

**COMMONWEALTH OF MASSACHUSETTS**

Suffolk, ss.

**Division of Administrative Law Appeals**

**Board of Registration in Medicine,  
Petitioner**

v.

**Docket No. RM-16-575**

**Riad K. Mortada, M.D.,  
Respondent**

**Appearance for Petitioner:**

James Paikos, Esq.  
Lawrence Perchick, Esq.  
Board of Registration in Medicine  
200 Harvard Mill Square, Suite 330  
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**Appearance for Respondent:**

Paul Cirel, Esq.  
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**Administrative Magistrate:**

James P. Rooney

**Summary of Recommended Decision**

Doctor who disposed of documents from his former medical office in a dumpster was not shown to have engaged in conduct that undermines public confidence in the integrity of the medical profession or committed misconduct in the practice of medicine because the evidence did not establish that any of the documents contained individually-identifiable health care information of any of his patients.

**RECOMMENDED DECISION**

On December 6, 2016, the Board of Registration in Medicine issued a Statement of Allegations charging Riad K. Mortada, M.D., with "engaging in conduct that undermines the

public confidence in the integrity of the medical profession" and committing "misconduct in the practice of medicine" by discarding boxes containing "remnants of a few very old patient records reflecting lab results and other information" in a dumpster.

I held a hearing in this matter on June 16, 2017 at the Division of Administrative Law Appeals, One Congress Street, Boston, Massachusetts. The hearing was transcribed by a court reporter. I admitted ten exhibits offered by the Board and two offered by Dr. Mortada. Three witnesses testified: Dr. Mortada, Board Investigator Luke Simard, and Yousef Abou-Allaban, M.D. Both parties filed closing briefs.

#### **Findings of Fact**

Based on the testimony and evidence presented, and the reasonable inferences drawn from them, I make the following findings of fact:

1. Riad K. Mortada, M.D., has been licensed to practice medicine in Massachusetts since 1984. Dr. Mortada has not been previously disciplined. He is certified in internal medicine and has hospital privileges at Good Samaritan Hospital in Brockton and Harrington House Nursing Facility in Walpole. He is a Medicare and Medicaid provider.<sup>1</sup> He has served as the Quality Medical Director of the New England Quality Care Alliance, a Tufts-affiliated network of doctors. (Mortada testimony; Bd. Exs. 8 and 9.)

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<sup>1</sup> The particular nature of Dr. Mortada's practice is not relevant to the charges the Board brought against him, but it helps explain why this case did not settle. MassHealth regulations provide that a doctor may not treat MassHealth patients unless the doctor "has never have been subject . . . to any disciplinary action" including "revocation, suspension, termination, reprimand, censure, admonishment, fine, probation agreement, agreements not to practice or other practice limitation, practice monitoring, or remedial training or other educational or public service activities." 130 C.M.R. § 450.212(A)(6).

2. Dr. Mortada maintained a solo practice for over 15 years in a professional office condominium building at 420 Main Street in Walpole in Suite 14, which he owned. He had between 1,500 and 2,000 patients. In October 2014, he joined a primary care practice in Norfolk, Massachusetts (Pondville Medical Associates) and, as a result, moved out of his office at 420 Main Street. (Mortada testimony; Bd. Exs. 5, 8, and 9.)

3. Dr. Mortada is familiar with the requirement of the federal Health Insurance Portability and Accountability Act of 1996 that the confidentiality of patient records be maintained. So was the staff of nurses and medical assistants he employed at his 420 Main Street office. (Mortada testimony.)

4. In 2013, Dr. Mortada reorganized his patient records. He had the paper records of his current patients scanned and converted to electronic records, after which the paper records were shredded. He had old records of his former patients boxed and placed in a storage facility. Thus, in Dr. Mortada's view, no paper patient records remained at his office when he moved his practice in 2014. (Mortada testimony.)

