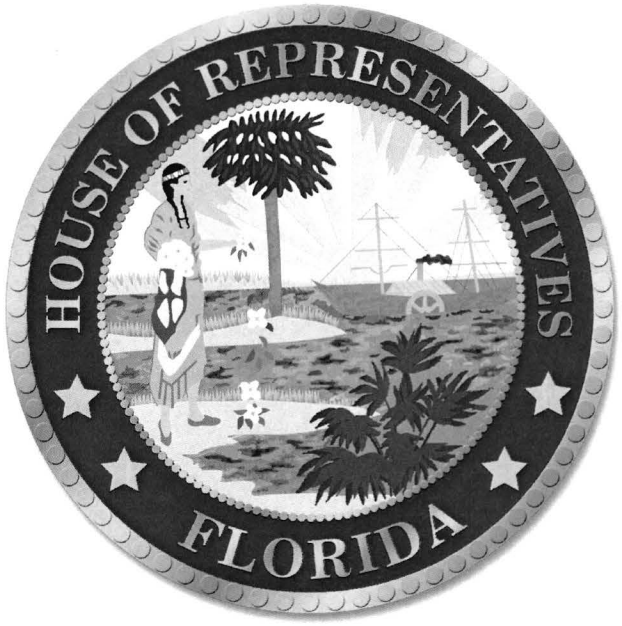

RULEMAKING OVERSIGHT
&
REPEAL
SUBCOMMITTEE
MEETING

Monday, February 1, 2016
3:00 p.m. – 5:00 p.m.

306 House Office Building

MEETING PACKET

Steve Crisafulli
Speaker

Lake Ray
Chair

Notice & Agenda

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Rulemaking Oversight & Repeal Subcommittee

Start Date and Time:	Monday, February 01, 2016 03:00 pm
End Date and Time:	Monday, February 01, 2016 05:00 pm
Location:	306 HOB
Duration:	2.00 hrs

Consideration of the following proposed committee bill(s):

PCB RORS 16-02 -- Ratification of administrative rules of the Board of Medicine

NOTICE FINALIZED on 01/28/2016 4:22PM by Powell-Battles.Sonja

FLORIDA HOUSE OF REPRESENTATIVES

Rules, Calendar & Ethics Committee
Rulemaking Oversight & Repeal Subcommittee

Steve Crisafulli
Speaker

Lake Ray
Chair

AGENDA
Monday, February 1, 2016
3:00 p.m. – 5:00 p.m.
306 House Office Building

- **Opening Remarks by Chair Ray**
- **Roll Call by Sonja Powell-Battles, CAA**
- **Announcements**
- **Consideration of the following proposed committee bill(s)**
    - PCB RORS 16-02—Ratification of administrative rules of the Board of Medicine
- **Closing Remarks**
- **Meeting Adjourned**

402 South Monroe Street, 400 House Office Building, Tallahassee, Florida 32399-1300
Telephone: 850–717-4881

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RORS 16-02 Ratification of administrative rules of the Board of Medicine
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom

SUMMARY ANALYSIS

The Board of Medicine has adopted amendments to the rule limiting physician's charges for reproducing medical records. The rule sets out the maximum reasonable cost per page reproduced that a physician may ask of any party requesting the medical records. The rule increases the cap with respect to patients and government entities requesting records. It raises that cap to $1.00 per page, which is the current cap for other entities requesting records and equal to the statutory cap for hospitals.

The Statement of Estimated Regulatory Costs showed Rule 64B8-10.003, F.A.C., *Costs of Reproducing Medical Records*, would have a specific, adverse economic effect, or would increase regulatory costs, exceeding $1 million over the first 5 years the rule was in effect. Accordingly, the Rule must be ratified by the Legislature before it may go into effect.

The Rule was adopted on December 9, 2015, and submitted for ratification on December 10, 2015.

The proposed bill authorizes the Rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Medical Records Charges

Statutory and administrative regulation of charges
Health care practitioners must regularly provide copies of patient records for use by the patient, insurers, other medical professionals or users authorized in legal proceedings. Such records can include materials such as X-Rays and other photographic records. All such records are private and confidential information regulated by federal and state patient privacy laws. Compliance with such laws entails administrative costs associated with the reproduction of such records.

Florida law limits the amount that can be charged by a practitioner for the reproduction and provision of copies of medical records to no more than the actual cost of copying including reasonable staff time or an amount specified in administrative rule adopted by the licensing board governing the practitioner.[1]

For Hospitals, Florida law sets the charge for copies of patient records at $1.00 per page, $2.00 for non-paper records.[2] This includes the medical records of physicians employed by a hospital, which accounts for over half of all licensed medical doctors in Florida.

For Medical Doctors not employed by hospitals, the Board of Medicine in the Department of Health (DOH) is the board responsible for rulemaking with respect to costs charged for copies of records. The current Board of Medicine rule limits charges to patients and government entities to $1.00 per page for written and typed documents for the first 25 pages and 25 cents for any additional pages. Other requesters may be charged up to $1.00 per page for each page. The $1.00/¢25 cap was adopted in 1988.[3] That rate was increased in 2009 to $1.00 per page for all pages for requesters other than patients and governmental entities.[4] The rule also limits the reasonable cost of reproducing X-rays and other special kinds of records to the actual cost of reproduction and delivery.[5]

Boards governing other health professions have followed the Board of Medicine in adopting limits on copy charges.[6]

After nine hearings conducted between August 2, 2013, and February 6, 2015, the Board of Medicine on March 12, 2015, filed a final version of a revision to its rule.[7] The rule was challenged in two separate administrative proceedings and a decision in the consolidated cases was entered December 8, 2015, upholding the rule as a valid exercise of the Board's authority. The Board filed the rule for adoption the following day with the Department of State.

The revised rule, if it goes into effect, would increase the limit of charges for such copies to $1.00 per page for all records. Following is the text of the rule as filed for adoption:

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[1] Section 456.057(17), F.S.
[2] Section 395.3025(1), F.S.
[3] The 1988 rule may be found at: https://www.flrules.org/gateway/notice_Files.asp?ID=2414541.
[4] 64B8-10.003, F.A.C. Accessed on January 11, 2016, at: https://www.flrules.org/gateway/notice_Files.asp?ID=6848605.
[5] 64B-10.003, F.A.C. Accessed on January 11, 2016, at: https://www.flrules.org/gateway/notice_Files.asp?ID=6848605.
[6] See 64B2-17.0055, F.A.C. (2010) and 64B2-17.0055, F.A.C. (1993) (Board of Chiropractic Medicine).
[7] "Additional Statement to the Secretary of State" included with "Certificate of Board of Medicine Administrative Rules" filed December 9, 2015. A copy of the Certificate and the Additional Statement are available in the offices of the Rulemaking Oversight and Repeal Subcommittee.

64B8-10.003 Costs of Reproducing Medical Records.
Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records stored and delivered in any format or medium.
(1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.
(2) The reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page.
(3) Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs associated with duplication, plus postage.
(4) Accessing medical records through patient portals does not constitute the reproduction of medical records.[8]

Actual costs of reproducing and providing patient records
The validity of the proposed rule was challenged by various parties in March of 2015. Addressing the factual basis for the increased limit on copy charges and objections related to the actual cost of such copies, the Administrative Law Judge made the following factual determinations:

57. Those opposed to the alleged increase testified there was no basis for the change, that the proposed change quadrupled the price for patients and governmental entities, and that it was arbitrary and capricious, especially with respect to electronic records. These opponents fail to recognize changes in medicine. HIPAA brought patient confidentiality and the need to maintain that confidentiality into sharp focus. Medical practitioners are required to ensure that confidential patient information is not disseminated to unauthorized persons. Physicians must pay to have medical records copied, whether it is done "in-house" or by an ROI provider. Labor costs have increased and the tedious review to ensure that confidential information remains confidential is time-consuming and costly.
58. Medical practices can be quite varied in type, size, sophistication, location, and much more. Petitioners' claim that the proposed rule should be the "actual cost" to the practitioner is impracticable. A general practitioner in a rural solo practice, who receives one request for medical records, might be able to ascertain the "actual cost" to produce that one medical record. A specialist in an urban multi-partner practice group, who receives multiple requests for medical records, would find it nearly impossible to ascertain the "actual cost" to produce each requested medical record without extensive business record-keeping.
59. ...Physicians provide medical records, free of charge, to subsequent or specialty physicians to ensure care. However, physicians are not in the business of repeatedly producing medical records.
60. Those in favor of the proposed rule testified that the cost to physicians for reproducing medical records has not increased in years. The stringent HIPAA requirements placed an additional requirement on health care providers to ensure that private individual health data is kept confidential.
61. The process to release medical records is not simply to pull a paper, digital or electronic medical record, copy it, and send it out the door. The process, as explained, takes valuable time from practitioners and their staff. In a simplified fashion once the request is made: staff must verify the requester's identity and right to obtain the copy; the request must be logged into a

[8] See Notice of Proposed Rule, F.A.R. No. 39, Iss. 95 (5/15/2013), and Notice of Change, F.A.R. Vol. 41, No. 49 (3/12/2015).

HIPAA log; staff must locate and retrieve the medical record in whatever format it is in; staff must redact confidential information; staff must review for specific health treatment records (mental health, alcohol or drug treatment, HIV status) that cannot be provided pursuant to statute; a copy may need to be made or a paper copy may need to be scanned to an electronic disc; and the practitioner must review it to make sure it can be provided as requested. It is a time-consuming process.[9]

In sum, the ALJ found that the $1.00 was not arbitrary and capricious in light of the factors, including HIPAA requirements, controlling the actual costs incurred by physicians.

Costs of complying with records requests are impacted by the kind of record (paper, electronic, etc.), size of the record, scope of the records request (all or some specific part of a patient's records), labor costs where records are examined and duplicated, the medical specialization of the particular practice, as well as the need for legal review of the records to be produced. Records are not only identifies and copied, but each page of records is also examined for compliance with a request and the propriety of release under the circumstances whenever medical records are produced for any purpose. A consultant employed by a medical records outsourcing firm has studied records request compliance costs at three different medical records sites and recently signed an affidavit asserting that costs average 93 cents, $1.01 and $1.20 at the three sites respectively.

The firm employing the consultant reports that 31 pages is the size of the average record request fulfilled for its clients who are medical practices subject to the Board's rule. Under the present rule, the maximum charges would be $26.50. Under the revised rule, that maximum charge would be $31.00, an increase of $3.50. All stakeholders report that a large proportion of physicians provide records at no charge when records are requested for treatment purposes.

Opponents of the rule asserted in a subcommittee hearing on the bill that actual costs in some circumstances are as low as 52 cents. Documentation for such assertion has been requested but not provided.

