

MONTGOMERY, McCracken, Walker & Rhoads, LLP  
ATTORNEYS AT LAW

STACY ALISON FOLS  
ADMITTED IN NEW JERSEY & PENNSYLVANIA

DIRECT DIAL  
856-488-7729

sfols@mmwr.com

LIBERTYVIEW  
457 HADDONFIELD ROAD, SUITE 600  
CHERRY HILL, NJ 08002  
856-488-7700  
FAX 856-488-7720

123 SOUTH BROAD STREET  
AVENUE OF THE ARTS  
PHILADELPHIA, PA 19109  
215-772-1500  
FAX 215-772-7620

300 DELAWARE AVENUE, SUITE 750  
WILMINGTON, DE 19801  
302-504-7800  
FAX 302-504-7820

1235 WESTLAKES DRIVE, SUITE 200  
BERWYN, PA 19312  
610-889-2210  
FAX 610-889-2220

September 1, 2004

**Via Hand-Delivery**

Marcia M. Waldron, Clerk  
United States Court of Appeals for the Third Circuit  
United States Courthouse  
601 Market Street, Room 21400  
Philadelphia, PA 19106-1790

Re: **Citizens for Health, et al. v. Tommy G. Thompson, Secretary,  
U.S. Department of Health and Human Services  
No. 04-2550**

---

Dear Ms. Waldron:

I am enclosing (1) the original and 10 copies of the *Amici Curiae* Brief of The National Association of Social Workers and The Pennsylvania Chapter of the National Association of Social Workers Supporting Appellants and In Favor of Reversal, including a Certificate of Compliance with the type volume limitation and a Certification Pursuant to L.A.R. 46.1(e), and (2) the original and two copies of an **Entry of Appearance**. Kindly file the originals and required copies and return a time-stamped copy of the brief and Entry of Appearance to the courier who is hand-delivering these papers.

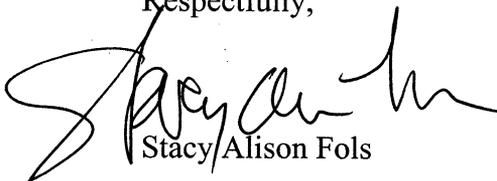
I have obtained consent of the parties to file this *amici curiae* brief.

1077209v1

Marcia M. Waldron, Clerk  
United States Court of Appeals for the Third Circuit  
September 1, 2004  
Page 2

Thank you for your attention to this matter.

Respectfully,



Stacy/Alison Fols

SAF:med  
Enclosures

cc: James C. Pyles, Esquire (w/encs.-2 copies) (*via overnight mail*)  
Peter Winebrake, Esquire (w/enc.-1 copy) (*via regular mail*)  
Robert N. Feltoon, Esquire (w/encs.-1 copy) (*via regular mail*)  
Charles Scarborough, Esquire (w/encs.-2 copies) (*via overnight mail*)

Marcia M. Waldron, Clerk  
United States Court of Appeals for the Third Circuit  
September 1, 2004  
Page 3

bcc: Carolyn I. Polowy, Esquire (w/encs.) (*via PDF and regular mail*)  
Sherri Morgan, Esquire (w/encs.) (*via PDF and regular mail*)  
Susan L. Burke, Esquire (w/encs.) (*via PDF and interoffice mail*)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-2550

CITIZENS FOR HEALTH, et al. vs. TOMMY G. THOMPSON, Secretary, U.S. Department of Health and Human Services

The Clerk will enter my appearance as Counsel of Record for (please list names of all parties represented, using additional sheet(s) if needed):

The National Association of Social Workers
The Pennsylvania Chapter of the National Association of Social Workers

who IN THIS COURT is (please check only one):

Petitioner(s) Appellant(s) Intervenor (s)
Respondent(s) Appellee(s) X Amicus Curiae

(Type or Print) Name Stacy Alison Fols, Esquire
Mr. Ms. Mrs. Miss

Firm Montgomery, McCracken, Walker & Rhoads, LLP

Address LibertyView, 457 Haddonfield Road, Suite 600

City & State Cherry Hill, NJ

Zip Code 08002

Phone (856) 488-7700

Fax (856) 488-7720

PLEASE TYPE E-Mail Address sfols@mmwr.com

SIGNATURE OF COUNSEL: [Handwritten Signature]
Stacy Alison Fols

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE AND ONLY THAT ATTORNEY WILL BE THE ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT OR WHO HAVE SUBMITTED A PROPERLY COMPLETED APPLICATION FOR ADMISSION TO THIS COURT'S BAR MAY FILE AN APPEARANCE FORM. (BAR ADMISSION IS WAIVED FOR FEDERAL ATTORNEYS.)

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED AND THAT COUNSEL SIGN THE FORM IN THE APPROPRIATE AREA.

