

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL )  
REGULATION, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 80-1086  
 )  
GEORGE A. CHAKMAKIS, M. D. )  
 )  
Respondent. )  
\_\_\_\_\_)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, R. L. Caleen, Jr., held a formal hearing in this case on August 18, 1981, in Lakeland, Florida, concluding on January 8, 1982, in Tampa, Florida Appearances

For Petitioner: Roy L. Glass, Esquire  
Post Office Box 10008  
St. Petersburg, Florida 33733

For Respondent: Elvin L. Martinez, Esquire  
Post Office Box 4311  
Tampa, Florida 33607

ISSUE PRESENTED

Whether respondent, a medical doctor, should have his license to practice medicine revoked or otherwise disciplined for alleged malpractice, unethical medical practices', and performance of services which he knew or should have known he was not competent to perform.

BACKGROUND

By a three-count administrative complaint dated April 8, 1980, petitioner Department of Professional Regulation ("Department") charged respondent George A. Chakmakis, M.D. ("respondent") with medical malpractice and performance of services which he knew or should have known he was not competent to perform.

Specifically, Count I alleges that respondent negligently failed to read, identify, and interpret a chest x-ray showing a clear abnormality in the lung of Mary Louise Wahl, his patient; that he failed to administer follow-up x-rays and seek consultation in light of what the chest x-ray revealed; that he negligently failed to diagnose Ms. Wahl for malignant lung disease, or refer her to another physician for necessary treatment; that, contrary to medical ethics, he failed to seek consultation in a doubtful or difficult case where the quality of medical service could have been enhanced by such referral.

Count II alleges that respondent prescribed, dispensed, or administered drugs in excessive or inappropriate amounts to Argola O'Neal, his patient.

Count III alleges that respondent, negligently and contrary to medical ethics, breached his obligation to provide postoperative care to Ronald Sequino, his patient.

On March 26, 1981, the Department amended its complaint by adding an additional count. Count IV alleges that respondent negligently used the Bellew Therapeutic Vaccine Method to treat the arthritis of Mary Louise Wahl, his patient.

Respondent disputed the charges and requested a hearing; on June 12, 1980, the Department referred this case to the Division of Administrative Hearings for the conducting of formal Section 120.57(1) proceedings.

Thereafter, hearing was set and reset numerous times. It was initially set for September 16, 1980; on motion of respondent, it was continued and reset for October 31, 1980. Subsequently, on joint motion of the parties, it was continued and reset for February 23, 1981. On motion of respondent, it was again continued and reset for April 9 and 10, 1981. On March 26, 1981, respondent moved for a continuance based on the Department's newly filed amendment to the administrative complaint; the motion, unopposed by the Department, was granted and hearing was reset for June 16 and 17, 1981. On June 9, 1981, respondent moved for a continuance, citing Section 11.111, Florida Statutes (1981); the motion was granted, and hearing was reset for August 18 and 19, 1981.

During the discovery stage of, this proceeding, respondent repeatedly failed to respond to discovery initiated by the Department. The Department filed motions to compel discovery and impose sanctions. By orders issued July 15 and August 11, 1981, respondent was directed to comply with the Department's discovery requests. The severe sanctions sought by the Department were not imposed; however, respondent was directed to pay the reasonable expenses incurred by the Department in obtaining the orders--with the exact amount to be determined at final hearing.

At hearing, the Department called as its witnesses: Vernon Golightly, Ronald Sequino, Argola O'Neal, Fred O'Neal, Wayne Lopez, Marie McGuire, Frances Davis, Dr. William Cottrell, Dr. W. M. Koon, Dr. J. D. Morgan, John Spanogle, and Dr. George Chakmakis. It offered Petitioner's Exhibit 1/ Nos. 1 through 17 into evidence which, except for Nos. 9 and 17, were received. Respondent called no witnesses and offered no exhibits into evidence.

The parties requested and were granted the opportunity to present their closing arguments subsequent to submittal of proposed findings of fact and conclusions of law. The Department filed proposed findings, respondent did not. Closing arguments were presented in Tampa, Florida, on February 8, 1982.

