IN THE COURT OF APPEALS OF MARYLAND

September Term, 2007

No. 110

MARYLAND STATE BOARD OF PHYSICIANS

Petitioner

v.

HAROLD I. EIST

Respondent

On Appeal from the Circuit Court for Montgomery County
(Duke Thompson, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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BRIEF OF AMICI CURIAE

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American Association of Practicing Psychiatrists
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American Psychoanalytic Association
Baltimore Washington Society for Psychoanalysis
California Psychoanalytic Confederation (CAPsaC)
Child and Adolescent Psychiatric Society of Greater Washington
Confederation of Independent Psychoanalytic Societies
Cyber Privacy Project
Delmarva Psychiatry Group
Empire State Lyme Disease Association
Florida Psychiatric Society
International Lyme and Associated Diseases Society
JustHealth
Lime Induced Autism Foundation
Lyme Disease Education and Support Groups of Maryland
Maryland Psychiatric Society
Med Chi
Mississippi Psychiatric Association
National Alliance on Mental Illness – Delaware
National Association of Social Workers
National Association of Social Workers, Maryland Chapter
National Coalition of Mental Health Professionals and Consumers
New Jersey Psychiatric Association
Oklahoma Psychiatric Physicians Association
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Psychiatric Society of Virginia
Psychoanalytic Society of New England, East
Psychiatric Society of Delaware
Psychiatric Society of Westchester County (The Westchester District Branch, APA)
Suburban Maryland Psychiatric Association
Talbot County Medical Society
Vermont Psychiatric Association
Washington Psychiatric Society
West Hudson Psychiatric Society

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BRIEF OF AMICI CURIAE

STATEMENT OF INTEREST

This appeal by the Maryland State Board of Physicians (the "Board") marks the sixth effort by the Board in this case to convince an independent tribunal that its "absolutist" policy of automatic compelled disclosure of highly sensitive mental health records is lawful under the U.S. Constitution and Maryland law. The first five efforts uniformly resulted in determinations that the Board's disclosure policy is an error of law in that it violates the constitutionally protected right to health information privacy of patients receiving psychotherapy.[1]

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[1] (a) ALJ decision of August 14, 2002 (the Board does not have an absolute right to obtain the mental health records of a patient);

In this latest appeal, the Board argues that the decisions in Doe v. Maryland Bd. of Social Work Examiners, 384 Md. 161, 862 A.2d 996 (2004) and Dr. K. v. State Bd., 98 Md.App. 103, 632 A.2d 453 (1993), cert. denied, 334 Md. 18, 637 A.2d 1191, cert. denied, 513 U.S. 817, (1994), provide the "applicable framework" for determining whether the patients' constitutional right to privacy can be overridden by the state's interest in disclosure. Board's Brief 16. Further, the Board argues that it "correctly applied" the criteria set forth in those cases. Board's Br. 18.

However, the record shows that the Board has little interest in that "framework" and actually applied a policy of automatic compelled disclosure that completely disregarded the sensitivity of the requested information, the potential harm to the patients and damage to the ongoing psychotherapist-patient relationship. In fact, the Board's policy of automatically compelling disclosure of the patients' entire mental health records in this case did not provide for any balancing of the patients' rights to privacy. In the eleven months that the Board sought to compel Dr. Eist to comply with that policy, it never considered, applied or asked a court to apply those criteria. Eist, 932 A.2d at 786.

Even after the Board's absolutist policy was ruled an error of law and the Board was ordered to consider the patients' constitutional rights under those

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(b) decision of Circuit Court for Montgomery County, July 31, 2003 (Board committed an "error of law" when it determined that it had an absolute right to the mental health records it subpoenaed);

(c) ALJ decision of November 16, 2004 ("as a matter of law", the Board failed to weigh the privacy rights of the patients against the necessity of disclosure as is necessary when the constitutional right to privacy is at stake) E.222;

(d) decision of Circuit Court for Montgomery County, March 29, 2006 ("The Board's decision is contrary to law." E. 107; and

(e) Maryland State Board of Physicians v. Eist, 176 Md.App. 82, 116, 932 A.2d 783, 803 (Md.App. 2007), "What the Board overlooks in making its statutory argument, however, is that the agency's right to obtain a medical record, as conferred by the statute, is not absolute. [footnote omitted]".

criteria, it again applied the invalid policy by finding that the Board's need for the entire medical record, especially in psychiatric cases, would always be a "compelling" need that inevitably overrides the patients' right to privacy and that disclosure of records is always a "necessary first step" in the investigation of any complaint against a psychiatrist. E. 19.

The Board's brief states that "the Board's policy is to subpoena the medical records of the patient as part of its preliminary investigation." Board's Br. at 8. After paying lip service to the constitutional criteria, the Board states that "in any case" the Board has discretion to issue a subpoena in connection with "any" investigation, and "it would be especially inappropriate for a reviewing court to second-guess the Board's determination of the need to subpoena medical records in a given case." Board's Br. at 27. So, the Board asks this Court to reverse the findings of five other independent tribunals and find, for the first time in this case and for the first time in Maryland case law, that the Board may adopt and apply a policy that effectively eliminates the Constitutionally protected right to health information privacy of mental health patients in all cases and that the Board's policy is insulated from judicial review.[2]

The Amici represented here are national and state practitioner and consumer organizations that have an interest in protecting and preserving the patient's right to health information privacy. They believe that the Board's absolutist compelled disclosure policy will impair or destroy the "atmosphere of confidence and trust" that is essential for effective psychotherapy. Jaffee v. Redmond, 518 U.S. 1, 10,

[2] The amicus curiae brief filed by the Federation of State Medical Boards similarly states that "as with all State Medical Boards" the Board in this case must have "timely, unfettered access" to all patient records regardless of the patients' right to privacy. Federation Br. at 10 and 22.

116 S. Ct. 1923, 1928 (1996).[3] This "chilling effect" on frank and complete disclosures by patients in need of psychiatric care is likely to be most pronounced in cases such as this where the circumstances that give rise to the need for treatment are likely to result in litigation. Id. at 11.

Further, these organizations believe that the Board's policy puts psychiatrists in an untenable position of having to violate their standards of ethics and act in a manner that is detrimental to their patients' interests and mental health in order to comply with the Board's inflexible policy. Finally, these organizations believe that sanctioning a psychiatrist for defending his patients' right to privacy and the ethical practice of psychiatry could inhibit psychiatrists, as well as other psychotherapists, from adhering to their standards of ethics and putting their patients' interests first.[4]

For all of these reasons, the Amici believe that the Board's absolutist policy is in conflict with its duty to ensure the safe and ethical practice of psychiatry in the State of Maryland. Accordingly, Amici believe the decision by the Court of Special Appeals in favor of Dr. Eist should be affirmed.