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

No. 04-2550

---

Citizens For Health, American Psychoanalytic Association, American Association For Health Freedom, New Hampshire Citizens For Health Freedom, American Mental Health Alliance, American Association Of Practicing Psychiatrists, Health Administration Responsibility Project, Congress Of California Seniors, National Coalition Of Mental Health, Professionals And Consumers, California Consumer Health Care Council, American Association Of Practice Psychiatrists, Sally Scofield, Eugene B. Meyer, Daniel S. Schrage, Morton Zivan, Michaelae Dunlap, Tedd Koren, Jane Doe, Janice Chester, Deborah Peel,

Plaintiffs/Appellants,

v.

Tommy G. Thompson, Secretary,  
U.S. Department of Health and Human Services,

Defendant/Appellee.

---

On Appeal From The United States District Court  
For The Eastern District Of Pennsylvania  
Civil Action No. 03-2267  
(Honorable Mary A. McLaughlin, District Judge)

---

**AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF  
SOCIAL WORKERS AND THE PENNSYLVANIA CHAPTER OF  
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS  
SUPPORTING APPELLANTS AND IN FAVOR OF REVERSAL**

---

Attorneys for the National Association of Social Workers and  
The Pennsylvania Chapter of the National Association of Social Workers:

Of Counsel:

Susan L. Burke  
Stacy Alison Fols  
MONTGOMERY, MCCrackEN,  
WALKER & RHOADS, LLP  
123 South Broad Street  
Philadelphia, PA 19109  
215-772-1500

Carolyn I. Polowy  
Sherri Morgan  
NATIONAL ASSOCIATION OF  
SOCIAL WORKERS  
750 First Street, NE, Suite 700  
Washington, D.C. 20002-4241  
202-408-8600

# TABLE OF CONTENTS

	Page
I. STATEMENT OF INTEREST.....	1
A. Identity Of NASW.....	1
B. NASW’s Interest In The Case.....	2
C. NASW’s Authority To File.....	4
II. SUMMARY OF ARGUMENT.....	4
III. ARGUMENT.....	5
A. The Individual’s Right To Control Disclosure Of Personal Health Information Given To Social Workers Is A Well- Established And Essential Right.....	5
1. Supreme Court Jurisprudence Protects Confidentiality In The Social Worker/Client Relationship.....	5
2. The U.S. Constitution Protects The Privacy Of Medical Records.....	9
3. Established Standards For Professional Social Workers Protect Privacy And Give Clients Control Over Their Own Sensitive Health Information.....	10
4. HIPAA Itself, If Properly Implemented, Would Protect Confidentiality And Prevent The Unwanted Dissemination Of Sensitive Mental Health Information.....	10
B. As Currently Implemented, HIPAA’s Privacy Rule Fails To Protect Potentially Stigmatizing Mental Health Information And Must Be Changed To Mandate Patient Consent To Disclosure.....	12
1. The Original Rule Protected Confidentiality By Making Client Consent To Disclosure Mandatory.....	12
2. The Amended Rule Does Not Require Consent To Disclosure For TPO Purposes.....	13
3. The “Optional” Consent Alternative In HIPAA Undermines Privacy And Confidentiality.....	14
a. If Consent Is Not Required, Unacceptable Inconsistency Will Result.....	15

## TABLE OF CONTENTS

(continued)

	<b>Page</b>
b.    If Consent Is Not Required, Clients Will Be Discouraged From Seeking Needed Treatment.....	16
c.    If Consent Is Not Required, Social Workers Will Be Forced Either To Contend With Unreasonable Complexity Or To Lower Existing Privacy Standards.....	16
4.    The Protection HIPAA Affords “Psychotherapy Notes” Does Little To Protect Most Mental Health Records. ....	17
IV.    CONCLUSION.....	20

## TABLE OF AUTHORITIES

Page

### Cases

<u>Citizens for Health v. Thompson</u> , No. Civ.A. 03-2267, 2004 WL 765356 (E.D. Pa. 2004).....	12, 13, 14
<u>Fraternal Order of Police v. City of Philadelphia</u> , 812 F.2d 105 (3d Cir. 1987).....	9
<u>In re Grand Jury Proceedings (Gregory P. Violette)</u> , 183 F.3d 71 (1st Cir. 1999).....	6
<u>Jaffee v. Redmond</u> , 518 U.S. 1 (1996).....	passim
<u>U.S. v. Chase</u> , 340 F.3d 978 (9th Cir. 2003).....	6
<u>U.S. v. Gill</u> , 99 F.3d 484 (1st Cir. 1996).....	6
<u>U.S. v. Glass</u> , 133 F.3d 1356 (10th Cir. 1998) .....	6
<u>U.S. v. Hayes</u> , 227 F.3d 578 (6th Cir. 2000) .....	6
<u>U.S. v. Schwensow</u> , 151 F.3d 650 (7th Cir. 1998).....	6
<u>United States v. Westinghouse Electric Corp.</u> , 638 F.2d 570 (3d Cir. 1980).....	9
<u>Whalen v. Roe</u> , 429 U.S. 589 (1977).....	9