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[10] Rulemaking authority is delegated by the Legislature[11] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[12] a rule. Agencies do not have discretion whether to engage in rulemaking.[13] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[14] The grant of rulemaking authority itself need not be detailed.[15] The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[16]

An agency begins the formal rulemaking process by filing a notice of the proposed rule.[17] The notice is published by the Department of State in the Florida Administrative Weekly[18] and must provide certain

[9] Fernandez, et al. vs. DOH, Board of Medicine, et al., Cases no. 15-1774RP, etc., Final Order, pp. 29-31 (Dec. 8, 2015).
[10] Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region,* 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[11] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).
[12] Section 120.52(17).
[13] Section 120.54(1)(a), F.S.
[14] Section 120.52(8) & s. 120.536(1), F.S.
[15] *Save the Manatee Club, Inc.,* supra at 599.
[16] *Sloban v. Florida Board of Pharmacy,*982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.,* 794 So. 2d 696, 704 (Fla. 1st DCA 2001).
[17] Section 120.54(3)(a)1, F.S.
[18] Section 120.55(1)(b)2, F.S.

information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.[19]

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.[20] Next is the likely adverse impact on business competitiveness,[21] productivity, or innovation.[22] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[23] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[24] A rule must be filed for adoption before it may go into effect[25] and cannot be filed for adoption until completion of the rulemaking process.[26] A rule projected to have a specific economic impact exceeding $1 million in the aggregate over 5 years[27] must be ratified by the Legislature before going into effect.[28] As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

SERC for Rule 64B8-10.003

At its December 4, 2014, hearing, the Board determined that a SERC should be prepared for the rule. The Board approved the SERC on February 6, 2015. The SERC estimates increased annual costs to DOH for its regulatory investigations of almost $100,000 annually, increased annual costs in civil litigation of about $300,000, and increased annual costs of about $250,000 in Social Security disability cases.[29] The SERC does not attempt to estimate costs associated with other records requests. The ALJ found that "Physicians provide medical records, free of charge, to subsequent or specialty physicians to ensure care. However, physicians are not in the business of repeatedly producing medical records." Based on the administrative record it appears that increased costs to patients are indeterminate other than estimates of the litigation volume listed above. Testimony in a subcommittee hearing on the bill indicated that an average records request of patients is about 33 pages, which if charged would raise the cost from $27.00 to $33.00. But there was no testimony or other basis to determine how many patients may be charged for such requests as compared to how many may not be charged at all.

The SERC recognized that net impact on the Florida economy is neutral owing to the fact that increased costs are economically offset by an equivalent increase in revenues to medical practices providing copies.. Nonetheless, to evaluate regulatory cost impacts it is appropriate to total the impacts on negatively affected parties without offset. It is the impact on parties expected to pay for copies that establishes estimated regulatory costs above the threshold requiring legislative ratification. On March

[19] Section 120.541(2)(a), F.S.
[20] Section 120.541(2)(a)1., F.S.
[21] This includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[22] Section 120.541(2)(a) 2., F.S.
[23] Section 120.541(2)(a) 3., F.S.
[24] Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.
[25] Section 120.54(3)(e)6, F.S.
[26] Section 120.54(3)(e), F.S.
[27] Section 120.541(2)(a), F.S.
[28] Section 120.541(3), F.S.
[29] A copy of the SERC is available in the offices of the Rulemaking Oversight and Repeal Subcommittee.

12, 2015, the Board filed a Notice of Change indicated that the rule appeared to require legislative ratification.[30]

The bill ratifies the rule as filed, making the rule effective upon the bill's becoming law.

B. SECTION DIRECTORY:

Section 1: Ratifies Rule 64B8-10.003, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill creates no additional source of state revenues.

2. Expenditures:

If ratified, the SERC anticipates regulatory costs to DOH investigative activities of about $100,000, less whatever might be recoverable therefor by costs assessments against licensees disciplined or entering into consent orders in such matters.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill itself has no impact on local government revenues.

2. Expenditures:

The bill itself does not impose additional expenditures on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

If ratified, the rule appears to have a neutral economic impact on the private sector. However, this impact results from increased costs to patients and governmental entities being offset by the physicians' receipt of any increased charges authorized and actually charged. The total increased costs estimated are in excess of $650,000 annually.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

[30] Notice of Change, accessed on January 11, 2015, at https://www.flrules.org/gateway/notice_Files.asp?ID=15773963.

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

B. RULE-MAKING AUTHORITY:

This bill does not grant additional rulemaking authority. It ratifies a rule that is subject to ratification due to its likely regulatory costs.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to ratification of Board of Medicine rules; ratifying specified rules relating to costs of reproducing medical records, for the sole and exclusive purpose of satisfying any condition on effectiveness pursuant to s. 120.541(3), F.S., which requires ratification of any rule meeting any specified thresholds for likely adverse impact or increase in regulatory costs; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) The following rule is ratified for the sole and exclusive purpose of satisfying any condition on effectiveness imposed under s. 120.541(3), Florida Statutes: Rule 64B8-10.003, Florida Administrative Code, titled "Costs of Reproducing Medical Records" as filed for adoption with the Department of State pursuant to the certification package dated December 9, 2015.

(2) This act serves no other purpose and shall not be codified in the Florida Statutes. After this act becomes law, its enactment and effective dates shall be noted in the Florida Administrative Code, the Florida Administrative Register, or both, as appropriate. This act does not alter rulemaking authority delegated by prior law, does not constitute

legislative preemption of or exception to any provision of law governing adoption or enforcement of the rules cited, and is intended to preserve the status of any cited rule as a rule under chapter 120, Florida Statutes. This act does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited.

Section 2. This act shall take effect upon becoming a law.

Current Rule

64B8-10.003 Costs of Reproducing Medical Records.

Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records.

(1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.

(2) For patients and governmental entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than the following:

(a) For the first 25 pages, the cost shall be $1.00 per page.

(b) For each page in excess of 25 pages, the cost shall be 25 cents.

(3) For other entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page.

(4) Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs and overhead costs associated with such duplication.

Specific Authority 456.057(18), 458.309 FS. Law Implemented 456.057(18) FS. History–New 11-17-87, Amended 5-12-88, Formerly 21M-26.003, 61F6-26.003, 59R-10.003, Amended 3-9-09.

Certification Packet

CERTIFICATE OF

BOARD OF MEDICINE ADMINISTRATIVE RULES

FILED WITH THE DEPARTMENT OF STATE

I hereby certify:

[xx] (1) That all statutory rulemaking requirements of Chapter 120, F.S., and all rulemaking requirements of the Department of State have been complied with; and

[xx] (2) That there is no administrative determination under subsection 120.56(2), F.S., pending on any rule covered by this certification; and

[xx] (3) All rules covered by this certification are filed within the prescribed time limitations of paragraph 120.54(3)(e), F.S. They are filed not less than 28 days after the notice required by paragraph 120.54(3)(a), F.S., and;

[ ] (a) Are filed not more than 90 days after the notice; or

[XX] (b) Are filed more than 90 days after the notice, but not more than 60 days after the administrative law judge files the final order with the clerk or until 60 days after subsequent judicial review is complete; or

[ ] (c) Are filed more than 90 days after the notice, but not less than 21 days nor more than 45 days from the date of publication of the notice of change; or

[ ] (d) Are filed more than 90 days after the notice, but not less than 14 nor more than 45 days after the adjournment of the final public hearing on the rule; or

[ ] (e) Are filed more than 90 days after the notice, but within 21 days after the date of receipt of all material authorized to be submitted at the hearing; or

[ ] (f) Are filed more than 90 days after the notice, but within 21 days after the date the transcript was received by this agency; or

[ ] (g) Are filed not more than 90 days after the notice, not including the days the adoption of the rule was postponed following notification from the Joint Administrative Procedures Committee that an objection to the rule was being considered; or

[ ] (h) Are filed more than 90 days after the notice, but within 21 days after a good faith written proposal for a lower cost regulatory alternative to a proposed rule is submitted which substantially accomplishes the objectives of the law being implemented; or

[ ] (i) Are filed more than 90 days after the notice, but within 21 days after a regulatory alternative is offered by the Small Business Regulatory Advisory Committee.

Attached are the original and two copies of each rule covered by this certification. The rules are hereby adopted by the undersigned agency by and upon their filing with the Department of State.

Rule No(s).

64B8-10.003

Under the provision of subparagraph 120.54(3)(e)6., F.S., the rules take effect 20 days from the date filed with the Department of State or a later date as set out below:

Effective: _____

(Month) (Day) (Year)

_____
Signature, Person Authorized
To Certify Rules

Interim Executive Director
Title

/
_____
Number of Pages Certified

DEPARTMENT OF HEALTH

BOARD OF MEDICINE

ADDITIONAL STATEMENT TO THE SECRETARY OF STATE

RULE TITLE:	RULE NO.:
Costs of Reproducing Medical Records	64B8-10.003

SUMMARY: The proposed rule amendments streamline the medical records rule by setting forth one fee for the reproduction of medical records.

SUMMARY OF THE HEARINGS ON THE RULE: The Board held nine (9) public hearings on this rule as follows: August 2, 2013; October 3, 2013; December 6, 2013; February 6, 2014; April 3, 2013; June 5, 2014; October 9, 2014; December 4, 2014; and February 6, 2015. The rule was originally published in Volume 39, No. 95, of the May 15, 2013, issue of the Florida Administrative Register (FAR). At the nine (9) public hearings, the Rules Committee and the Board reviewed many written comments and heard oral testimony from many interested parties. Additionally, at the December 4, 2014 public hearing, the Committee determined that a Statement of Estimated Regulatory Costs (SERC) should be prepared. At the Board's meeting held on February 6, 2015, the Board voted to approve the SERC and to make additional changes the proposed rule. Prior to filing the Notice of Change, the Board received correspondence from the staff of the Joint Administrative Procedures Committee dated February 17, 2015, with regard to the SERC and inquiring as to whether the rule required legislative ratification. The Board held a telephone conference meeting on March 4, 2015, and based upon the written comments from the Joint Administrative

Procedures Committee and discussion of the Board, the Board determined that the rule would indeed, require legislative ratification and that the SERC needed to be revised to state as such. The Notice of Change was published in Volume 41, No. 49, of the March 12, 2015, issue of the FAR.

On March 31, 2015, Petitioners, Daniel Fernandez, and Dax J. Lonetto, Sr. PLLC, each filed a Petition for Administrative Hearing Determining Invalidity of Proposed Rule. On April 1, 2015, Petitioner, Florida Justice Association and Florida Consumer Action Network, Inc. filed Petitions for Administrative Hearing Determining Invalidity of Proposed Rule. The cases were consolidated and assigned DOAH Case No. 15-1774RP. The hearing in this matter was held at the Division of Administrative Hearings on September 8 and 9, 2015. On December 8, 2015, Administrative Law Judge, Lynne A. Quimby-Pennock, issued a Final Order finding that the proposed changes to the rule do not constitute an invalid exercise of delegated legislative authority, and dismissing the petitions. The rule is being adopted as changed.

STATEMENT OF FACTS AND CIRCUMSTANCES JUSTIFYING RULE PROPOSAL: Physicians receive numerous requests to reproduce patient medical records. The Board has determined that one fee for the reproduction of medical records is appropriate. The proposed rule amendments streamline the rule by setting forth one fee for the reproduction of medical records.

THE FULL TEXT OF THE PROPOSED RULE IS:

64B8-10.003 Costs of Reproducing Medical Records. Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records stored and delivered in any format or medium.

(1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.

~~(2) For patients and governmental entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than the following:~~

~~(a) For the first 25 pages, the cost shall be $1.00 per page.~~

~~(b) For each page in excess of 25 pages, the cost shall be 25 cents.~~

(2) ~~(3)~~ The ~~For other entities, the~~ reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page.

