

HEALTH CARE PROVIDER PATIENT PRIVILEGE AND ITS WAIVER

APRIL 23, 2001

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Communication between a health care provider and a patient is privileged and should not be disclosed in verbal or written form except in a manner allowed by law. The privilege may be claimed by the patient, the patient's legal representative, or the health care provider may claim the privilege on behalf of the patient. The following explains how the health care provider patient privilege may be overcome to ascertain a release of a patient's medical records.

I. **GENERAL RELEASE OF MEDICAL RECORDS**

Medical records of a patient may be released with a signed authorization or a subpoena duces tecum.

A. **Release of medical records with a written authorization.**

A patient's record (chart, billing, etc.) maintained in a health care provider's office is the property of the health care provider that created it and is considered property and business records of the health care provider. *La. R.S. 1299.96(2)(a)*. A patient or his legal representative may request a copy of the patient's medical records relating to the patient's medical treatment, history or condition upon furnishing a **signed authorization** and upon payment of copying and handling charges. *La. R.S. 1299.96(2)(b)*.

Reasonable copy charges are:

- a) \$1.00 per page for one to twenty-five pages;
- b) \$0.50 per page for twenty-six to five hundred pages;
- c) \$0.25 per page thereafter.

Id. In addition, hospitals may charge a \$10.00 handling fee, and other health care providers may charge a \$5.00 handling fee, and actual postage. Id.

In the case of a **deceased patient**, the executor of the will, the administrator of the estate, and in the following order in favor of the surviving spouse or children of the deceased patient, the parents, the surviving brothers and sisters of the deceased patient to the exclusion of all others. These groups may seek copies of the medical records of the deceased patient, either personally or through an attorney, upon furnishing a signed authorization and paying the reasonable copying fees as enumerated above. Id. In the event a hospital record is not complete, then the health care provider may indicate through a stamp, coversheet, or otherwise, the record is incomplete. Id.

Patient records in either the original form or in another format that will accurately reproduce the original must be retained by the creating physician or dentist for at least six years from the date the patient was last treated by the physician or dentist. *La. R.S. 1299.96(3)(a)*. Graphic matter and material, x-rays, and the like must be retained by the creating physician or dentist in their original form or in another format that will accurately reproduce the original for at least three years from the date the patient was last treated by the physician or dentist. *La. R.S. 1299.96(3)(b)*. Upon receipt of a written request

from the patient, these retention dates may be extended. Id.

In the case of hospitals, hospital records shall be retained in their original, microfilmed, or similarly reproduced form for a minimum period of ten years from the date a patient is discharged. *La. R.S. 40:2144(F)(1)*. Graphic matter, images, X-ray films, etc. that were necessary to produce a diagnostic or therapeutic report shall be retained and stored by hospitals for a minimum period of three years from the date a patient is discharged. Such graphic matter, images, X-ray film and like matter shall be retained for longer periods when requested in writing by an attending or consultant physician of the patient, the patient or someone acting legally in his behalf, or legal counsel for a party having an interest affected by the patient's medical records. *La. R.S. 40:2144(F)(2)*.

B. Releasing Medical Records pursuant to a Subpoena Duces Tecum.

Absent a written authorization from the patient, a health care provider shall disclose records of patient who is a party to the litigation pursuant to a subpoena issued in that litigation. A subpoena duces tecum for the purpose of obtaining or compelling the production or inspection of medical, hospital, or other records relating to a person's medical treatment, history, or condition compelling the attendance of the custodian of records of the health care provider shall be granted or issued except as provided in *La. R.S. 13:3715.1*. *La. C.C.P. 1469.1*.

According to *La. R.S. 13:3715.1*, a health care provider shall disclose the medical records of a patient party to a litigation pursuant to a subpoena under the following conditions. First, the party's attorney requesting the subpoena of medical

records from the health care provider shall provide an AFFIDAVIT attesting to the fact the subpoena is for the records of a party to the litigation. A copy of the subpoena must be mailed, by certified or registered mail, to the patient whose records are sought, or through the patient's attorney of record, at least seven days prior to the issuance of the subpoena. The subpoena is to be served on the health care provider at least seven days prior to the date on which the records are to be disclosed. The health care provider should ascertain whether a petition or motion has been filed by the patient restraining the release of the medical records.