Based on the evidence presented at hearing, the following facts are determined:

## FINDINGS OF FACT

1. Respondent, George A. Chakmakis, M.D., is licensed by the Department to practice medicine in Florida. At all times material to this proceeding, he was engaged in the general practice of medicine at 123 Tampa Street, Auburndale, Florida., (P-6.)

### I.

#### As to Count I

##### A. Failure to Detect Clear Abnormality in Patient's Chest X-ray

2. From 1974 to 1977, Mary Louise Wahl was respondent's patient. At various times, he treated her for rheumatoid arthritis, chronic bronchitis, and the flu. (P-8.)

3. On February 16, 1977, respondent had a chest x-ray taken of Ms. Wahl. In reading the x-ray film, he failed to detect or identify any abnormality in her lung. In a letter he subsequently wrote to another physician, respondent contended that, in February, 1977, her chest x-ray "was clear." (Testimony of Spanogle; P-5, P-8.)

4. During the next eight months, Ms. Wahl suffered from chronic breathing problems. Respondent treated her for bronchitis and prescribed various antibiotics--none of which caused any noticeable improvement in her condition. Her last visit to respondent's office was on November 11, 1977. (P-8.)

5. On December 15, 1977, Ms. Wahl was admitted to the emergency room of Winter Haven Hospital. She complained of progressive shortness of breath and coughing to Dr. Alan G. Gasner, the physician on duty. (P-8.)

6. Dr. Gasner did a complete history, performed a physical examination and had a chest x-ray taken of Ms. Wahl. The x-ray revealed a massive left pleural effusion. He removed the fluid from the left side of her chest and conducted tests to determine the cause of the effusion. He concluded that she had a carcinoma of the lung, with metastatic tumor as the cause of the left pleural effusion. She received chemotherapy and was discharged from the hospital 13 days later. (P-8.)

7. On May 5, 1978, Ms. Wahl was readmitted to Winter Haven Hospital. Twelve days later, she died. The cause of death: metastatic carcinoma (or cancer) of the lung. (P-8.)

8. The chest x-ray of Ms. Wahl, taken by respondent on February 16, 1977 clearly showed an abnormality in the upper left lobe of her lung. The abnormality, indicated by a white hazy area between the ribs, was obvious, not subtle: a physician who had completed medical training should have been able to recognize it. The white hazy area was present only on the left lobe, not the right. In examining lung x-rays, physicians are trained to compare the left side with the right side. Additional factors were present: Ms. Wahl was 63 years old and respondent was aware that she smoked cigarettes. Respondent's failure to detect such an obvious abnormality in the February 16, 1977, chest x-ray deviates from the standard of care, skill, and treatment recognized by reasonably prudent similar physicians as acceptable under similar circumstances. This standard of care, and respondent's deviation therefrom, was established at hearing by the expert testimony of five licensed physicians who practice medicine in the Auburndale-Winter Haven area. Respondent admitted, at hearing,

that the February 16, 1977, chest x-ray shows an increased density in the left upper lobe of the lung. (Testimony of Chakmakis, Gasner, Libinski, Cottrell, Koon, Morgan; P-5.)

9. The abnormality shown in the February 16, 1977, chest x-ray of Ms. Wahl, if detected, would have warranted further action by the treating physician, such as additional x-rays, including a lateral view, and tests. In light of Ms. Wahl's age and smoking habit, the February 16, 1977, x-ray would lead a prudent physician to suspect a malignancy or carcinoma. If it was a carcinoma, immediate action would have been necessary; it is possible that surgical intervention to remove the carcinoma could have been performed. (Testimony of Cottrell, Gasner, Lipinski, Koon, Morgan.)