### Statutes

225 Ill. Comp. Stat. 20/16 .....	8
Ariz. Rev. Stat § 32-3283.....	8
Ark. Code Ann. § 17-103-107.....	8
Colo. Rev. Stat. Ann. § 12-43-218.....	8
D.C. Code Ann. § 14-307.....	8

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
Del. Code Ann. tit. 24 .....	8
Ind. Code Ann. § 25-23.6-6-1 .....	8
Iowa Code § 622.10 .....	8
La. Rev. Stat. Ann. § 37:2718 .....	8
Mass. Gen. Laws ch. 112 .....	8
Me. Rev. Stat. Ann. tit 32.....	8
Mich Comp. Laws Ann. § 333.181513 .....	8
Miss. Code Ann. § 73-53-17 .....	8
Mo. Rev. Stat. § 337.636.....	8
Mont. Code Ann. § 37-22-401 .....	8
N.J. Stat. Ann. § 45:15BB-13 .....	8
N.M. Stat. Ann. § 61-31-24.....	8
Okla. Stat. Ann. tit. 59.....	8
S.C. Code Ann. § 19-11-95 .....	8
S.D. Codified Laws Ann. § 36-26-30 .....	8
S.D. Codified Laws Ann. §36-26-32 .....	1
Tenn. Code. Ann. § 63-23-107 .....	8
W. Va. Code § 30-30-12 .....	8
Wis. Stat. Ann. § 905.04 .....	8
 <b><u>Regulations</u></b>	
65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000) .....	11

## TABLE OF AUTHORITIES

(continued)

	Page
65 Fed. Reg. 82,462, 82,464 (Dec. 28, 2000) .....	12
45 C.F.R. 164.501 .....	18
Alaska Admin. Code tit. 12.....	1
Cal. Bus. & Prof. Code § 4992.3 .....	8
Cal. Code Regs. tit. 5 .....	1
Code Me. R. § 02-416.....	1
Conn. Agencies Regs. § 19-13-D4b.....	1
Ill. Admin. Code tit. 68 .....	1
Mass. Regs. Code tit. 258.....	1
Miss. Regs. § 50 032 001 .....	1
N.H. Code Admin. Rules Mhp 501.02.....	1
N.Y. C.P.L.R. 4508 .....	8
OAC 675:20-1-6.....	1
Ohio Admin. Code § 4757-5-01 .....	1
R.I. Code R. 15 050 001.....	1
Tenn. Comp. R. & Regs. 1365-1-.13 .....	1
Utah Admin. Code R156-60a-502 .....	1
Wash. Admin. Code § 180-78A-270 .....	1
Wyoming Mental Health Professions Board, Rules, Ch. 11 .....	1

**TABLE OF AUTHORITIES**  
(continued)

**Page**

**Other References**

*Social Work Speaks, National Association of Social Workers  
Policy Statements 55 (6th ed. 2003-2006)..... 3*

**I. STATEMENT OF INTEREST**

**A. Identity Of NASW.**

With 153,000 members, the National Association of Social Workers (“NASW”) is the largest organization of professional social workers in the world. The Pennsylvania Chapter of NASW represents 6,328 members. Established in 1955, NASW’s purposes include improving the quality and effectiveness of social work practice in the United States, developing and disseminating standards for social work practice, and strengthening and unifying the social work profession as a whole. To further these purposes, NASW promulgates professional standards and criteria, including *Standards for the Practice of Clinical Social Work* and *Guidelines for Clinical Social Work Supervision*. NASW also conducts research, prepares studies of interest to the profession, sponsors the NASW Press, provides opportunities for continuing education, and enforces the *NASW Code of Ethics*, which NASW members are required to honor. In fact, to date sixteen states<sup>1</sup> have expressly adopted NASW’s Code of Ethics into some aspect of their licensing or

---

<sup>1</sup> See Alaska Admin. Code tit. 12, § 18.150; Cal. Code Regs. tit. 5, § 80632.3; Conn. Agencies Regs. § 19-13-D4b; Ill. Admin. Code tit. 68, §1470.96; Code Me. R. § 02-416; Mass. Regs. Code tit. 258, § 20.01; Miss. Regs. § 50 032 001; N.H. Code Admin. Rules Mhp 501.02; Ohio Admin. Code § 4757-5-01; OAC 675:20-1-6; R.I. Code R. 15 050 001; S.D. Codified Laws Ann. §36-26-32; Tenn. Comp. R. & Regs. 1365-1-.13; Utah Admin. Code R156-60a-502; Wash. Admin. Code § 180-78A-270; Wyoming Mental Health Professions Board, Rules, Ch. 11.

other social work laws. NASW also offers a credentialing program to enhance the professional standing of social workers.