If the **requesting party is the patient** or, if represented, the attorney for the patient, the affidavit shall state the patient authorizes the release of the records pursuant to the subpoena. Any attorney requesting the medical records of a **patient who is deceased** may obtain the records by a subpoena, in addition to a written authorization, as enumerated above.

Any attorney requesting medical records of a **patient, who is not a party to the litigation**, in which the records are being sought may obtain the records by written authorization of the patient whose records are being sought. If the written authorization is not given, then the attorney must seek a court order. *La. R.S. 13:3715.1(B)(2)*.

In *Speer v. Whitecloud*, 744 So.2d 1283 (La. 10/15/99), the Louisiana Supreme Court addressed the applicability of La. R.S. 13:3715.1 with non party patients. In this case, the plaintiff alleges Dr. Whitecloud committed medical malpractice in 1992 when he surgically implanted a pedicle screw device in the plaintiff's spine. The plaintiff propounded discovery on Dr. Whitecloud requesting the names of the manufacturers

and model numbers of the pedicle screw devices used in a 1994 study published by Dr. Whitecloud. Plaintiff admitted he is only concerned with the devices used in the study and **not the identity of the patients**. Dr. Whitecloud objected to the discovery on the grounds that La. R.S. 13:3715.1 requires a subpoena duces tecum, a court order, or consent of the patient before medical records can be released.

The Supreme Court **found the circumstances of this case to be unique**. The Court believed the plaintiff did not seek any personal, identifying information regarding the patient's in this study; rather, the plaintiff only seeks to learn the model numbers and manufacturers of the pedicle screws used in the study. The Court found once any personal information identifying the patients is redacted from these records, the requested discovery does not invade the physician-patient privilege, and the need for protections set forth in La. R.S. 13:3715.1 is eliminated. Thus, the information became discoverable.

Any subpoena for medical records issued by the office of Worker's compensation administration in the Department of Labor, or by a hearing officer or agent employed by that office, shall be considered a subpoena for purposes of the patient's medical records.

C. Release of Medical Records pursuant to a court order.

La. R.S. 13:3715.1(B)(5) addresses the criteria for seeking medical records pursuant to a court order. A court shall issue an order for the production and disclosure of a patient's records, regardless of whether the patient is a party to the litigation, only: after contradictory hearing with the patient, or, if represented, with his counsel of record,

or if deceased, with those persons allowed by law, and after a finding by the court the release of the requested information is proper; or with the consent of the patient.

D. Compliance with a valid requested release of medical records.

Unless the subpoena or court order otherwise specifies, the health care provider shall be considered compliant if the records are delivered by registered or certified mail within forty-eight hours prior to the date upon which production is due. The health care provider may also deliver by hand on the date due a true and certified copy of the records described in the subpoena.

The records shall be accompanied by the certificate of the health care provider or other qualified witness, stating the following:

- 1) That the copy is a true copy of all records described in the subpoena.
- 2) That the records were prepared by the health care provider in the ordinary course of the business of the health care provider at or near the time of the act, condition or event.

If the health care provider has none of records described, or only a portion of the records, the health care provider shall so state in the certificate and deliver such certificate and the available records to the requesting party. The health care provider shall be reimbursed by the person causing the issuance of the subpoena, summons or court order pursuant to the provisions of *La. R.S. 40:1299.96*.

Please note at any time a health care provider may deny access to a record if the health care provider reasonably concludes that knowledge of the information contained

in the record would be injurious to the health or welfare of the patient or could reasonably be expected to endanger the life or safety of any other person. *La. R.S. 40:1299.96(A)(2)(d)*.

