

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0483

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

VERSUS

DARYL G. PURPERA, C.P.A., C.F.E., IN HIS OFFICIAL
CAPACITY AS LEGISLATIVE AUDITOR

Judgment Rendered: DEC 20 2018

On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court Number 663625

Honorable R. Michael Caldwell, Judge Presiding

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Auditor

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

PENZATO, J.

The Louisiana State Board of Medical Examiners (Board) appeals a declaratory judgment ordering it to make available certain records to the Louisiana Legislative Auditor (LLA). For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

In October 2017, the LLA notified the Board that a performance audit for the Board had been scheduled pursuant to La. R.S. 24:513(D)(4)¹ and La. R.S. 24:522². In response to the LLA's request for an initial meeting, the Board expressed concerns in connection with the LLA's review of the Board's investigative files as to "privileged medical records of patients and licensees and privileged communications." The parties were unable to agree as to the records that must be made available to the LLA, and the Board filed a petition for declaratory judgment to determine its obligation to disclose records to the LLA that the Board believes to be privileged. The LLA answered the petition, praying for declaratory judgment authorizing the LLA to access the records, confidential or otherwise, of the Board, and decreeing that the Board make available all records except those alleged to be protected by the lawyer-client privilege.

Following a hearing on January 3, 2018, the trial court signed a judgment on January 16, 2018 decreeing that:

[P]ursuant to the Audit Law, La. R.S. 24:513, *et seq.*, the Louisiana Legislative Auditor is authorized to access the records, confidential or otherwise, of the Louisiana State Board of Medical Examiners ("the Board") and that the Louisiana Legislative Auditor is bound by the

¹ Louisiana Revised Statutes 24:513(D)(4) provides in pertinent part that the LLA "shall conduct performance audits, program evaluations, and other studies as are needed to enable the legislature and its committees to evaluate the efficiency, effectiveness, and operation of state programs and activities."

² Louisiana Revised Statutes 24:522(B) provides that for purposes of the Louisiana Performance Audit Program, "'state agency' means any state agency, office, department, board, commission, institution, division, committee, program, or legal entity, heretofore existing or hereafter created within the legislative or executive branch of state government, including an institution of higher education, but does not include any agency, governing body, or officer of any local government or political subdivision of the state."

provisions of La. R.S. 24:513(I) to maintain those records in the same confidential manner as the Board by limiting the review of records to those that the Auditor determines are reasonably related to the audit; restricting access to the records to staff performing the audit; and by maintaining those records in a secure manner[.]

The judgment ordered the Board to make available the following documents contained in the Board's records upon request by the LLA in the course of his audit: medical records pertaining to the examination or treatment of any patient by a licensee of the Board; medical records pertaining to the examination or treatment of any of the Board's licensees; records pertaining to mental illness or deficiency, or physical illness, including substance abuse, of licensees of the Board; records concerning the HIV or HBV seropositive status of any licensee of the Board.³

The Board appeals, contending that the trial court failed to respect the health care provider-patient privilege established by La. C.E. art. 510. At issue in this appeal is whether the Board may assert the health care provider-patient privilege to prevent the LLA access to patient and licensee medical records in the Board's possession.

LAW AND DISCUSSION

The Board was created by the Louisiana Legislature within the Louisiana Department of Health for the purpose of protecting the public against "unprofessional, improper, unauthorized, and unqualified practice of medicine and from unprofessional conduct of persons licensed to practice medicine[.]" La. R.S. 37:1261; see also La. R.S. 37:1263. The Board's duties include examining all applicants for the practice of medicine, issuing licenses or permits to those possessing the necessary qualifications therefor, and taking appropriate administrative actions to regulate the practice of medicine in the state of Louisiana.

³ The judgment also ordered that the Board make available state criminal history records obtained from the Louisiana Bureau of Criminal Identification and provide the LLA with a privilege log of any documents withheld from the LLA by the Board on grounds of lawyer-client privilege. These portions of the judgment are not at issue in this appeal.

La. R.S. 37:1270(A)(1). In furtherance of its duties, the Board is authorized to obtain medical records of any patient treated by a physician under investigation by the Board. The identity of any patient identified in or by such records shall be maintained in confidence by the board and shall be deemed a privilege of confidentiality existing in favor of any such patient. La. R.S. 37:1278.1; La. R.S. 13:3715.1(J). The Board is also authorized to obtain the medical records of a licensee. La. R.S. 37:1278. Any records obtained by the Board pursuant to La. R.S. 37:1278 shall not constitute public records and shall be maintained in confidence by the Board. *Id.*

As a state agency, the Board is subject to oversight by the LLA. The LLA is required to conduct performance audits as needed and is authorized to examine, audit, inspect, and copy documents, whether confidential or otherwise, in connection with such audits. La. R.S. 24:513(D)(4) and (I). The LLA is required to comply with any and all restrictions imposed by law on documents, data, or information deemed confidential by law and furnished to his office. La. R.S. 24:513(I).