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[3] The Court was quite clear that the findings and holding in Jaffee extended to licensed psychiatrists, psychologists and social workers. 116 S. Ct. 1931.

[4] While this case has been pending, Dr. Eist, who is the past president of the American Psychiatric Association and the Washington Psychiatric Society (E. 11), has been given two awards for his stand in this case in defense of this patients' rights and the ethical practice of psychiatry. He received the American Psychiatric Association's Profile in Courage Award in 2003 for taking financial and professional risks on behalf of his patients with mental illness and for his willingness to abide by his medical ethics in this case. "Assembly Honors Members for Courageous Stand", 38 PSYCHIATRIC NEWS 1, 1-27 (2003). More recently, Dr. Eist received the Maryland State Medical Society (MedChi) H. Margaret Zassenhaus Profile in Courage Award which recognizes "a physician who has taken a risk to his /her own professional and/or personal status for the good of patient care and in keeping with MedChi and AMA Principles of Ethics." (September 1, 2006). In June of this year, Dr. Eist will receive a Presidential Commendation from the American Psychoanalytic Association for his "unwavering stand for his patient's right to privacy despite untold cost to himself and his family."

ISSUES BEFORE THE COURT

I. Whether the Board's absolutist policy of automatic compelled disclosure of highly sensitive psychiatric records is consistent with the right to health information privacy protected by the U.S. Constitution even though the policy compels disclosure without notice or consent and over the patients' objections and fails to take into account the criteria for balancing the patients' right to privacy with the Board's interest in disclosure.

II. Whether the Board demonstrated a compelling governmental interest that justified overriding the patients' rights to privacy.

III. Whether Dr. Eist acted reasonably and in good faith by offering to cooperate with the Board's investigation while protecting his patients' Constitutionally protected right to privacy and adhering to the standards of ethics for his profession.

SIGNIFICANT FACTS

Significant facts in this case illustrate the conflict between Board's policy and the patients' right to privacy and the ethical practice of psychiatry. As the Board has conceded, there are no genuine issues of material fact, and the Board has not contested any of the facts cited by the Court of Special Appeals Board's Br. at 2.

1. This case began when the estranged husband of a wife and two minor children who were receiving psychiatric treatment from Dr. Eist filed a complaint with the Board that Dr. Eist had been overmedicating the wife and children. At the time of the complaint, the husband and wife were involved in bitterly contested divorce and child custody

proceedings. E. 10, and 195-196. The complaint was filed by the husband several months after Dr. Eist had provided an affidavit in the custody proceeding, at the request of the wife, attesting that she was a "competent caretaker" of the children. Eist, 932 A.2d at 794.

2. By March 13, 2001, when the complaint was received by the Board, Dr. Eist had been treating the wife for five years and was currently treating her two sons. Id. Two days later, on March 15, 2001, the Board issued a subpoena duces tecum commanding Dr. Eist to produce "IMMEDIATELY UPON SERVICE OF PROCESS a copy of all medical records" of the wife and her two children in his possession. E. 196; Board's Br. 9; see Eist, 932 A.2d at 795. The Board's policy when it receives a complaint of a failure to meet a standard of quality medical care is to subpoena the entire medical records of the patient automatically, without notice to the patient or the patient's consent, as part of its preliminary investigation. E. 10.

3. Dr. Eist received the subpoena on April 19, 2001, and wrote the Board on April 20, 2001 offering "to cooperate fully" with any investigation and to disclose the information with the consent of the patients or, if they objected, to comply "with any appropriate decision overruling their objections and requiring that I furnish the information." Eist, 932 A.2d at 976. He also informed the Board of the divorce and custody proceeding and suggested that the Board inform the patients of the demand. Id.

4. After being informed of the demand for their mental health records by Dr. Eist, the mother and children strongly objected to the disclosure of their psychiatric records and registered those objections with Dr. Eist

and with the Board, directly and through independent counsel. E. 197.

5. The Board completely ignored and overrode those objections by applying its policy of automatic compelled disclosure of the entire psychiatric records as a preliminary step in the investigation of the complaint. E. 196, 198, 210-211.

6. The Board even compelled disclosure of portions of the patients' psychiatric records that were not within the period of time covered by the complaint. Eist, 932 A.2d at 806.

7. Dr. Eist never indicated that he would not cooperate with the Board's investigation but merely asked that it reconcile its demand with his patients' objections and his ethical obligations. E. 221.

8. The Board never responded to the patients or addressed their privacy concerns, nor did the Board seek to have those concerns addressed by a court. E. 11-12.

9. Patient A (the mother), as well as Patients B and C (her children), were understandably concerned that disclosure of their psychiatric information in response to the complaint could harm their family as well as their right to privacy. E. 213.

10. Dr. Eist sought to uphold his standards of professional ethics which require patient consent for the disclosure of psychiatric communications while the Board ignored those standards. E. 217.

11. The treatment relationship between Dr. Eist and the patients was ongoing at the time of the Board's demand, so the potential for damage to the therapeutic relationship was substantial. E. 213.

12. Dr. Eist promptly conferred with counsel and with his patients' counsel and followed their advice and direction. E. 11-12, 198.

13. After being charged by the Board with failing to cooperate in an investigation, Dr. Eist provided the records demanded by the subpoena after giving the patients a last opportunity to intervene. E. 12.

14. The original complaint that Dr. Eist had overmedicated his patients was reviewed by a peer review committee and found to be without merit. The Board decided not to charge him with any violation of a standard of care in the treatment of his patients. E. 12.

15. The Board, however, has continued to try to sanction Dr. Eist for not complying quickly enough with the subpoena even though the Board failed to respond to Dr. Eist's request for guidance for seven months. E. 222. See also, E. 31.

ARGUMENT

I. THE BOARD'S POLICY OF AUTOMATIC COMPELLED DISCLOSURE IS IN CONFLICT WITH THE PATIENTS' CONSTITUTIONAL RIGHT TO HEALTH INFORMATION PRIVACY AND STANDARDS FOR THE ETHICAL PRACTICE OF PSYCHIATRY

A. The Patient's Right to Privacy is Essential to Effective Psychotherapy

The sensitive nature of psychiatric records has been addressed briefly in Maryland case law. In Dr. K, 632 A.2d at 459, the court noted "the intensely personal and extremely delicate nature of the information." In Doe, 862 A.2d at 1010, this Court noted that the records of social workers could "contain information of a highly private nature." Those courts did not, however, address the importance of an assurance of confidentiality to effective psychotherapy. The Board's policy and decision completely ignore this critical point.

In Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028 (D. Haw. 1979), the court enjoined enforcement of a state statute authorizing general administrative warrants to search the patient files of Medicaid beneficiaries treated by psychiatrists and psychologists on the grounds that the statute violated the patients' constitutional right to privacy. In examining whether the patients had a reasonable expectation of privacy in psychotherapist-patient relationships, the court made the following finding:

> Psychotherapy probes the core of the patient's personality. The patient's most intimate thoughts and emotions are exposed during the course of treatment." "The psychiatric patient confides (in his therapist) more utterly than anyone else in the world. . . . (H)e lays bare his entire self, his dreams, his fantasies, his sins, and his shame." "(Taylor v. United States (1955) 95 U.S. App. D.C. 373, 222 F.2d 398, 401, quoting Guttmacher and Weinhofen, Psychiatry and the Law 272 (1952).). The patient's innermost thoughts may be so frightening or morbid that the patient in therapy will struggle to remain sick, rather than reveal those thoughts even to himself. The possibility that the psychotherapist could be compelled to reveal those communications to anyone. . .can deter persons from seeking needed treatment and destroy treatment in progress. (Citing J. Katz, J. Goldstein, & A. Dershowitz, Psychotherapy, Psychoanalysis and the Law 726-27 (1967).

Id. at 1038; see also, McMaster v. Iowa Board of Psychology Examiners, 509 N.W.2d 754, 758 (Iowa 1993) referencing the same finding. The court went on to note that:

> Many courts and commentators have concluded that, because of the uniquely personal nature of mental and emotional therapy, accurate diagnosis and effective treatment require a patient's total willingness to reveal the most

intimate personal matters, a willingness that can exist only under conditions of the strictest confidentiality [numerous citations omitted].

Ariyoshi, 481 F.Supp. at 1038.

The Supreme Court recognized a psychotherapist-patient privilege under federal common law based upon the "reason and experience" of the country which showed:

> Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make frank and complete disclosure of facts, emotions, memories, and fears.... For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. [citations omitted].

Jaffee, 518 U.S. at 10 (emphasis added); see also, McCormack v. Bd. of Education, 158 Md. App. 292, 305-06, 857 A.2d 159, 166-67 (Md. App. 2004) (finding that a psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust.") This Court has also found similarly that physical ailments may be effectively treated by a practitioner without a relationship of trust, "but a psychiatrist must have his patient's confidence or he cannot help him." Laznovsky v. Laznovsky, 357 Md. 586, 613 n.13, 745 A.2d 1054, 1069 n.13 (2000), quoting Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955).

Recent textbooks on the practice of psychiatry express a similar view:

> Practitioners sometimes assume that they are the final arbiters of what information to share with parents, other clinicians and other agencies. In fact, in most circumstances that do not involve the safety of the patients or

others, the patient should be the arbiter of what information is shared with whom.

Benjamin J. Sadock et al., Synopsis of Psychiatry, 971 (10th Ed. 2007).

If the confidential conversations between psychotherapists and their patients are not protected, those conversations "would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for the treatment will probably result in litigation." Jaffee v. Redmond, 518 U.S. at 12. This Court has noted that the typical importance of maintaining the privacy of psychotherapy communications becomes even more important where there is a chance they can be used in child custody cases. Laznovsky, 745 A. 2d at 1072; see also, In re Berg, 886 A.2d 980, 986-987 (N.H. 2005) ("The weight of authority in other jurisdictions supports the protection for the therapy records of children who are at the center of a custody dispute or whose interests may be in conflict with those of their natural guardians." [citations omitted].)

So maintaining the privacy of the psychiatric records of the mother and her two children that were the subject of the Board's automatic compelled disclosure policy, could hardly have been more important to the practice of effective psychotherapy. They included "psychiatric treatment notes" documenting the details of the intimate disclosures made by the patients to Dr. Eist. Board's Br. at 21. And they likely contained information about the emotions, fears and anger logically felt by the mother and her children as they went through the contested divorce and custody proceeding. It would be difficult to imagine health information that could be more personal and sensitive. Accordingly, the Board's absolutist policy impairs the ability of patients in Maryland to gain access to effective psychotherapy.[5]

[5] The U.S. Department of Health and Human Services has found that more than 2 million Americans each year do not seek treatment for mental illness due to privacy fears.

The Board believes that society's need for psychiatric records will always outweigh the patients' privacy rights, and its automatic disclosure policy reflects that belief. E. 22. However, the Supreme Court noted, in rejecting a balancing test in Jaffee, that protecting the privacy of psychotherapist-patient communications is essential for effective psychotherapy and access to effective psychotherapy is in the interest of the public as well as the individual patient. Jaffee, 518 U.S. at 11.

To appreciate the adverse impact of the Board's policy on the public's access to effective psychotherapy, one need only imagine the Miranda-style warning that the ethical psychiatrist would have to provide were that policy to be upheld by this Court:

> Now Mrs. A, you may disclose to me your most intimate thoughts and emotions so that I can treat you effectively. I will not disclose what you tell me, unless, of course, your estranged husband or anyone else files even the most frivolous complaint with the Maryland State Board of Physicians in an effort to deprive you of custody of your children, or for any other reason, in which case, I will have to disclose your entire psychiatric record immediately without notice to you and without providing you with an opportunity to object.[6]

Few patients in the midst of a contentious divorce and custody battle would feel free to disclose sensitive information to a psychotherapist if the Board's policy were to be upheld.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82779 (Dec. 28, 2000). The Board's policy is likely to exacerbate that problem.

[6] The ethical therapist must disclose to the patient the "relevant limits on confidentiality" at the beginning of the therapeutic relationship. Jaffee, 518 U.S. at 13 n.12.

B. Standards for the Ethical Practice of Psychiatry Require Protection of the Patient's Right to Privacy

The right of patients to not have their communications with their psychiatrists disclosed without their consent and against their will is reflected in the long-standing ethics standards of virtually all medical and psychotherapy associations including the American Psychiatric Association, the American Psychoanalytic Association and the National Association of Social Workers, among others. For example, the principles of ethics of the American Psychiatric Association provide as follows:

> A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.
>
> 1. Psychiatric records, including even the identification of a person as a patient, must be protected with extreme care. Confidentiality is essential to psychiatric treatment. This is based in part on the special nature of psychiatric therapy as well as on the traditional ethical relationship between physician and patient. . . . Because of the sensitive and private nature of the information with which the psychiatrist deals, he or she must be circumspect in the information that he or she chooses to disclose to others about a patient. The welfare of the patient must be a continuing concern.
> 2. A psychiatrist may release confidential information only with the authorization of the patient or under proper legal compulsion. . . .
> 7. Careful judgment must be exercised by the psychiatrist in order to include, when appropriate, the parents or guardian in the treatment of a minor. At the same time, the psychiatrist must assure the minor proper confidentiality.

9. When the psychiatrist is ordered by the court to reveal the confidences entrusted to him/her by patients, he or she may comply or he/she may ethically hold the right to dissent within the framework of the law. When the psychiatrist is in doubt, the right of the patient to confidentiality and, by extension, to unimpaired treatment should be given priority. The psychiatrist should reserve the right to raise the question of adequate need for disclosure. In the event that the necessity for legal disclosure is demonstrated by the court, the psychiatrist may request the right to disclosure of only that information which is relevant to the legal question at hand.

