

IN THE  
**CIRCUIT COURT FOR MONTGOMERY COUNTY**

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Harold I. Eist, M.D.,  
*Petitioner,*

vs.

Maryland State Board of  
Physician Quality Assurance,  
*Respondent.*

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Civil Case No. 240300

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**AMICUS CURIAE BRIEF**  
AMERICAN PSYCHIATRIC ASSOCIATION  
AMERICAN ASSOCIATION OF PRACTICING PSYCHIATRISTS  
AMERICAN PSYCHOANALYTIC ASSOCIATION  
ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.  
BALTIMORE-WASHINGTON PSYCHOANALYTIC SOCIETY  
MARYLAND PSYCHIATRIC SOCIETY  
NATIONAL COALITION OF MENTAL HEALTH PROFESSIONALS AND  
CONSUMERS, INC.  
WASHINGTON PSYCHIATRIC SOCIETY

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## **Issue**

Effective psychotherapy is entirely dependent upon the patient's reasonable expectation that communications with their psychotherapist are "privileged" and will not be disclosed without their permission or due process of law. This principle is reflected in the "reason and experience" of the country as recognized by the United States Supreme Court, the United States Constitution, the ethical standards for the practice of psychiatry, and the statutory law of the State of Maryland. In this case, the Board of Physician Quality Assurance issued a subpoena to a psychiatrist, based on a complaint by a non-patient, for sensitive mental health information about patients. The issues in this case are whether the Board improperly sought to compel that disclosure over the patients' repeated objections without obtaining the patients' permission or judicial approval and whether the Board improperly sanctioned the psychiatrist for responding to the subpoena, not by immediately turning over the records, but by asking the board to consider the patients' objections.

## **Preliminary Statement**

The relationship between a therapist and his patient must be one of trust and candor. The patient has the right to expect that he can express his innermost thoughts and emotions to his or her therapist, and that the privacy of this information will be respected. Undermining this confidentiality threatens

the ability of therapists to provide effective treatment, to the ultimate detriment of the mental health of the citizenry.

Additionally, every individual has a constitutional right to privacy with respect to his or her personal health information. This right, coupled with the need to maintain the confidentiality of the therapist-patient relationship, has led to the recognition of a therapist-patient privilege.

The State of Maryland has enacted a therapist-patient privilege into law, but has provided for certain limited exceptions to this privilege. One such exception permits licensing and disciplinary boards to compel the disclosure of medical information in order to investigate the behavior of health professionals. The Board's authority to penetrate the therapist-patient privilege is kept in check by several limitations. For example, though the Board may issue a subpoena, it must petition the courts to enforce it. Additionally, both the health professional that is subpoenaed and the patient whose records are at issue may challenge the subpoena.

It is the position of the *amicus curiae* that the due process provisions for the preservation of effective psychotherapy and the orderly exercise of the Board's authority are critical to the preservation of the constitutional right to privacy and access to quality health care. Accordingly, it is the duty of the courts to ensure that the Board does not unlawfully circumvent the limitations

on its subpoena authority and that individuals are afforded their constitutional and statutory right to protest the disclosure of their mental health records.

In the present case, Dr. Eist provided psychiatric therapy to a mother and her two children. Dr. Eist filed an affidavit in the mother's divorce proceeding affirming her caretaking ability. The husband, apparently in retaliation, filed a complaint with the Board questioning Dr. Eist's professional abilities. In response to this complaint, the Board issued a subpoena to Dr. Eist compelling the disclosure of his patients' medical records. All three patients, directly or through counsel, informed Dr. Eist and the Board that they did not want their mental health records disclosed to the Board. The Board took no action to inform Dr. Eist of his right to challenge the subpoena, and did not provide his patients with the opportunity to challenge the disclosure of their confidential information. Further, when Dr. Eist sought to protect his patients' right to challenge the subpoena, the Board did not seek to compel disclosure of the patients' records by petitioning the courts, but instead unlawfully sanctioned Dr. Eist's actions as a "fail[ure] to cooperate."

The Board's sanction of Dr. Eist should be reversed on the following grounds: (a) effective psychotherapy depends on the patient's reasonable expectation that his or her privacy will be protected; (b) the importance of the therapist-patient privilege and the confidentiality of mental health information

requires that the Board's investigative subpoena authority be limited by the judiciary, as set forth by Maryland law; (c) the Board unlawfully deprived Dr. Eist and his patients of their rights to challenge the subpoena; (d) the Board's punishment exceeds its statutory authority, represents an unlawful procedure, and deprives Dr. Eist of his due process rights; and (e) the Board's decision, if affirmed, would reduce access to quality mental health care in the State of Maryland.