5. When Dr. Mortada vacated his 420 Main Street office in October 2104, he left a number of items behind, including five or six banker's boxes of items from the front desk area. Dr. Mortada thought they contained mostly old continuing education materials and items related to his involvement with New England Quality Care Alliance. (Mortada testimony; Bd. Ex. 5.)

6. In June 2015, Dr. Mortada sold his 420 Main Street office to Yousef Abou-Allaban, M.D., a psychiatrist who already had an office at 420 Main Street and was seeking additional space. The two doctors walked through the space. Dr. Abou-Allaban saw the boxes that remained. Dr. Mortada asked him to check the boxes and, if he saw anything related to

patient records, to put them aside and he would pick them up. The doctor was confident that no patient records were in the boxes because his staff was knowledgeable about what kinds of documents were patient records. (Abou-Allaban and Mortada testimony.)

7. Initially, Dr. Mortada understood that Dr. Abou-Allaban was not going to start using the office immediately, and hence he left the boxes where they were. But then Dr. Abou-Allaban told him he wanted to paint the office. Dr. Mortada called Dr. Abou-Allaban and offered to pick up the boxes, but asked him to confirm that there were no medical records in them. Dr. Abou-Allaban went through each box. He saw continuing education materials and documents from conferences, but nothing he thought was a patient record. He relayed this to Dr. Mortada, who responded that Dr. Abou-Allaban could throw the boxes out. (Mortada and Abou-Allaban testimony.)

8. Dr. Abou-Allaban contacted his cleaning person and had her dispose of the boxes in a dumpster behind the building. (Abou-Allaban testimony.)

9. This disposal was observed by a woman who then placed a call to the Board of Registration in Medicine and spoke to Investigator Luke Simard. She told him that she knew that Dr. Abou-Allaban was moving into an office vacated by Dr. Mortada, and that she thought that someone associated with one of these offices had put medical records in the building's dumpster. She claimed to have retrieved such a record. However, she declined Investigator Simard's request to forward a copy of the document to him. (Simard testimony.)

10. Investigator Simard then called Dr. Mortada to tell him of the report that medical records were in the dumpster. Dr. Mortada responded that he would speak to Dr. Abou-Allaban about what was going on. (Simard and Mortada testimony.) In a memo Investigator Simard

wrote describing the conversation, he noted that Dr. Mortada had said that he left some medical records behind. (Simard testimony.) Dr. Mortada denied saying he left any medical records in the office. (Mortada testimony.)

11. Dr. Mortada then called Dr. Abou-Allaban and told him of his conversation with Investigator Simard. Dr. Abou-Allaban responded that he did not think any medical records had been disposed of, but he agreed to have his cleaning person retrieve the disposed material, place it in bags, and deliver it to Dr. Mortada's home. (Mortada and Abou-Allaban testimony.) By that evening, two bags with material from the dumpster had been delivered to Dr. Mortada. He reviewed the material and did not find anything he considered a medical record. He found various faxes from Harrington House that either were illegible or contained the first name and the last initial of a patient with a brief message, such as a request that the doctor call to receive lab results.<sup>2</sup> (Mortada testimony; Mortada Ex. 2.)

12. The next morning, July 1, 2015, Dr. Mortada had his office manager call Investigator Simard to report what had been found. He understood, based upon this call, that he was not being directed to keep what had been found in the dumpster and was to do what he usually did to dispose of the material. Dr. Mortada had the material shredded on July 2, 2105. (Mortada testimony; Mortada Ex. 1.)

13. That same morning, Dr. Abou-Allaban called Investigator Simard, reported that material had been retrieved from the dumpster and sent to Dr. Mortada, and asked whether there

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<sup>2</sup> Dr. Mortada did not keep any of these documents, thus none of them were in evidence. All that was in evidence were similar documents identified by Dr. Mortada. See Dr. Ex. 2.

was anything else the Board wanted done.<sup>3</sup> He told Investigator Simard that the material retrieved did not contain medical records. (Abou-Allaban and Simard testimony.) Investigator Simard recalls that the doctor said the material included old MRI and lab reports. (Simard testimony.) Dr. Abou-Allaban denied telling Investigator Simard that he had seen MRI reports, and he testified at the hearing that he did not see any MRI reports.<sup>4</sup> (Abou-Allaban testimony.)