II. RAMIFICATIONS ASSOCIATED WITH FAILURE TO PROVIDE RECORDS.

If a copy of the record is not provided within a reasonable time, not to exceed fifteen days following the receipt of the request and written authorization, and production of the record is obtained through a court order or subpoena duces tecum, the health care provider shall be liable for reasonable attorney fees and expenses incurred in obtaining the court order or subpoena duces tecum. Such sanction shall not be imposed unless the person requesting a copy of the records has by certified mail notified the health care provider of his failure to comply with the original request, referred to the sanctions available, and the health care provider failed to furnish the requested copies within five days from receipt of such notice.

Please note, unless the health care provider is grossly negligent, the health care provider shall not otherwise be held liable in damages by reason of their compliance with such a request for medical records or their inability to fulfill such request. *La. R.S. 1299.96(A)(2)(c)*. Also, no health care provider, employee, or agent shall be held civilly or criminally liable for disclosure of the records of the patient pursuant to the procedures set forth in *La. R.S. 13:3715.1, La. R.S. 40:1299.96 or Code of Evidence Article 510* provided the health care provider has not received a copy of the petition or motion indicating that legal action has been taken to restrain the release of medical records. *La. R.S. 13:3751.1(C)*.

III. EFFECT OF LA. CODE OF EVIDENCE ART. 510 AND THE WAIVER OF THE HEALTH CARE PROVIDER PATIENT PRIVILEGE.

The health care provider patient privilege is waived under certain circumstances caused by the patient. Before 1992, upon filing a lawsuit, this privilege was automatically waived by the patient, allowing the dissemination of medical records and patient information including conferences between the health care provider and the involved parties and their attorneys. Since 1992, the patient privilege is governed by the Louisiana Code of Evidence art. 510.

The general rule of privilege in civil proceedings states a patient has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication made for purpose of advice, diagnosis or treatment of his health condition between or among himself or his representative, his health care provider, or their representative. *La. Code of Evidence art. 510(B)(1)*. However, there are exceptions to this privilege in noncriminal proceedings. *La. Code of Evidence art. 510(B)(2)* states the following exceptions:

- (b) When the communication relates to the health condition of a patient who brings or asserts a personal injury claim in a judicial or worker's compensation proceeding.
- (c) When the communication relates to the health condition of a deceased patient in a wrongful death, survivorship, or worker's compensation proceeding brought or asserted as a consequence of the death or injury of the deceased patient.

- (d) When the communication is relevant to an issue of the health condition of the patient in any proceeding in which the patient is a party and relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which a party deriving his right from the patient relies on the patient's health condition as an element of his claim or defense.
- (e) When the communication relates to the health condition of a patient when the patient is a party to a proceeding for custody or visitation of a child and the condition has a substantial bearing on the fitness of the person claiming custody or visitation, or when the patient is a child who is the subject of a custody or visitation proceeding.
- (f) When the communication made to the health care provider was intended to assist the patient or another person to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud.
- (g) When the communication is made in the course of an examination ordered by the court with respect to the health condition of a patient, the fact that the examination was so ordered was made known to the patient prior to the communication, and the communication concerns the particular purpose for which the examination was made, unless the court in its order directing the examination has stated otherwise.
- (h) (i) When the communication is made by a patient who is the subject of an interdiction or commitment proceeding to his current health care provider when such patient has failed or refused to submit to an examination by a health care provider appointed by the court regarding

issues relating to the interdiction or commitment proceeding, provided that the patient has been advised of such appointment and the consequences of not submitting to the examination.

(ii) Notwithstanding the provisions of Subitem (i) of this Item, in any commitment proceeding, the court-appointed physician may review the medical records of the patient or respondent and testify as to communications therein, but only those which are essential to determine whether the patient is dangerous to himself, dangerous to others, or unable to survive safely in freedom or protect himself from serious harm. However, such communications shall not be disclosed unless the patient was informed prior to the communication that such communications are not privileged in any subsequent commitment proceedings. The court appointed examination shall be governed by Item B(2)(f).

- (i) When the communication is relevant in proceedings held by peer review committees and other disciplinary bodies to determine whether a particular health care provider has deviated from applicable professional standards.
- (j) When the communication is one regarding the blood alcohol level or other test for the presence of drugs of a patient and an action for damages for injury, death, or loss has been brought against the patient.
- (k) When disclosure of the communication is necessary for the defense of the health care provider in a malpractice action brought by the patient.
- (l) When the communication is relevant to proceedings concerning issues of child abuse, elder abuse, or the abuse of disabled or incompetent persons.