## **Amicus Curiae**

### **A. American Psychiatric Association**

The American Psychiatric Association, with approximately 40,000 members, is the Nation's leading organization of physicians specializing in psychiatry. The Association's members have a strong interest in protecting the confidentiality interests of psychiatric patients and in preserving fair treatment of physicians by medical licensing authorities performing their oversight functions. This case implicates both interests.

### **B. American Association of Practicing Psychiatrists**

The American Association of Practicing Psychiatrists (AAPP) is a nationwide 1,000 member organization of psychiatric physicians who have dedicated themselves to preserving the accessibility and availability of quality psychiatric care for patients, and reasonable reimbursement for the psychiatric

physicians who provide that care. It stands for patients and against the intrusion of third party payers and other parties into the therapeutic relationship of patient and physician.

### **C. American Psychoanalytic Association**

The American Psychoanalytic Association is one of the oldest mental health provider organizations in the country, having been established in 1911, and includes among its 3,500 members, therapists who are physicians, psychiatrists, psychologists, social workers, researchers, and professors of academic medicine.

### **D. Association of American Physicians and Surgeons, Inc.**

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending the ethical practice of private medicine. Founded in 1943, AAPS publishes a newsletter, journal and other materials in furtherance of its goals of patient confidentiality, limited government and the free market. Members of AAPS object to the violation of ethical medicine entailed in the unconsented disclosure of patient information. AAPS has thousands of members in all specialties, including members in Maryland. AAPS litigates on behalf of patient privacy, most recently with respect to the federal Privacy Rule, and it frequently files *amicus curiae* briefs in judicial proceedings. *See, e.g., United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversing, on the strength of AAPS' *amicus curiae* brief, many of

the convictions related to Medicare fraud); see also *United States v. Sell*, 282 F.3d 560 (8th Cir. 2002), *cert. granted*, 123 S. Ct. 512 (2002) (granting *certiorari* as briefed by *Amicus AAPS*).

**E. Baltimore-Washington Psychoanalytic Society**

The Baltimore-Washington Psychoanalytic Society is a professional organization of over 100 psychoanalysts from the local Baltimore-Washington area. These members are psychiatrists, psychologists and social workers who obtained post-graduate training to qualify as psychoanalysts in an institute accredited by The American Psychoanalytic Association.

**F. Maryland Psychiatric Society**

The Maryland Psychiatric Society is a medical specialty society for the State of Maryland, founded in 1950, whose physician members specialize in the diagnosis, treatment and prevention of mental illnesses including substance use disorders. The mission of the Society is to further the science and progress of psychiatry, to preserve high professional and ethical standards, and to protect the therapeutic alliance between the patient and his/her psychiatrist and treating facility. The Society works to support the choice of and access to the best, most effective care for patients, and to aid psychiatrists in achieving the highest degree of professional satisfaction.

### **G. National Coalition of Mental Health Professionals and Consumers, Inc.**

National Coalition of Mental Health Professionals and Consumers (NCMHPC) is a member association of over 1600 consumers, professionals of all mental health disciplines, and consumer advocates who are dedicated to improving the quality and availability of health services for treating mental and emotional distress. NCMHC works to remove barriers to access to quality mental health and substance abuse care such as the loss of health information privacy. NCMHC has members who reside in 41 states, including the State of Maryland.

### **H. Washington Psychiatric Society**

The Washington Psychiatric Society (WPS) is a medical specialty organization composed of approximately 1,000 physicians who specialize in the diagnosis and treatment of mental illnesses, including substance abuse disorders. WPS covers the National Capital Area with regional chapters representing the District of Columbia, Suburban Maryland (Montgomery and Prince George's Counties) and Northern Virginia (Alexandria City, Arlington, Fairfax and Loudon Counties), and is affiliated with the internationally recognized American Psychiatric Association (APA). WPS works to ensure access to humane care and effective treatment for people with mental illnesses.

## Facts

Dr. Harold I. Eist, M.D. is a respected psychiatrist who practices in the metropolitan Washington D.C. area. Dr. Eist filed an affidavit in a divorce proceeding in which he affirmed the caretaking abilities of his patient, Mrs. NS. Upon filing the affidavit, Mrs. NS' spouse, Mr. MFS, filed a complaint against Dr. Eist with the Board, questioning Dr. Eist's professional abilities and claiming that Dr. Eist had over-medicated Mrs. NS and her two sons. In response to this complaint, the Board issued a *subpoena duces tecum* to Dr. Eist, requiring him to, within 10 days, deliver the medical records of Mrs. NS and two of her children, who were also patients of Dr. Eist.