10. It cannot, however, be concluded that respondent's failure to detect the clear abnormality in Ms. Wahl's lung caused or contributed to her eventual death from carcinoma of the lung. No definite link has been established. There is no way of now knowing whether Ms. Wahl had a carcinoma or cancer in February, 1977. The abnormality shown in the x-ray could be consistent with these different primary diagnoses: cancer, tuberculosis, and pneumonia. (Tr. 50.)  
B. Failure to Provide Chest X-ray to Ms. Wahl's Subsequently Treating Physician

11. When Ms. Wahl was admitted to Winter Haven Hospital in December, 1977, she explained to Dr. Gasner that she had been under the care and treatment of respondent. Dr. Gasner immediately asked respondent to forward her medical records so that he could determine the nature of her treatment. Respondent replied by letter dated December 21, 1977: he indicated that her last chest x-ray, taken February, 1977, was clear; that her last office visit was on November 11, 1977, when she was treated for bronchitis; and he enclosed copies of lab test results. On December 28, 1977, Dr. Gasner wrote respondent, explaining that he needed to have her prior chest x-ray films in order to plan a course of therapy for her. Dr. Gasner received no response from respondent. (P-8.)

12. Respondent's failure to provide Dr. Gasner with the requested chest x-rays of Ms. Wahl is insufficient, in itself, to support a conclusion that respondent refused to supply such records. Respondent testified that he believed that the requested x-rays had been sent to Dr. Gasner; such testimony, although self-serving, was not refuted by the Department. It is concluded that respondent's failure to supply the x-rays requested by Dr. Gasner's December 28, 1977, letter was due to inadvertence, not willful refusal. (Testimony of Chakmakis.)

13. Refusal to supply patient medical records requested by a subsequent treating physician constitutes a deviation from the accepted standard of care in the Auburndale-Winter Haven area. But, it has not been shown that the inadvertent failure to supply such records constitutes a deviation. (Testimony of Koon, Cottrell.)

## II.

### As to Count II

14. Argola O'Neal was respondent's patient from November 8, 1978, through December 20, 1978. She went to him for treatment of kidney problems and recalls receiving two drug prescriptions from him. He also dispensed drugs to her in his office. (Testimony of O'Neal.)

15. She has no complaints about the quality of the treatment she received. The medications respondent prescribed made her feel better. She stopped seeing respondent because her husband felt that respondent's prices were too high. (Testimony of O'Neal.)

16. After leaving the care of respondent, Ms. O'Neal became a patient of Dr. William Cottrell. At Dr. Cottrell's request, she showed him the medications which had been prescribed by respondent. They included: Inderal, 40 milligram and 20 milligram tablets; Digoxin, .25 milligrams; Tofranil; Synthroid; Isomil; Dyazide; Serapes, 10 milligrams; Nitrostat; Lasix, 20 milligrams; Mylicon; Darvocet-N 100; Thyroid, 2-grain tablets; and Gaviscon. The Inderal prescriptions were duplicative, as were the drugs Synthroid and thyroid extract. If used improperly, they were potentially dangerous to the patient. (Testimony of Cottrell.)

17. Ms. O'Neal, age 76, is a frail woman suffering from senility and hardening of the arteries. Her ability to accurately recall respondent's brief treatment of her--occurring three years prior to hearing--has been affected. For example, she did not recognize respondent until he introduced himself to her immediately before hearing. Her testimony conflicts with that of her husband, Fred O'Neal. He testified that she stopped seeing respondent because she was dissatisfied with his treatment. (Testimony of O'Neal, Cottrell.)

18. Because Ms. O'Neal had medications prescribed by an earlier doctor, respondent was concerned about prescribing duplicate medications. He instructed her to stop taking duplicative diuretics, thyroid, and heart medications. Although Ms. O'Neal does not recall such instructions, respondent's recollection is persuasive. (Testimony of Chakmakis.)

19. When Ms. O'Neal became Dr. Cottrell's patient, she expressed some confusion concerning the medications which she had received from respondent. Although Dr. Cottrell testified that, in his opinion, there was some redundancy in the medications prescribed by respondent, he consistently avoided concluding that the prescriptions were sufficiently excessive or inappropriate to constitute a deviation from the prevailing standard of medical care in the Auburndale-Winter Haven area. 2/ (Tr. 235-236.) In his treatment of Ms. O'Neal, Dr. Cottrell tried to simplify the medication instructions and make sure that her husband was fully aware of them. (Testimony of Cottrell.)