(m) When the communication is relevant after the death of a patient, concerning the capacity of the patient to enter into the contract which is the subject matter of the litigation.

(n) When the communication is relevant in an action contesting any testament executed or claimed to have been executed by the patient now deceased.

In a criminal proceeding, 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, his representative, and his physician or psychotherapist, and their representatives. *La. Code of Evidence art. 510(C)(2)* provides exceptions to this rule:

a) When the communication is relevant to an issue of the health condition of the accused in any proceeding in which the accused relies upon the condition as an element of his defense.

b) When the communication was intended to assist the patient or another person to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud.

c) When the communication was made in the course of an examination ordered by the court in a criminal case to determine the health condition of a patient, provided that a copy of the order was served on the patient prior to the communication.

d) When the communication is a record of the results of a test for blood alcohol level or drugs taken from a patient who is under arrest, or who was subsequently arrested for an offense related to the test.

- e) When the communication is in the form of a tangible object, including a bullet, that is removed from the body of a patient and which was in the body as a result of the crime charged.
- f) When the communication is relevant to an investigation of or prosecution for child abuse, elder abuse, or the abuse of disabled or incompetent persons.

This privilege may be claimed by the patient or his legal representative. The person who was the physician, psychotherapist, or health care provider at the time of the communication is presumed to have authority to claim the privilege on behalf of the patient or deceased patient. *La. Code of Evidence art. 510(D)*.

However, there shall be no health care provider-patient privilege in medical malpractice claims as defined in the Louisiana Medical Malpractice Act as to information directly and specifically related to the factual issues pertaining to the liability of a health care provider who is a named party in a pending lawsuit or medical review panel proceeding. Information about a patient's treatment or physical condition may only be disclosed pursuant to testimony at trial, pursuant to the discovery methods authorized by La. C.C.P. art. 1421 et seq., pursuant to La. R.S. 40:1299.96 or La. R.S. 13:3715.1. *La. Code of Evidence art. 510(F)(2)*.

Even with the automatic waiver of the privilege except in a medical malpractice claim, patient records or information about a patient may only be released to the patient, to one in possession of a signed authorization from the patient, or to any person through a properly issued subpoena or by an order from the court.

When a claim is submitted for a medical review panel or a lawsuit for malpractice has been instituted, the patient has voluntarily waived this privilege. Thereafter, any health care provider may share patient records and information and even meet with and discuss such information with the named defendant, health care provider, or his attorney, provided it is relevant to the defense of the malpractice claim.

IV. DISCLOSURE OF PRIVILEGED INFORMATION THROUGH A MEDICAL REPORT PURSUANT TO LA. R.S. 13:3734.

Finally, under *La. R.S. 13:3734(D)*, a health care provider may disclose privileged information by a medical report before or after any legal proceedings are instituted, provided he is in receipt of a written authorization executed by the patient. If the health care provider knows or reasonably believes that the patient is physically or mentally incapable of authorizing release, the health care provider may disclose privileged information provided he is in receipt of a written authorization executed by a person authorized under R.S. 40:1299.40 to consent to medical treatment for the patient. Furthermore, when a patient is represented by an attorney and that attorney provides the health care provider with written authorization executed by the patient, the health care provider may disclose to the attorney any communication which was necessary to enable him to diagnose, treat, prescribe, or act for the patient and may provide to the attorney, as agent for the patient, any medical reports, X-rays, or any other written information the health care provider has regarding the patient, all without the necessity of complying with formal discovery.

V. RELEASE OF MEDICAL RECORDS REGARDING A MINOR PURSUANT TO LA. R.S. 13:3715.1

No health care provider shall be required to grant access to or copying of photographs, or both, of any minor or part of minor's body who is alleged to be the

victim of child sexual abuse. **Only a court of competent jurisdiction, after a contradictory hearing, may order the health care provider to grant or access the copying of said photographs to the moving party's counsel of record or experts qualified in the medical diagnosis of child sexual abuse, or to both.** This court order shall prohibit further copying, reproduction, or dissemination of said photographs.