The day after receiving the subpoena (which arrived over one month after it was dated), Dr. Eist responded to the Board's Compliance Analyst. Upon advice of counsel, Dr. Eist questioned the propriety of providing the records in response to a non-patient's complaint during the course of a "bitterly contested" divorce proceeding with his patient and expressed his willingness to cooperate in the investigation with the knowledge and consent of his patients or their guardians, or, in the absence of their consent, a valid decision overruling their objections. Dr. Eist's actions in response to this complaint were in consideration of his patients' privacy and medical well-being.

When the Board took no apparent action to notify Dr. Eist's patients of the subpoena for their records, Dr. Eist informed his patients in writing of the

subpoena and asked whether they would object to the request. An attorney representing the two children did object and filed a report with the Court in Montgomery County refusing to waive their therapist-patient privilege. Dr. Eist also was informed by Mrs. NS that she expressly refused to allow her medical records to be disclosed to the Board in response to the complaint from her estranged spouse. Dr. Eist timely notified the Board of his patients' objections and suggested that the Board contact his patients' attorneys. Their attorneys then contacted the Board directly, explaining Dr. Eist's patients' refusal to waive their confidentiality rights.

Without direct response to either correspondence, the Board sent Dr. Eist a letter giving him forty-eight hours to respond to the original subpoena that was attached to the letter. In response to this letter, Dr. Eist's attorney notified the Board that Dr. Eist was willing to cooperate but that he continued to believe that his patients' objection to the disclosure of their records must be settled by an appropriate court of law. Seven months later, in February 2002, the Board initiated the administrative proceeding against Dr. Eist that is the subject of this appeal. In March of 2002, Dr. Eist's counsel notified his patients at issue of the charges against him and their option to contest the disclosure of their records. After being told by the Board that it had an

absolute right to their records, Mrs. NS and her sons declined to further contest the disclosure. Accordingly, Dr. Eist delivered their records to the Board.

In August 2002, an Administrative Law Judge issued a recommendation to the Board that the Board dismiss its charge against Dr. Eist. The Administrative Law Judge's decision contained the following relevant findings:

1. The therapist-patient privilege in Maryland should be interpreted and applied based on the "reason and experience" of all 50 states and the District of Columbia (including Maryland) as noted in the Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923 (1996). ALJ Decision at 15
2. Dr. Eist continuously expressed his willingness to cooperate with the Board but merely asked that the Board provide a process to reconcile the Board's demands with his legal and ethical obligations to his patients. ALJ Decision at 21.
3. The Board must afford "basic due process protections" set forth in law before it extinguishes patients' statutory privilege and constitutional right to mental health privacy, particularly where patients have expressed their strong objection to the

disclosure of their mental health records by a psychiatrist.

ALJ Decision at 22.

4. These due process protections are essential in order to avoid placing the psychiatrist in “an untenable position” where he receives a subpoena for mental health records based on a complaint by a non-patient and has a legal and ethical duty to honor his patients’ privilege and yet has no legal ability to waive the privilege. ALJ Decision at 22.

Despite the findings in this recommended decision, the Board reprimanded Dr. Eist and fined him \$5,000 for his initial refusal to furnish to the Board his patients’ medical records without their consent.

## **Argument**

### **A. Effective Psychotherapy is Entirely Dependent Upon a Reasonable Expectation by Patients That Communications With Their Psychotherapist Will Not Be Disclosed Without Their Permission**

In 1996, the Supreme Court expressly recognized the central importance of privacy for communications with psychotherapists. That was the basis for the court’s adoption of the “therapist-patient” privilege in *Jaffee v. Redmond*.<sup>1</sup>

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<sup>1</sup> *Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 (1996).

As that decision confirms, effective psychotherapy depends on the strong guarantee that communications that patients make to their therapists will not be further used or disclosed without their consent.

The issue in the *Jaffee* case was whether a plaintiff in a wrongful death case could obtain the medical records of a clinical social worker who had provided counseling sessions to a police officer who had shot and killed an individual while breaking up a fight.<sup>2</sup> The Court concluded that the medical records could not be disclosed without the patient's consent despite the fact that, "[f]or more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence."<sup>3</sup>

After an exhaustive analysis of the statutory and common law at the state and federal levels, the ethical standards of professional associations, and findings of Congressional commissions, the Court in *Jaffee* concluded that the "reason and experience" of the nation shows that "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories,

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<sup>2</sup> *Jaffee*, 116 S. Ct. at 1926.

<sup>3</sup> *Jaffee*, 116 S. Ct. at 1928.

and fears.”<sup>4</sup> Citing a Judicial Conference Advisory Committee report, the

Court noted that a psychiatrist’s ability to help her patients:

[I]s completely dependent upon [the patients’] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.<sup>5</sup>

The Court in *Jaffee* also held that honoring the therapist-patient privilege was in the interest of both the individual patient as well as the public in general. As the Court noted,

The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.<sup>6</sup>

The importance of the privacy of therapist-patient communications to effective psychotherapy is also reflected in the ethical principles of psychiatric professional associations. For example, the American Psychoanalytic Association has adopted the following standard:

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Jaffee*, 116 S. Ct. at 1929.