(3) ~~(4)~~ Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs ~~and overhead costs~~ associated with duplication, plus postage.

(4) Accessing medical records through patient portals does not constitute the reproduction of medical records.

Rulemaking ~~Specific~~ Authority 456.057(17) ~~(18)~~, 458.309 FS.

Law Implemented 456.057(17) ~~(18)~~ FS.

History–New 11-17-87, Amended 5-12-88, Formerly 21M-26.003, 61F6-26.003, 59R-10.003, Amended 3-9-09,_____.

STATEMENT OF ESTIMATED REGULATORY COSTS

Subject: Proposed amendments to Rule 64B8-10.003, F.A.C., Costs of Reproducing Medical Records

Summary of Proposed Changes

The proposed rule amends the rule for the costs of reproducing medical records by setting forth a single fee of $1.00 per page for reproducing medical records.

(a) An economic analysis showing whether the rule directly or indirectly:

1. Is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of $1 million in the aggregate within 5 years after the implementation of the rule;

The proposed rule is likely to have an adverse impact on economic growth, private sector job creation or employment, or investment in excess of $1 million in the aggregate within 5 years. There may be increased costs of doing business to small law firms and law practices that are defined as a small business by s. 288.703, F.S. See analysis under 3(e).

2. Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate within 5 years after the implementation of the rule; or

The proposed rule is likely to have an adverse impact on business competitiveness. However, the proposed rule would have a positive impact on Florida physicians' businesses; they would be able to charge the reasonable costs of reproducing records of up to a $1 per page and recoup more of the costs associated with reproducing medical records. As far as the impact on business competitiveness to businesses other than physician offices, the impact of the rule is the same to any party that requests medical record copies, regardless of geographic location. To obtain copies of medical records from a Florida physician, an out of state party would be charged the same amount as a party residing within the state. The proposed rule may have an impact on small plaintiffs' law firms' ability to compete with larger plaintiffs' firms because those smaller firms likely have less capital to recoup the upfront expenditures associated with reproducing large volumes of medical records. However, the loss in competitiveness to smaller plaintiffs' firms is only realized if a case is dismissed or found in favor of the defendant. The adverse impact on these smaller

firms' ability to compete with larger firms is likely *de minimis* as small plaintiffs' firms are not likely to reject a potential client's business based upon the sole fact that it will have to pay more upfront costs for reproducing medical records.

3. Is likely to increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years after the implementation of the rule.

No. This is a regulatory rule that physicians are required to comply with. By increasing the amount a physician may charge for medical records, the physician's regulatory costs may actually be reduced over five years.

(b) A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule.

There are approximately 45,000 licensed physicians actively practicing in Florida. Any one of these physicians may be asked for copies of medical records for a patient and would have to comply with Rule 64B8-10.003, F.A.C.

The individuals that would be affected by the proposed rule amendment are patients that request medical records from a physician's office. Previously those patients would pay $1 per page for the first 25 pages and $.25 per page thereafter. When all the requested records are less than 25 pages, this rule change has no effect on the cost the patient would have to pay. The rule change would have an effect on those patients that request copies of medical records that contain greater than 25 pages. Patients requesting copies of medical records in excess of 25 pages would pay more based upon the proposed rule than the current rule. The proposed rule would have no effect on the costs to patients that received treatment at a hospital, because pursuant to s. 395.025, F.S., a hospital may charge $1 per page.

This rule change may have an effect on attorneys' offices that request records on behalf of a patient. That effect would be determinant on whether an attorney representing a patient in a civil suit and requesting that patient's records would be entitled to the patient rate under the current version of the rule.[1]

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[1] See Rule 64B8-10.003(2), F.A.C., effective 03/09/2009.

(c) A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues.

There would not be any additional costs to the agency for implementing and enforcing the proposed rule. However, there would be a cost to the agency when requesting copies of medical records for the purpose of investigating legally sufficient complaints for alleged violations of the Medical Practice Act. Under the current rule the Department would be entitled to the rate under subsection (2), $1.00 for the first $25 pages and $0.25 for each page in excess of 25 pages. Under the proposed rule the Department would have to pay $1.00 per page.

To estimate the costs to the agency there needs to be an estimate of the average number of pages of medical records that the Department obtains from a physician's office per disciplinary investigative case, and an estimate of the total number of investigative cases that the Department investigates in a given year. According to information obtained from the Department's Investigative Services Unit, the average number of medical records obtained from a physician's office per investigative case would be approximately 50-100 pages.[2] The estimated number of cases in any given year would be approximately 1055; this is based upon 1055 legally sufficient complaints against physicians for fiscal year 2013-2014.[3] For purposes of calculating the estimated cost to the agency the low end of 50 pages will be used as not every legally sufficient complaint contains medical records from a physician's office.

Thus, the estimated cost to the agency for 50 pages of medical records under the current rule is $31.25. The cost to the agency under the proposed rule is $50. The difference in cost per 50 pages of records between the current rule and the proposed rule is $18.75. Applying this cost difference to the number of legally sufficient complaints the Department investigates in one year (n=1055), the total difference in cost would be approximately $19,781.25 per year, with an aggregate of approximately $98,906.25 within five years after implementation of the proposed rule. However, this amount is likely an overestimation as patients often provide copies of medical records to the Department themselves and not every legally sufficient complaint requires the Department to request medical records from a physician's office.

(d) A good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to

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[2] Email from Chief of Investigative Services, Investigative Services Unit, Div. of Medical Quality Assurance, DOH (Dec. 19, 2014, 4:26 EST) (on file with author).

[3] Florida Board of Medicine, 2013-2014 Annual Report (2014).

comply with the requirements of the rule. As used in this section, "transactional costs" are direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, the cost of monitoring and reporting, and any other costs necessary to comply with the rule.

None. There are no costs to the regulated entities for complying with this rule. Medical doctors are required to provide copies of records to patients and this rule allows medical doctors to recover the costs associated with providing medical records. The rule change will increase the amount a physician may recover for reproducing medical records.

(e) An analysis of the impact on small businesses as defined by s. 288.703, and an analysis of the impact on small counties and small cities as defined in s. 120.52. The impact analysis for small businesses must include the basis for the agency's decision not to implement alternatives that would reduce adverse impacts on small businesses.

Positive Impact on Physicians

By changing the amount that a physician may charge for reproducing medical records to the reasonable costs, this rule change would not have a negative impact on small physician businesses in the state. By not increasing the rate a physician could charge for records for 26 years, physicians were likely absorbing the costs associated with reproducing records. Under the proposed rule, physicians will experience a positive impact on their business by being able to recover the reasonable costs associated with reproducing medical records.

Impact on law practices/offices defined as a small business under s. 288.703, F.S.

This rule change may have an adverse impact on those attorneys that represent patients in civil suits and are defined as a small business under s. 288.703, F.S. Attorneys that practice in certain areas of the law are required to obtain medical records in order to pursue or defend a claim on behalf of a client. Law practices that may be affected by the proposed rule include those that handle social security disability, medical malpractice, auto accidents, and other negligence cases.[4] Defense firms have

[4] Workers' compensation attorneys expressed concern over the rule change. However, this change would not affect those attorneys because Rule 69L-7.601, F.A.C., describes the amount a health care provider can charge an injured employee or his/her attorney for medical records. That rule limits the charge to .50/page.

always paid the "other entity" rate which is $1 per page. Therefore, the rule change has no effect on defense firms.

With the exception of social security disability cases and federal court actions, most cases involving patient records will be handled in circuit court. Most firms representing a plaintiff require the client to pay the costs associated with litigating a matter. Plaintiffs' attorneys typically require the client to pay these costs out of the amount the client recovers. The firms lose these costs when their client does not prevail. When a case is settled, the costs of the case are typically factored into the settlement and are paid to the plaintiff's attorney out of the client's recovery.

To analyze the impact on these small businesses the analysis will have to make certain legal assumptions, set a constant for the average number of medical records per case, and approximate the number of cases that law practices will have to cover their costs for obtaining copies of medical records. First, it has to be assumed that all law practices that would have to pay for the costs of copies of medical records would qualify as a small business under s. 288.703, F.S. Second, it has to be assumed that of all the civil cases that would require copies of medical records that those cases would contain records obtained from a physician office. Third, it must be assumed that the attorneys representing patients in these suits would be entitled to the patient rate under the current version of Rule 64B8-10.003(2), F.A.C. In addition, for purposes of this analysis we will set the average number of medical records copied from a physician office to 50 pages, the amount set above in section 3(c). It is possible that some cases may have many more pages and other cases may not have any medical records that were obtained from a physician's office. Thus, with the average number of pages set at 50, the cost difference between the current rule and proposed rule, as described above in 3(c), is approximately $18.75.

The Florida Office of the State Courts Administrator maintains a report of the disposition of the cases that are filed in circuit courts throughout Florida.[5] The relevant categories of cases that are included in the report and used for this estimation are medical malpractice, product liability, auto negligence, and other negligence (including environmental/ toxic tort, nursing home negligence, and premises liability). The Statistical Reference Guide breaks down circuit court civil dispositions in the categories of professional malpractice, product liability, auto negligence, and other negligence. Fiscal year 2012-2013 case numbers were used to estimate the number of case dispositions in any given year. To estimate the number of cases where a law practice

[5] See Florida Office of the State Courts Administrator, Florida's Trial Courts Statistical Reference Guide FY 12/13 (2014), *available at* http://www.flcourts.org/publications-reports-stats/statistics/trial-court-statistical-reference-guide.stml

may have to pay for the costs of copying medical records, the number of cases dismissed before and after hearing were added and then divided by the total number of disposed cases. This number came out to approximately 55% of civil case dispositions. For the purpose of this analysis, the cases that were disposed pursuant to a settlement agreement were eliminated because costs were likely factored into the agreement. Due to the limitations in the available data, it was not possible to discern the percentage of those cases disposed by judge or jury after hearing. For the purposes of this analysis it was assumed that plaintiffs' attorneys would have to pay the costs for medical records copies for approximately 55% of the disposed cases in each case category where medical records might be requested.

From the available data there are approximately 861 medical malpractice case dispositions a year. Attorneys may have to pay copying costs for 474 of those cases. The cost increase for copies of medical records associated with medical malpractice cases is approximately $8,887.50 per year. There are approximately 20,903 auto negligence case dispositions per year. Attorneys may have to pay copying costs for 11,497 of those cases. The cost increase for copies of medical records associated with auto negligence cases is approximately $215,568.75 per year. There are approximately 2,280 product liability case dispositions per year. Attorneys may have to pay copying costs for 1,254 of those cases. The cost increase for copies of medical records associated with product liability cases is approximately $23,512.50 per year. There are approximately 5,470 other applicable negligence case dispositions per year. Attorneys may have to pay copying costs for 3008 of those cases. The cost increase for copies of medical records associated with other negligence cases is approximately $56,400 per year. The total combined cost increase for civil cases could be approximately $304,368.75 per year.