VI. RELEASE OF HIV RESULTS AND LA. R.S. 40:1300.14.

Louisiana law states no person who obtains, retains or becomes the recipient of confidential HIV test results in the course of providing any health or social service or pursuant to a release of confidential HIV test results may disclose such information pursuant to a written authorization to release medical information, **when such authorization contains a refusal to release HIV test results.** *La. R.S. 40:1300.14(A).*

La. R.S. 40:1300.14(B) allows the release of HIV results to the following:

- 4) Any person to whom disclosure of medical information is authorized by law without the consent of the patient.
- 5) Any agent or employee of a health facility or health care provider if:
 - (a) The agent or employee is permitted access to medical records.
 - (b) The health facility or health care provider is authorized to obtain the HIV test results.
 - (c) The agent or employee provides health care to the patient or maintains or processes medical records for billing or reimbursement purposes.
- 6) A health care provider or health facility, when knowledge of the HIV test results is necessary to provide appropriate care or treatment to the patient and afford the health care provider and the personnel of the health facility an opportunity to protect themselves from transmission of the virus.

- 7) A health facility or health care provider, in relation to the procurement, processing, distributing, or use of a human body or a human body part, including organs, tissues, eyes, bones, arteries, blood, semen, or other body fluids, for use in medical education, research, therapy, or transplantation.
- 8) Any health facility staff committees or accreditation or oversight review organizations authorized to access medical records, provided that the committee or organization shall only disclose confidential HIV test results:
 - (a) To the facility or provider of a health or social service.
 - (b) To a federal, state, or local government agency for the purposes of and subject to the conditions provided in Paragraph (6) of this Subsection.
 - (c) To carry out the monitoring evaluation, or service for which it was obtained.
- 9) A federal, state, parish, or local health officer when the disclosure is mandated by federal or state law.
- 10) An agency or individual in connection with the foster care programs of the Department of Social Services or an agency or individual in connection with the adoption of a child.
- 11) Any person to whom disclosure is ordered by a court of competent jurisdiction.
- 12) An employee or agent of the Board of Parole of the Department of Public Safety and Corrections to the extent that the employee or agent is authorized to access records containing HIV test results in order to implement the functions, powers, and duties with respect to the individual

patient of the Board of Parole, Department of Public Safety and Corrections.

- 13) An employee or agent of the office of probation and parole of the Department of Public Safety and Corrections, division of correction services, to the extent the employee or agent is authorized to access records containing HIV test results in order to carry out the functions, powers, and duties, with respect to patient of the office.
- 14) A medical director of a local correctional facility, to the extent the medical director is authorized to access records containing HIV test results in order to carry out the functions, powers, and duties with respect to the patient.
- 15) An employee or agent of the Department of Public Safety and Corrections, to the extent the employee or agent is authorized to access records containing HIV test results in order to carry out the Department of Public Safety and Corrections functions, powers, and duties with respect to the patient.
- 16) An employee or agent who is authorized by the Department of Social Services, office of rehabilitative services to access records containing HIV test results in order to carry out the Department of Social Services, office of rehabilitative services functions, powers, and duties with respect to the protected patient.
- 17) An insurer, insurance administrator, self-insured employer, self-insurance trust, or other person or entity responsible for paying or determining payment for medical services to the extent necessary to secure payment for those services.

Any individual who receives confidential HIV test results pursuant to this statute shall not disclose this information to another person except as authorized by this statute. However, these provisions will not apply to any individual or natural person authorized by law to consent to the health care of the individual.

VII. CASE LAW INCORPORATING RELEASE OF MEDICAL RECORDS.

The Fourth Circuit Court of Appeal recently addressed the requirements of releasing medical records of **patients not a party to the litigation** in Davis v. American Home Products Corp., 727 So.2d 647 (La.App. 4 Cir.1/15/99). The basis of the suit involved a product's liability case brought by women allegedly injured by using the Norplant contraception system. In preparation for the certification and hearing in compliance with a case management order for a class action, plaintiffs and defendant exchanged expert reports. After receiving the plaintiff's expert report, the defendant requested copies of all of the plaintiffs' expert and his clinic medical records, including **those patients not a party to the lawsuit**. Defendant contended these "patient's experiences constituted both the bases and reasons for the expert's opinions and the data or other information considered by the witness in forming his opinion."

