UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:11-cv-22026-MGC

DR. BERND WOLLSCHLAEGER, et al.,

Plaintiffs,

v.

FRANK FARMER, et al.,

Defendants.
_____/

DEFENDANTS' SUPPLEMENTAL RESPONSE
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants provide this brief and limited response addressing Plaintiffs' motion for preliminary injunction in light of the Court's invitation to file supplemental material.

I. Plaintiffs' Reliance on the Tootle Letter is Misplaced

In their reply brief, Plaintiffs misconstrue the June 14, 2011 letter of Joy A. Tootle, Executive Director of the Florida Board of Medicine ("Board"). Plaintiffs claim that this letter "conclusively" demonstrates that the Board of Medicine's policy is to prohibit physicians from inquiring about firearm ownership and to discipline those who do. (Plaintiffs' Reply at 2.) The letter, however, is not a policy statement of, and is not binding upon, the Board; it is merely an executive summary of several recently enacted bills. The letter also makes clear that physicians should "review each of these bills in their entirety to understand and comply with their provisions." *See* June 14, 2011 Letter from Joy A. Tootle ("Tootle Letter") at 3, a true and correct copy of which is attached hereto as "Exhibit A."

Notably, the letter states in the first paragraph that its sole purpose is to bring attention to legislation passed during the 2011 session that may affect physicians; nowhere does it say that it reflects Board policy. Instead, the letter makes clear that it is merely providing the "highlights" of recently enacted legislation, specifically encouraging physicians to "read the full text of each bill" to understand and comply with the new provisions. Ex. A at 1. The letter's last page has the following sentence in bold and italics: "***It is imperative that you review each of these bills in***

their entirety to understand and comply with new provisions." *Id.* at 3. The letter does not, in any way, constitute a policy statement, bind the Board, or represent the Board's "view" on any of the new laws.

Second, the letter does not quote the statutory language of CS/CS/HB 155. While the sentence on page 2 of the letter using the term "prohibited" should have used the actual "should refrain" language of the statute, even as written, the letter does not support the blanket ban that Plaintiffs assert. Instead, the letter reiterates that inquiring about firearm ownership and entering the information into a patient's health record is permitted if "*the information is relevant to the patient's medical care or safety, or the safety of others*."

In any event, Plaintiffs' point is moot because the Board's director has since amended the letter to reflect the actual language of the bill. *See* Declaration of Joy A. Tootle, a true and correct copy of which is attached hereto as "Exhibit B." Ms. Tootle has posted a new letter on the Board's website clarifying that the law does *not* prohibit health care providers and facilities from asking questions; instead, it states that they should refrain from asking them unless they have a good-faith basis for doing so. *See* July 18, 2011 Letter from Joy A. Tootle, a true and correct copy of which is attached hereto as "Exhibit C." Accordingly, any potential misunderstanding of the June 14 letter has been eliminated.

II. Plaintiffs' Fear of Discipline is Unfounded

As explained in Defendants' initial response, the Plaintiffs are not prohibited from engaging in the actions they claim they wish to perform: inquiring about firearm ownership or engaging in conversations regarding firearm safety with their patients. These activities by themselves are not subject to discipline under the act. Thus, no objective basis exists for their claimed self-censorship and chilled speech rights.

Moreover, the fear they claim for their careers and reputations for merely providing firearm safety information or asking about firearm ownership generally—beyond being objectively unfounded under a plain reading of the statute—is safeguarded by the disciplinary system itself. First, before any discipline can be imposed, professional regulatory boards, such as the Board of Medicine, must establish guidelines, via administrative rules, for the disposition of cases involving specific violations of statutes and rules. *See* §§458.331(5), 456.079, Fla. Stat.; *see also Arias v. Dep't of Bus. & Prof. Reg., Div. of Real Estate*, 710 So. 2d 655 (Fla. 1st DCA

1998). These rules are written to weed out meritless claims and maintain the confidentiality of the physician.

