At the Commercial Division of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of November , 2006.

PRESENT:
HON. CAROLYN E. DEMAREST,
Justice.

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Madelyn Pullman, M.D.

Plaintiff,

DECISION AND ORDER

- against -

Index No. 11999/06

Dennis J. Gormley, M.D.; Philip Kramer, M.D.;
And Ophthalmology Associates of Staten Island, P.C.,

Defendants.

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The following papers numbered to read on this motion:

	Papers Numbered
Notice of Motion-Order to Show Cause and Affidavits (Affirmations) Annexed	2, 3
Answering Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	4
Other Papers Memoranda of Law	1, 5

This action was commenced by plaintiff physician, a specialist in pediatric ophthalmology, against her partners and fellow shareholders of defendant Ophthalmology Associates of Staten Island, P.C., complaining of her wrongful

termination from the practice and the refusal to supply her with the medical records of her own patients. An Employment Agreement, effective March 1, 1986 ("Agreement") governs the relationship of the parties. All issues have been resolved by settlement except plaintiff's right to possession of the original medical records of the patients she personally treated.

The Agreement provides at Article 10 (b):

> Upon termination of employment or dissolution of the CORPORATION, EMPLOYEE [plaintiff] shall have the right to copy (and the PARTIES shall share the cost) all medical records of the CORPORATION pertaining to to patients treated by EMPLOYEE, and EMPLOYEE shall have the right to advise such patients of EMPLOYEE'S new practice and to solicit such patients. The medical records shall remain in the possession of the CORPORATION.

Upon plaintiff's initial application for an Order to Show Cause seeking, among other things, enforcement of the above provision affording her a contractual right to copy the records of her patients, following argument regarding a requested TRO in which both sides participated, on April 19, 2006, the Court granted a TRO directing defendants to supply plaintiff with the names, addresses and telephone numbers of all of her patients treated by her in the previous two years, as well as contact information regarding new patients scheduled to see her in the future. Upon the return date of the Order to Show Cause, in her Reply Affidavit, plaintiff first demanded that the original records be turned over to her rather than remaining with defendants. Following argument, the Court entered an order on May 31, 2006, directing defendants to provide the original records to plaintiff when requested to do so by the patient, retaining copies for themselves. The matter was then adjourned to June 28, 2006, at which time the Court was

advised that the parties had settled all disputes except for the custody of the original records. Noting that, pursuant to Medicaid rules, original records belong to the patient, the parties nonetheless agreed that authority is mixed. Defendants sought leave to re-argue the Order of May 31 which was granted orally on the record.

In her Cross-Motion, plaintiff moves that, in the event this Court modifies its May 31,2006 Order, the Court direct that copies of all of plaintiff's patients' records be supplied to her without prior written authorization by the patient or that, should a time come when defendants wish to discard or destroy the original records, that such original records be turned over either to plaintiff or the patient. The reason for plaintiff's request to obtain the original records of her patients should defendants wish to discard or destroy them, as set forth in her Affidavit in Opposition of August 23, 2006, is that most of her patients are minors and she wishes to ensure compliance with Education Law § 6530 (32), which defines as "professional misconduct" the failure to retain the medical records of a minor patient "until one year after the minor patient reaches the age of eighteen years", and 8 NYCRR § 29.2 (a) (3), which defines as "unprofessional conduct" the failure to maintain such records "until one year after the minor patient reaches the age of 21 years".

Discussion

Pursuant to Public Health Law § § 17 and 18 (2) (a) and (d), subject to various limitations not relevant here, a patient has the right to inspect his or her medical information maintained in the custody of a health care provider and to obtain a copy thereof upon payment of reasonable fees. Clearly, both plaintiff and

defendants qualify as "health care providers" under the statute and either party would be authorized to maintain the records at issue under the Public Health Law. It therefore appears to this Court that the need for written authorization from the patient to share a copy of the record of a particular patient with the plaintiff treating physician who, in all probability, created the record, is unnecessary and that prerequisite should be voided.

Defendants contend that the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 USC § 1301 et seq) prevents them from providing the patient records to plaintiff without prior written authorization. This issue was expressly addressed by Justice Stander in Lewis v. Clement, 1Misc 3d 464, 466 (Sup. Ct., Monroe Co., 2003). Citing 45 CFR 164.506 (c) (4), Justice Stander noted that a "covered entity" is vested with the discretion to disclose protected health information to another "covered entity" where the patient has had a professional relationship with both entities. (Both plaintiff and defendants are "covered entities"). This is consistent with the underlying purpose of both the above-cited New York Public Health Law and the relevant provisions of HIPAA, to protect the confidentiality of the information for the benefit of the patient and to facilitate the provision of appropriate care to the patient by a new provider. It is ludicrous to insist that one "covered entity" must withhold the records of a patient from the very treating physician, also a "covered entity," that created such record on the basis of confidentiality. As Justice Stander concluded (at 467):

> HIPAA cannot be used as a sword or shield in disputes between partners as it relates to the sharing of patient records. If the physician (the covered entity) has a relationship with a patient, the remaining partners may not refuse to provide files by virtue of HIPAA . . .In other words, a physician-patient relationship is required to trigger the right to patient records and the obligation to provide the patient records.