NASW's members are highly trained and experienced social workers who provide professional and clinical services to individuals, families, and communities in a variety of settings, including hospitals, private practices, mental health clinics, employer assistance programs, senior centers, nursing homes and social services agencies. The practice of social work requires knowledge of various subjects, including human development and behavior; social, economic and cultural institutions; and the interaction of all of these factors. Clinical social workers are required to complete an advanced graduate degree and a significant number of hours of supervised training and meet other state licensing requirements in order to practice.

**B. NASW's Interest In The Case.**

Because NASW's members, professional programs, ethical and practice standards are directly affected by the privacy regulations issued under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), NASW has a pressing need to clarify HIPAA's intended requirements – particularly those involving efforts to protect the confidentiality of the sensitive mental health information that is central to the work of many of its members.

The issue presently before this Court – whether the Court should invalidate HIPAA’s Amended Rule allowing health care providers to disseminate their clients’ identifiable health information without client consent for purposes of treatment, payment and health care operations (“TPO purposes”) – profoundly impacts NASW and its members. Moreover, NASW has expertise that will assist the Court in reaching a proper resolution of the question presented in this case.

NASW’s policy statement on *Confidentiality and Information Utilization*, recognizes that “[i]ssues of confidentiality and privacy are even more important now that the patient or client’s record . . . may consist of thousands of electronic bits of information” rather than paper files. *Social Work Speaks, National Association of Social Workers Policy Statements* 55 (6th ed. 2003-2006). NASW’s policy statement states that it should “advocate that the [HIPAA privacy] rule protects patient privacy as intended without harming access to quality care and maintaining benefits.” *Id.* at 58. Further, NASW’s policy specifies, “Information obtained about individuals for one purpose must not be used or made available for other purposes without the individual’s explicit informed consent.” *Id.*

Throughout the development of the HIPAA privacy regulations, NASW has commented on the impact of the substance and structure of the proposed regulations on social workers and their practices. With regard to the issue of

requiring consent for disclosure of client records for any reason, including for TPO purposes, NASW submitted comments on February 14, 2000, prior to the adoption of the Original Rule, detailing the need for mandatory client consent. It then submitted comments on March 30, 2001, after the promulgation of the Original Rule, applauding the inclusion of the mandatory consent requirement. Finally, on April 25, 2002, NASW submitted comments on the “about face” of the Department of Health and Human Services (“HHS”) when it rejected mandatory client consent to disclosure for TPO purposes.

**C. NASW’s Authority To File.**

NASW has obtained consent of the parties to file an *amici curiae* brief in this matter, and it respectfully requests that this Court consider the following:

**II. SUMMARY OF ARGUMENT**

Confidentiality of an individual’s sensitive health information is a long-recognized right and the cornerstone upon which a successful social worker/client relationship is built. The fear that stigmatizing information might possibly fall into some unknown person’s hands does not merely hamper the therapeutic relationship, it prevents its coming into existence. The thought that a stranger may find out what medications a person is taking, or how often and for what purpose an

individual is seeing a therapist, can prevent a person from confiding in a therapist or from even seeking therapy or mental health treatment at all.

Because the right of the individual to control the dissemination of personal, potentially-stigmatizing mental health information is indispensable to treating individuals and serving the public, client confidentiality is protected by the common law, the U.S. Constitution, and professional practice standards – and is intended to be protected by HIPAA as well.

The HIPAA Amended Rule being challenged by Appellants removes the requirement of client consent to disclosure of records for TPO purposes, thus (1) undermining the fundamental protections necessary to establishing or continuing a successful therapeutic relationship between social worker and client, and (2) subverting the standard for consent established by NASW's Code of Ethics, state social worker licensing laws, and psychotherapy privilege laws.

### **III. ARGUMENT**

#### **A. The Individual's Right To Control Disclosure Of Personal Health Information Given To Social Workers Is A Well-Established And Essential Right.**

##### **1. Supreme Court Jurisprudence Protects Confidentiality In The Social Worker/Client Relationship.**

The Supreme Court has recognized that the privacy of mental health information is absolutely necessary for the establishment of mutual trust in the

social worker/client relationship. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (recognizing federal common law psychotherapist-patient privilege “rooted in the imperative need for confidence and trust”)(quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).<sup>2</sup> The psychotherapist at issue in *Jaffee* was, in fact, a clinical social worker whose psychotherapy treatment records the Supreme Court had “no hesitation in concluding” were properly the subject of protection and not available as evidence in the federal courts. *Id.* at 15 (noting the privilege that applies to psychologists and psychiatrists should apply with “equal force” to social workers

