

**STATE OF FLORIDA
DEPARTMENT OF HEALTH**

In re:

DOH Case No.: _____

Objection to SUBPOENA NO. A _____

_____ /

OBJECTION AND EXCEPTIONS TO ORDER DENYING MOTION TO QUASH

Respondent, a doctor of medicine (M.D.), to whom the referenced subpoena is directed, by and through his/her undersigned counsel, in accordance with Chapter 120, Florida Statutes, hereby files this Objection and Exceptions to the Order Denying Objection to DOH Subpoena No. A _____, Office Issuance No. _____, which was issued _____, 20____ (referred to herein as the "Order"), in the referenced case.

The Respondent files this Objection and Exceptions anonymously to avoid disclosure of a confidential investigation which is prohibited by Florida law.

As grounds therefor he/she states:

1. The Respondent is a Florida licensed medical doctor who provides medical services, including but not limited to, drug and alcohol abuse counseling, HIV testing and counseling, testing and counseling for sexually transmitted diseases (STDs), and/or mental health/psychotherapy counseling and/or referrals to specialists and consultants for the same.

2. The subpoena seeks the confidential medical records of fifteen (15) named patients, none of whom made a complaint against the physician.

3. The complaint giving rise to this investigation is not based on any complaint made by or on behalf of any patient. In fact, all of the Respondent's patients or former patients are very satisfied with the medical care they have received from this Respondent.

4. Respondent filed an Objection to the Subpoena which is incorporated by reference.

5. The Respondent Department of Health seeks to obtain the private, personal, confidential medical records of fifteen (15) different patients. Yet the Department of Health has not received or furnished any signed authorization from any patient to obtain or receive a copy of the patient's medical record.

6. The underlying documents allegedly supporting the subpoena indicate that the investigator attempted to obtain signed patient releases to obtain their medical records but "met with negative results."

7. The subpoena shows on its face that it is being issued pursuant to Chapter 456, Florida Statutes, for the investigation of an alleged violation of Section 458.331, Florida Statutes.

8. Objection is made and exception is taken to the Order, as follows.

9. The Order cites a single case, Community Healthcare Centerone, Inc. v. State of Florida, 852 So. 2d 322 (Fla. 4th DCA 2003), rev. denied, 868 So. 2d 522 (Fla. 2004), as authority. Reliance on Community Healthcare case is misplaced. It does not apply to the facts of the present case.

10. Community Healthcare involved a criminal investigation for Medicaid fraud pursuant to Chapter 409, Florida Statutes. The subpoena in Community Healthcare was issued by the Office of the Statewide Prosecutor, a criminal law enforcement agency with the authority to investigate criminal Medicaid fraud allegations. The subpoena specifically sought records of Medicaid recipients from a Medicaid provider pursuant to Section 409.920(7), Florida Statutes.

11. The Respondent is not a Medicaid provider, has never signed any agreement agreeing to be in the Medicaid Program, and advises his patients in advance that he does not

accept Medicaid.

12. The Respondent physician has not billed or collected any fees from the Medicaid Program.

13. Chapter 409, Florida Statutes, does not require any physician who is not a Medicaid physician and who has not agreed to the terms of the Medicaid Program, to furnish such information and records.

14. The law is clear that the Surgeon General and the Department of Health do not have the same authority as the Office of the Statewide Prosecutor. The law is also clear that the Surgeon General and the Department of Health do not have independent enforcement authority for such subpoenas or orders. Neither Chapter 456 nor Chapter 120, Florida Statutes, grants the Department of Health or the Surgeon General independent authority to enforce the subpoena at issue.

15. Carrow v. Dep't of Professional. Reg., 453 So. 2d 842 (Fla. 1st DCA 1984) and Nathanson v. Dep't of Labor & Emp. Security, 620 So. 2d 1066 (Fla. 1st DCA 1993) both stand for the long-established proposition that the subpoena of an administrative agency may not be enforced under such facts as exist in the present case.

16. Furthermore, one patient whose record is requested (whose initials are " ____ ") is not even known to the Respondent and has never been treated by him/her. It is believed that the correct patient names are not being provided. This may lead to the release of the incorrect patient's medical records.

17. As stated previously, Respondent contends that the underlying affidavit and other documents attached to the subpoena show that there is no probable cause nor even a "reasonable

cause" that any offense has been committed by the Respondent or that the medical records being sought contain any evidence of any violation of any law or rule.

18. The records requested include those that are considered to be "super-confidential" and may not be released absent a specific court order in accordance with Florida law, federal law, and Federal Regulations, including but not limited to 42 CFR Part 2, Florida Statutes, and the HIPAA Privacy Regulation. Federal Regulations and Federal Statutes prohibit the release of the information sought by the Subpoena, including 42 U.S.C. Sect. 290dd-2; 42 U.S.C. Sect. 9501(1)(H) & (2)(B); 42 C.F.R. Part 2; 45 C.F.R. Sects. 164.102, 164.501, 164.502(a), and 164.512. These federal laws and regulations override and pre-empt any state laws or regulations.

19. The subpoena for fifteen (15) patients' medical records appears to be nothing more than a fishing expedition. It is overbroad and over-reaching on the part of the Department of Health.

20. The Respondent objects to the Order because Respondent believes that the subpoena may not have been lawfully issued and that the order is not proper.

21. The other grounds and authorities set forth in Respondent's previously filed Objection to DOH Subpoena No. A _____, are incorporated herein by reference.

WHEREFORE, the Respondent objects to and takes exception to the Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was filed and served as follows:

Filed via telefax (with original following via certified mail, return receipt requested), to:

Agency Clerk
c/o General Counsel
Department of Health

Mailing address:

4052 Bald Cypress Way, Bin #A02
Tallahassee, Florida 32399-1703

Physical address:

2585 Merchants Row Boulevard
Tallahassee, Florida 32399
Telephone: (850) 245-4005
Telefax: (850) 410-1448

with a copy served via telefax (with original following U.S. mail, postage prepaid), to:

_____, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin #C- ____
Tallahassee, Florida 32399
Telephone: (850) 245-4640
Telefax: (850) 245-4681

this _____ day of _____ 20_____.

GEORGE F. INDEST III, ESQUIRE

Board Certified in Health Care Law
Florida Bar No.: _____

MICHAEL L. SMITH, ESQUIRE

Board Certified in Health Care Law
Florida Bar No.: _____

THE HEALTH LAW FIRM

1101 Douglas Avenue
Altamonte Springs, Florida 32714
Telephone: (407) 331-6620
Facsimile: (407) 331-3030

ATTORNEYS FOR RESPONDENT

[NOTE: THE DOCUMENT ABOVE IS A SAMPLE, FOR ILLUSTRATIVE AND EDUCATIONAL PURPOSES ONLY. ONLY ALLEGE THE CORRECT FACTS AND CIRCUMSTANCES THAT MAY APPLY TO THE CASE. EVERY CASE AND EVERY SET OF CIRCUMSTANCES IS DIFFERENT. YOU SHOULD CONSULT AN EXPERIENCED HEALTH ATTORNEY TO ASSIST YOU.]