### III.

#### As to Count III

20. Ronald Sequino was respondent's patient from November 30, 1978, through December 11, 1978. On Friday, November 30, 1978, respondent surgically removed two cysts from Sequino's back. The agreed-upon price was \$30. (Testimony of Sequino; P-2, P-6.)

21. That evening, the cyst wounds began to open. Sequino, concerned about infection, telephoned respondent's office number Friday evening, Saturday, and Sunday. He obtained respondent's answering service which informed him that respondent was unavailable; he left a message for respondent to contact him. Respondent did not return Sequino's call. (Testimony of Sequino.)

22. The next week, Sequino returned to respondent's office for treatment of the wound which, by then, was discharging pus. Sequino, disturbed by his inability to reach respondent during the weekend, asked respondent whether the

answering service had contacted him; respondent replied that he had gotten the message from the answering service but "made light of it" by telling Sequino that he worried too much. (Testimony of Sequino.)

23. During the weekend that Sequino tried unsuccessfully to reach him, respondent did not have another physician covering for him. Respondent's testimony to the contrary is rejected as self-serving and uncorroborated. Neither did respondent have hospital privileges. (Testimony of Davis, Sequino; P-6.)

24. Sequino returned to respondent two more times for post-operative care. The healing of his cysts was aggravated because Sequino frequently got his back wet, contrary to respondent's instruction. Because of this, respondent charged Sequino an additional \$12 for each follow-up visit. (Testimony of Davis.)

25. Sequino was disturbed by what he perceived as respondent's lack of concern; he was also upset about being separately charged for each follow-up visit. He became angry, used threatening language toward respondent, and mumbled profanities on leaving the office. (Testimony of McGuire.)

26. Respondent denies that he was unavailable or received an answering service message from Sequino during the weekend following the cyst removals. He denies that he made "light" of Sequino's concern about not being able to reach him. He asserts that if he was unavailable, he had another physician covering for him. These contentions are rejected as self-serving and lacking corroboration. Diane Davis, his former receptionist and clerk-secretary, testified that--to her knowledge--respondent had no physician cover for him when he was out of town; that, during the weekends when he was unavailable, he never referred a patient to another physician. (Testimony of Chakmakis, Davis.)

27. By failing to provide continuing care to Sequino over the weekend, or making arrangements so that another physician would be available to provide such care, respondent deviated from the prevailing standard of medical care and treatment recognized by a reasonably prudent similar physician as acceptable under the circumstances. That standard of care requires that a physician be available to his patients or have a physician cover for him at all times. Similarly, contrary to the Principles of Medical Ethics, he neglected his patient after having undertaken to provide him medical care. Such a breach of medical ethics constitutes a deviation from the standard of medical care recognized by a prudent similar physician as acceptable under the circumstances. (Testimony of Morgan; P-7.)

#### IV.

##### As to Count IV

28. Respondent admits having used the Bellew Vaccine Method for Treating Arthritis ("the Bellew Method"). He used it to treat the arthritis of Mary Wahl. The Bellew Method was developed by Bernard A. Bellew, M.D. Generally, it consists of regimen of intradermal and subcutaneous injections of commonly available influenza viral vaccines and respiratory bacterial vaccines. It purports to provide therapeutic or curative relief to arthritis. (Testimony of Chakmakis; P-1, P-8, P-16.)

29. The Bellew Method is not widely known or used by the medical profession. Respondent does not know of another physician in the United States who uses it. (Testimony of Chakmakis;

30. The Bellew Method is considered, at best, as an "unusual treatment" by other physicians the Auburndale-Winter Haven area. It is not accepted in that area, or elsewhere in the country, as an acceptable method for treating arthritis. It is so far removed from the accepted practice and method of treating arthritis that it cannot be considered to have even achieved experimental status. (Testimony of Cottrell; P-8.)

31. Respondent's use of the Bellew Method to treat Ms. Wahl's arthritis deviated from the standard of care, skill, and treatment recognized by a reasonably prudent similar physician as acceptable under similar circumstances. (P-8.)