Louisiana Code of Evidence article 510(B) sets forth the health care provider-patient privilege and provides that in civil proceedings, a patient has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication made for the purpose of advice, diagnosis or treatment of his health condition between or among himself or his representative, his health care provider, or their representatives. La. C.E. art. 510(B)(1). The privilege may be claimed by the patient or by his legal representative. The person who was the physician, psychotherapist, or health care provider or their representatives, at the time of the communication is presumed to have authority to claim the privilege on behalf of the patient or deceased patient. La. C.E. art. 510(D).

The Board assigns as error the trial court's rulings ordering it to make available to the LLA the medical records of patients examined or treated by a licensee of the Board and the medical records of its licensees. The Board argues that the patient records in its possession "are subject to an evidentiary privilege that the Board cannot waive, a privilege that belongs to the patients, a privilege that the Legislature has directed the Board to maintain."

We find that the relevant statutes do not support the Board's position. Louisiana Revised Statutes 37:1278.1 and 13:3715.1 provide that when the Board obtains patient medical records from a licensee, the identity of any patient is deemed confidential. With regard to the medical records of a licensee, La. R.S. 37:1278 provides that any records obtained by the Board pursuant to this statute shall be maintained in confidence by the Board. While these statutes provide for the confidentiality of the medical records, they do not create an evidentiary privilege.

The health care provider-patient privilege provided by La. C.E. art. 510 is a testimonial privilege that may be claimed by the parties identified in the statute: the patient or his legal representative and the patient's physician, psychotherapist, or health care provider, or their representatives. See La. C.E. art. 510(D). The Board was not acting as the patient's physician, psychotherapist, or health care provider at the time that it obtained the patient's medical records. Rather, the records were obtained in the Board's capacity as regulator.

In support of its position that the health care provider-patient privilege established by La. C.E. art. 510 is applicable herein, the Board cites *Louisiana Dep't of Ins. ex rel. Donelon v. Theriot*, 2010-0069 (La. App. 1 Cir. 5/3/11), 64 So. 3d 854, 862, writ denied, 2011-1139 (La. 9/30/11), 71 So. 3d 286, wherein this court concluded that, "an auditee's duty to provide information to the Auditor in

connection with an audit is restricted by evidentiary privileges, whether legislatively enacted or jurisprudentially created.”

We, however, find *Theriot* to be distinguishable from the present case. In *Theriot*, 64 So. 3d at 857, the Louisiana Department of Insurance requested a declaratory judgment affirming that the LLA’s ability to have access to and be permitted to examine and copy information pursuant to La. R.S. 24:513 is subject to the protections, safeguards, privileges, and guaranties accorded by the lawyer-client privilege provided by La. C.E. art. 506 and the deliberative process privilege. The court held that the Department of Insurance could assert **its** privileges in the context of a legislative audit. *Theriot*, 64 So. 3d at 862.

In the instant case, the Board, as a third party, seeks to assert a testimonial privilege that belongs to a patient and his health care provider. The privilege provided by La. C.E. art. 510 is not applicable in this case with regard to patient and licensee medical records obtained by the Board in furtherance of its regulatory duties.

In conclusion, based upon the applicable law, the LLA is authorized to access confidential records of an auditee in connection with a performance audit and is required to comply with any and all restrictions imposed by law on documents, data, or information deemed confidential by law and furnished to his office. La. R.S. 24:513. The Board is not authorized to assert the health care provider-patient privilege on behalf of a patient to prevent the LLA access to patient and licensee medical records in the Board’s possession. Thus, we find that the trial court properly ordered the Board to make available to the LLA the medical records of patients examined or treated by a licensee of the Board and the medical records of its licensees. We recognize, as did the trial court, that the LLA’s access to the Board’s records requires that the LLA maintain the confidentiality required by La. R.S. 13:3715.1, 37:1278, and 37:1278.1. See La. R.S. 24:513(I).

CONCLUSION

For the above and foregoing reasons, the January 16, 2018 judgment is affirmed. The costs of this appeal in the amount of \$875.00 are assessed against the Louisiana State Board of Medical Examiners.

AFFIRMED.