---

<sup>2</sup> See also, e.g., *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 76 (1st Cir. 1999) (noting that both attorney/client and psychotherapist/client privileges are “rooted in the imperative need for confidence and trust”); *U.S. v. Hayes*, 227 F.3d 578, 582-87 (6th Cir. 2000) (examining potential chilling effect a “dangerous patient” exception to the privilege would have on atmosphere of “confidence and trust” between psychotherapist and patient); *U.S. v. Chase*, 340 F.3d 978, 990 (9th Cir. 2003) (declining to recognize a “dangerous patient” exception to psychotherapist/patient privilege because “[a]ny exception necessarily has some adverse effect on the candor that the [] privilege is meant to encourage”); *U.S. v. Glass*, 133 F.3d 1356, 1358-59 (10th Cir. 1998) (concluding that no “dangerous patient” exception applied because defendant’s statements arose in “an atmosphere of confidence and trust” in which he was “willing to make a frank and complete disclosure of facts, emotions, memories, and fears”); *U.S. v. Schwensow*, 151 F.3d 650, 657-58 (7th Cir. 1998) (finding that privilege did not apply because defendant did not engage in “confidential communications”); *U.S. v. Gill*, 99 F.3d 484, 489 (1st Cir. 1996) (noting that “[t]he guideline phrase ‘private trust’ readily describes the relationship of a psychologist vis a vis his or her patients,” and upholding sentencing enhancement for defendant who abused that position of trust).

because “social workers provide a significant amount of mental health treatment.”).

Quoting the opinion below with approval, the *Jaffee* Court explained, “Reason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment.” *Id.* at 6 (quoting *Jaffee v. Redmond*, 51 F.3d 1346, 1355-56 (7th Cir. 1995)). Further, the Court noted that protecting the privacy of the information disclosed in confidence to a psychotherapist benefits not merely the individual patient, but also “serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.” *Id.* at 11.

The Court recognized that these significant benefits to the patient and to the public flow directly from the potential negative consequences of even the possibility of failing to adequately protect the privacy of the sensitive information psychotherapists are privy to:

Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

*Id.* at 10 (emphasis added). The Court also noted that “all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege.” *Id.* at 12; *See also id.* at n. 11 (citing those state statutes enacting psychotherapist privilege).<sup>3</sup>

The *Jaffee* Court considered the need for consistent and absolute protection to be so critical that it rejected an approach that would have allowed for abrogation of the privilege if, on balance, the evidentiary need for disclosure outweighed the patient’s interest in privacy. The Court concluded that this limitation on privacy “would eviscerate the effectiveness of the privilege.” *Id.* at 17. It explained:

[I]f the purpose of the privilege is to be served, the participants in the confidential conversation ‘must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.’

---

<sup>3</sup> In addition, state laws uniformly require that social workers maintain their patients’ confidentiality. *See, e.g.*, Ariz. Rev. Stat § 32-3283; Ark. Code Ann. § 17-103-107; Cal. Bus. & Prof. Code § 4992.3; Colo. Rev. Stat. Ann. § 12-43-218; Del. Code Ann. tit. 24, § 3913; D.C. Code Ann. § 14-307; Iowa Code § 622.10; 225 Ill. Comp. Stat. 20/16; Ind. Code Ann. § 25-23.6-6-1; La. Rev. Stat. Ann. § 37:2718; Me. Rev. Stat. Ann. tit 32, § 7005; Mass. Gen. Laws ch. 112, § 135B; Mich Comp. Laws Ann. § 333.181513; Miss. Code Ann. § 73-53-17; Mo. Rev. Stat. § 337.636; Mont. Code Ann. § 37-22-401; N.J. Stat. Ann. § 45:15BB-13; N.M. Stat. Ann. § 61-31-24; N.Y. C.P.L.R. 4508; Okla. Stat. Ann. tit. 59, § 1261.6; S.C. Code Ann. § 19-11-95; S.D. Codified Laws Ann. § 36-26-30; Tenn. Code Ann. § 63-23-107; W. Va. Code § 30-30-12; Wis. Stat. Ann. § 905.04.

*Id.* at 18 (quoting *Upjohn v. United States*, 449 U.S. 383, 393 (1981)). Thus, the Supreme Court rejected a balancing test approach and placed first consideration on the protection of psychotherapy records from any type of release.

**2. The U.S. Constitution Protects The Privacy Of Medical Records.**

The U.S. Constitution also protects a person's right to safeguard the privacy of his or her protected health information. See *Whalen v. Roe*, 429 U.S. 589 (1977). As this Court has stated, "Although the full measure of the constitutional protection of the right to privacy has not yet been delineated . . . there can be no question that an [individual]'s medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). The privacy of information is protected where "it is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 112-113 (3d Cir. 1987). No information is more "intimate or personal" than that shared with a psychotherapist, and clients have the justified expectation that such information will generally not be disclosed without their permission.

