclosed only to other health care providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena . . . for which proper notice has been given.

7: The Board has consistently acknowledged the importance of the confidentiality of patient records that is codified in Section 455.241(2), Florida Statutes, and it appears that the prohibition against violating patient confidentiality runs exactly counter to the requirement of Section 458.331(1)(e), Florida Statutes, in the factual situation presented by the Petition in this cause. The weighing of these two contrasting concerns, protection of patient confidentiality and protection of the public health, safety, and welfare, is an extremely difficult and delicate task.

8: Petitioner has suggested that Section 455.2415, Florida Statutes, does not provide any assistance in determining whether or not Petitioner can breach the patient/physician's confidentiality and file a report with AHCA. Section 455.2415, Florida Statutes, provides that:

Communications between a patient and a psychiatrist, as defined in s. 394.455(23), shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative. Provision of psychiatric records and reports shall be governed by s. 455.241. Notwithstanding any other provisions of this section or s. 90.503, where:

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

the psychiatrist may disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency.

However, as stated by Chief Judge Schwartz in his dissent in *Boynton v. Burglass*, 590 So. 2d 446 (Fla. 3d DCA 1991), the Legislature has considered the issues of certainty and secrecy of physician-patient communications and decided that at least in the circumstances set forth in Section 455.2415, Florida Statutes, such considerations are not well served or are outweighed.

Supra. at 454. Paraphrasing the suggestion by Chief Judge Schwartz, rather than asking why a duty to report should exist, that bearing in mind the demands of common decency and the protection of life, we should be asking why it should not. As Chief Judge Schwartz observed in the *Boymton* case, "There is no reason why not..."

9. In the factual scenario presented by Petitioner, the Board finds that if the Patient is not practicing medicine and has not indicated any intention to do so prior to the resolution of the Patient's psychiatric condition, there is no statutory duty imposed on Petitioner to report the Patient to AHCA for violation of Section 458.331(1)(s), Florida Statutes. However, in the circumstance where the Patient is unable to practice medicine with reasonable skill and safety to his patients by reason of a psychiatric condition, but resumes or states an intention to resume practicing medicine against Petitioner's advice, the Board finds that the requirements of Section 455.2415(1), (2), and (3), Florida Statutes, are met and the Petitioner may report the Patient to AHCA.¹

WHEREFORE, the Board hereby finds that under the specific facts of the Petition, as set forth above, the Board's position is similar to that of the AMA, if the Patient is not currently practicing medicine, the Petitioner has no duty to report the Patient to AHCA, and is not in violation of any statutory requirement for failing to do so. However, if the Patient resumes or threatens to resume the practice of medicine while impaired, then Petitioner may report the Patient to AHCA without violating any statutory obligation. This resolution properly balances

¹ In that Section 455.2415, Florida Statutes, authorizes a psychiatrist to disclose patient communications "to the extent necessary to warn any potential victim" (emphasis added) and to the extent that the Patient's return to the practice of medicine would pose a threat to the health, safety, and welfare of any number of unidentifiable potential victims, a single report to AHCA would reasonably be within the parameters of "to the extent necessary to warn any potential victim" as set forth in Section 455.2415, Florida Statutes.

the dual purposes of the various regulations designed to protect the public and to protect the confidentiality of the physician-patient relationship.

DONE AND ORDERED this 30 day of June, 1997.

BOARD OF MEDICINE



EDWARD A. DAUER, M.D.
CHAIRMAN

NOTICE OF RIGHT TO JUDICIAL REVIEW

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. Mail to Robert Steinberg, M.D. c/o Lester J. Perling, Attorney at Law, Broward Financial Centre, 500 East Broward Boulevard, Suite 1130, Ft. Lauderdale, Florida 33394, and by interoffice delivery to Larry G. McPherson, Jr., Chief Medical Attorney, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, Florida 32308, this

_____ day of _____, 1997.

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by certified mail to Robert Steinberg, M.D., 200 West Palmetto Park Road, Suite 303, Boca Raton, FL 33432, Lester J. Perling, Esquire, Broward Financial Centre, 500 East Broward Boulevard, Suite 1130, Ft. Lauderdale, FL 33394, and interoffice delivery to Larry McPherson, Jr., Chief Attorney, 2727 Mahan Drive, Tallahassee, Florida 32308-5403, at or before 5:00 p.m., this _____ day of _____, 1997.

RECEIVED

MAR 04 1997

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION
BOARD OF MEDICINE

AHCA NO. _____

IN RE:

Petition For Declaratory
Statement of Robert Steinberg,
M.D.



PETITION FOR DECLARATORY STATEMENT

Pursuant to Section 120.565 Florida Statutes and Rules 59R-1.003 and 28-4.001, Florida Administrative Code, Petitioner, ROBERT STEINBERG, M.D. ("Dr. Steinberg"), by and through undersigned counsel petitions the Board of Medicine for a Declaratory Statement and says:

1. The Petitioner is Robert Steinberg, M.D. For purposes of this Petition, Petitioner's address is that of undersigned counsel.

