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
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For Respondent: Jon M. Pellett, Esquire
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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.