**3. Established Standards For Professional Social Workers Protect Privacy And Give Clients Control Over Their Own Sensitive Health Information.**

Social workers, like most mental health providers, have professional ethical obligations to keep their patients' medical records confidential. The *NASW Code of Ethics* expressly prohibits the disclosure of client records or information without the client's specific, informed consent, except in extremely limited circumstances. *NASW Code of Ethics*, Standard 1.07(c).

Licensing requirements and ethical standards imposed by law on social workers throughout the country impose similar (or identical) requirements of strictly maintaining client confidentiality and revealing information – even for TPO purposes – only with client consent. As noted above, sixteen states have expressly adopted or referenced the *NASW Code of Ethics* in state social work licensing or other laws, and all states have adopted standards of confidentiality and privilege for psychotherapy records.

**4. HIPAA Itself, If Properly Implemented, Would Protect Confidentiality And Prevent The Unwanted Dissemination Of Sensitive Mental Health Information.**

HIPAA was created, in part, to give federal legislative support to individuals' existing rights to protect their own sensitive mental health information through the application of Constitutional principles, the common law, and professional practice standards. The Privacy Rule was “to protect and enhance the

rights of consumers by providing them access to their health information and controlling the inappropriate use of that information.” 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000).

In implementing HIPAA, HHS acknowledged that “few experiences are as fundamental to liberty and autonomy as maintaining control over when, how, to whom, and where you disclose personal material.” *Id.* at 82,464 (quoting Janna Malamud Smith, *Private Matters: In Defense of the Personal Life*, at 240-41 (1997)). This is especially true in the context of mental health information. “If, in Justice Brandeis’ words, the ‘right to be let alone’ means anything, then it likely applies to having outsiders have access to one’s intimate thoughts, words, and emotions.” *Id.*

However, it is precisely this mental health information that HIPAA, as presently implemented by HHS, fails to adequately protect. Instead of supporting and enhancing the privacy-right protections detailed above, as it was intended to do, the current HIPAA privacy rule actually undermines and destroys these protections because HHS removed the necessity for client consent prior to disclosure for TPO purposes.

**B. As Currently Implemented, HIPAA's Privacy Rule Fails To Protect Potentially Stigmatizing Mental Health Information And Must Be Changed To Mandate Patient Consent To Disclosure.**

**1. The Original Rule Protected Confidentiality By Making Client Consent To Disclosure Mandatory.**

The Original Rule mandated that a patient's consent must be obtained in order to share information for TPO purposes. *See Citizens for Health v. Thompson*, No. Civ.A. 03-2267, 2004 WL 765356 at \*2 -\*6 (E.D. Pa. 2004) (explaining evolution of the HIPAA privacy rule). When drafting the original privacy portions of HIPAA requiring client consent for disclosure, HHS noted the importance of protecting a patient's sensitive health information:

The provision of high-quality health care requires the exchange of personal, often-sensitive information between an individual and a skilled practitioner. Vital to that interaction is the patient's ability to trust that the information shared will be protected and kept confidential.

65 Fed. Reg. 82,462, 82,464 (Dec. 28, 2000). HHS recognized that "a breach of a person's health privacy can have significant implications well beyond the physical health of that person, including the loss of a job, alienation of family and friends, the loss of health insurance, and public humiliation." *Id.* at 82,468.

These considerations – central to the purposes of HIPAA – led to the requirement that patient consent be obtained for any disclosure, including for TPO purposes. Noting that seeking patient consent is an ethical requirement for many

health care practitioners, HHS explained that many comments it received “indicated that both patients and practitioners believe that patient consent is an important part of the current health care system and should be retained.” *Id.* at 82,473. HHS noted that “[p]roviding and obtaining consent clearly has meaning for patients and practitioners” and, if required by HIPAA, would “not significantly change the administrative aspect of consent as it exists today.” *Id.* at 82,473, 82,474.

**2. The Amended Rule Does Not Require Consent To Disclosure For TPO Purposes.**

Notwithstanding its prior conclusion that “patient consent . . . should be retained,” HHS enacted the Amended Rule, eliminating the requirement of patient consent for TPO purposes. *Citizens for Health*, 2004 WL 765356 at \*4. The District Court noted that the Amended Rule “retained almost all the other protections and provisions of the Original Rule,” except that it “rescinded the consent requirement by granting covered entities regulatory permission to use health information for routine purposes.” *Id.* at \*6, \*4. The Amended Rule should be invalidated because it undermines existing protections for sensitive health information and is inconsistent with the purposes of HIPAA itself.

### 3. The “Optional” Consent Alternative In HIPAA Undermines Privacy And Confidentiality.

Under the Amended Rule rescinding the mandatory consent requirement, a provider is permitted, at his or her own discretion, to obtain patient consent prior to any specific disclosure. When the HHS Secretary promulgated the Amended Rule and determined that optional rather than mandatory consent was sufficient, he failed to consider the repercussions of this decision to mental health patients and providers. The removal of the requirement of mandatory consent undermines the nature of consent itself, which is the right to maintain when, to whom, and for what purpose personal health information is disclosed.