The American Psychiatric Association, The Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry, 6-7, Section 4 Confidentiality (2003) (emphasis added).[7]

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[7] Recently, the American Psychiatric Association adopted a policy position with respect to how medical boards should appropriately handle complaints from non-patient third parties:

> When complaints are filed by third parties about the treatment of identified patients, the board should determine whether there is sufficient substance to warrant further investigation and whether the medical records of the identified patients are necessary to its investigation before seeking access to those patients' records. If review of records is believed to be necessary, identified patients should be contacted by the board for consent. If patients do not grant the board consent for release of the records and the board continues to believe that access is necessary, an independent review process should exist for determining whether the board's interest in obtaining the records outweighs the patients' interest in privacy. The APA acknowledges that a variety of review mechanisms may be acceptable for this purpose, and that different jurisdictions may have reasons to select one mechanism over another. Possible mechanisms include review by a hearing officer, by an administrative agency, or by a court, and may be based on evidence from written submissions or from hearings. The key elements of any process are that it is independent of the medical board and that patients are guaranteed notice and a right to object.

American Psychiatric Association, Position Statement on Release of Patients' Records to State Medical Boards (Dec. 2007), available at

Similarly, the ethics standards of the American Psychoanalytic Association provide that:

> "Confidentiality of the patient's communications is a basic patient's right and an essential condition for effective psychoanalytic treatment and research. A psychoanalyst must take all measures necessary to not reveal present or former patient confidences without permission, nor discuss the particularities observed or inferred about patients outside consultative, educational, or scientific contexts.

The American Psychoanalytic Association, Principles and Standards of Ethics for Psychoanalysts, IV. Confidentiality (2001) (emphasis added).

The National Association of Social Workers' standards state that the social worker should be guided by the principle that "[c]lients' informed and authorized consent will be a prerequisite to transmitting information to or requesting information from third parties." National Association of Social Workers Policy Statements, Social Work Speaks, 2006-2009, 61 (2006).

The American Medical Association's Code of Ethics provides that "conflicts between a patient's right to privacy and a third party's need to know should be resolved in favor of the patient, except where that would result in serious health hazard or harm to the patient or others." See 65 Fed. Reg. at 82,472, (citing AMA Policy No. 140.989).

Dr. Eist, as a medical doctor, a psychiatrist, a past president of the American Psychiatric Association and the Washington Psychiatric Society, and a psychoanalyst, clearly felt bound by these ethical principles.

The Board is charged under Maryland law with preventing the "immoral or unprofessional conduct in the practice of medicine" which includes the failure of a

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http://www.psych.org/MainMenu/EducationCareerDevelopment/Library/PositionStatements.aspx

psychiatrist to protect the confidentiality of communications with patients. Salerian v. Maryland Bd. of Physicians, 176 Md.App. 231, 236, 932 A.2d 1225, 1228 (Md. App. 2007). Confidentiality is broader than privilege so information not protected by a privilege can still be confidential information. Id. At 1242. The Board had a duty under its responsibility to preserve the ethical practice of medicine to carefully consider the patients' strong objections to disclosure of their highly sensitive psychiatric information.

Instead, the Board took the position, under its policy of automatic compelled disclosure, that the patients "had no say in the matter" and that Dr. Eist's ethical obligation to his patients "doesn't matter." E. 217. The ALJ who issued the second decision against the Board perhaps best captured the conflict between the Board's policy and its duties to the public:

> I find it difficult to fathom that a Board whose function is, not only to ensure that a physician's treatment of his patients meets the standards of care, but also to make certain that a physician abides by the standards of professional conduct, can label a physician's ethical responsibilities essentially irrelevant.

E. 217.

The Board's blind spot with respect to its duty to protect the patient's right to privacy as reflected in standards of professional ethics appears to be shared by the Federation of State Medical Boards (FSMB) which has filed an amicus brief in this case. That organization has published a report on Professional Conduct and Ethics which states that "state medical boards should assess any adverse impact of [a physician's] conduct on the sacred relationship between the physician and the patient."[8] The Federation also notes that medical boards should affirmatively state

[8] Federation of State Medical Boards of the United States, Inc., Report of the Special Committee on Professional Conduct and Ethics, 2 (2000), available at http://www.fsmb.org/pdf/2000_grpol_Professional_Conduct_and_Ethics.pdf.

their expectations that licensees have a duty to comply with national codes of ethics. Supra at 4. The Federation also states in another document that it "recognizes the importance of medical ethics in guiding the development and practice of physicians, and the vital role that ethics can play in protecting the public interest."[9] However, none of these documents discuss the patient's right to privacy included in nearly all standards of professional ethics or instruct medical boards in how to weigh the patient's constitutional right to privacy against the medical board's request for sensitive health information. It would appear that the Federation, like the Board in this case, has little regard for the patient's fundamental constitutional right to privacy or the psychotherapist's ethical duty to protect it.

C. The Right to Privacy for Highly Sensitive Health Information is a Fundamental Right Protected by the U.S. Constitution

The right to privacy for highly sensitive health information has been found by Congress to be a "fundamental right protected by the Constitution of the United States."[10] More recently, the U.S. Department of Health and Human Services found that "[p]rivacy is a fundamental right" protected by the Constitution that "is necessary to secure effective, high quality health care".[11] Fundamental rights are those "deeply rooted in this Nation's history and tradition." Washington v. Glucksburg, 521 U.S. 702, 720 (1997).

This Court has found that medical records fall within the constitutional protections for the right to privacy. Doe, 862 A.2d at 1008. The right to privacy in

[9] Federation of State Medical Boards of the United States Inc., Ethics and Quality Care, 3 (1995), available at http://www.fsmb.org/pdf/1995_grpol_Ethics_and_Quality_of_Care.pdf.
[10] The Privacy Act of 1974, Pub.L. No. 93-579, Section 2 (codified at 5 U.S.C. § 552a (2006)).
[11] Preamble to HIPAA Health Information Privacy Rule, 69 Fed. Reg. 82,464, 82,467 (2000).

this country is "older than the Bill of Rights." Griswold v. Connecticut, 381 U.S. 479, 516 (1965).[12] Over the years, the right to privacy has variously been found to be protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution. Roe v. Wade, 410 U.S. 113, 151-153 (1973). Recently, the courts have focused on the Fourth, Fifth and Fourteenth Amendments as the principal sources of health information privacy protections for the reasons that patients have a reasonable expectation of privacy in their personal health information and privacy is a fundamental right "implicit in the concept of ordered liberty." Ferguson v. City of Charleston, 532 U.S. 67, 121 S.Ct. 1281, 1288 (2001); Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977). United States v. Scott, 424 F.3d 888, 895 (9th Cir. 2005) (holding that a general interest in protecting the public from criminal activity was not enough to override the individual's privacy interest); Doe v. Delie, 257 F.3d 309, 315 (3rd Cir. 2001) ("We have long recognized the right to privacy in one's medical information.") McMaster, 509 N.W.2d at 758-59 (finding such a privacy right specifically with respect to psychotherapy records). Accordingly, a person's right to privacy in his or her medical records is a fundamental right because "[t]hese are matters of great sensitivity going to the core of the concerns for the privacy of information about an individual." Bearman v. Superior Court, (2004) 117 Cal.App.4th 463, 473.