In addition to attorneys handling negligence cases in circuit court, attorneys practicing in the area of social security disability have to pay the costs for obtaining medical records on behalf of their clients. As in personal injury matters, the client usually pays those costs out of the recovery, and does not pay the costs when there is no recovery. A review of the case disposition report from the Social Security Administration from September 29, 2012, through August 30, 2013, indicated that there were 13,306 social security disability claims denied in Florida in one year.[6] Therefore, assuming all these claimants were represented by an attorney, it is possible that those claimant's attorneys would have paid for the costs of obtaining these medical records without assistance from the client. Thus, it is possible that the cost increase for copies

[6] See Social Security Administration ALJ Disposition Data.

of medical records associated with social security disability claims could be as high as approximately $249,487.50 per year.

Based on this analysis, it is possible that law practices that have to request copies of medical records from physician offices on behalf of the patient will see cost increases between the current rule and proposed rule. However, as discussed above, this estimate is based upon limited data and several assumptions that are taken as true. In addition, this estimate is not based on valid statistical or economic methods or models. Overall, it is likely that the proposed rule will have some adverse impact on economic growth, private sector job creation or employment, or investment in excess of $1 million in the aggregate within 5 years. This impact will primarily result in increased costs of doing business to law firms and law practices that are defined as a small business under s. 288.703, F.S.

Consideration of Lower Cost Alternative

In making its decision to increase the cost for reproducing medical records, the Board took testimony from lawyers, patients, physicians and associations. The Board found that since the adoption of the rule in 1987, the costs for reproducing medical records have increased. However, the Board never increased the reimbursement amount over the last 26 years. Further, the limitations placed on providers by the Health Insurance Portability and Accountability Act (HIPAA) requires many offices to spend more time reviewing and redacting records depending on the person who is requesting the records. There are additional expenditures associated with hiring qualified staff to review the records before the records can be provided to the requesting party. In addition, the proposed rule considers that access of medical records through patient portals does not constitute the reproduction of medical records, thus there are no additional costs created by the proposed rule to patients who access their records in this manner.

The Board determined that the current amount in the rule was inadequate to allow physicians to recover the actual costs for reproducing medical records for a patient or any other entity. Based upon the testimony presented and the increased costs to physicians in the last 26 years since the adoption of the rule, the Board determined that there is no lower cost alternative.

(f) Any additional information that the agency determines may be useful.

Patients that obtain their medical records for personal reasons would also be affected by the rule change. However, those patients were not analyzed because those patients would not be required to obtain medical records as a part of a small business.

Physician practices and groups are increasingly utilizing patient portals to communicate with patients and to provide access to electronic medical records.[7] Patients and attorneys that represent patients may avoid paying the costs for reproducing medical records as provided in the proposed rule if the medical records can be accessed through a patient portal. Additionally, the proposed rule encourages physicians, and they often do, to provide their patients a copy of their medical records without cost.

[7] See Office of the Secretary for the U.S. Department of Health and Human Services, Office of National Coordinator for Health Information Technology, What is a patient portal?, *available at* http://www.healthit.gov/providers-professionals/faqs/what-patient-portal

Final Order

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANIEL R. FERNANDEZ; DAX J. LONETTO, SR., PPLC; FLORIDA JUSTICE ASSOCIATION; AND FLORIDA CONSUMER ACTION NETWORK, INC.,

Petitioners,

vs.

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Respondent,

and

BACTES IMAGING SOLUTIONS, INC.; HEALTHPORT TECHNOLOGIES, LLC; AND FLORIDA MEDICAL ASSOCIATION,

Intervenors.
_____/

Case Nos. 15-1774RP
15-1775RP
15-1778RP
15-1794RP

FINAL ORDER

A final evidentiary hearing was held in these consolidated cases on September 8 and 9, 2015, in Tallahassee, Florida, before Lynne A. Quimby-Pennock, a duly-designated Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

At issue in this proceeding is whether the proposed amendments set forth in the Notice of Proposed Rule published on

May 15, 2013, in the Florida Administrative Register, Vol. 39, No. 95, pages 2609 through 2610 and modified by the Notice of Change, published on March 12, 2015, in the Florida Administrative Register, Vol. 41, No. 49, pages 1236 through 1237, constitute an invalid exercise of delegated legislative authority,[1/] and, if so, whether costs and attorney's fees should be assessed against Respondent and paid to Petitioner.

PRELIMINARY STATEMENT

In October 2012, the Florida Board of Medicine (Board, Respondent, or BOM) proposed the development of rule amendments to Florida Administrative Code Rule 64B8-10.003 to address the cost of the reproduction of medical records, which were stored in an electronic format. In May 2013, the Board proposed a rule amendment that was intended to set forth a single fee for reproducing medical records. In March 2015, the Board published a Notice of Change that provided additional changes to the May 2013 proposed rule.

On March 31, 2015, Petitioners, Daniel R. Fernandez (Fernandez), and Dax J. Lonetto, Sr., PLLC (Lonetto), each filed a Petition for Administrative Hearing Determining Invalidity of Proposed Rule. Fernandez's petition was assigned DOAH Case No. 15-1774RP. Lonetto's petition was assigned DOAH Case No. 15-1775RP. On April 1, Petitioner, Florida Justice

Association (FJA), filed a Petition for Determination of Invalidity of BOM's Proposed Medical Records Increase Rule. FJA's petition was assigned DOAH Case No. 15-1778RP. Also, on April 1, Petitioner Florida Consumer Action Network, Inc. (FCAN) filed a Petition for Administrative Hearing Determining Invalidity of Proposed Rule. FCAN's petition was assigned DOAH Case No. 15-1794RP. Fernandez, Lonetto, FJA, and FCAN will be collectively identified as Petitioners.

On April 2, the undersigned issued a Notice of Hearing and Order of Pre-Hearing Instructions. The notice scheduled the hearing for April 29.

On April 3, Respondent filed an Unopposed Motion to Abate, Continue, and Consolidate.[2/] The four petitions were consolidated to DOAH Case No. 15-1774RP. On April 7, an Order Denying Abatement and Granting Continuance (Order) was issued. The Order afforded Respondent's counsel time to present the Board with the lower cost regulatory alternatives that Petitioners had submitted. Additionally, the Order provided that the parties were to provide three mutually-agreeable dates prior to June 5 on which to conduct the hearing.

Leave to intervene, without any objections from Petitioners[3/] or Respondent, was granted to BACTES Imaging Solutions, Inc. (BACTES); HealthPort Technologies, LLC (HealthPort); and the Florida Medical Association (FMA).

At the hearing, Joint Exhibits JT-1 through JT-12[4/] were admitted into evidence. Petitioners' Exhibit, PT-1, was admitted over objection. Respondent's Exhibits BOM-1, BOM-2 and BOM-3 were admitted over objection, and BOM-4 and BOM-5 were admitted without objection. Petitioners and Respondent each listed (former Board Executive Director) Allison Dudley and (current Board Executive Director) Andre Ourso as their witnesses. In order to provide an orderly hearing flow and allow each party the opportunity to elicit the direct testimony of each witness, the undersigned allowed great leeway in each cross-examination.

At the conclusion of the hearing, Petitioner FJA offered an oral motion to amend its petition by adding an additional count, "specifically to address the failure of an agency to follow applicable rulemaking procedures or requirements set forth in the chapter," according to section 120.56, Florida Statutes. Following oral arguments, the motion was denied. Additionally, in light of the fast-approaching October Board meeting, Respondent requested to file the post-hearing submissions on October 23. None of the parties objected and the request was granted.

The three-volume Transcript of the final hearing was filed on September 21. On September 22, a Notice of Filing was issued, directing the parties to file their proposed final

orders (PFOs) on or before 5:00 p.m. on October 23. On October 19, an Unopposed Motion for Late Filed Exhibit was filed and requested that the second portion of Joint Exhibit 9 be admitted.[5/] This second portion of the Joint Exhibit 9 was admitted.

On October 22, an Unopposed Motion for Extension of Time to File Proposed Final Order and for Extending Page Limit on Proposed Final Order was filed. Both motions were granted. The parties were allowed to file their PFOs before the close of business on Friday, November 6, and the page limitation was raised to 60 pages.

On November 6, Petitioners filed a Joint Proposed Final Order and Respondent filed its Proposed Final Order. The Florida Medical Association filed a notice that it concurred with Respondent's PFO. BACTES and HealthPort did not file a PFO. Each submission has been carefully considered in the preparation of this Final Order.

Unless otherwise noted, all statutory references are to the 2015 version of the Florida Statutes.

FINDINGS OF FACT

I. The Petition

1. Petitioners have challenged the Notice of Proposed Rule and Notice of Change as an invalid exercise of delegated legislative authority. The petitions request that a formal

hearing be conducted, a final order be entered determining that the proposed rule is an invalid exercise of delegated legislative authority, award petitioners' costs and attorneys' fees, and provide such other relief as deemed necessary.

II. The Parties

2. Petitioner Fernandez is a Florida resident and patient with ongoing medical issues that requires him to request and obtain his medical records from his attending or treating physicians from time to time.

3. Petitioner Dax J. Lonetto, Sr., PPLC, is a Florida-based law firm. Dax Lonetto is a Florida-licensed attorney and sole shareholder of the Lonetto PPLC law firm. Eighty-five to 90 percent of Mr. Lonetto's practice involves social security disability benefits, and the remainder of his practice involves veteran's benefits and other basic personal injury claims.[6/] In order to pursue and obtain social security benefits or veteran's benefits for clients, Mr. Lonetto must first obtain his clients' medical records.

4. Petitioner FJA is a statewide, not-for-profit, professional association of approximately 2,500 plaintiff trial attorneys. FJA's purpose is engaging in advocacy efforts on behalf of its membership, strengthening and upholding Florida's civil justice system, and protecting the rights of Florida's citizens and consumers.

5. Paul D. Jess is a Florida-licensed attorney who serves as the general counsel and deputy executive director for FJA. Mr. Jess provided no documentary evidence to support the position that most physician "offices or vendors would charge the maximum [amount] permitted [by the rule]." Mr. Jess admitted that FJA is not "directly injured by this price hike as an association or as a corporation," because FJA does not order medical records. However, Mr. Jess testified that for the majority of FJA's members, ordering medical records is a routine practice on behalf of their clients. Further, Mr. Jess believed that a majority of FJA members would be adversely impacted by this proposed rule, based on the increased costs in obtaining their clients' medical records.

6. Petitioner FCAN is a Florida not-for-profit grassroots organization dedicated to advocating for the rights of Florida consumers. William Newton served as the corporate representative for FCAN. Mr. Newton previously relinquished the full-time executive director's position and now currently works part-time as FCAN's deputy director.

7. FCAN currently has about 7,000 individual members. FCAN is a nonpartisan organization which represents Florida consumers in four major issue areas: utilities, insurance, health care, and the environment.[7/] With respect to the health care area, FCAN stands for affordable and available health care for

everyone, with a focus on trying to improve accessibility, as well as to control the price of health care. Mr. Newton did not know how many of FCAN's 7,000 members would be affected by the proposed rule change; however, he believed that "almost all of them would be" because they go to the doctor.

8. The Board regulates the practice of medicine in Florida pursuant to chapters 456 and 458, Florida Statutes, and is the agency that is proposing the rule amendments at issue.