**IV. Confidentiality.** 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.<sup>7</sup>

Similarly, the guidelines of the American Psychiatric Association provide that “[c]onfidentiality is essential to psychiatric treatment. . . . When the psychiatrist is in doubt, the right of the patient to confidentiality and, by extension, to unimpaired treatment should be given priority.”<sup>8</sup>

The present case before the Court affects whether future patients in need of psychotherapy in Maryland will be afforded a reasonable expectation of privacy. As discussed above, this expectation of privacy is a prerequisite to effective mental health treatment.

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<sup>7</sup> American Psychoanalytic Ass’n, Principles and Standards of Ethics for Psychoanalysts § 4.

<sup>8</sup> American Psychiatric Ass’n, The Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry § 4 (2001 Edition).

**B. The Importance of the Therapist-Patient Privilege Requires Enforcement of the Limitations on the Board's Subpoena Authority.**

*1. The State Has a Duty to Maintain the Privacy of Mental Health Information.*

In order for a therapist to provide effective treatment to an individual experiencing a mental or emotional problem, a relationship of complete candor must exist.<sup>9</sup> A therapist often must know the patient's memories, emotions, fears, and desires.<sup>10</sup> Most patients will not divulge such intimate information unless they are secure in the knowledge that their communications will be kept in confidence.

In recognition of the importance of confidentiality in the patient-therapist relationship, all fifty states and the District of Columbia have enacted privileges protecting mental health information.<sup>11</sup> Maryland statutorily enacted its therapist-patient privilege in 1963.<sup>12</sup> According to the statute:

Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or the patient's authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing:

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<sup>10</sup> *Jaffee*, 116 S. Ct. at 1929.

<sup>11</sup> *Id.* at 1930.

<sup>12</sup> *Goldsmith v. State of Maryland*, 337 Md. 112, 144, 651 A.2d 866, 882 (1993).

- (1) Communications relating to diagnosis or treatment of the patient; or
- (2) Any information that by its nature would show the existence of a medical record of the diagnosis or treatment.<sup>13</sup>

“Patient” is defined in the statute as “a person who communicates or receives services regarding the diagnosis or treatment of his mental or emotional disorder from a psychiatrist, licensed psychologist, or any other person participating directly or vitally with either in rendering those services in consultation with or under direct supervision of a psychiatrist or psychologist.”<sup>14</sup> Therefore, the Maryland privilege is limited to mental health services and does not extend to health care services in general.

Even in the absence of a statutory privilege, both the Supreme Court and Maryland courts have recognized a constitutional right to privacy of highly personal information.<sup>15</sup> In *Dr. K. v. State Board of Physician Quality Assurance*, the court recognized that a patient seeking care for mental or emotional problems has a constitutional right to the privacy of his or her

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<sup>13</sup> Md. Code Ann., Cts. & Jud. Proc. § 9-109(b).

<sup>14</sup> Md. Code Ann., Cts. & Jud. Proc. § 9-109(a)(3).

<sup>15</sup> *Whalen v. Roe*, 429 U.S. 589 (1977); *Dr. K. v. State Board of Physician Quality Assurance*, 98 Md. App. 103, 632 A.2d 453 (Md. Ct. Spec. App. 1993)

mental health information.<sup>16</sup> While the constitutional right to privacy with respect to health information is not absolute, it should not be set aside lightly.

2. *Under Maryland Law, the Exemption to the Therapist-Patient Privilege for Board Investigatory Subpoenas Is Subject to Judicial Oversight.*

There are a limited number of exceptions to the therapist-patient privilege. One such exception permits disclosure of medical records in response to the subpoena of a licensing or disciplinary board:

A health care provider shall disclose a medical record without the authorization of a person in interest:

(vi) In accordance with a subpoena for medical records on specific recipients:

1. To health professional licensing and disciplinary boards for the sole purpose of an investigation regarding licensure, certification, or discipline of a health professional or the improper practice of a health profession.<sup>17</sup>

Though the legislature created an exception to the therapist-patient privilege for licensing and disciplinary boards, the judiciary has been granted a level of oversight over such disclosures. For example, the Board may issue a subpoena, but it cannot independently enforce it. Maryland law states that “[i]f, without lawful excuse, a person disobeys a subpoena from the Board or

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<sup>16</sup> *Dr. K.*, 98 Md. App. at 112, 632 A.2d at 457.