The constitutionally protected right to privacy has two branches in the health care area—the right to avoid disclosures of sensitive health information ("informational" privacy) and the right to make independent decisions about heath

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[12] The decision in Griswold "validated" Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928) which described the right to privacy as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion of the government upon privacy of an individual...must be deemed a [constitutional] violation." Sterling v. Borough of Minersville, 232 F.3d 190, 193 (3rd Cir. 2000).

care ("decisional" privacy). Where, as in this case, the disclosure of highly sensitive health information over the individuals' objections could affect their decision to seek needed health care, both rights are implicated. Whalen v. Roe, 429 U.S. at 598-602; Ariyoshi, 481 F. Supp. at 1043; McMaster, 509 N.W.2d at 758-59. The constitutional right to privacy for sensitive personal health information is now so well established that no reasonable public official could unaware of it. Gruenke v. Seip, 225 F.3d 290, 302-03 (3rd Cir. 2000); see also, Sterling v. Borough of Minersville, 232 F.3d 190, 198 (3rd Cir. 2000).

While the right to health information privacy is not absolute, a state may not infringe fundamental liberty interests "at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling [governmental] interest." Glucksburg, 521 U.S. at 721 (emphasis added); see also, Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 872, 112 S.Ct. 2791, 2818 (1992); Roe v. Wade, 410 U.S. at 155; Doe v. Bolton, 410 U.S. 179, 219-20, 93 S. Ct. 739, 761-62 (Douglas, J. concurring) (1973); Doe, 862 A.2d at 1008.

Correlatively, the state has the burden of demonstrating that there are no "less intrusive alternatives" that would accomplish the state's interest. Sell v. United States, 539 U.S. 166, 179, 123 S. Ct. 2174, 2186 (2003). See also, Parents Involved in Comty. Schools v. Seattle School District No. 1, ___U.S.___, 127 S.Ct. 2738, 2789 (2007) ("the government has the burden of proving racial classifications 'are narrowly tailored measures that further compelling governmental interests.'"); Grutter v. Bollinger, 539 U.S. 306, 339, 123 S.Ct. 2325, 2345 (2003) (narrow tailoring requires consideration of "lawful alternative[s] and less restrictive means"); Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 909, 106 S.Ct. 2317, 2324 (1986); Dunn v. Blumstein, 405 U.S. 330, 341, 92 S.Ct. 995, 1003 (1972), Carroll v. President and Comm'rs of Princess Anne, 393

U.S. 175, 183, 89 S.Ct. 347, 353 (1968). Government policies that can only be upheld based on a "compelling need" are "presumed invalid" unless the government can show that it used the least restrictive means in achieving its objective. Ashcroft v. ACLU, 542 U.S. 656, 660, 124 S. Ct. 2783, 2791 (2004); see also, Bartnicki v. Vopper, 200 F.3d 109, 121 (3d Cir. 1999), aff'd, 532 U.S. 514 (2001). These constitutional principals have been recognized repeatedly in cases involving demands for information by medical boards. Bearman, 117 Cal.App.4th at 472; McMaster, 507 N.W.2d at 759; Wood v. Bd. of Medical Quality Assurance, (1985) 166 Cal. App.3d 1138, 1148; Division of Medical Quality, Bd. of Medical Quality Assurance v. Gherardini, (1979) 93 Cal.App.3d 669, 680.

The Board's decision concedes that its policy of automatic compelled full disclosure is not tailored to minimize the infringement on the patients' fundamental rights to privacy. On the contrary, total disclosure is the "necessary first step" at the preliminary stage of every investigation and particularly in investigations of psychiatric cases. E 11.

In fact, the Board's policy renders meaningless any theoretical opportunity for the patients to assert and protect their constitutionally protected rights to privacy. The subpoena compelled Dr. Eist to disclose his patients' entire mental health records "IMMEDIATELY". Board's Br. 9. The Board provided no notice to the patients and did not seek their consent. Under such a process, it is highly unlikely that a patient would be able to learn of the threat to his or her medical privacy, locate a knowledgeable attorney, and file a motion for a protective order or to quash the subpoena before the records were disclosed. But taking such action would make little difference in any event since, according to the Board, its interest

in compelling disclosure of all medical records always overrides the patient's privacy interest. E. 10; Board's Br. at 27. [13]

Further, the Board has not shown why its duties could not have been discharged through the use of less intrusive alternatives.[14] E. 215. Indeed, the Board's policy does not appear to permit consideration of such alternatives and none were used.

The Board's decision does not adequately explain why using a phased approach would not have been adequate, as suggested by the first Circuit Court decision. E. 181. Judge Thompson stated in the second Circuit Court proceeding that the Board seemed to be "out to get Dr. Eist" rather than identify less intrusive means to investigate the complaint that would not violate the patients' right to privacy. E. 84.

Finally, there is no indication as to why, even if the records had to be reviewed as a last resort, they could not have been sent to one or more psychiatrists bound by the same ethical standards as Dr. Eist rather than being disclosed to the non-physician government employees of the Board. Such an approach is described in the Position Statement of the American Psychiatric Association, supra at p. 14 n.6, and has been included in practice guidelines for other mental health practitioner associations for years.[15] Had the Board used such a less intrusive alternative in this case, it would have learned much sooner that the patients had not

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[13] The Board relied on this policy to persuade counsel for Patient A that contesting the subpoena would be "a lot of effort to no avail". E. 11.
[14] See finding to this effect by ALJ.
[15] "In the event that there is a request for external review by a third party, we recommend that the patient be referred to a consultant psychoanalyst who will conduct this review within the confines of strict confidentiality." American Psychoanalytic Association, External Review of Psychoanalysis, Practice Bulletin 3, (Dec. 1999) available at http://apsa.org/TrainingandEducation/PracticeBulletins/tabid/172/Default.aspx

been overmedicated, and the patients' privacy and access to effective psychotherapy would not have been jeopardized.

The first decision in this case by the Circuit Court of Montgomery County found that the Board's "absolutist" policy of assuming that its interest "at all times" outweighs the patient's right to privacy, is contrary to prevailing constitutional case law and that the Board's reliance on that policy was "an error of law." E. 174, 177. The Board never appealed that decision. The Board should not now be allowed to resurrect that policy by cloaking it in a post hoc rationalization that distorts the criteria for balancing the patient's right to privacy against the Board's interest in disclosure.