9. Intervener BACTES is a release of information (ROI) provider that contracts with physicians in Florida and throughout the country to process and fulfill requests for medical records received by such physicians. William Bailey founded BACTES and served as its CEO from 1991 until July 2013, when he assumed a consultant status with the provider. Mr. Bailey confirmed that BACTES is currently operating in Florida with three offices located in Orlando, Ft. Myers, and Jacksonville. BACTES has no plans to discontinue doing business in Florida.[8/]

10. Intervener HealthPort is also an ROI provider that contracts with physicians in Florida and throughout the country to process and fulfill requests for medical records received by such physicians. Kyle Probst, HealthPort's counsel and director of government relations, confirmed that HealthPort engaged Cynthia Henderson to approach the Board regarding making changes

to the rule to "clear up some apparent confusion about how medical records should be billed in the state of Florida."

11. Intervener FMA is a professional association dedicated to the service and assistance of allopathic and osteopathic physicians in Florida. Approximately 20,000 licensed Florida physicians are members of the FMA. The parties agreed there are approximately 75,000 physicians licensed and regulated by the Board. Not all 75,000 Florida licensed physicians are currently practicing in Florida.

III. The Statute and Current Rule

12. Section 456.057(17), Florida Statutes, provides:

> A health care practitioner or records owner furnishing copies of reports or records or making the reports or records available for digital scanning pursuant to this section shall charge no more than the actual cost of copying, including reasonable staff time, or the amount specified in administrative rule by the appropriate board, or the department when there is no board.

13. Section 458.309(1) provides in pertinent part:

> The board has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter conferring duties upon it.

14. Florida Administrative Code Rule 64B8-10.003 is the Board's rule governing the costs of reproducing medical records. The rule was first adopted on November 11, 1987, as rule 21M-26.003. It was transferred to rule 61F6-26.003, then to

rule 59R-10.003, amended on May 12, 1988, amended on March 9, 2009, and then finally transferred to rule 64B8-10.003. The rule currently provides:

> Costs of Reproducing Medical Records. Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records.
>
> (1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.
>
> (2) For patients and governmental entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than the following:
> (a) For the first 25 pages, the cost shall be $1.00 per page.
>
> (b) For each page in excess of 25 pages, the cost shall be 25 cents.
>
> (3) For other entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page.

> (4) Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs and overhead costs associated with such duplication.
>
> *Specific Authority 456.057(18),*[9/] *458.309 FS. Law Implemented 456.057(18) FS. History-New 11-17-87, Amended 5-12-88, Formerly 21M-26.003, 61F6-26.003, 59R-10.003, Amended 3-9-09.*

15. This rule was first created in 1987 and was effective in May 1988. In pertinent part, that first rule provided that chapter 458 licensees could condition the release of copies of patient medical records "upon payment . . . of reasonable costs of reproducing the records." The rule then defined "reasonable costs of reproducing copies . . . [should] not be more than" a $1.00 for the first 25 pages and 25 cents per page in excess of 25 pages.

16. In 2009, the rule was revised to allow patients and governmental entities to get copies of medical records at that same rate. For all other entities the "reasonable costs of reproducing copies . . . [should] not be more than $1.00 per page."

17. Over the course of 26 months, the Board had access to as much information as the Board staff and interested parties could provide it. The Board heard testimony in no fewer than

nine public hearings.[10/] The proposed rule language was dissected and discussed on multiple levels, and the Board devoted countless hours to listening to and evaluating those comments.

IV. Rule Development

18. In June 2012, the Department of Health (Department) and the Board received an email correspondence on behalf of HealthPort requesting clarification on the costs for reproducing electronic medical records. That correspondence, the current rule 64B8-10.003, and the applicable statutes were placed on the agenda for the Board's August 2012 Rules/Legislative Committee (RLC or Committee) meeting.

19. At the August RLC meeting, the Committee discussed the requested action and heard from an attorney representing HealthPort. The Committee voted to table the item and seek additional information.

20. The Board commenced rulemaking to amend rule 64B8-10.003 in early October 2012. At the RLC meeting on October 11, 2012, the Committee voted unanimously to recommend noticing this proposed change for rule development. The Board's counsel was to draft language for a proposed rule change to be presented at the next RLC meeting.

21. On October 30, 2012, a Notice of Development of Rulemaking (Notice) was published in the Florida Administrative

Register. The Notice listed the "PURPOSE AND EFFECT: [as] The Board proposed the development of rule amendments to address the cost of reproduction of medical records which are stored in an electronic format."

22. At the November 2012 RLC meeting, the Committee received a draft rule proposal, excerpts of the October RLC meeting report, and materials from the October meeting. The Committee heard from various speakers on the proposed rule language. One Committee member suggested that the RLC would benefit from knowing what other state medical boards allowed physicians to charge. Another suggested the Board staff look at a different charge for paper versus electronic production. Following the discussion, the Committee approved two motions: one to move to one rate (but undecided on what that rate would be); and the second to have then Executive Director, Alison Dudley, "come back to [the RLC] with the aspects of what costs are elsewhere so that [the RLC could] make that decision about what that rate and particular medium" is, in order to move forward.

23. The Board's staff prepared a survey that was sent to administrators in medicine via a web portal, asking the following specific questions:

> 1. Does your board have a rule or law that outlines what a physician can

charge for medical records? Flat rate or per page?

2. Does that law or rule delineate different charges for paper medical records versus electronic medical records? What are the charges?

3. Does the law or rule delineate different charges for producing the medical records on paper versus on a CD? What are the charges?

4. Does the law or rule contemplate charges for other services such as diagnostic tests or X-rays? What are the charges?

5. Does your law or rule define "electronic medical record?" If so, what is that definition?

6. Can you share your law and/or rule with us? Thank you for your responses.

Of the 50 or so administrators contacted, the Board staff received 13 responses. Those responses were provided to the RLC for review.

24. At the January 31, 2013, RLC meeting, the agenda included multiple items for the Committee's consideration: the transcript from the November 29, 2013, RLC meeting; excerpts of the RLC report dated December 2012; an email from Ms. Henderson; a 2003 White paper; the costs charged by Florida Clerk of Courts, Florida hospitals, and other Florida health care boards; costs charged by other state medical boards; and all the materials presented at the prior meetings.

25. The Committee received testimony from individuals regarding their understanding of how the proposed changes to the rule would or could affect their patient/clients. As a result of those comments and the RLC's discussion, the Committee voted to have draft language prepared that included one fee for any records release with the following specific language: "stored and delivered in any format or medium." The draft language was to be presented at the next RLC meeting.

26. At the April 4, 2013, RLC meeting, the Committee agenda included excerpts from its January meeting, draft language, and an article regarding the federal Health Portability and Accountability Act (HIPAA) requirements. The Committee heard from individuals again and considered the various recommendations regarding the appropriate language for the proposed rule. The draft language presented at this RLC meeting, in the underline/strike-through method, provided the following:

> Costs of Reproducing Medical Records. Recognizing that patient access to medical records is important and necessary to assure continuity of patient care, the Board of Medicine urges physicians to provide their patients a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged. The Board, however, also recognizes that the cost of reproducing voluminous medical records may be financially burdensome to

some practitioners. Therefore, the following rule sets forth the permitted costs for the reproduction of medical records stored and delivered in any format or medium.

(1) Any person licensed pursuant to Chapter 458, F.S., required to release copies of patient medical records may condition such release upon payment by the requesting party of the reasonable costs of reproducing the records.

~~(2) For patients and governmental entities, the reasonable costs of reproducing copies of written or typed documents or reports shall not be more than the following:~~
~~(a) For the first 25 pages, the cost shall be $1.00 per page.~~
~~(b) For each page in excess of 25 pages, the cost shall be 25 cents.~~

(2)~~(3)~~ The ~~For other entities, the~~ reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page.

(3)~~(4)~~ Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs and overhead costs associated with such duplication.

Additionally, the Committee discussed the anticipated financial impact that the proposed changes would have on small businesses, including whether or not a statement of estimated regulatory costs (SERC)[11/] was necessary. The Department staff could not say whether the proposed change would increase the Department's

cost in excess of $200,000 a year. Following the discussion, the Committee voted to table the SERC decision until additional information could be brought before the Board and the proposed draft rule language was approved.

27. The full Board met on April 5 and approved the RLC report which included the approval of the draft rule language. Additionally, the Department staff reported that, after conferring with other staff in Tallahassee, the Department did not feel that the cost associated with the draft rule language would exceed $200,000 a year in the aggregate. The Board voted that a SERC was not required.

28. Between the October 2012 Notice and the May 2013 publication of the proposed rule changes, the RLC met in noticed public meetings discussing the potential rule revision. The rule record is clear that the proposed changes were discussed extensively by Committee members with input from attorneys, residents, association representatives and corporate representatives.

29. On May 15, 2013, a Notice of Proposed Rule (using the proposed language found in paragraph 26 above) was published in the Florida Administrative Register, Vol. 39, No. 95. The purpose for the proposed rule was to provide a single fee for reproducing medical records. The Board received a request for a hearing and numerous comments from the public on the proposed

changes. The rule hearing was scheduled for the next available Board meeting.

30. On August 2, 2013, the Board held a public hearing on the proposed rule in Deerfield Beach. The Board agenda included: the proposed rule 64B8-10.003; the rule hearing request; the rule hearing notice; a summary of the issue for Board consideration submitted by Ms. Henderson; copies of the notices sent regarding the hearing; meeting reports from the RLC meetings held on August 2, 2012, October 11, 2012, November 29, 2012, January 31, 2013, and April 4, 2013; and over 60 written comments. At the Board meeting over 15 people addressed the Board, expressing either opposition to or support of the proposed changes. As a result of the testimony received, the Board chair directed that the public rule hearing be transcribed and the transcript be sent to the RLC for its consideration and determination.

31. At the Orlando RLC meeting on October 3, 2013, the Committee conducted a rule hearing on the proposed rule language. The RLC's agenda included: draft proposed language for the rule; a draft RLC meeting report; a transcript from the August 2, 2013, rule hearing; an article regarding Florida doctors and medical records; and additional comments from seven different sources.

32. The Committee was charged to consider the testimony from the August 2013 public rule hearing, as well as the testimony from this rule hearing to make recommendations to the full Board. The Committee heard testimony from individuals who either opposed or supported the proposed rule.

33. The Committee members asked questions of the various presenters, and provided education to those presenters and attendees as to the multiplicity of medical practices, attendant issues, and personal experiences in dealing with medical records requests. The Committee agreed that the rule should be as set forth in the draft rule language. The Committee also agreed that there might be an "adverse impact" on small businesses, and that a SERC should be prepared.

34. In November 2013, Board staff distributed a survey to 1,419[12/] Florida-licensed physicians seeking responses to the following questions:

> 1. Do you handle the copying of your medical records with your own staff? If yes continue to 1a. If no, go to Question 2.
> Yes. No.
>
> 1a. Do you have a designated staff person who only handles the review and copying of medical records? If yes, continue to 1b. If no, continue to 1c.
> Yes. No.
>
> 1b. How much do you pay this person on a monthly basis, including any benefits that are provided?

1c. How much do you spend on special equipment and supplies (copier, paper etc.) for the copying of medical records annually?