The court found the expert and the clinic to be health care provider's under **La. Code of Evidence art. 510 and La. R.S. 13:3734(A)**. Pursuant to La. Code of Evidence art. 510, a patient, patient's physician or health care provider at the time of the communication may claim a privilege to refuse to disclose these confidential communications. The court found none of the exceptions of the art. 510 apply in this case. **The court stated none of the non-party patients gave authorizations. Further, the mandatory procedure set out in La. R.S. 13:3751.1(B)(5), i.e. subpoena duces tecum, was not followed. Also, there was no contradictory hearing with the non-party patients, their counsel, any of the survivors, or the**

executors of the estates. The court held this information to be privileged and/or confidential. Absent the existence of a statutory exception, permission from the non-party patients, or a contradictory hearing, the medical records of the non-party patients are not discoverable in Louisiana.

VIII. FEDERAL REGULATION ON SUBSTANCE ABUSE AND MENTAL HEALTH RECORDS.

Under the federal statutes, records of the identity, diagnosis, prognosis, or treatment of any patient that are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research which is conducted, regulated, directly or indirectly assisted by any department or agency of the United States shall be kept confidential and disclosed only for the purposes and circumstances expressly authorized. *42 USCS § 290dd-2(a)*. The content of any record relating to substance abuse may be disclosed with prior written consent of the patient with whom such record is maintained and only to the extent for such purposes as allowed under the federal regulations. *42 USCS § 290dd-2(b)*.

However the federal regulations permits disclosure with or without consent for the following situations:

(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.

(C) If authorized by an appropriate order of a court of competent jurisdiction

granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

Therefore, absent a court order granted for good cause or a written consent form, substance abuse records are not discoverable. The following two cases illustrate the status of the federal statute on medical records relating to drug and alcohol abuse and the privileges recognized under federal law.

In Kathleen "S" v. Ochsner Clinic, et al, 1997 U.S. Dist. LEXIS 20386, (E.D.La. 1997), the court addressed whether *42 USCS § 290dd-2* provided for a confidential provision enforceable by private parties. The court failed to find evidence that Congress viewed this statute as recognizing certain aspects of the federal administration of the program. The court stated there is no indication in the prior or present act that the confidentiality provision was intended to be enforceable by private parties.

Finally, in United States Ex Rel. Gameel Ghaprial, M.D. v. Quorum Health Resources, Inc. et al, 1999 U.S. Dist. LEXIS 325 (E.D.La. 1999), the federal court recognized that Louisiana law does not apply in actions brought exclusively under federal law. In this case, the defendants sought to protect the confidentiality of non-party patient's medical records requested by plaintiff. The district court stated that Louisiana state health care provider patient privilege did not apply to actions brought exclusively under federal law. This court further stated the only privileges recognized by the Supreme Court of the United States are:

7. Psychotherapist/patient privilege under federal common law; and
8. The federal statute regulations prohibiting disclosure of records related to drug and alcohol abuse.

IX. HIPAA REGULATIONS

In 1996, President Clinton and Congress enacted the Health Insurance Portability and Accountability Act, or HIPAA, to address the need for national patient record privacy. Congress had three years to pass comprehensive health privacy regulations. In October of 2000, regulations guaranteeing patient rights and protections against the misuse or disclosure of their health records were released.

As required by HIPAA, the final regulation covers health plans, health care clearinghouses, and those health care providers who conduct certain financial and administrative transactions electronically. The information protected includes medical records and individually identifiable health information held or disclosed by a covered entity, as defined by HIPAA, whether communicated electronically, on paper, or orally. This regulation addresses the patient's rights, boundaries regarding the medical record use and release, accountability of the covered entities with civil and criminal penalties, and the special protections afforded. The next speaker will address these issues.