<sup>17</sup> Md. Code Ann., Health Gen. § 4-307(k)(1).

an order by the Board to take an oath or to testify or answer a question, then, on petition of the Board, a court of competent jurisdiction may punish the person as for contempt of court.”<sup>18</sup> Furthermore, the statute granting the Board an exemption from the privilege also states that “[t]his subsection may not preclude a health care provider, a recipient [of mental health services], or person in interest from asserting in a motion to quash or a motion for a protective order any constitutional right or other legal authority in opposition to disclosure.”<sup>19</sup>

The involvement of the judiciary is an integral part of the Board’s subpoena power. The statutory right of a therapist or patient to seek a protective order or to quash the subpoena ensures that these parties can preserve the confidentiality of psychotherapist records when disclosure to the Board is unwarranted. Likewise, the statutory enforcement mechanism for a Board subpoena – requiring the Board to petition a court to hold the subpoenaed individual in contempt – ensures that a party that refuses to disclose confidential records is afforded the due process in a court of law. The Board’s actions represent an attempt to circumvent these restrictions, first by

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<sup>18</sup> Md. Code Ann., Health Occ. § 14-206(b).

<sup>19</sup> Md. Code Ann. Health Gen. § 4-307(k)(6).

attempting to independently enforce its subpoena rather than complying with its statutory obligation to petition the court, and second by punishing a therapist for attempting to preserve his and his patients' due process rights under law.

Because patients have a constitutional and statutory right to the privacy of their mental health records and effective psychotherapy requires such confidentiality, it is critical that any infringement on this right – such as the Board's subpoena power – be narrowly construed and strictly supervised. To permit otherwise would lead to a substantial loss of personal privacy for individuals who seek counseling for mental and emotional disorders and would substantially undermine therapists' ability to furnish effective care.

Accordingly, it is the position of the *amicus curiae* that the Court should set aside the Board's punishment of Dr. Eist because the Board's sanction represents an unlawful attempt to circumvent the judicial oversight of its subpoena authority. While the Maryland legislature has seen fit to provide the Board with the authority to compel disclosure of mental health records, it is the duty of the Court to ensure that this authority is not abused.

**C. The Board Unlawfully Deprived Dr. Eist and His Patients of Their Statutory Rights to Challenge the Subpoena.**

*1. The Board Did Not Notify Dr. Eist of His Right to Challenge the Subpoena and Punished Him For Protecting His Patients' Right to Challenge the Subpoena.*

Maryland law permits a therapist or patient to challenge a Board subpoena.<sup>20</sup> The Board's actions represent an attempt to inhibit – and ultimately punish – the exercise of this right.

Upon receiving the Board's subpoena, Dr. Eist immediately made clear that he personally objected to the subpoena and that his patients likewise had a right to object. Despite Dr. Eist's unambiguous objection, the Board did not inform Dr. Eist of his statutory right to challenge the subpoena through a protective order or a motion to quash. Instead, the Board responded with threats of a sanction.

Dr. Eist timely informed the Board that he would cooperate with the subpoena if the patients at issue consented to the disclosure or if any of their objections were overruled after they were afforded due process:

I will be pleased to cooperate fully with any investigator with the consent of the patients (including any guardian necessary to waive the children's privilege), or, if the patients object and take steps to protect their communications[,] with

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<sup>20</sup> Md. Code Ann., Health Gen. § 4-307(k)(6).

any appropriate decision overruling their objections and requiring that I furnish the information.<sup>21</sup>

If Dr. Eist furnished his patient records to the Board within the 10-day period set forth by the subpoena, without his patients first receiving notice of the subpoena and the opportunity for them to object, then he would have been a party to the unlawful deprivation of their statutory rights.

In a second correspondence, the Board gave Dr. Eist forty-eight hours to disclose the records and threatened sanctions for his failure to comply. Dr. Eist's attorney reiterated Dr. Eist's intention to protect his patients' right to challenge the subpoena:

What action has been taken with respect to [the letter from the lawyer for Mrs. NS]? . . . It would appear that it is incumbent upon the Board to address [Mrs. NS's] communications, as well as those made on behalf of her children. It should not be Dr. Eist's responsibility to say to them that they have no confidentiality rights.<sup>22</sup>

A patient's right to challenge a Board subpoena is rendered meaningless if the patient's therapist discloses the information prior to the patient's opportunity to challenge the subpoena or while such a challenge is pending.

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<sup>21</sup> Letter of Dr. Eist to Board dated April 20, 2001, as quoted at Defendants Motion to Dismiss or For Summary Judgment, Case No. DHMH-BPQA-71-0200200002, Administrative Law Judge of the Maryland Office of Administrative Hearings, at p. 8.

<sup>22</sup> Letter of Dr. Eist's Counsel to Board dated July 11, 2001, as quoted at Defendants Motion to Dismiss or For Summary Judgment, Case No. DHMH-BPQA-71-0200200002, Administrative Law Judge of the Maryland Office of Administrative Hearings, at p. 15.