14. Following the conversation with Dr. Abou-Allaban, Investigator Simard went to 420 Main Street and looked in the dumpster. He retrieved a single document. It was a list of doctors and included a chart related to breast cancer screening. No patient names are included in the document. Dr. Mortada identified it as a New England Quality Care Alliance document related to preventative care. (Mortada testimony; Bd. Ex. 7.)

15. The Board opened an investigation of both Drs. Mortada and Abou-Allaban. Investigator Simard sent letters to each doctor seeking a response to an allegation that "medical records were thrown in a dumpster behind 420 Main Street." (Bd. Exs. 1 and 3.) Counsel for both doctors submitted a letter in response, which stated, in part, that the boxes "most likely [contained] old CME [continuing medical education] materials, materials from medical conferences, old educational videos, and materials from [Dr. Mortada's] involvements with the New England Quality Care Alliance" and that:

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<sup>3</sup> The record is not clear as to whether Dr. Abou-Allaban's conversation on July 1, 2015 with Investigator Simard occurred before or after the Investigator's conversation with Dr. Mortada's office manager.

<sup>4</sup> The specific comments about MRI reports and medical records Investigator Simard attributed in his hearing testimony to Drs. Abou-Allaban and Mortada (*see* Findings 10 and 13) are based on testimony the investigator gave after having his memory refreshed by a report he wrote summarizing his investigation. That report is not in evidence.

After the materials that had been in the dumpster were delivered to Dr. Mortada's home, he reviewed them and found that there were remnants of a few very old patient records reflecting patient lab results and other information that had been faxed to him. As the records were all more than seven years old and none had any relevance to the on-going treatment or diagnosis of any patient, Dr. Mortada had them destroyed by a shredding company. Dr. Mortada's office manager also spoke with Investigator Simard on July 1, 2015 and informed him that all medical records had been appropriately destroyed.

Since all records that had been placed in the dumpster were retrieved and returned to Dr. Mortada, it does not appear that patient information has been divulged or compromised, and those records have now been properly destroyed.

(Bd. Ex. 5.)

16. The Board did not take action any action against Dr. Abou-Allaban. (Abou-Allaban testimony.) On December 5, 2016, it issued a Statement of Allegations charging that Dr. Mortada had "committed misconduct in the practice of medicine" and had "engaged in conduct that undermines the public confidence in the integrity of the medical profession." The former charge referred to a Board regulation, 243 C.M.R. § 1.03(5)(a)18. The Statement of Allegations did not refer to any other federal or state regulations that the doctor was alleged to have violated. (Bd. Ex. 8.)

17. The gist of the charge was that Dr. Mortada improperly disposed of patient records in a dumpster. The only mention of patient records is in the following paragraphs of the Statement of Allegations:

10. The boxes contained remnants of a few very old patient records reflecting lab results and other information that had been faxed to [Dr. Mortada].
11. After learning that the boxes contained patient records, [Dr. Abou-Allaban] had the boxes removed from the dumpster and forwarded to [Dr. Mortada's] home.

(Bd. Ex. 8.)

18. In answering these two paragraphs, Dr. Mortada replied:

10. Dr. Mortada admits that the boxes contained documents and materials as described above in [his] answer to paragraph 6 [old CME and other medical conference/course materials, along with brochures and paperwork relating to Dr. Mortada's long standing affiliation with NEQCA] . . . , as well as a few remnants of aged faxes and lab results.
11. Dr. Mortada repeats and incorporates his answers to paragraphs 9 and 10 [concerning the disposal of the material] . . . , and is without sufficient information to admit or deny the remaining allegations in paragraph 11.