The District Court accepted the proposition that the Amended Rule caused no harm to patient or client privacy rights because it “does not compel anyone to use or disclose” information without consent. *Citizens for Health*, 2004 WL 765356 at \*16 (emphasis added). “Because the Amended Rule is not compulsory in nature, it does not affirmatively interfere with any right.” *Id.* This conclusion, however, misconstrues the nature of confidentiality in the therapeutic relationship and the ownership of the privacy right, as well as the repercussions sure to flow from the existence of an “optional” consent rule in HIPAA. Giving providers the option to require consent is inconsistent with the legal and historical precedent detailed above because it destroys patient or client control over the release of

private information and the attendant trust that confidentiality will be maintained by the clinician.

**a. If Consent Is Not Required, Unacceptable Inconsistency Will Result.**

Optional consent – or worse, presumed consent – leads inevitably to inconsistent applications, not just from state to state, but from provider to provider.<sup>4</sup> Even in the example illustrated by the District Court, inconsistency is evident. Plaintiff Dr. Deborah Peel was provided with three different types of notices regarding the sharing of her information. *Id.* at \*8. One provider “used and disclosed,” another “may use and disclose,” and yet another “will use and disclose” information. *Id.* If authorization for the release of some or all information for TPO purposes is presumed to be the case for mental health records as it is for other medical records, the right to confidentiality and privilege may be waived without a flicker of recognition that there has been a breach of the patient’s basic rights.

---

<sup>4</sup> The Supreme Court recognized that at least forty-five states plus the District of Columbia apply a version of the social worker/client privilege. See Jaffee, 518 U.S. at 17, n.17 (citing state statutes).

**b. If Consent Is Not Required, Clients Will Be Discouraged From Seeking Needed Treatment.**

In the context of mental health treatment, this inconsistency and uncertainty can only serve to discourage clients from (1) seeking treatment for sensitive conditions in the first place, or, even when treatment is sought, (2) disclosing complete and honest information for fear of lack of privacy. If clients are unsure of the circumstances under which a provider “may” or “will” share information, the first essential step in building a relationship with a therapist is never taken. As the *Jaffee* Court noted, inconsistent protection is little better than no protection at all, because “the mere possibility of disclosure” of embarrassing information can prevent the formation of a successful therapeutic relationship. *Jaffee*, 518 U.S. at 10, 17-18.

**c. If Consent Is Not Required, Social Workers Will Be Forced Either To Contend With Unreasonable Complexity Or To Lower Existing Privacy Standards.**

The inconsistency inherent in optional consent has additional consequences as well. Placing the onus on individual providers scattered throughout the country to protect their clients’ privacy (1) places an unreasonably high expectation of knowledge of conflict of laws on practitioners, and (2) pits practitioners’ interests against those of the health plans that they depend upon for business referrals and ongoing reimbursement of services. Health plans and others seeking access to

records for TPO purposes are not subject to the ethical standards or state laws regarding confidentiality that apply to social workers; accordingly, their interest is in procuring information, not protecting confidentiality.

Also, because HIPAA provides a national standard for privacy, it will be the one standard toward which all others inevitably bend, regardless of whether a higher standard established by state laws is “allowed” in a particular situation. Electronic information sharing recognizes no state border; therefore, for the sake of ease and consistency, providers and insurers will inevitably gravitate toward a consistent national standard. The scrutiny and analysis that will have to occur if some providers opt to seek consent and others do not will be tedious and onerous, and will yield even more inconsistency. This will drive states, and providers themselves, to shed any heightened standards in preference for the nationally-consistent standard of HIPAA, whatever that standard is.

If the floor of protection offered by HIPAA is set too low, which it is in the case of mental health records, existing privacy and confidentiality protections and standards will suffer greatly.

#### **4. The Protection HIPAA Affords “Psychotherapy Notes” Does Little To Protect Most Mental Health Records.**

The limited protection that HIPAA affords to disclosure of “psychotherapy notes” does not obviate the need for client consent because (a) a broad range of

material falls outside that category, and (2) even for material that falls within the definition of “psychotherapy notes,” an artificial separation of files is needed to achieve the limited protection available. Psychotherapy is one type of recognized mental health treatment and, thus, other mental health treatment modalities not specifically identified in the privacy regulations would not receive any special HIPAA protection.

The psychotherapy notes provisions apply to certain records detailing client communications, but expressly exclude “medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.” 45 C.F.R. 164.501. The breadth of these exclusions, as a practical matter, means that the bulk of sensitive mental health information is left unprotected as part of the individual’s general medical record. If, for example, a “summary” of a diagnosis of schizophrenia or a record of a prescription for an anti-depressant drug is disclosed, then stigmatizing information has been revealed and HIPAA’s “psychotherapy notes” protection is effectively meaningless.