Once again, Dr. Eist protected his patients' rights, despite the threat of sanction by the Board.

The Board's actions impermissibly punish Dr. Eist for his efforts to protect his patients' confidentiality rights. Dr. Eist was placed in the untenable situation of either becoming a party to the deprivation of his patients' confidentiality rights or risking sanction by the Board. Dr. Eist's ethical obligations required the latter course of action.

In order to preserve the confidentiality of mental health information and to protect the therapist-patient privilege, it is imperative that therapists are formally informed of their statutory right to challenge a Board subpoena and are given the opportunity to protect their patients' confidentiality rights. The Court must not permit the Board to circumvent patient rights by bullying therapists into disclosing records without offering the patient a chance to challenge the Board's order. The therapist-patient privilege belongs to the patient; it is not the place of a patient's therapist to deprive the patient of this privilege, even if compelled by the Board, without first affording the patient the due process of law.

2. *The Board Unlawfully Deprived Dr. Eist's Patients of Their Right to Challenge the Subpoena.*

The therapist-patient privilege belongs to the patient. Accordingly, a recipient of mental health services has a statutory right to challenge a Board

subpoena requesting that patient's records.<sup>23</sup> This right is only meaningful, however, if the patient is informed of the subpoena. "No principle is more fundamental to our system of judicial administration than that a person is entitled to notice before adverse judicial action is taken against him."<sup>24</sup>

The Court of Special Appeals of Maryland, in *Warner v. Lerner*<sup>25</sup>, has held that, where a Maryland statute permits the disclosure of patient medical records without the patient's authorization, the patient is nevertheless entitled to notice of the intended use of the records and the opportunity to oppose the disclosure of the records.

This same issue was also recently adjudicated by a federal district court in *United States v. Sutherland*.<sup>26</sup> In *Sutherland*, the court grappled with whether a hospital was permitted to disclose patients' pharmacy records in response to a subpoena without first providing notice to the patients and the opportunity for them to object. The court held that "in light of the strong federal policy in favor of protecting the privacy of medical records, [the court]

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<sup>23</sup> Md. Code Ann., Health Gen. § 4-307(k)(6).

<sup>24</sup> *Lugo v. Keane*, 15 F.3d 29, 30 (2<sup>nd</sup> Cir. 1994).

<sup>25</sup> *Warner v. Lerner*, 115 Md. App. 428, 436, 693 A.2d 394, 398 (Md. Ct. Spec. App. 1997), *rev'd on other grounds*, 348 Md. 733, 705 A.2d 1169 (1998).

<sup>26</sup> *United States v. Sutherland*, 143 F. Supp. 2d 609 (W.D. Va. 2001).

find[s] that it would be ‘unreasonable or oppressive’ to permit disclosure of these records at trial without opportunity for the affected patient to object.”<sup>27</sup>

The federal Privacy Rule, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), also emphasizes the importance of providing patients an opportunity to object to disclosure of their medical information.<sup>28</sup> As with Md. Code Ann., Health Gen. §4-307(k)(6)(vi), the federal Privacy Rule permits disclosure of patient health information without the authorization of the patient.<sup>29</sup> The Rule, however, only permits such disclosure after the health care facility (or other covered entity that is the subject of the subpoena) receives “satisfactory assurance,” in the form of written documentation, that attests that: (a) the patient whose records are subject to disclosure has been provided notice of the subpoena; (b) the patient has been apprised of his or her right to object to the subpoena, and (c) the time for objection has elapsed or any objection has been judicially or administratively resolved.<sup>30</sup> While the subpoena at issue in this appeal was issued prior to the compliance date of the federal Privacy Rule, the Rule

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<sup>27</sup> *Id.* at 613, quoting Fed. R. Crim. P. 17(c).

<sup>28</sup> 45 CFR § 164.512(e).

<sup>29</sup> *Id.*

<sup>30</sup> 45 C.F.R. § 164.512(e)(iii).

nevertheless provides sound guidance as to the need to provide patients with notice of, and the opportunity to object to, a subpoena requiring disclosure of their medical information. Further, this process would be required in Maryland as of April 14, 2003 because the federal law under HIPAA preempts state law that is less protective of privacy rights. 45 CFR 160.203.

The Board did not send a copy of its subpoena to the patients whose records are at issue. Even when Dr. Eist requested that the Board correspond with the patients in order to provide them with the opportunity to consent to or challenge the subpoena, the Board still did not inform the patients of the subpoena. Instead, Dr. Eist had to inform the patients of the subpoena himself.

The Board also did not inform the patients of their right to challenge the subpoena. When the patients stated their objection to the subpoena, the Board apparently instructed the patients that it had an absolute right to their records and that they had no right to challenge the subpoena. Accordingly, the patients – believing that any objection was futile – eventually consented to the disclosure of their records.