32. No evidence was presented to show either that the Bellew Method has been proven effective or that it was harmful to Ms. Wahl. Neither was evidence presented to show that, before utilizing this method, respondent disclosed to Ms. Wahl that the Bellew Method had not been proven effective; that it was held in disfavor or not used by the mainstream of the medical community. No evidence was presented to show that Ms. Wahl gave her informed consent to such treatment after having been advised that, at best, it was considered to be unusual or unorthodox treatment by the medical community.

#### V.

##### Costs Incurred by Department in Obtaining Orders

##### Compelling Discovery

33. Respondent's failure to respond to discovery resulted in the Department filing numerous motions to compel. By orders dated July 15 and August 11, 1981, two such motions were granted and orders compelling discovery were issued. Respondent gave no excuse, or justification for his failure to respond to the Department's discovery. Accordingly, pursuant to Rules 1.380, Florida Rules of Civil Procedure, the Department was awarded reasonable expenses which it incurred in obtaining these orders.

34. By stipulation, the Department's reasonable expenses were to be determined by affidavit of the Department's counsel submittal at final hearing. The affidavit indicates the Department incurred expenses in the amount of \$419.16. (Affidavit of Expenses, dated August 13, 1981.)

##### CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. Section 120.57(1), Fla. Stat. (1981).

36. Section 458.1201(1) , Florida Statutes (1977) , empowered the Board of Medical Examiners ("Board") to discipline a licensed physician if it finds him or her guilty of, among other things:

(m) Being guilty of immoral or unprofessional conduct, incompetence, negligence, or willful misconduct. Unprofessional conduct shall include any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice

in his area of expertise as determined by the board, in which proceeding actual injury to a patient need not be established when the same is committed in the course of his practice, whether committed within or without this state.

In 1979, the Florida Legislature repealed, comprehensively revised and reenacted, Chapter 458, Florida Statutes, the Medical Practice Act. Section 458.331(1), Florida Statutes (1981), empowers the Board to discipline a licensed physician for, among other things:

(t) Gross or repeated malpractice or 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. The board shall give great weight to the provisions of s. 768.45 when enforcing this paragraph.

(v) Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that he is not competent to perform.

37. Although the terms differ, Sections 458.1201(1)(m), Florida Statutes (1977) and 458.331(1)(t), Florida Statutes (1981), provide authority to discipline a physician for what is generally considered to be medical malpractice:

Malpractice, as the term is used with reference to physicians and surgeons, is a practice of a physician or surgeon that is bad or unskillful and results in an injury to his patient. Negligent malpractice by a physician or surgeon consists of his failure to exercise the required degree of care, skill, and diligence, doing something that he should not have done or omitting to do something that he should have done, resulting in injury to his patient. 25 Fla. Jur., Physicians and Surgeons, Section 75.

38. Where, as here, a statute has been repealed and substantially reenacted by a statute containing changes to the original statute, "the reenacted provisions are deemed to have been in operation continuously from the original enactment whereas the additions or changes are treated as amendments effective from the time the new statute goes into effect." *McKibben v. Mallory*, 293 So.2d 48, 53 (Fla. 1974). Thus, to the extent that the later enacted Section 458.331(1)(t), Florida Statutes (1981), encompasses its predecessor, Section 458.1201(1)(m), Florida Statutes (1977), the new provision is considered to reaffirm and continue in force the former provision; to such extent, the newly reenacted provision can be given retroactive effect. *McKibben*, supra at 52, 53. Since both subsections proscribe malpractice,

respondent's complained of conduct in 1977 and 1978 may subject him to discipline to the extent his conduct constitutes a violation of both provisions.

39. But, by the same reasoning, the Department's charge (in Count I) that respondent violated Section 458.331(1)(v), Florida Statutes (1981), in 1977 cannot be sustained. Section 458.331(1)(v), Florida Statutes (1981), specifically proscribes a physician from performing treatment which he knows or has reason to know he is not competent to perform; there is no similar provision in Section 458, Florida Statutes (1977). Respondent cannot be found guilty of violating a statute not in existence at the time of the alleged misconduct. Retroactive application of Section 458.331(1)

40. Florida Statutes (1981), would effectively deny him "the right to know in advance from a reading of the [statutory] language what conduct is proscribed by the legislature." *Lester v. Department of Professional and Occupational Regulations*, 348 So.2d 923, 925 (Fla. 1st DCA 1977).