II. THE BOARD FAILED TO DEMONSTRATE A COMPELLING INTEREST TO JUSTIFY OVERRIDING THE PATIENTS' FUNDAMENTAL RIGHT TO PRIVACY

A. The Board's Policy Conflicts with the Standards for Protecting the Patients' Right to Privacy

This Court has correctly determined that whether a compelling state interest can be shown in order to override an individual's right to health information privacy "is to be determined on a case-by-case basis." Doe, 862 A.2d at 1010. Whether a court will allow an intrusion on the fundamental right to health information privacy will depend upon "the specific facts of the case." Dr. K., 632 A.2d at 459, quoting United States v. Westinghouse Elec. Corp., 638 F.2d 570, 572-73 (3d Cir. 1980). Of course, the policy used to sanction Dr. Eist did not allow for a compelling interest determination to be made based on the facts of this case.

Both this Court in Doe and the Court of Special Appeals in Dr. K rely heavily on the constitutional analysis by the Court of Appeals for the Third Circuit in Westinghouse. Doe, 862 A.2d at 1010; Dr. K., 632 A.2d at 459. However, an

important portion of the Westinghouse holding is not discussed in Doe and Dr. K. In conducting its balancing analysis, the court in Westinghouse noted that most of the information sought by the National Institute for Occupational Safety and Health (NIOSH) from an employer was simply routine worksite testing information that was not generally regarded as sensitive. The court also noted that the disclosure of this information was not likely to inhibit employees from undergoing future examinations because the inspection of the records was being conducted to protect them from worksite hazards that had been the subject of employee complaints. Westinghouse, 638 F.2d at 579.

After applying the balancing criteria to this non-sensitive information, however, the court noted that some of the files could include "records of the employees' personal consultations with the company physician and the physician's ministrations on a broad spectrum of health matters." Id. At 580-81. Since the employees had received no prior notice that medical records might be subject to examination, the records might include matters "unrelated to employment which they consider highly confidential." Accordingly, the court found, "[w]e cannot assume that an employee's claim of privacy as to particular sensitive data in that employee's file will always be outweighed by NIOSH's need for such material." Id. at 581.

Thus, the Westinghouse court concluded that additional procedures beyond the balancing factors were needed to protect the privacy of particularly sensitive health information. The court held that those additional procedures should include "prior notice" by NIOSH to the employees whose medical records it sought to examine informing them that they could object to the disclosures. Id. According to the court:

> The touchstone [of due process protections] should be provision for reasonable notice to as many affected individuals as can reasonably be

reached; an opportunity for them to raise their objections, if any, expeditiously and inexpensively; preservation of confidentiality as to the objections and the material itself from unwarranted disclosure; and prompt disposition so that NIOSH's evaluation is not hampered.

Id. at 582. So the Westinghouse framework adopted by Doe and Dr. K. was only the framework adopted for weighing the privacy interests in non-sensitive health information. According to the court, disclosure of highly sensitive health information would require something more--prior notice and an opportunity to object. The Board's policy in this case was applied to highly sensitive psychiatric information and did not provide notice and an opportunity for the patients to object. So the Board's policy is plainly in conflict with the constitutional analysis required by Westinghouse.

B. The Court of Special Appeals Properly Applied the Balancing Criteria

1. The Type of Records Subpoenaed and the Information They Contain

The Court of Special Appeals correctly found that medical records at issue in this case contain "notes of psychiatric treatment sessions" and that the patients would be "embarrassed and offended to have disclosed to anyone." Eist, 932 A.2d at 806. This Court's holding in Doe has confirmed that such records contain information "of a highly private nature." Doe, 862 A.2d at 1010.[16]

The Court of Appeals for the Third Circuit in interpreting Westinghouse has held that "[t]he more intimate or personal the information, the more justified is the

[16] The court below correctly found that the constitutional criteria are ultimately to be applied de novo by a reviewing court because it is the province of the courts to interpret and apply the Constitution. As noted, the courts in Doe and Dr. K. applied the constitutional criteria without deference, or even reference, to the Board's decision. Eist, 932 A.2d at 805.

expectation that it will not be subject to public scrutiny." Sterling v. Borough of Minersville, 232 F.2d at 195. So the Court of Special Appeals correctly found that the patient's privacy interest increases with the sensitivity of the information. Eist, 932 A.2d at 806.

The Westinghouse court noted that the Supreme Court in Whalen v. Roe had observed that the disclosure of some private medical information to public agencies is often an essential part of modern medical practice. Id. at 577. However, those disclosures upheld by courts generally were "to develop treatment programs or control threats to public health." Id. at 578. The medical records at issue in Westinghouse were "more extensive" than the prescription drug reporting records at issue in Whalen. Id. at 577. And the psychiatric records at issue in this case are more sensitive still.

The Board's decision states that the psychiatric records it sought were "identical" to the information sought in Dr. K., "perhaps more personal" than the information sought in Patients of Dr. Solomon v. Bd. of Physician Quality Assurance, 85 F. Supp. 2d 545 (D. Md. 1999), and "not unlike" the mental health counseling records sought in Doe. E. 14. The information that was the target of the Board's demand in this case, and the circumstances out of which it arose, bear little resemblance to these cases.

Although all psychotherapy information is highly sensitive and can cause harm or embarrassment if disclosed, the courts in Doe, 862 A.2d at 998-999 and Dr. K, 632 A.2d at 459 noted that the patients in those cases had, respectively, collaborated with a social worker in an admitted legal violation and participated with a psychiatrist in an admitted ethical violation (even if as a result of exploitation). Psychiatric records were not at issue in Dr. Soloman, and the Board's subpoena was based on evidence from a patient of prior unprofessional conduct. Solomon v. State Board of Physician Quality Assurance, 155 Md.App.

687, 845 A.2d 47, 50 (Md.App. 2004). Nothing similar is involved in the present case, with its divorce and custody context. A demand for records in the present case therefore cannot be defended by pointing to Doe, Dr. K, and Dr. Solomon.

The psychiatric records at issue in this case were for a mother and her two minor children who had not collaborated in the violation of any law or standard of professional ethics and who posed no threat to society. Nor was there any complaint or any other evidence from a patient suggesting inappropriate conduct by Dr. Eist. Neither the patients nor Dr. Eist were seeking to block a lawful investigation but rather to allow the investigation to take place without abrogating the patients' rights to privacy and the psychotherapist's professional ethics.