In Lewis, the priority of possession of patient records was given to the treating physician where there was a dissolution of the practice. As stated therein (at p. 466): "The patient records belong to the treating physician or physicians, not the partnership." See also, United Calendar Mfg. Corp.v. Huang, 94 AD2d 176, 179 (2d Dep't, 1983). However, Lewis involved the dissolution of a partnership in which there was no surviving corporate entity and the dispute did not involve the right of the treating physician to the records of his own patients but involved a demand for copies of all records of all patients who had been treated by the partnership. While clearly HIPAA does not restrain plaintiff from acquiring the original records, defendants are members of a professional services corporation which will survive the departure of plaintiff. It may, therefore, reasonably be assumed that some of plaintiff's patients will seek out continuing treatment with defendants and will look to defendants as custodians of their medical records. Thus Lewis is not dispositive of the issue presented any more than is HIPAA. The real issue presented involves the economic interests of the three physicians who originally formed the professional corporation, each of whom has an ownership interest therein.

In support of her position, plaintiff cites professional mandates which speak to the obligation of the physician to preserve patient records for the benefit of the patient and to make such records available to the patient upon request (e.g. AMA Ethics Rules, E-7.03 and 7.04), however, an article from the American Medical News states unequivocally that, in the circumstances at bar: "The medical record is the property of the group practice, which must retain it for a number of reasons. The information in the record belongs to the patient [who retains the right to direct

transfer of such information.]" "Dispute over records when doctor leaves group", American Medical News, June 23/30, 1997, p. 92. Such direction is consistent with the Agreement between the parties which clearly states: "EMPLOYEE specifically acknowledges that all medical, financial or other records of services rendered are the property of the CORPORATION" (Art. 3), and expressly provides that upon termination of employment, "EMPLOYEE shall have the right to copy . . . all medical records of the CORPORATION pertaining to parties treated by EMPLOYEE . . . (Art. 10 (b)). (emphasis added). These contractual provisions are also consistent with the law in this state. See Albany Medical College v. McShane, 66 NY2d 982, 984 (1985); Damsker v. Haque, 93 AD2d 729 (1st Dep't, 1983); Parsley v. Associates in Internal Medicine, P.C., 126 Misc 2d 996, 997 (Sup. Ct., Broome Co., 1985). Plaintiff's efforts to distinguish these authorities is unavailing.

Plaintiff's efforts to take issue with defendants' failure to make a formal motion to reargue is also unavailing, as is defendants' similar argument in reply regarding plaintiff's cross-motion seeking alternative modification of the Order of May 31, 2006, which is the subject of defendants' motion. On June 28, 2006, on the record in open court,, I orally granted defendants' application to re-argue when it became apparent that the issue herein had not been addressed by defendants because it had first been raised in plaintiff's Reply on May 31, 2006. Given the posture of this matter, and the fact that defendants have had a full opportunity to argue in response to plaintiff's cross-motion, this Court will address the issues on the merits.

In her cross-motion, plaintiff requests that, if this Court should modify the order of May 31, the Order should be modified to direct that copies of plaintiff's

patients' records should be provided to her without written authorization from the patient and that the original records be turned over to plaintiff or the patient when defendants determine to destroy or discard such records. The first request is granted for the reasons set forth herein. Plaintiff has an unfettered right to copies of the records of her own patients.

As to the request that original records be returned to the patient or plaintiff, there is no basis in law or reason for such procedure. Numerous authorities, including the Education Law of the State of New York, mandate retention of records for a lengthy and specific period. Despite plaintiff's concern that defendants will not adhere to the dictates of the applicable statutes, there is no reason to conclude that they will not, particularly in light of the very serious disciplinary consequences of the failure to do so. In any event, plaintiff herself will be in possession of a copy of the records and will be able to respond to her patients' needs if the original records are unavailable. Finally, the Court concludes that requiring compliance with such a mandate so many years after any services have been rendered to the patient (up to 22 years for a minor) would be unduly burdensome. Defendants' concerns that the costs, inconvenience and possible ultimate impossibility of compliance with such an order would far exceed the value to the patient are justified.

Conclusion

Defendants' motion to reargue having been granted by this Court, upon reargument, the Court modifies its Order of May 31, 2006, as follows:

Defendants are directed to provide copies of all records of patients treated by plaintiff, retaining the originals in compliance with applicable law.

Plaintiff's cross-motion is granted to the extent that the requirement of a patient request for transfer of records to her is deleted and is otherwise denied.

That portion of defendants' motion that seeks a direction to plaintiff to return original patient records is denied as moot. The plaintiff asserts that she is not in possession of any original records as defendants have not complied with this Court's Order of May 31, 2006.

Counsel shall retrieve from the Part Clerk, the copies of confidential print-outs previously supplied for in-camera review.

The foregoing constitutes the decision and order of the Court.

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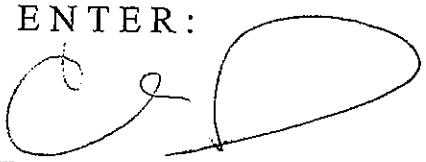

J.S.C.