Second, the Department of Health reviews a complaint against a physician to determine whether it is legally sufficient, meaning the complaint must allege ultimate facts indicating an actual violation of a statute or rule has occurred. § 456.073(1), Fla. Stat. Allegations that a physician merely made an inquiry regarding firearm ownership or had a discussion about firearm safety would be legally insufficient because neither act is prohibited under the law. The types of allegations the Plaintiffs fear, therefore, would not give rise to disciplinary proceedings.

Only after a complaint is deemed legally sufficient is it then referred to the Board for investigation; a copy is also sent to the physician, who may respond. *Id*. The results of the investigation and the physician's response, if any, are then forwarded to a probable-cause panel (composed of physicians) for a determination of whether there is probable cause to believe that a violation has occurred. *Id.* § 456.073(4). Only if probable cause is found is the case set for an administrative hearing. *Id.* § 456.073(5). During this entire process, and until 10 days after a finding of probable cause, the identity of the physician remains confidential. *Id.* § 456.073(6). Thus, if no finding of probable cause is made, the identity of the physician is *never* revealed.

Given the confidential nature of the disciplinary process, the due process afforded to physicians, and the specific conduct Plaintiffs claim they wish to engage in with their patients (inquiring generally about firearm ownership and engaging in firearm safety discussions with their patients or providing firearm safety information), Plaintiffs cannot reasonably or objectively claim any "actual or well-founded fear that the law will be enforced against them." *Dermer v. Miami-Dade County*, 599 F.3d 1217, 1220 (11th Cir. 2010).

CONCLUSION

For the reasons stated above and in the Defendants' initial response, the court should deny the motion for preliminary injunction.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

s/ *Jason Vail*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to counsel of record through use of the Court's CM/ECF system on July 19, 2011.

s/ *Jason Vail*

FLORIDA DEPARTMENT OF HEALTH

Rick Scott
Governor

H. Frank Farmer, Jr., M.D., Ph.D.
State Surgeon General

June 14, 2011

Dear Doctor:

We want to bring to your attention a number of bills that were passed during the 2011 Legislative Session that have been signed by Governor Scott and may affect your medical practice. Unless otherwise noted, these bills will become effective July 1, 2011. We encourage you to read the full text of each bill; you can find links to the bills' text at our legislative page at: www.doh.state.fl.us/mqa/medical/. We are providing the highlights below:

CS/CS/HB 7095, 3rd Engrossed/Enrolled-Prescription Drugs

This bill changes the regulation of activities by physicians, pain management clinics, pharmacies and wholesale drug distributors.

On July 1, 2011:

Practitioners, generally, will no longer be authorized to dispense Schedule II or Schedule III controlled substances. A few exceptions are provided:

- Complimentary or sample controlled substances
- In the health care system of the Department of Corrections
- In connection with specified surgical procedures in certain timeframes
- In approved clinical trials
- Methadone in certain licensed treatment facilities
- For patients in licensed hospice facilities

Any controlled substance inventory that was acquired for dispensing that is still in the possession of a practitioner who will no longer be authorized to dispense controlled substances must be disposed of by July 11, 2011. Disposal can be achieved by either returning the drugs to the wholesale distributor or turning the inventory in to a local law enforcement agency and abandoning them. Controlled substances not disposed of by August 2 are deemed contraband and are subject to seizure by law enforcement.

Beginning July 1, 2011, counterfeit-proof prescription blanks must be used by practitioners for prescribing of any controlled substance. The department is in the process of compiling a list of approved vendors of counterfeit-proof prescription pads (many of whom are already approved by the Agency for Health Care Administration as Medicaid vendors). This list, which will continue to grow as the Department approves new vendors, will be posted on the Board's website prior to July 1, 2011. You can access the Board of Medicine's website at: http://www.doh.state.fl.us/mqa/medical/.