The Court of Special Appeals correctly noted that the subpoena was defective in that it sought disclosure of "all medical records" of these patients even if they did not relate to the two-year period referenced in the complaint. Eist, 932 A.2d at 806, citing Bearman, 117 Cal.App. 4th at 472. An "overly broad" demand for access to highly sensitive health information simply does not meet the requirement that intrusions on fundamental rights must be narrowly tailored. See also, Tucson Woman's Clinic v. Eden, 371 F.3d 1173, 1194 (9th Cir. 2004).

2. The Potential for Harm in Subsequent Non-consensual Disclosures

The Court of Special Appeals noted that the potential for harm due to the non-consensual disclosure of psychiatric records is "plainly apparent." Eist, 932 A.2d at 806 citing Dr. K., 632 A.2d at 459 and Shady Grove Psychiatric Group, 128 Md.App. 163, 736 A.2d 1168 (1999). The court further noted that the chances for such harm were significantly enhanced in this case because "the entire family was embroiled in a divorce action in which child custody was a disputed issue." Eist, 932 A.2d at 807.

As noted in Ariyoshi, 481 F. Supp. at 1028, it is generally accepted that psychiatric patients disclose highly sensitive information to their psychotherapists that they would not want disclosed to anyone else. The non-consensual disclosure of these patients' psychiatric records, as Patient A clearly believed, could have been catastrophic for the family and for the patients' mental health care. As with the highly sensitive records at stake in Tucson Woman's Clinic, 371 F.3d at 1194, the potential harm from a subsequent non-consensual disclosure "is obviously tremendous."

3. Injury from Disclosure to the Relationship in Which the Record Was Generated

The Court of Appeals correctly noted that this factor weighed more heavily in favor of the patients' right to privacy in this case because, unlike in Doe and Dr. K., the treatment relationship with the mother and her two children was ongoing at the time of the Board's subpoena. Eist, 932 A.2d at 808.

The Board's decision found it "almost impossible to predict the impact, if any" of its compelled disclosure of the patients' detailed psychiatric records. However, as recognized in Ariyoshi, McMaster, and Jaffee, the disclosure of this information can reliably be expected to impair the effectiveness of psychotherapy. It is well accepted, as the Supreme Court noted, that the therapist-patient relationship can be damaged "merely by the threat" that psychiatric notes will be disclosed. Jaffee, 518 U.S. at 10; Laznovsky, 745 A.2d at 1069; McCormack, 857 A.2d at 166. The ALJ in this case reached a similar conclusion. E. 213. It appears only the Board found that damage to the ongoing therapeutic relationships would be almost impossible to predict.

4. Adequacy of the Safeguards to Prevent Unauthorized Disclosure

The Court of Special Appeals correctly found that evidence of statutes that prohibit the redisclosure of properly subpoenaed mental health records is not determinative of whether the state should be allowed to override the patient's right to privacy. Eist, 932 A.2d at 808. Where the potential for harm is high, it is important for the court determine whether there are civil or criminal penalties for unauthorized disclosures by state employees and whether such employees have "unbounded" access to patient information. Tucson Woman's Clinic, 371 F.3d at 1194. There would appear to be no such penalties under Maryland law.

The fact that a state statute contains safeguards does not give a medical board "the license to invade a patient's constitutional right of privacy where there has been no factual justification enabling an independent assessment of good cause for disclosure." Bearman, 117 Cal. App. 4th at 472; McMaster, 509 N.W.2d at 760 ("Such safeguards, however, are only one factor for a court to consider in the balancing process and should not be controlling. This is so because of the unique personal nature of the [mental health] records.")

5. The Government's Need for Access to the Documents

The Court of Special Appeals correctly determined the Board's generalized need to access medical records in any case is not sufficient to measure the government's need in a given case and weigh it against the patient's competing privacy interests. Eist, 932 A.2d at 809. Once a patient's constitutional right to privacy is at stake, a medical board "must demonstrate through competent evidence that the particular records it seeks are relevant and material to its inquiry sufficient for a trial court to independently make a finding of good cause to order the materials to be disclosed." Bearman, 117 Cal.App. 4th at 469.

The Court of Special Appeals was also correct in holding that the particulars of the complaint that generated the subpoena are pertinent to assessing the Board's need for the records. Eist, 932 A.2d at 810. There must be some showing of the authenticity of the complaint and more than "conclusory statements that the records are necessary." McMaster, 509 N.W.2d at 760. See also, Bearman, 117 Cal.App. 4th at 471 ("speculations, unsupported suspicions, and conclusory statements" are not adequate grounds for intruding on a patient's constitutional right to privacy). Here the particulars show that the complaint was made by an obviously biased non-clinician and not by any of the patients. The court in Dr. K. noted that bias by the complainant would be relevant unless the unprofessional conduct has been admitted by the physician. Dr. K., 632 A.2d at 462. The complaint contained nothing more than unsupported allegations and conclusory statements vaguely alleging that Dr. Eist had "overmedicated" the patients. Eist, 932 A.2d at 810. There was every reason to believe, as Dr. Eist immediately explained to the Board, that the complaint was retaliatory and specious including the fact that the complainant failed to respond when the peer review committee "made numerous attempts" to contact him. Eist, 932 A.2d at 799.

As other courts have held, a medical board seeking to intrude on the patient's right to health information privacy "cannot delve into an area of reasonably expected privacy simply because it wants assurance the law is not violated or a doctor is not negligent in treatment of his or her patient." Bearman, 117 Cal.App. 4th at 468-69, citing other cases. Accordingly, the Board in this case failed to provide evidence of a compelling need sufficient to override the patients' right to privacy.

The Court of Special Appeals also correctly noted that this case is unlike Dr. Solomon, 85 F.Supp. at 548 (D. Md. 1999), on which the Board relied (E. 18), because the records here are "of the most highly private and personal sort", the

Board had no prior information to suggest there was any problem with Dr. Eist's treatment practices, the complaint was from an interested, and hostile, source, and it did not provide any specifics or any objective or expert criticism. Eist, 932 A.2d at 813.

There is, however, another reason why the decision in Dr. Solomon should not be regarded as support for the Board's policy. The central holding in that case was that privacy rights can be overridden where the state "has a compelling interest in the identification of law breakers and in deterring future misconduct", and the same would be true given the Board's mission to identify physicians who engage in immoral or unprofessional conduct. Dr. Solomon, 85 F.Supp. at 548, citing Ferguson v. City of Charleston, 186 F.3d 469, 483 (4th Cir. 1999).[17] The Supreme Court, however, reversed the 4th Circuit's holding in Ferguson finding explicitly that a desire to further a general societal interest cannot, by itself, serve as justification for violating the Fourth Amendment's protection against unreasonable searches and seizures. Ferguson v. City of Charleston, 532 U.S. 67, 80-86, 121 S.Ct. 1281, 1290-92 (2001). See also, United States v. Scott, 424 F.3d 888, 894 (9th Cir. 2005). The basis for the holding was the "reasonable expectation of privacy" enjoyed by the typical patient receiving tests in a hospital. Id. at 78. Patients undergoing psychiatric care in a private psychiatrist's office have an even stronger expectation of privacy, so it is unlikely that a general societal interest in a patient's psychotherapy notes and information, without more, would ever be a sufficient compelling interest to override the patient's fundamental right to privacy.