2. If you send your medical records for copying by a service, how much do you pay each month for this service?

3. On average, how many requests for copies of medical records do you receive each month?

The Board staff received 28 responses from the 1,419 surveys sent out. Of those 28 responses, 27 handled the copying of medical records in-house. Twelve practitioners had a designated staff person to review and copy medical records, while 15 did not. Fifteen declined to provide how much their personnel were paid. There was a wide range of pay for the others. The costs associated for special equipment and supplies to provide copies of medical records ranged from $120 to $20,000 per month. Only one practitioner responded that medical records were sent out to a copying service. The number of medical record requests varied from one to more than 600 per month.

35. The next public hearing was held in Orlando on December 6, 2013. The Board materials included: the hearing notice for December 6, 2013; proposed rule language; the transcript of the October 3, 2013, meeting; section 164.524, Access of Individuals to Protected Health Information; new comments received; the survey results; and material from the

previous public hearings and meetings. The Board considered the testimony from the public hearings that had been held on August 2 and October 3. Each speaker was afforded the opportunity to express their position and comments received were either "opposed" or "supported" the proposed rule changes. Following the testimony, the Board voted to change proposed subsection (2) by adding the following language, which is underscored:

> [t]he reasonable costs of reproducing copies of written or typed documents or reports shall not be more than $1.00 per page, <u>but shall not exceed actual costs</u>.

36. Thereafter, the Board again revisited the question of whether a SERC was necessary. The Board considered whether the newly revised language would adversely affect, or was likely to directly or indirectly increase regulatory costs to any entity in excess of $200,000 in the aggregate in Florida within one year of the implementation of the rule. The Board determined that a SERC was necessary.

37. On February 6, 2014, the RLC met in Kissimmee for another public hearing on the proposed rule amendments. The Committee was to consider changes authorized by the Board during its December meeting. The agenda materials included: draft language of the rule; additional correspondence; and the materials from the prior meetings/hearings. If the draft rule

language was approved, two questions had to be addressed: would the proposed rule have an adverse impact on small businesses; and would the proposed rule be likely to directly or indirectly increase regulatory costs to any entity in excess of $200,000 in the aggregate in Florida within one year after its implementation? Testimony was received from several individuals.

38. Following the testimony, the Committee members had a discussion about the terms "actual costs" versus "reasonable costs." The Committee voted to revise the draft rule language to "reasonable costs" and approved a "Notice of Change" to be published. The Committee also determined that the amendment would not have an adverse impact on small businesses, nor was it likely to directly or indirectly increase regulatory costs in excess of $200,000.

39. On April 3, 2014, the RLC held another public hearing in Deerfield Beach on the proposed rule. There remained some inconsistencies in the changes that were approved and the Committee reconsidered the proposed rule language. The material in the RLC's agenda included: materials presented at previous meetings including correspondence; draft changes to the rule; the hearing notice; an article regarding electronic records; an excerpt of the February 2014 meeting; and the transcript of the February 2014 meeting.

40. The Committee received testimony from several speakers who pointed out concerns about the proposed rule, and provided alternatives to it. After the testimony, the Committee voted to have new language prepared addressing those concerns and, in some instances, incorporated alternative suggestions. Additionally, the Committee understood that an additional public hearing would be necessary, and that the SERC might need to be revised.

41. On June 5, 2014, the RLC met in Tampa for another public hearing to consider the revised draft rule language. The agenda included: the hearing notice; the proposed draft language; a proposed SERC; multiple written comments; transcripts from prior RLC and Board meetings where the proposed rule was discussed; and RLC meeting reports. The Committee voted to table the discussion of the proposed rule until another hearing could be held in South Florida.

42. On October 9, 2014, the RLC met in Deerfield Beach and held a rule hearing regarding the revised rule language. The Committee received additional testimony from concerned individuals. The Committee voted to accumulate all the comments and present everything to the full Board at the December 2014 meeting.

43. In October 2014, Ms. Dudley was asked to speak at the Capital Medical Society in Tallahassee. Ms. Dudley took the

opportunity to hand out the survey (found in paragraph 34) to the participants. Although she received four additional responses to the survey, the audience was not physicians, but staff who primarily handled the medical records for medical offices.

44. On December 4, 2014, the RLC met in St. Petersburg for an additional rule hearing on the proposed rule language. The Committee was to review all the comments submitted. The RLC's agenda material included: the hearing notice; the suggested changes to the draft proposed rule from March and May 2014; the excerpt of the RLC meeting report in October 2014; multiple correspondence from concerned individuals; survey responses from physician offices (including the four additional surveys); materials from the prior hearings and RLC meetings; and the proposed SERC.

45. At the beginning of this rule hearing, the Board's executive director provided a suggested revision to the proposed rule by adding a new paragraph: "(4) Accessing medical records through patient portals does not constitute the reproduction of medical records." Testimony was received from various individuals regarding the proposed rule language. The Committee reviewed all the comments submitted. The Committee determined that a SERC should be prepared.

46. The Board held another rule hearing on the proposed rule language on February 6, 2015, in Stuart. The agenda material included: the hearing notice; the draft changes; the excerpt of the RLC meeting; survey responses from physician offices; newly received written comments; a proposed SERC; and materials presented at the previous hearings and meetings. The Board heard testimony from several individuals who either opposed or supported the proposed rule language. The Board reviewed the changes to the proposed rule and the proposed SERC, and heard testimony from presenters. Based on that testimony, the Board members further discussed the proposed rule language and voted to modify it again.

47. After the proposed rule language discussion, the Board then addressed whether it believed, with the latest revision to the draft rule, that a SERC was necessary. The Board voted to accept the SERC as presented.

48. On February 17, 2015, the Joint Administrative Procedures Committee (JAPC) wrote the Board regarding the SERC and inquired as to whether the draft rule would require legislative ratification.

49. As a result of the JAPC inquiry on March 4, 2015, the Board held a telephonic conference meeting. The Board heard from three individuals regarding whether the proposed rule required legislative ratification and the status of the SERC.

The Board determined that the rule would require legislative ratification and the SERC needed to be revised. The Board approved the following changes to the proposed rule (the initial paragraph and sections (1) and (2) are found in paragraph 26 above):

> (3) ~~(4)~~ Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs ~~and overhead costs~~ associated with duplication, plus postage.
>
> (4) Accessing medical records through patient portals does not constitute the reproduction of medical records.

50. On March 12, 2015, the Notice of Change was published in the Florida Administrative Register, and the four petitions were filed. Following the filing of the petitions at DOAH, the parties requested a continuance to allow the Petitioners the opportunity to present their lower-cost alternatives to the Board.

51. At the April 10, 2015, Board meeting, the Board addressed an allegation that the Board had failed to consider five lower-cost regulatory alternatives (Alternatives). The Board had not considered the Alternatives because they had not been filed for the Board's consideration. Once the Alternatives were filed, they were placed on the next available Board agenda.

52. The first Alternative was to leave the rule in its current state. After hearing from interested parties, the Board determined that it had evaluated the issues around the rule and the costs during the prior hearings and meetings. The Board agreed that the status quo was not viable for a variety of reasons. The Board voted to reject this Alternative.

53. The second Alternative asked that the medical record holder only be allowed to charge the actual cost of copying, including reasonable staff time consistent with section 457.057(17). The Board discussed that through the multiple public hearings it had determined that it would be impossible to determine the actual charge for copying. The actual cost for an urban multi-partner physician would be different than a solo practitioner's office in a rural location. The Board voted unanimously to reject this Alternative.

54. The third Alternative asked the Board to conduct an evaluation or study regarding what the actual costs of copying are for medical record holders based on the type of request, type of medical record, the format of the record, and the format of the record to be delivered. The Board discussed what it had heard about in the prior meetings: other states allowed higher levels of reimbursing; and hospitals charged $1.00 per page as authorized by statute. The Board attempted to obtain the data sought but was unsuccessful in obtaining any significant

response. Further, the Board does not have the statutory authority to require physicians to respond to any data or survey requests. The Board voted unanimously to reject this Alternative.

55. The fourth Alternative asked the Board to eliminate the per-page price and impose a restriction that the prices could not exceed the maximum price authorized by HIPAA. The Board did not concur that HIPAA set an exact amount, and trying to determine the costs for each practitioner in each type of practice would be frustrating to all involved. The Board voted unanimously to reject this Alternative.

56. The fifth Alternative asked the Board to keep the current rule, but separate the costs for electronic versus digital copies. The Board discussed the movement towards all electronic medical records, but paper records and other records will still exist. The Board determined that there is a need for the proposed rule to address the current circumstance. The Board voted unanimously to reject this Alternative.

57. Those opposed to the alleged increase testified there was no basis for the change, that the proposed change quadrupled the price for patients and governmental entities, and that it was arbitrary and capricious, especially with respect to electronic records. These opponents fail to recognize changes in medicine. HIPAA brought patient confidentiality and the need

to maintain that confidentiality into sharp focus. Medical practitioners are required to ensure that confidential patient information is not disseminated to unauthorized persons. Physicians must pay to have medical records copied, whether it is done "in-house" or by an ROI provider. Labor costs have increased and the tedious review to ensure that confidential information remains confidential is time-consuming and costly.

58. Medical practices can be quite varied in type, size, sophistication, location, and much more. Petitioners' claim that the proposed rule should be the "actual cost" to the practitioner is impracticable. A general practitioner in a rural solo practice, who receives one request for medical records, might be able to ascertain the "actual cost" to produce that one medical record. A specialist in an urban multi-partner practice group, who receives multiple requests for medical records, would find it nearly impossible to ascertain the "actual cost" to produce each requested medical record without extensive business record-keeping.

59. This proposed rule retains the suggestion that physicians "provide their patients with a copy of their medical records, upon request, without cost, especially when the patient is economically disadvantaged." Physicians provide medical records, free of charge, to subsequent or specialty physicians

to ensure care. However, physicians are not in the business of repeatedly producing medical records.

60. Those in favor of the proposed rule testified that the cost to physicians for reproducing medical records has not increased in years. The stringent HIPAA requirements placed an additional requirement on health care providers to ensure that private individual health data is kept confidential.

61. The process to release medical records is not simply to pull a paper, digital or electronic medical record, copy it, and send it out the door. The process, as explained, takes valuable time from practitioners and their staff. In a simplified fashion once the request is made: staff must verify the requester's identity and right to obtain the copy; the request must be logged into a HIPAA log; staff must locate and retrieve the medical record in whatever format it is in; staff must redact confidential information; staff must review for specific health treatment records (mental health, alcohol or drug treatment, HIV status) that cannot be provided pursuant to statute; a copy may need to be made or a paper copy may need to be scanned to an electronic disc; and the practitioner must review it to make sure it can be provided as requested. It is a time-consuming process.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to sections 120.56, 120.569 and 120.57(1), Florida Statute. Jurisdiction attaches when a person who is substantially affected by an agency's rule claims that it is an invalid exercise of delegated legislative authority.

Standing

63. Section 120.56(1) provides in pertinent part:

> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.—
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
>
> (b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.
>
> * * *
>
> (e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. Hearings

> shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. Failure to proceed under this section shall not constitute failure to exhaust administrative remedies.

64. Standing is jurisdictional. See State of Fla., Dep't of HRS v. Alice P., 367 So. 2d 1045, 1052-53 (Fla. 1st DCA 1979); see also Abbott Labs. v. Mylan Pharm., Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009). The parties agreed that Mr. Fernandez, HealthPort, and the FMA have standing.