The State Health Officer, Dr. H. Frank Farmer, will declare a public health emergency concerning the possession of controlled substances for dispensing by practitioners who are no longer authorized to dispense controlled substances. The Department of Health will identify those practitioners who pose the greatest threat to the public health and those that create a risk that the controlled substances may not be disposed of in accordance with this act. Beginning on July 5, 2011, law enforcement agencies will enter the business premises of the identified dispensing practitioners and quarantine the inventory on site.

The standards of practice for a controlled substance prescribing practitioner are spelled out in the law and include for each patient, among other things:

- Complete medical history and physical exam
- Written individualized treatment plan
- Written controlled substance agreement
- Regular follow-up appointments at least every 3 months

Criminal and regulatory sanctions for violations of the provisions of this law are modified.

Criteria for required registration as a pain management clinic are revised. Registration is required if the clinic advertises in any medium for any type of pain management services or where, in any month, a majority of patients are prescribed opiods, benzodiazepines, barbiturates, or carisoprodol for the treatment of chronic nonmalignant pain.

New requirements for physicians practicing in a pain management clinic:

- All physicians working in a pain management clinic must notify the applicable board within 10 days of beginning or ending practice at the clinic
- All physicians working in a pain management clinic ensure compliance with facility and physical operations of the clinic, among other functions
- A physician assistant or advanced registered nurse practitioner is authorized to perform the examination of a patient in a pain management clinic

Effective January 1, 2012, each practitioner who prescribes controlled substances for the treatment of chronic nonmalignant pain must designate on his or her practitioner profile that he or she is a controlled substance prescribing practitioner. Instructions on how to update your profile will be sent prior to January 1st.

CS/CS/HB 155 Enrolled– Privacy of Firearm Owners

The provisions of this bill take effect upon becoming law. It creates the "Medical privacy concerning firearms" law and establishes grounds for discipline for violation of certain provisions of the law. It prohibits a licensed health care practitioner or licensed health care facility from intentionally entering any disclosed information concerning firearm ownership into a patient's health record if the information is not relevant to the patient's medical care or safety, or the safety of others. A health care provider or facility is prohibited from inquiring about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others. Patients are permitted to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician's authority to choose patients.

CS/CS/HB 935, 1st Engrossed/Enrolled-Health Care Price Transparency

This bill addresses posting, in the reception area of certain medical offices, urgent care centers, and clinics, a schedule of prices charged for the 50 most common services provided to an uninsured person paying by cash, check, credit card or debit card. The bill specifies the size of the posting and parameters for its contents. A primary care provider who publishes and maintains the schedule of charges is exempt from the professional license fee requirements for a single renewal period and continuing education requirements for a single 2-year period.

CS/CS/CS/HB 1319 Enrolled-Certificates/Licenses/Health Care Practitioners

This bill authorizes the department to issue a temporary license to a health care practitioner whose spouse is stationed in Florida on active duty with the Armed Forces if the applicant meets the eligibility requirements for a full license and is qualified to take the licensure examination. It also requires the applicant for a temporary license to pay for fingerprint processing for a criminal history check in addition to the application fee. It also names the temporary certificate for practice as a physician in areas of critical need the "Rear Admiral LeRoy Collins, Jr., Temporary Certificate for Practice in Areas of Critical Need."

It is imperative that you review each of these bills in their entirety to understand and comply with new provisions.

It is also important to note that there are other bills that may affect your medical practice that were passed by the 2011 Legislature but are still awaiting Governor Scott's signature. Those bills have not been included in this letter. To access these laws and other information that we will post periodically on their implementation, please visit our websites at: http://www.doh.state.fl.us/mqa/medical/ or http://www.flhealthsource.com.

Sincerely,

Joy A. Tootle
Executive Director
Board of Medicine

JT/rph

DECLARATION of JOY A. TOOTLE

I, Joy A. Tootle, serve as the Executive Director of the Board of Medicine.