The Board's misinformation to Dr. Eist's patients, whether grounded in ignorance or an intention to unlawfully quash any dissent, deprived Dr. Eist's patients of their statutory rights to challenge the subpoena. The Board now seeks to punish Dr. Eist for his interference with this injustice. Because the

Board's actions unlawfully deprived Dr. Eist's patients of their statutory and constitutional right to challenge the compelled disclosure of their personal information, and because all of Dr. Eist's actions were merely an attempt to prevent this unlawful conduct, the Court should vacate the sanction of Dr. Eist's conduct.

**D. The Board's Sanction of Dr. Eist Exceeds the Board's Authority, Deprives Dr. Eist of His Right to Due Process, and Is Otherwise Unlawful**

*1. The Board's Sanction Exceeds Its Statutory Authority.*

Maryland law expressly grants the Board a single avenue for enforcing a subpoena. If the recipient of a subpoena refuses to obey it, then the Board may petition a court of competent jurisdiction to hold the individual in contempt.<sup>31</sup> As discussed earlier, this check on the Board's authority is an essential means of protecting the patient's constitutional right to the privacy of his or her mental health information.

If the Board disagreed with Dr. Eist's objection, it had the opportunity to petition a court of competent jurisdiction to hold Dr. Eist in contempt. The

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<sup>31</sup> Md. Code Ann., Health Occ. § 14-206(b).

Board was well aware of this right; it cites it in the subpoena itself. The Board chose not to exercise this option.

The Board's sanction for allegedly disobeying a subpoena is a usurpation of the judiciary's authority that exceeds the Board's statutory authority. The Maryland legislature placed the duty of enforcing a Board subpoena with the courts, not the Board itself.

The Board claims that it may discipline a therapist who objects to a subpoena on the grounds that the therapist has "fail[ed] to cooperate with a lawful investigation conducted by the Board."<sup>32</sup> The Board's interpretation of its authority has no statutory basis. While the Board may punish a physician for obstructing an investigation, the Board may not use this provision to circumvent the statutory process for enforcing a subpoena. Moreover, the Board may not use this provision to penalize a therapist who chooses to challenge the Board's subpoena or who takes the necessary steps to ensure that his patients have the opportunity to challenge the subpoena.

The Court may set aside any agency decision that exceeds the agency's statutory authority.<sup>33</sup> The Board has exceeded its authority in this

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<sup>32</sup> Md. Code Ann., Health Occ. § 14-404(a)(33).

<sup>33</sup> Md. Code Ann., State Gov't § 10-222(h)(3).

circumstance, enforcing a subpoena when such authority has been expressly assigned to the courts. Further, the Board has exceeded its authority by punishing a therapist for “fail[ure] to cooperate” with an investigation merely by objecting to a subpoena and seeking to preserve his patients’ right to challenge it. Because the Board has exceeded its authority, the Court should set aside its decision.

*2. The Board’s Sanction Is Unlawful.*

Similarly, the Court may set aside an agency decision if it results from an unlawful procedure.<sup>34</sup> A patient has a statutory right to challenge a Board subpoena for disclosure of the patient’s records.<sup>35</sup> Nevertheless, the Board sought to obtain the records of Dr. Eist’s patients without permitting them the opportunity to exercise this right. This constitutes an unlawful procedure. Furthermore, Maryland law requires the Board to petition a court if it seeks to enforce a subpoena.<sup>36</sup> The Board, however, has taken this responsibility upon itself. This too represents an unlawful procedure. Accordingly, pursuant to the Maryland Administrative Procedure Act, the Court should vacate the Board’s

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<sup>34</sup> Md. Code Ann., State Gov’t § 10-222(h)(3).

<sup>35</sup> Md. Code Ann., Health Gen. § 4-307(k)(6).

<sup>36</sup> Md. Code Ann., Health Occ. § 14-206(b).

sanction of Dr. Eist on the grounds that the sanction constitutes an unlawful procedure.

3. *The Board's Sanction Deprives Dr. Eist of His Right to Due Process.*

The Board is punishing Dr. Eist for objecting to its subpoena and for attempting to preserve his patients' right to challenge the subpoena. This punishment violates Dr. Eist's right to due process because the Board's interpretation of its statutory authority renders Maryland law impermissibly vague.

The Court of Appeals of Maryland has held that a statute must "be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . . a statute which either forbids or requires the doing of an act in terms so vague that men [or women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."<sup>37</sup>

Similarly, the Supreme Court has recently held that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person

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<sup>37</sup> *Ferro v. Lewis*, 348 Md. 593, 607, 705 A.2d 311, 318 (1998), quoting *Connally v. General Const. Co.*, 269 U.S. 385 (1926)

receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”<sup>38</sup>

A reasonable person could not foresee that it is a punishable offense for a therapist to heed his patients’ wishes and attempt to preserve their statutory right to challenge a subpoena for their health records. The Board’s interpretation of what constitutes a “fail[ure] to cooperate with a lawful investigation” renders the language so vague that any lawful challenge to a subpoena may constitute a punishable offense.