65. To establish that it is "substantially affected," a party must show (1) that the rule or policy will result in a real or immediate injury in fact and (2) that the alleged interest is within the zone of interest to be protected or regulated. Off. of Ins. Reg. & Fin. Servs. Comm'n v. Secure Enters., L.L.C., 124 So. 3d 332, 336 (Fla. 1st DCA 2013). A "real or immediate injury in fact" does not include an injury that is abstract, conjectural, speculative, or hypothetical. See Vill. Park Mobile Home Ass'n, Inc. v. State of Fla., Dep't of Bus. Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987). Rather, a rule challenge petitioner must allege that it has sustained or

is in immediate danger of sustaining some direct injury as a result of the challenged official conduct. Id. Stated a different way, Petitioners' allegations must be of sufficient immediacy and reality to confer standing. Id. (citing Fla. Dep't of Offender Rehab. v. Jerry, 353 So. 2d 1230, 1236 (Fla. 1st DCA 1978) (disapproved on other grounds by Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351 (Fla. 1982)).

66. In order to meet the substantially affected test, each individual or entity must establish that, as a consequence of the proposed rule, each, individually, will suffer injury in fact and that the injury is within the zone of interested to be regulated or protected. Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94 (Fla. 1st DCA 1999). With respect to Petitioner Dax Lonetto, Sr., PLLC, the law firm demonstrated that it would suffer a real or immediate injury should the proposed rule language become effective, thus evidencing an adverse impact.

67. With respect to organizations or associations, in order to be permitted to have standing, a "professional association must demonstrate that (1) a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule[;] . . . (2) the subject matter of the rule [is] within the association's general scope of interest and activity[;] and (3) the relief requested

[is] of the type appropriate for a trade association to receive on behalf of its members." Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351, 353-54 (Fla. 1982).

68. FJA, via Mr. Jess' testimony failed to meet the threshold test. Mr. Jess' "belief" that FJA's members would be adversely impacted is insufficient to find standing.

69. FCAN, via Mr. Newton's testimony also failed to meet the threshold test. Mr. Newton believed that "almost all" of FCAN members would be impacted simply because they go to the doctor. This begs the question of whether or not any member would seek a copy of their medical record or be adversely affected by the proposed rule. Mr. Newton's belief is insufficient to find standing.

70. With respect to Intervenor BACTES, BACTES has established that its "substantial interest" could be affected by the proposed rule language. BACTES' legal status is not the issue at present; the issue is whether or not BACTES' substantial interest could be affected. BACTES has standing.

Burden of Proof and Applicable Legal Standards

71. Section 120.56(2) provides in pertinent part:

> CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—
>
> (a) A substantially affected person may seek an administrative determination of the invalidity of a proposed rule by filing a petition seeking such a

determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a) . . . . ; The petition must state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. A person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change. A person who is not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule.

(b) The administrative law judge may declare the proposed rule wholly or partly invalid. Unless the decision of the administrative law judge is reversed on appeal, the proposed rule or provision of a proposed rule declared invalid shall not be adopted. After a petition for administrative determination has been filed, the agency may proceed with all other steps in the rulemaking process, including the holding of a factfinding hearing. In the event part of a proposed rule is declared invalid, the adopting agency may, in its sole discretion, withdraw the proposed rule in its entirety. The agency whose proposed rule has been declared invalid in whole or part shall give notice of the decision in the first

> available issue of the Florida Administrative Register.
>
> (c) When any substantially affected person seeks determination of the invalidity of a proposed rule pursuant to this section, the proposed rule is not presumed to be valid or invalid.

72. The party challenging a proposed agency rule has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(2)(a), Fla. Stat. When any substantially affected person seeks a determination of the invalidity of a proposed rule pursuant to section 120.56(2), the proposed rule is not presumed to be valid or invalid. § 120.56(2)(b), Fla. Stat.

73. A petitioner satisfies its burden of going forward by establishing a factual basis for the objections to the proposed rule. See St. Johns River Water Mgmt. Dist. v. Consol.-Tomoka Land Co., 717 So. 2d 72, 76 (Fla. 1st DCA 1998) (parts superseded by ch. 99-379, §§ 2, 3, Laws of Fla.). This requires the petitioner to offer more than mere conclusions or allegations that a rule is arbitrary or capricious or is an invalid exercise of delegated legislative authority in some other way. See Combs Oil Co. v. Dep't of Fin. Servs., Div. of State Fire Marshall, Case No. 11-3627RP, ¶ 14 (Fla. DOAH Mar. 9,

2012). Rather, the petitioner must offer expert testimony, documentary evidence, or other competent evidence—otherwise, the petitioner's objections amount to nothing more than conjecture and speculation. Id. Only after the petitioner has met its burden of going forward does the burden shift to the agency to demonstrate by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

74. Section 120.52(8) defines what constitutes an "invalid exercise of delegated legislative authority":

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

75. Section 120.536(1) provides in pertinent part:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific

powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

76. Section 120.54 provides in pertinent part:

> (1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—
>
> (a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.
>
> * * *
>
> (2) RULE DEVELOPMENT; WORKSHOPS; NEGOTIATED RULEMAKING.—
>
> (a) Except when the intended action is the repeal of a rule, agencies shall provide notice of the development of proposed rules by publication of a notice of rule development in the Florida Administrative Register before providing notice of a proposed rule as required by paragraph (3)(a). The notice of rule development shall indicate the subject area to be addressed by rule development, provide a

short, plain explanation of the purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available.

(b) All rules should be drafted in readable language. The language is readable if:

1. It avoids the use of obscure words and unnecessarily long or complicated constructions; and

2. It avoids the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions.

(c) An agency may hold public workshops for purposes of rule development. An agency must hold public workshops, including workshops in various regions of the state or the agency's service area, for purposes of rule development if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary. . . .

(3) ADOPTION PROCEDURES.—

(a) Notices.—

1. Prior to the adoption, amendment, or repeal of any rule . . . an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the grant of rulemaking

authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented or interpreted. The notice must include a summary of the agency's statement of the estimated regulatory costs, if one has been prepared, based on the factors set forth in s. 120.541(2); a statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by s. 120.541(1), must do so in writing within 21 days after publication of the notice; and a statement as to whether, based on the statement of the estimated regulatory costs or other information expressly relied upon and described by the agency if no statement of regulatory costs is required, the proposed rule is expected to require legislative ratification pursuant to s. 120.541(3). The notice must state the procedure for requesting a public hearing on the proposed rule. Except when the intended action is the repeal of a rule, the notice must include a reference both to the date on which and to the place where the notice of rule development that is required by subsection (2) appeared.

(b) Special matters to be considered in rule adoption.—

1. Statement of estimated regulatory costs. Before the adoption, amendment, or repeal of any rule other than an emergency rule, an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541. However, an agency must prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541, if:

a. The proposed rule will have an adverse impact on small business; or
b. The proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in this state within 1 year after the implementation of the rule.
2. Small businesses, small counties, and small cities.—

a. Each agency, before the adoption, amendment, or repeal of a rule, shall consider the impact of the rule on small businesses as defined by s. 288.703 and the impact of the rule on small counties or small cities as defined by s. 120.52. Whenever practicable, an agency shall tier its rules to reduce disproportionate impacts on small businesses, small counties, or small cities to avoid regulating small businesses, small counties, or small cities that do not contribute significantly to the problem the rule is designed to address. An agency may define "small business" to include businesses employing more than 200 persons, may define "small county" to include those with populations of more than 75,000, and may define "small city" to include those with populations of more than 10,000, if it finds that such a definition is necessary to adapt a rule to the needs and problems of small businesses, small counties, or small cities. The agency shall consider each of the following methods for reducing the impact of the proposed rule on small businesses, small counties, and small cities, or any combination of these entities:

(I) Establishing less stringent compliance or reporting requirements in the rule.

(II) Establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements.

(III) Consolidating or simplifying the rule's compliance or reporting requirements.

(IV) Establishing performance standards or best management practices to replace design or operational standards in the rule.

(V) Exempting small businesses, small counties, or small cities from any or all requirements of the rule.

b. (I) If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to the rules ombudsman in the Executive Office of the Governor at least 28 days before the intended action.

(II) Each agency shall adopt those regulatory alternatives offered by the rules ombudsman in the Executive Office of the Governor and provided to the agency no later than 21 days after the rules ombudsman's receipt of the written notice of the rule which it finds are feasible and consistent with the stated objectives of the proposed rule and which would reduce the impact on small businesses. When regulatory alternatives are offered by the rules ombudsman in the Executive Office of the Governor, the 90-day period for filing the rule in subparagraph (e)2. is extended for a period of 21 days.

(III) If an agency does not adopt all alternatives offered pursuant to this sub-subparagraph, it shall, before rule

adoption or amendment and pursuant to subparagraph (d)1., file a detailed written statement with the committee explaining the reasons for failure to adopt such alternatives. Within 3 working days after the filing of such notice, the agency shall send a copy of such notice to the rules ombudsman in the Executive Office of the Governor.

(c) Hearings.—

1. If the intended action concerns any rule other than one relating exclusively to procedure or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice of intended agency action, give affected persons an opportunity to present evidence and argument on all issues under consideration. The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule. When a public hearing is held, the agency must ensure that staff are available to explain the agency's proposal and to respond to questions or comments regarding the rule. If the agency head is a board or other collegial body created under s. 20.165(4) or s. 20.43(3)(g), and one or more requested public hearings is scheduled, the board or other collegial body shall conduct at least one of the public hearings itself and may not delegate this responsibility without the consent of those persons requesting the public hearing. Any material pertinent to the issues under consideration submitted to the agency within 21 days after the date of publication of the notice or submitted to the agency between the date of publication of the notice and the end of the final public hearing shall be considered by the

agency and made a part of the record of the rulemaking proceeding.

* * *

(8) RULEMAKING RECORD.—In all rulemaking proceedings the agency shall compile a rulemaking record. The record shall include, if applicable, copies of:
(a) All notices given for the proposed rule.

(b) Any statement of estimated regulatory costs for the rule.

(c) A written summary of hearings on the proposed rule.

(d) The written comments and responses to written comments as required by this section and s. 120.541.

(e) All notices and findings made under subsection (4).

(f) All materials filed by the agency with the committee under subsection (3).

(g) All materials filed with the Department of State under subsection (3).

(h) All written inquiries from standing committees of the Legislature concerning the rule.

77. The Board's interpretation of section 456.057(17), a statute it is charged with administering, is entitled to great deference. Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Bellsouth Telecomms., Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). When an agency committed with authority to implement a statute construes the statute in a permissible

way, that interpretation must be sustained, even though another interpretation may be possible or even, in the view of some, preferable. Humhosco, Inc. v. Dep't of Health and Rehab. Servs., 476 So. 2d 258, 261 (Fla. 1st DCA 1985).

78. An agency is accorded broad discretion and deference in the interpretation of the statutes which it administers, and an agency's interpretation should be upheld when it is within a range of permissible interpretations and unless it is clearly erroneous. Pan Am. World Airways, Inc. v. Fla. Pub. Serv. Comm'n, 427 So. 2d 716 (Fla. 1983); see also Bd. of Podiatric Med. v. Fla. Med. Ass'n, 779 So. 2d 658, 660 (Fla. 1st DCA 2001).