(Bd. Ex. 9.)

#### Discussion

The Board of Registration in Medicine has the burden of proving the allegations against Dr. Mortada by a preponderance of the evidence. *Board of Registration in Medicine v. Perrone*, Docket no. RM-14-311 (Mass. Div. of Admin. Law App., July 1, 2016).

I examine first the nature of the allegations against Dr. Mortada, for it is with respect to those allegations that I must determine whether the Board has presented sufficient facts to establish a violation. As first described in the Statement of Allegations, the doctor was charged with violating a general obligation not to engage in conduct that undermines the public confidence in the integrity of the medical profession and with violating 243 C.M.R. § 1.03(5)(a)18, which allows the Board to discipline a doctor who has committed "misconduct in the practice of medicine." Misconduct is:

improper conduct or wrong behavior, but as used in speech and in law it implies that the conduct complained of was willed and intentional. It is more than that



conduct which comes about by reason of error of judgment or lack of diligence. It involves intentional wrongdoing or lack of concern for one's conduct.

*Hellman v. Board of Registration in Medicine*, 404 Mass. 800, 804, 537 N.E.2d 150, 152 (1989).

A deliberate disclosure of confidential medical records has been held to be misconduct in the practice of medicine and behavior that undermines public confidence in the integrity of the medical profession. *Board of Registration in Medicine v. Hoang*, RM-05-623 (Mass. Div. Of Admin. Law App., Dec. 12, 2006)<sup>5</sup>.

The evident form of misconduct the Board alleges was, from the beginning, that Dr. Mortada, without sufficient concern for what he was doing, disposed of medical records in a dumpster. What legal obligation he allegedly violated by doing so was not so clear, even by the date of the hearing. When the doctor's attorney objected to Board Exhibit 10, which was an excerpt of a federal website cautioning doctors against disposing of medical records in a dumpster, Board counsel responded that he sought to introduce this exhibit to demonstrate community awareness of how not to dispose of medical records, and that the Board was sanctioning the doctor only for violating Massachusetts, not federal, regulations. The only regulation the Board had cited to that point was the one allowing it to discipline a doctor who engaged in misconduct in the practice of medicine.

In his post-hearing brief, a different Board counsel asserted that the doctor had violated the "Privacy Rule" of the federal Health Insurance Portability and Accountability Act of 1996

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<sup>5</sup> Dr. Hoang, who erroneously believed he was sending the medical records to New England Medical Center, was reprimanded by the Board. *See Board of Registration in Medicine v. Hoang* (Bd. of Reg. in Med, July 11, 2007).

(HIPAA). See 45 C.F.R. § 164.514(a). This presents a potential notice problem because it was hardly made explicit by the time of the hearing that the Board was claiming that the doctor violated a federal patient privacy statute. The absence of any detailed argument about HIPAA compliance by the doctor's attorney in his closing brief suggests that the doctor, even after the hearing, did not appreciate that this was part of the Board's charge against him.

As significant as this might be, I will not dwell on it. The hearing made clear that the essence of the federal patient privacy scheme the Board was relying on in its attempt to prove that the doctor had committed misconduct in the handling of medical records was that he improperly disposed of records containing "protected health information," as HIPAA defines this phrase. It is not unusual for the Board to look to sources other than explicit commands of its own regulations as the source of standards applicable to medical practice. See *Sugarman v. Board of Registration in Medicine*, 422 Mass. 338, 343, 662 N.E.2d 1020, 1024 (1996) (psychiatrist's release to the press during a custody dispute of a confidential psychiatric evaluation of the family violated ethical guidelines established by the American Academy of Psychiatry and Law). Moreover, the question of whether the documents in the dumpster contained protected health information was a subject on which witnesses were examined at the hearing.