On June 14, 2011, a three-page letter was distributed to Florida physicians, the purpose of which was to highlight some of the state laws passed during the 2011 legislative session. One of the highlighted bills is CS/CS/HB 155, relating to the privacy of firearm owners. The letter only highlighted portions of this law and made clear that physicians should read the full text of the law to understand it. To emphasize this point, the letter included a bolded and italicized sentence on the last page: "***It is imperative that you review each of these bills in their entirety to understand and comply with new provisions.***"

Moreover, the letter is not a statement of agency policy and does not represent the viewpoint of the Board of Medicine or bind the Board in any way. It was merely intended to convey helpful information to Florida's physicians. Due to the high level of public attention this bill has received, this declaration is intended to clarify two sentences in the June 14 letter.

One sentence in the paragraph summarizing the highlights of the new firearm privacy law stated: "A health care provider or facility is prohibited from inquiring about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others." The use of the word "prohibited" in this sentence did not accurately track the statutory language. The firearm privacy law does not state that physicians are *prohibited* from inquiring about the ownership of firearms or ammunition. Rather, a more accurate statement of the sentence above is: "A health care provider or facility should refrain from inquiring about the ownership of firearms or ammunition unless the provider has a good faith belief that the information is relevant to the patient's medical care or safety, or the safety of others." Thus, the law suggests that health care practitioners and facilities should refrain from asking questions about firearm ownership unless there is a good faith belief that the information is relevant to a patient's medical care or safety or the safety of others.

Another sentence stated the new law "prohibits a licensed health care practitioner or licensed health care facility from intentionally entering any disclosed information concerning firearm ownership into a patient's health record if the information is not relevant to the patient's medical care or safety, or the safety of others." However, the statutory language actually provides: "A licensed health care practitioner or licensed heath care facility may not intentionally enter disclosed information concerning firearm ownership into a patient's medical record if the

practitioner knows the information is not relevant to the patient's medical care or safety, or the safety of others." While this aspect of the law is mandatory, it may only be violated if the health care practitioner or facility enters information into a patient's health record that the practitioner or facility *knows* is not relevant to the patient's medical care or safety, or the safety of others.

I have amended the June 14, 2011 letter and posted a more accurate description of the statute on the Board of Medicine's website. A true and correct copy of that letter is attached hereto.

Joy A. Tootle
Executive Director
Board of Medicine

Date: July 19, 2011

FLORIDA DEPARTMENT OF HEALTH

Rick Scott
Governor

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

July 18, 2011

Dear Doctor:

On June 14, 2011, we issued a letter highlighting a number of bills that were passed during the 2011 Legislative Session and signed into law by Governor Scott that may affect your medical practice. One of those bills was CS/CS/HB 155, relating to the medical privacy of firearm owners. Due to the high level of public attention this bill has received, we are writing to clarify our statements regarding its potential impact on your medical practice.

In our June 14 letter, we stated that under the firearms privacy law "[a] health care provider or facility is *prohibited* from inquiring about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others." To clarify: the law does not *prohibit* the asking of such questions, but rather *recommends* that health care providers and facilities *should* refrain from asking them. This recommendation does not apply when a health care practitioner or facility has a *good faith belief* that the information is relevant to a patient's medical care or safety, or the safety of others.

We also stated that the law "prohibits a licensed health care practitioner or licensed health care facility from intentionally entering any disclosed information concerning firearm ownership into a patient's health record if the information is not relevant to the patient's medical care or safety, or the safety of others." While this aspect of the law is mandatory, it may only be violated if the health care practitioner or facility enters information into a patient's health record that the practitioner or facility *knows* is not relevant to the patient's medical care or safety, or the safety of others.

Finally, we reiterate that the law provides patients with the right not to answer questions about their ownership of firearms or the presence of firearms in their homes. A patient's decision not to answer such questions, however, does not alter the physicians' authority to choose their own patients.

We again emphasize that we have only highlighted certain aspects of this bill, and we encourage you to review it in its entirety to understand and comply with all of its provisions. Its text may be found at the following link:
http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0155er.docx&DocumentType=Bill&BillNumber=0155&Session=2011.

Sincerely,

Joy A. Tootle
Executive Director
Board of Medicine