79. An agency is empowered to adopt rules where there is both (1) a statutory grant of rulemaking authority, or statutory language explicitly authorizing or requiring the agency to adopt rules, and (2) a specific law to be implemented. Whiley v. Scott, 79 So. 3d 702, 710 (Fla. 2011). The Legislature delegates rulemaking authority to agencies because agencies generally have expertise in the particular area for which they are given oversight. Id.

80. Courts have, historically, given deference to agencies based on agency expertise in the areas regulated. See, e.g., Wallace Corp. v. City of Miami Beach, 793 So. 2d 1134 (Fla. 1st

DCA 2001) (noting that an agency's construction of a statute it is given power to administer will not be overturned unless clearly erroneous). Traditionally, agencies generally have more expertise in a specific area they are charged with overseeing, and courts have noted the benefit of the agency's technical and/or practical experience in its field. Rizov v. Bd. of Prof'l Eng'rs, 979 So. 2d 979 (Fla. 3d DCA 2008).

81. Section 456.057(17) (paragraph 12 above) and section 458.309 (paragraph 13 above) provide the specific statutory authority and the law implemented for the proposed rule.

82. At hearing, Petitioners failed to present any persuasive evidence that proposed rule 64B8-10.003 is an invalid exercise of delegated legislative authority. The controlling statute 456.057(17), provides for two independent options: a practitioner "shall charge no more than the actual cost of copying, including reasonable staff time, or the amount specified in administrative rule by the appropriate board, or department when there is no board." (Emphasis added).

83. Respondent received a request for a rule revision. Respondent acted on that request by holding multiple meetings and hearings to develop proposed rule language. Once the Board determined its course of action it followed the procedures to enact the rule.

84. The evidence fails to establish that the Respondent has exceeded its grant of rulemaking authority, or that the proposed rule enlarges, modifies or contravenes the specific provision of law being implemented. The evidence fails to establish that the proposed rule is vague, that it fails to establish adequate standards, or that it vests unbridled discretion in the agency. The evidence fails to establish that the proposed rule is an invalid exercise of delegated legislative authority, or is arbitrary or capricious as those terms are defined by section 120.52(8).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the proposed changes to rule 64B8-10.003 do not constitute an invalid exercise of delegated legislative authority. Accordingly, the petitions are DISMISSED.

DONE AND ORDERED this 8th day of December, 2015, in Tallahassee, Leon County, Florida.

LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of December, 2015.

ENDNOTES

[1/] In the "Relief Sought" section of Daniel R. Fernandez's Petition For Administrative Hearing Determining Invalidity of Proposed Rule; Dax J. Lonetto, Sr., PLLC's Petition for Administrative Hearing Determining Invalidity of Proposed Rule; and Florida Consumer Action Network, Inc.'s Petition for Administrative Hearing Determining Invalidity of Proposed Rule, the following was requested of the Division:

> a) Conduct a formal hearing on this Petition pursuant to Sections 120.56, 120.569, and 120.57, Florida Statutes,
>
> b) Enter a final order determining that the Proposed Rule is an invalid exercise of delegated legislative authority,
>
> c) Award Petitioner its costs and attorneys' fees incurred in this proceeding, and
>
> d) Provide such other relief as deemed appropriate.

The only difference (underlined below) between the above section of the "Relief Sought" in the Florida Justice Association's Petition for Determination of Invalidity of BOM's Proposed Medical Records Increase Rule is found in paragraph (b) which provides the following:

> b) Enter a final order determining that the Medical Records Increase Rule is an invalid exercise of delegated legislative authority.

[2/] Within this unopposed motion, the undersigned was advised that all the parties:

> [a]greed to waive the 30-day hearing deadline established by Section 120.56(1)(c), Florida Statutes, and

agree that the final hearing date should be continued.

(See Respondent's Motion to Abate, Continue and Consolidate, page 3, paragraph 7.)

[3/] In BACTES' Motion for Leave to Intervene, filed on April 16, the undersigned was apprised of the following:

> Pursuant to Rule 28-106.204(3), F.A.C., the undersigned has conferred with David Caldevilla, counsel for Petitioners Daniel Fernandez, Dax J. Lonetto, Sr., PPLC and Florida Consumer Action Network, Inc., and is authorized to advise that such Petitioners consent to BACTES' request to intervene. The undersigned also sent an email to counsel for the Florida Justice Association on April 9, 2015 inquiring as to its position on the relief requested in this motion, but has not yet received responses. Upon receipt, the undersigned will supplement this filing and advise as [sic] the Florida Justice Association's position regarding the requested intervention. (Emphasis added).

On April 21, BACTES filed a Notice of Supplemental Conferral Regarding Bactes Imaging Solution, Inc.'s Motion For Leave To Intervene, and apprised the undersigned of the following:

> Pursuant to Rule 28-106.204(3), F.A.C., BACTES Imaging Solutions, Inc. ("BACTES") notifies the Court that following the filing of its Motion For Leave to Intervene on April 9, 2015, BACTES has conferred with the counsel for Florida Justice Association and is authorized to represent that Florida Justice Association does not object to BACTES' request to intervene. Consequently, none of the Petitioners object to the requested intervention. (Emphasis added).

In HealthPort's Motion for Leave to Intervene, filed on April 23, the undersigned was apprised of the following:

> As required by Rule 28-106.204(3), Florida Administrative Code, the undersigned attorneys for HealthPort have conferred with David Caldevilla and Scott R. Jeeves, counsel for Petitioners Daniel Fernandez, Dax J. Lonetto, Sr., PPLC, and Florida Consumer Action Network, Inc.: and G.C. Murray, Jr., counsel for Petitioner Florida Justice Association, all of whom have authorized the undersigned to represent that they have no objection to this Motion for Leave to Intervene, on the condition that the undersigned also represent that they reserve the right to later challenge HealthPort's standing in this matter. The undersigned have also conferred with Edward Tellechea, counsel for Respondent State of Florida, Department of Health, Board of Medicine; and Michael Fox Orr, counsel for Intervenor BACTES Imaging Solutions, Inc., who have authorized the undersigned to represent that they support this Motion for Leave to Intervene.

In the FMA's Motion for Leave to Intervene, filed on April 28, the undersigned was apprised of the following:

> Per Rule 28-106.204(3), F.A.C., the undersigned attorneys for the FMA have conferred with David Caldevilla, counsel for Petitioners Daniel Fernandez, Dax J. Lonetto, Sr., PPLC, and Florida Consumer Action Network, Inc., and G.C. Murray counsel for Florida Justice Association and is [sic] authorized to advise that such Petitioners consent to the FMA's request to intervene. The Florida Justice Association reserved the right to later challenge the FMA's standing in this matter. The undersigned have also conferred with Edward Tellechea, counsel for Respondent State of Florida,

> Department of health [sic], Board of Medicine; with Michael Fox Orr, counsel for Intervenor BACTES Imaging Solutions, Inc.; and with Dan R. Stengle, Counsel for HealthPort Technologies, LLC, who have authorized the undersigned to represent their support for this Motion for Leave to Intervene.

[4/] All admitted pages of the rule record from the multiple BOM meetings, public hearings and committee meetings were read. A chronologically concise rule record, without duplicates (duplicates were not read, but reviewed) would have been appreciated.

During the hearing, Petitioners voiced concerns over the status of objections interjected during the deposition of Mr. Newton. A review of that specific deposition does not reflect any "certified" questions for the undersigned to determine.

Each deposition was read. There were "certified questions" in the following depositions: Mr. Rohs; Mr. Probst; and Mr. Bailey. The 21 certified questions were covered in the Protective Order.

[5/] Respondent's cross-noticed deposition transcript of Alan Pillersdorf, M.D., was inadvertently treated as a separate deposition, and not included with the original deposition transcript, Exhibit JT-9.

[6/] Mr. Lonetto also has handled some long-term disability Employee Retirement Income Security Act claims, but they do not comprise a significant part of his practice.

[7/] FCAN will go outside these four main areas if it believes it is a consumer issue; however, these four areas are FCAN's mainstay.

[8/] During the August 13, 2015, deposition of Mr. Bailey, Petitioners elicited that BACTES Imaging Solution, Inc., had, in August 2013, voluntarily surrendered its authority to transact business or conduct affairs in Florida. While there may be a paper trail that BACTES is not authorized to transact business or conduct affairs in Florida, during the 29 months of the Board's committee hearings, Board meetings and workshops, BACTES' was in fact conducting business in Florida.

[9/] Section 456.057(18) was renumbered in 2013 to section 456.057(17) Florida Statutes. Petitioners, in a footnote on page 3 of their PFO averred that "[T] he parties agree that the statute being implemented is actually 456.057(17), not (18)."

Florida Administrative Code Rule 1-1.012,(4) provides: The rulemaking authority, law implemented and history notes shall be corrected or modified by writing a letter to the Administrative Code and Register Section. Such a change does not require notification in the Florida Administrative Register.

[10/] The undersigned finds that the June 2014 RLC meeting did not constitute a full public hearing because the proposed rule was tabled without taking any testimony and rescheduled to be heard in South Florida.

[11/] Section 120.541 provides the parameters of a statement of estimated regulatory costs.

[12/] Ms. Dudley explained that the 1,419 physicians are part of an "active campaign." The Board established a website, and physicians signed up to receive e-mail blasts from the Board. However, physicians were not (and are not) required to join the active campaign.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.

Affidavit

STATE OF MASSACHUSETTS }

COUNTY OF ESSEX }

AFFIDAVIT OF

GREGORY TREROTOLA, MBA, MPH, FACMPE OF

TREROTOLA MANAGEMENT CONSULTING

Before me, the undersigned authority, personally appeared Gregory Trerotola, who, being duly sworn, deposed as follows:

1.

My name is Gregory Trerotola, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

2.

I, Gregory Trerotola, a principal of Trerotola Management Consulting, am working on a project for HealthPort Technologies, LLC ("HealthPort") regarding a study of the costs involved in reproducing a requested medical record.

3.

HealthPort retained me to perform a cost study to ascertain certain items and assist the company in its litigation matters in various states.

4.

HealthPort first retained me as an expert in 2012, and HealthPort continues to retain me for various cost-study projects today.

5.

The costs of reproducing medical records are calculated using averages based upon the fact that the requests, the records, and the tasks involved in preparing the records can vary from one request to another and from one health care organization to another.

6.

I have conducted studies analyzing the costs HealthPort incurs in its work. The last study I completed was in early 2015. In determining the costs per page for the studies, one must evaluate the costs associated with fulfilling a variety of requests from: 1) attorneys, 2) copy companies, 3) insurance entities, and 4) other third parties (excluding patient, auditor, and government requestors).

7.

I have visited and evaluated a great number of sites across the country in my studies. In the most recent study I completed, I discovered that, HealthPort and it's client health care organizations have an average per page cost for requests of $0.93 per page; $1.01 per page, and $1.20 per page at three of its sites.

Affiant

In witness whereof I have hereunto subscribed
my name and affixed my official seal
this 22 day of January, 2016.

Signed

JOSEPH FC BARBARA
FEB. 25, 2022