"Protected health information" under HIPAA means "individually identifiable health information." 45 C.F.R. § 160.103. "Health information" means any information, created or received by a health care provider, that "[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual." *Id.*

Understandably, the U.S. Department of Health & Human Services advises doctors and other health care providers that they “are not permitted to . . . dispose of [protected health information] in dumpsters or other containers that are accessible by the public or other unauthorized persons.” (Bd. Ex. 10: “What do the HIPAA Privacy and Security Rules require of covered entities when they dispose of protected health information?” Feb. 18, 2009, <https://www.hhs.gov/hipaa/for-professionals/faq/575/what-does-hipaa-require-of-covered-entities-when-they-dispose-information/index.html>.)

Whether any of the documents from Dr. Mortada’s office that ended up in the dumpster contained protected health information is not at all obvious. The only document that still exists is the one recovered by Investigator Simard from the dumpster. It is single-page New England Quality Care Alliance document that shows a list of doctors and includes a chart related to breast cancer screening; no patients are mentioned. (See Finding 14.) This is not a document containing protected health care information.

The only people to see what documents were disposed of in the dumpster (aside from the unidentified woman who called the Board) were Drs. Abou-Allaban, who saw the documents before they went into the dumpster, and Dr. Mortada, who saw them after they were removed. Dr. Abou-Allaban testified that he did not see any patient records in the boxes, and thus disposed of their entire contents in the dumpster. Dr. Mortada testified that he “found various faxes from Harrington House that either were illegible or contained the first name and the last initial of a patient with a brief message, such a request that the doctor call to receive lab results.” (Finding 11.)

Investigator Simard wrote a report in which he stated that Dr. Mortada told him he left medical records behind in his old office and that Dr. Abou-Allaban said he saw old MRI reports in the boxes. Both doctors deny making any such statements. The investigator had no independent recollection of this aspect of his report at the time of the hearing, and thus his memory needed to be refreshed by the report, which was not placed in evidence. This is not the strongest of evidence in favor of the Department's position. In any event, I doubt that Dr. Mortada left items he thought were medical records behind in his old office because he had already transformed the way he handled medical records, converting all print records of his current patients into electronic files and boxing up and sending to storage the print records of his former patients. Once the office had converted its existing patient records to electronic files, it is unlikely that the trained office staff at his front desk kept paper copies of patient records there. It also seems unlikely that Dr. Abou-Allaban saw complete MRI reports and then did nothing to set them aside and deliver them to Dr. Mortada, although he had been asked to make sure there were no medical records in the boxes before he disposed of them. Even if Investigator Simard had some conversation with either of the doctors about documents in the boxes that might be described as medical records, Investigator Simard's refreshed recollection did not include enough detail to determine what was really in the documents disposed of, particularly whether those documents contained protected health information.

The evidence that comes closest to describing those documents comes from an exhibit submitted by Dr. Mortada. While this exhibit does not include documents retrieved from the dumpster, it does include examples of what the doctor identified as similar documents. These documents include short communications from Harrington House stating that lab results for a

certain patient, identified only by first name and last initial, are ready for review. There are also faxes that came out mostly smudged, with little or no information readable. (Dr. Ex. 2.)

Assuming that the Dr. Mortada's Exhibit 2 accurately reflects the type of documents he saw when he reviewed the materials retrieved from the dumpster, the question is whether such documents contain the individually identifiable health care information protected by HIPAA. HIPAA regulations define individually identifiable health care information as information created or received by a health care provider about a patient that:

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(I) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. § 160.103.

Dr. Mortada contends that none of the documents recovered from the dumpster contained individually identifiable health care information. The Board, on the other hand contends, that these documents show that the doctor did not "de-identify" medical records before he disposed of them, as HIPAA requires. HIPAA regulations provide that a medical record that contains protected health information can be de-identified, either by a person having "appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable" or if 18 types of identifying information are removed from the record, including names and dates (other than the year). 45 C.F.R. § 164.514(a) and (b).