41. License revocation proceedings are penal in nature. *Bowling v. Department of Insurance*, 394 So.2d 165 (Fla. 1st DCA 1981). The term "substantial competent evidence" takes on vigorous implications. *Bowling*, supra at 171. Matters in issue must be proven by evidence "which is indubitably as 'substantial' as the consequences [for the licensee]." *Id.* at 172. Violations are

[N]ot to be found on loose interpretations and problematic evidence, but the violation must in all its implications be shown by evidence which weighs as "substantially" on a scale suitable for evidence as the penalty does on the scale of penalties. In other words, in a world ensnarled by false assumptions and hasty judgments, let the prosecutor's proof be as serious-minded as the intended penalty is serious. *Id.* at 172.

42. Measured by these standards, it is concluded that respondent is:

As to Count I: X-ray Malpractice

A. Guilty of violating Section 458.1201(1)(m), Florida Statutes (1977), and Section 458.331(1)(t), Florida Statutes (1981), by failing to detect a clear abnormality in the chest x-ray of Mary Wahl;

B. Not guilty of violating Section 458.331(1)(v), Florida Statutes (1981), a statutory proscription not in effect at the time of the alleged misconduct;

C. Not guilty of violating Section 458.1201(1)(m), Florida Statutes (1977), and Section 458.331(1)(t), Florida Statutes (1981), on charges that he refused to provide Ms. Wahl's chest x-ray to her subsequent treating physician and that he negligently failed to diagnose and treat Ms. Wahl's carcinoma of the lung.

As to Count II: Inappropriate or Excessive

Prescription of Medications

A. Not guilty of violating Section 458.1201(1)(m) , Florida Statutes (Supp. 1978), and Section 458.331(1)(t), Florida Statutes (1981) , on charges that he prescribed, dispensed, or administered inappropriate or excessive medication to Argola O'Neal.

As to Count III: Breach of Obligation to Provide

Continuing Post-Operative Care

A. Guilty of violating Section 458.1201(1)(m) , Florida Statutes (Supp. 1978), and Section 458.331(1)(t), Florida Statutes (1981), by failing to be available to provide post-operative care to Ronald Sequino<sup>7</sup> or failing to arrange for another physician to cover for him if he was unavailable.

As to Count IV: Bellew Therapeutic Vaccine Method

A. Guilty of violating Section 458.1201(1)(m) , Florida Statutes (1977), and Section 458.331(1)(t), Florida Statutes (1981), by using the Bellew Therapeutic Vaccine Method to treat the arthritis of Mary Wahl.

The Medical Practice Act cannot be used to prohibit treatment methods merely because they are unorthodox or are used by a minority of physicians. See, *Rogers v. State Board of Medical Examiners*, 371 So.2d 1037 (Fla. 1st DCA 1979). But, "quackery under the guise of scientific medicine," *Id.* at 1040, need not be tolerated. In *Rogers*, *supra*, the court found that chelation therapy--the unorthodox treatment in question--was widely used as a treatment for arteriosclerosis (though by a definite minority of physicians) ; that the defending physician "allowed his patients to make their own choice of treatments after a full disclosure that chelation therapy had not been proven effective and was held in disfavor by the mainstream of the medical community." *Id.* at 1040. In the case at hand, there was no evidence that the Bellew Method was used by anyone other than respondent or that he made full disclosure and allowed Ms. Wahl to choose this method of treatment.

44. Section 458.331(2), Florida Statutes (1981), authorizes the Board, upon finding that a licensee is guilty of misconduct, to, among other things, revoke or suspend the physician's medical license. Outright revocation of a professional license is a serious and drastic penalty, one which should be used sparingly and only in the most flagrant cases. Cf., *Taylor v. State Beverage Department*, 194 So.2d 321 (Fla. 2d DCA 1967).

45. The Medical Practices Act allows malpractice to be established without a showing of injury to the patient. However, the lack of patient injury is a factor which should be considered when determining the appropriate disciplinary penalty. Here, it was not shown that respondent's misconduct caused any significant harm to his patients.