Because compliance with a subpoena represents an irrevocable – and potentially unethical – breach of patient confidentiality that in this case was clearly contrary to the patients’ wishes, prudence required Dr. Eist to proceed with caution in responding to the Board’s subpoena. He had no notice that exercising such caution represents a “fail[ure] to cooperate.” In fact, even after the sanction of Dr. Eist, the line between a lawful challenge of a Board subpoena and an unlawful failure to cooperate with an investigation remains obscure. It is unclear whether a therapist can lawfully comply with a subpoena without providing the individual whose information is sought the opportunity to respond or object. Accordingly, the Court should reverse the Board’s

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<sup>38</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003), quoting *BMW of North*

interpretation of its statutory authority, since that interpretation does not “afford[] a reasonable opportunity to know what is prohibited, so that [persons of ordinary intelligence] may govern their behavior accordingly.”<sup>39</sup>

**E. The Practical Effect of the Board’s Decision is to Reduce Access to Quality Mental Health Care**

It must be remembered that the complaint on which the Board’s subpoena was based was from a non-patient, the estranged spouse of a patient, in response to a statement filed by Dr. Eist in a bitter divorce proceeding. The wife and the two children, who were ongoing patients of Dr. Eist, strongly and repeatedly objected to the release of their mental health records. Thus, Dr. Eist was placed in the “untenable” position of complying with the Board’s demands or complying with his patients’ wishes, the ethical standards of his profession and his professional judgment. The Board failed to afford Dr. Eist or his patients with a process for resolving this conflict.

If the Board’s sanction of Dr. Eist under the facts of this case is upheld, therapists in Maryland would have an ethical obligation to inform their patients

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*America, Inc. v. Gore*, 517 U.S. 559, 574 (1996).

<sup>39</sup> *Ferro v. Lewis*, 348 Md. at 607, 705 A.2d at 318, quoting *Bowers v. State*, 283 Md. 115, 122, 389 A.2d 341, 346 (1978)

that therapist-patient communications under such circumstances may not remain private, thereby impairing the quality of the therapy provided.<sup>40</sup>

As the Supreme Court noted in *Jaffee*, “[i]f the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.”<sup>41</sup>

Unfortunately, the factual circumstances of this case are not unique. If the Board’s sanction of Dr. Eist were upheld, then it is more likely that complaints to the Board will be used as a litigation tactic in domestic disputes. The unfortunate and ironic result would be that the Maryland Board of Physician Quality Assurance could be used to attack and limit access to quality mental health care in Maryland.

By contrast, if the Board were simply required to provide notice and an opportunity for patients to protect the privacy of their mental health information, the Board’s duties could be discharged in an orderly fashion without jeopardizing access to quality health care. There is little chance that information needed by the Board to assure the quality of health care will be

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<sup>40</sup> See *Laznovsky*, 357 Md. at 598.

<sup>41</sup> *Jaffee*, 116 S. Ct. at 1929.

lost because it is unlikely that the communications will ever take place if the privilege is not protected.<sup>42</sup>

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<sup>42</sup> See *Jaffee*, 116 S.Ct. at 1929.

## Conclusion

The Court should vacate the Board's decision to reprimand and fine Dr.

Eist:

- The Board's has undermined the therapist-patient privilege and threatened the ability of therapists to effectively treat patients by unlawfully circumventing judicial supervision of its administrative subpoena power.
- The Board has unlawfully deprived Dr. Eist and his patients of their rights to challenge its subpoena.
- The Board has exceeded its authority by enforcing a subpoena, acted in an unlawful manner, and deprived Dr. Eist of his right to due process.
- The Board's decision will reduce access to quality mental health care in the State of Maryland.

Accordingly, for the reasons set forth above, the Court should find in favor of the petitioner, Dr. Eist.

Respectfully Submitted,

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## Certificate of Service

A copy of this document was delivered via first-class mail on May 28,

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## **Certification of Admission to Practice in the State of Maryland**

In accordance with Rule 1-313, I hereby certify that I am licensed to practice law in the State of Maryland. I was admitted before the Maryland Court of Appeals on December 12, 2000.

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Adam H. Greene

### **Schedule of Exhibits**

- Tab A. Md. Code Ann., Cts. & Jud. Proc. § 9-109
- Tab B. Md. Code Ann., Health Gen. § 4-307
- Tab C. Md. Code Ann., Health Occ. § 14-206
- Tab D. *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996)