There are very few reported decisions that explain the de-identification provision of HIPAA. What is clear is that the HIPAA does not create a federal physician-patient privilege. Rather, HIPAA recognizes that medical records may be discoverable, and thus the de-identification provision exists to “provide[] a procedure for the disclosure and use of medical records in litigation.” *In re Zyprexa Products Litigation*, 254 F.R.D. 50, 54 (E.D.N.Y. 2008) (pharmaceutical company sought discovery of a sample of medical records of Medicaid patients who used the drug it manufactured).

Implicit in the *Zyprexa* decision is a recognition is that the de-identification procedure applies only to documents that in their original state contained individually identifiable health care information. Thus, Dr. Mortada would have been obliged to de-identify any documents he disposed of only if those documents either identified a particular patient or contained information that could be reasonably used to identify that patient, and the documents also contained information about health care provided, or to be provided, to that patient. *See* 45 C.F.R. § 160.103.

None of the documents in the doctor’s Exhibit 2 contain individually identifiable health care information, so defined. The first document is what appears to be a smudged pelvic x-ray. The hospital where the x-ray was performed and the date are listed, but no patient name is listed. Absent any patient name, it is hard to see how the fact that someone underwent a pelvic x-ray on a particular day at a hospital discloses individually identifiable health care information.

The rest of the documents are faxes from Harrington House to Dr. Mortada. Patients are identified by first name and last initial (“Geraldine W” and “Doris S.”), dates are listed, and brief descriptions are given for the reason the doctor was being contacted (“admitted on 5/2/17,”

"please call to review labs", and "please call to discuss psych orders"). These documents contain some treatment information, dates, and partial names. The most explicit is one stating that, on a particular date in 2016, Rosalie V. was sent to Norwood Hospital. Even assuming that one of the faxes in the dumpster contained this much information – and that would be a leap considering that Dr. Mortada testified that the faxes he saw were mainly reports that lab results were ready – it is not clear that this sort of fax contained individually identifiable health care information. Without Rosalie V.'s last name, to figure out who she was, one would have to know from which communities patients at Harrington House were drawn, and then one would have to search for people with that same first name and last initial who resided in those communities in 2016. There is no evidence in the record identifying the communities from which Harrington House drew its patients and no showing that Harrington House's faxes to Dr. Mortada listing patient first names, with only their last initials, provided enough information for someone to determine the identity of the patient. The Board had the burden to show that the faxes contained enough information to provide a "reasonable basis to believe the information can be used to identify the individual." *See* 45 C.F.R. § 160.103. It introduced no evidence that would tend to prove this.<sup>6</sup>

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<sup>6</sup> The Board also contends that Dr. Mortada, by answering the Statement of Allegations that accused him of disposing of "patient records" in a dumpster by saying that the documents were "remnants of aged faxes and lab results," essentially conceded that the documents contained protected health information that should have been de-identified before they were disposed of. No such concession can fairly be read into this answer. Neither the Board's use of the term "patient records" nor Dr. Mortada's use of the word "remnant" were very specific, and it was not clear until later that the Board's concern was with whether the documents contained protected health information. The best, if limited, evidence as to the contents of the documents comes from the exemplars the doctor introduced as his Exhibit 2. However, as discussed above, the exemplars are insufficient proof that the documents disposed of in the dumpster contained

Because there is no evidence that the documents placed in the dumpster behind Dr. Mortada's former office contained individually identifiable health care information of any of his patients, the Board has not proved that he improperly handled any confidential patient health care information. As this was the gravamen of the charge against Dr. Mortada, the Board has not established that he violated patient confidentiality in a manner that showed that undermines public confidence in the integrity of the medical profession or that he committed misconduct in the practice of medicine. I therefore recommend that the allegations against Dr. Mortada be dismissed as unproven.

DIVISION OF ADMINISTRATIVE LAW APPEALS

*James P. Rooney*

James P. Rooney  
First Administrative Magistrate

Dated: **OCT 16 2018**

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protected health information.