46. Moreover, the violations have not shown intentional wrongdoing. Neither have they shown that respondent is incapable of practicing medicine effectively and safely in the future. Before resuming the practice of medicine, however, he should be required to: (1) satisfactorily complete an approved continuing education course on the proper administration, interpretation, and use of x-rays; and (2) demonstrate that he recognizes the serious statutory,

professional, and ethical obligations placed on a physician who performs an experimental or unorthodox procedure or therapy on a patient. Suspension of his license for a minimum of six (6) months would allow respondent to take these necessary rehabilitative steps and impress upon him the seriousness of his misconduct.

47. Section 120.58(1)(b) , Florida Statutes (1981) , empowers a hearing officer to effect discovery by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure." Id. See, also Rule 28-5.208, F.A.C. In this case, the Department was confronted with the respondent's failure to respond to its discovery requests; pursuant to Rule 1.380(a), Florida Rules of Civil Procedure, it successfully moved for an order compelling discovery. Rule 1.380(a)(4) requires the awarding of reasonable expenses to the prevailing party unless it is found that the losing party's opposition was justified or awarding the expenses would be unjust. Under Rule 1.380(a)(4), the awarding of such expenses is not considered a sanction for failing to comply with a discovery order. The awarding of such expenses in accordance with Rule 1.380 (a)(4) "effects" discovery within the meaning of Section 120.58(1)(b), Florida Statutes; it does not constitute "enforcement of [an] order directing discovery," a function delegated by Section 120.58 (2) to the circuit courts. Cf., *Great American Banks, Inc., et al. v. Division of Administrative Hearings*, \_\_\_ So.2d \_\_\_ (Fla. 1st DCA, Case No. AG-388, Opinion filed November 25, 1981; pet. for rehearing pending). Consequently, the orders dated July 15 and August 11, 1981, which awarded the Department the reasonable costs incurred in obtaining the orders compelling discovery is a lawful exercise of authority pursuant to Section 120.58(1)(b) , Florida Statutes, and Rule 1.380(a)(4), Florida Rules of Civil Procedure.

48. To the extent the Department's proposed findings of fact and conclusions of law are incorporated in this Recommended Order, they are adopted; otherwise, they are rejected as unsupported by the evidence, irrelevant, or unnecessary to resolution of the issues.

#### RECOMMENDATION

Based on the foregoing, it is

#### RECOMMENDED:

1. That the Board of Medical Examiners enter a final order suspending respondent's medical license for six (6) months, after which the suspension should be vacated upon: (1) a showing by respondent that he has satisfactorily completed an approved continuing education course on the proper administration, interpretation, and use of x-rays; and (2) respondent demonstrating, to the Board's satisfaction, that he recognizes the serious statutory, professional, and ethical obligations placed on a physician who administers experimental or unorthodox treatment to a patient.

2. That the Board, as part of its final order, require respondent to pay \$419.16 to the Department as reasonable expenses incurred in obtaining the orders compelling discovery dated July 15 and August 11, 19,81.

DONE AND RECOMMENDED this 12th day of March, 1982, in Tallahassee, Florida.

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R. L. CALEEN, JR.  
Hearing Officer  
Division of Administrative Hearings  
The Oakland Building  
2009 Apalachee Parkway  
Tallahassee, Florida 32301  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of March, 1982.

ENDNOTES

- 1/ Petitioner's Exhibits will be referred to as "P-\_\_\_\_" Pages of the transcript of hearing will be referred to as "Tr.
- 2/ Neither Dr. Cottrell nor any other qualified physician testified that, under the circumstances, respondent's prescription of medications to Ms. O'Neal deviated from the prevailing and accepted practice of general medicine.

COPIES FURNISHED:

Roy L. Glass, Esquire  
Post Office Box 10008  
St. Petersburg, Florida 33733

Elvin L. Martinez, Esquire  
Post Office Box 4311  
Tampa, Florida

Samuel R. Shorstein, Secretary  
Department of Professional  
Regulation  
130 North Monroe Street  
Tallahassee, Florida 32301