2. The agency affected by this Petition is the Agency For Health Care Administration, Board of Medicine ("Board"). The statutory provisions on which Declaratory Statement is sought are Sections 455.241(2), 455.2415, 458.331(1)(e), 458.331(1)(g), 458.331(1)(s).

3. Dr. Steinberg is a physician specializing in psychiatry and licensed by the state of Florida. He currently is treating another physician ("Patient"), licensed by the state of Florida, for severe anxiety incident to the break up of the Patient's marriage, and other domestic matters. The Patient is not

BROAD and CASSEL

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practicing medicine because of his condition and does not intend to practice until his psychiatric condition is resolved. The Patient's judgment is not impaired and he is capable of determining when he is able or unable to practice. It is possible that the Patient's condition is so severe that he may be "impaired" as that term is used in Section 458.331(1)(s), Florida Statutes, which makes it grounds for disciplinary action to practice while mentally or physically impaired.

4. Dr. Steinberg recently made an inquiry to the Physician Recovery Network ("PRN") in order to access the treatment options available to the Patient. PRN advised Dr. Steinberg that pursuant to Section 458.331(1)(e), Florida Statutes, he is required to report the Patient to the PRN or he, Dr. Steinberg, would be subject to disciplinary action. Section 458.331(1)(e), Florida Statutes, states that a physician may be disciplined for failing to report another physician who the first physician knows is in violation of any of the provisions of the licensure statutes. Dr. Steinberg's failure to report his patient as being impaired thus could be construed to be a violation of Section 458.331(1)(e).

5. Taken together, the requirements of Sections 458.331(1)(s) and 458.331(1)(e) appear to be in direct conflict with the requirements of Sections 455.241(2), 455.2415 and 458.331(1)(g), Florida Statutes.

6. Section 455.241(2) specifically states that "medical records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the

patient or the patient's legal representative or other health care providers involved in the care or treatment of the patient except upon written authorization of the patient." Section 455.241(2) does not contain an exception applicable to this situation.

7. Section 455.2415, Florida Statutes, additionally states that "communications between a patient and a psychiatrist . . . shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative." This Section goes on to state that where a patient is engaged in the treatment or relationship and such a patient has made an actual threat to physically harm an identifiable victim or victims and the treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act, and that it is more likely than not that in the near future the patient will carry out the threat, the psychiatrist may disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to the law enforcement agency. Section 455.2415 makes reporting of even such specific threats optional and provides for reporting not to the Board of Medicine, but rather to law enforcement agencies or to the victims themselves. Furthermore, the Patient has not threatened to physically harm anyone.

8. In turn, Section 458.331(1)(g) subjects a physician to sanctions for "failing to perform any statutory or legal obligation placed upon a licensed physician." Maintaining patient confidence is such a statutory obligation.

9. The requirements of the Florida Statutes in this case are conflicting and appear to be mutually exclusive. Pursuant to Section 458.331(1)(e) Dr. Steinberg is seemingly subject to sanction for failing to report the Patient's impairment. On the other hand, Dr. Steinberg also would appear to be subject to sanction under Section 458.331(1)(g) for violating Sections 455.241(2) and 455.2415 for reporting the Patient's impairment and thereby disclosing his condition to third parties without the Patient's written consent.

10. Through undersigned counsel, Dr. Steinberg has inquired of the American Medical Association ("AMA") as to how this conflict might be resolved under the AMA's Code of Ethics. The written standard of the AMA's Code of Medical Ethics is attached as Exhibit A to this Petition. We also spoke to the AMA's Ethics Standards Division regarding the facts of this case. The AMA takes the position that if a patient/physician is not practicing and therefore not placing any patients in imminent danger, the interest in maintaining the confidentiality of the patient's communications prevails and that the treating physician should not be required to report his patient to the Board or to the PRN. If the physician/patient resumes practicing, and undertakes procedures that, due to his or her impairment may place patients at risk of serious injury, the balance of considerations switches in favor of reporting the impaired physician to the appropriate authority.

11. Dr. Steinberg concurs with the AMA's position, that, as a matter of public policy, it is preferable for a physician with a

AHCA NO. _____

psychiatric disorder who is not practicing and who is in active treatment, to be able to remain in treatment without his condition being disclosed to an agent of the state of Florida. Otherwise, physicians may be reluctant to seek treatment or remain in treatment. This is true even though a physician may not be subject to disciplinary action for seeking mental health treatment. So long as a physician is not in active practice, he poses no threat to patient safety, the apparent basis for the statutory reporting requirement. Dr. Steinberg urges the Board to adopt the AMA's position, which is not inconsistent with the requirements of the Florida Statutes.

12. In light of the conflict among the statutes cited above, Dr. Steinberg requests that the Board issue a Declaratory Statement advising him as to the proper place to balance the opposing considerations under the facts of this case.

Respectfully submitted,

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By: _____

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