[17] The Court of Special Appeals referenced this proposition in Solomon, 845 A.2d 56 as did this Court in Doe, 862 A.2d at 1010, without mentioning that 4th Circuit's Ferguson decision was the underlying basis.

6. Express Statutory Mandate, Articulated Public Policy, or Other Public Interest Militating Towards Access

There is no doubt, as the Court of Special Appeals concluded that the Board has the statutory authority to subpoena medical records to investigate complaints. Eist, 932 A.2d at 811. But the Board only has the authority to regulate the practice of medicine "within constitutional limitations." Dr. K, 632 A.2d at 461. The Board has cited no Maryland statute that requires it to issue a subpoena for all medical records in every case without regard for the objections of the patient, the nature of the information requested or the damage that might be done to the patient's treatment or health. In short, there is no express mandate for the absolutist policy that the Board has elected to apply in this case to sanction Dr. Eist.

The public policy behind the Board's authority is for the Board to prevent immoral or unprofessional conduct in the practice of medicine and psychiatry. Id. at 460. The Board's policy of automatic compelled disclosure by psychiatrists of entire psychiatric records over the patients' objections is contrary to the standards for ethical conduct in psychiatry.[18]

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[18] The Federation of State Medicare Boards in its amicus curiae brief at p. 17 argues incorrectly that the Health Information Privacy Rule implementing the Health Information Portability and Accountability Act (HIPAA) "specifically states" that state agencies engaged in oversight do not need patient permission or notice in order to obtain identifiable health information, citing 45 C.F.R. § 164.512(d). Actually, that regulation states only that certain covered entities "may" disclose identifiable health information to a health oversight agency if the disclosure is authorized by law. The preamble to that regulation stated that it was only intended as a "floor" of federal privacy standards and not as a "best practices" standard and that it was not intended to "interfere" with ethical standards. 67 Fed. Reg. at 53,212 (Aug. 14, 2002). So the U.S. Department of Health and Human Services recognized that the public policy reflected in standards of professional ethics is to be given priority. Further, a companion to §164.512(d) was found to not actually authorize government access to sensitive health information but rather "to create a procedure for obtaining authority" to obtain the information.

Further, the Board's policy is detrimental to the practice of effective psychotherapy. The public, as well as the individual, has an interest in access to effective psychotherapy. Jaffee, 518 U.S. at 11. For these reasons, the Board's application of its policy of automatic compelled disclosure without specific facts, does not show a compelling governmental interest sufficient to override the patients' constitutional right to privacy.

III. DR. EIST ACTED REASONABLY AND IN GOOD FAITH

After decisions in his favor by five independent tribunals in this case, it should be obvious, at the very least, that Dr. Eist acted reasonably and in good faith when he asserted his patients' constitutional right to privacy. Dr. Eist contacted the Board on the day he received the subpoena to inform staff that it was baseless and had been submitted by a biased third party. He wrote the Board the next day expressing his willingness to cooperate with any measures the Board might suggest to accommodate his patients' privacy interests including cooperating with any court order the Board might obtain. He informed the Board of his patients' objections to disclosing their psychiatric records. He had his lawyer write the Board informing them of the patients' "legitimate privacy and confidentiality

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Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923, 926 (7th Cir. 2004). After rejecting the government's HIPAA argument, the court found the question was whether, under the Federal Rules of Evidence, the harm to the government of not obtaining the health records was greater than the harm to the patients of having their records disclosed. The court decided that "[e]ven if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy" that would outweigh the harm to the government. The hospital would "lose the confidence of its patients and persons with sensitive medical conditions may be inclined to turn elsewhere for medical treatment." Id. at 929. As in this case, the government had failed to allege sufficient facts to support its need for the information. According to the court, the government might engage in a fishing expedition, but the federal rule "allows the fish to object, and when they do the fisherman has to come up with more than the government has been able to do in this case despite the excellence of its lawyers." Id. at 931. So too in this case.

issues" and asking the Board to address the patients' concerns. And he provided the Board with a detailed statement of the facts and the basis for the complaint. Eist, 932 A.2d at 795-798. The Board never addressed any of the concerns raised by Dr. Eist or his patients.

As the Court below correctly held, the burden was on the Board "to show that its statutorily recognized interest in obtaining the records is a compelling one that outweighs the patient's privacy rights in those same records." Eist, 932 A.2d at 805; see McMaster, 509 N.W.2d at 759; Gherardini, 93 Cal.App.3d at 681. Even the Board concedes in its decision that "the Administrative Prosecutor has the burden of proof." E. 29. Of course, the very nature of the Board's policy precludes any evaluation of the patients' privacy interests. Accordingly, the court correctly concluded that the Board failed to carry its burden of proof.

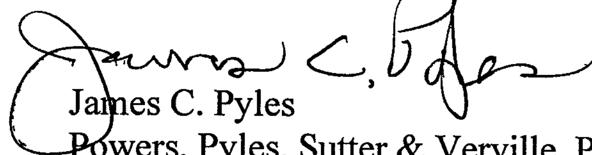
IV. CONCLUSION

For more than seven years, the Board has unsuccessfully campaigned to sanction Dr. Eist for questioning the validity of its absolutist disclosure policy. That policy has been ruled an error of law on five occasions by every independent tribunal to consider the issue. All that has been accomplished by the Board's efforts is that (a) the health information privacy of three patients, one adult and two children, has been violated, (b) access to effective psychotherapy in Maryland has been jeopardized, and (c) the reputation of Dr. Eist as an exceptional, ethical psychiatrist has been confirmed. It is time that the Board's unconstitutional, absolutist policy be permanently laid to rest and the taxpayer's resources be

directed to developing a process for investigating complaints that does not violate the patient's right to privacy and the psychiatrist's standards of ethics.

The decision by the Court of Special Appeals in this case should be affirmed.

Respectfully submitted,



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Dated: March 31, 2008

Certificate of Service

I certify that I have served, by U.S. mail, a copy of the Brief of Amici Curiae on counsel for the Petitioner, the Respondent and the Amicus Curiae Federation of State Medical Boards at the addresses listed below:

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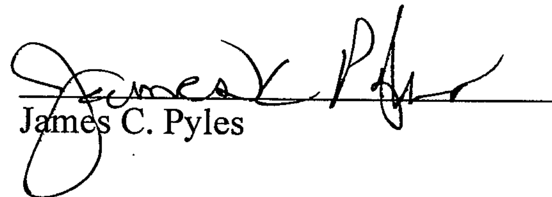

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March 31, 2008