Moreover, in order to receive even the limited protection afforded by the psychotherapy note provisions, the therapist or clinician must actively separate the

psychotherapy notes from the record into a separate file. If the notes have not been separated, there is no additional protection. Thus, the clients' fate rests on the decision and ability of the therapist to separate psychotherapy notes from the entire file and to maintain separate file cabinets.

It is beyond logic to reduce clients' right to privacy of their extremely sensitive mental health information to the existence of separate files containing some – but far from all – of their most sensitive records. Surely, the intention of HIPAA was not to take such a gamble with the guarantees of client privacy and confidentiality established by the U.S. Constitution, statute, Court precedent, common law, and professional practice standards. Adoption of the well-understood and accepted standards for client consent to the disclosure of psychotherapy and other mental health records – which are incorporated into state laws, which have been recognized by the Supreme Court, and which are required by social work licensing laws and under the *NASW Code of Ethics* – is the proper legal standard to be incorporated into HIPAA privacy regulations for the release of mental health records.

**IV. CONCLUSION**

For the foregoing reasons, this Court should reverse the District Court's decision to uphold HIPAA's Amended Rule.

Respectfully submitted,



---

Susan L. Burke  
Stacy Alison Fols  
Montgomery, McCracken,  
Walker & Rhoads, LLP  
123 South Broad Street  
Philadelphia, PA 19109  
215-772-7514

Carolyn Polowy, Of Counsel  
Sherri Morgan, Of Counsel  
National Association of  
Social Workers  
750 First Street NE, Suite 700  
Washington, DC 20002  
202-336-8282

Attorneys for the National Association  
of Social Workers and the Pennsylvania  
Chapter of the National Association of  
Social Workers

Dated: September 1, 2004

**CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND  
TYPE STYLE REQUIREMENTS**

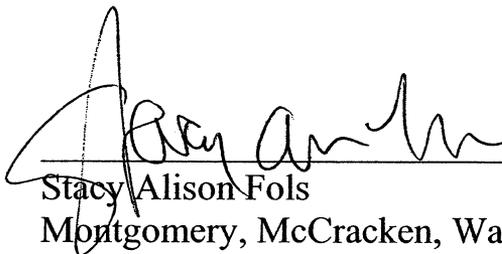
1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because:

This brief contains 4,605 words, excluding the parts of the briefs exempted by Fed. R. App. P. 32(a)(7)(b)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word XP in 14 point Times New Roman.

Dated: September 1, 2004



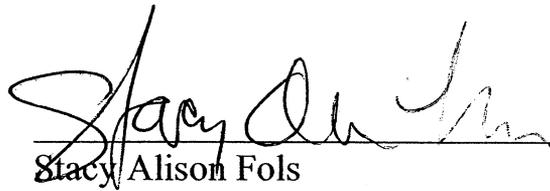
---

Stacy Alison Fols  
Montgomery, McCracken, Walker & Rhoads, LLP  
123 South Broad Street  
Philadelphia, PA 19109  
215-772-1500

**CERTIFICATION PURSUANT TO L.A.R. 46.1(e)**

For the purpose of filing this *amici curiae* brief on behalf of the National Association of Social Workers and the Pennsylvania Chapter of the National Association of Social Workers, I, Stacy Alison Fols, hereby certify that I am a member in good standing of the bar of the Court of Appeals for the Third Circuit.

Dated: September 1, 2004

A handwritten signature in black ink, appearing to read "Stacy Alison Fols", written over a horizontal line.

Stacy Alison Fols

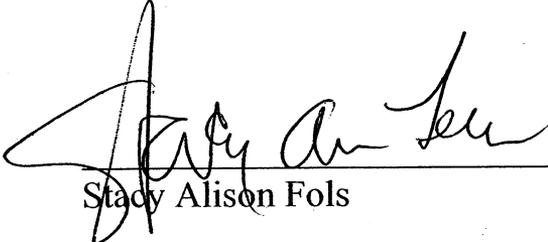
Montgomery, McCracken, Walker & Rhoads, LLP  
123 South Broad Street  
Philadelphia, PA 19109  
215-772-1500

**CERTIFICATION OF SERVICE**

I, Stacy Alison Fols, hereby certify that on the date listed below I caused to be served two copies of the foregoing *Amici Curiae* Brief of The **National Association of Social Workers and The Pennsylvania Chapter of the National Association of Social Workers Supporting Appellants and in Favor of Reversal** on the following persons by overnight mail:

Charles Scarborough, Esquire  
U.S. Department of Justice  
Civil Division, Appellate Staff  
601 "D" Street, N.W.  
Room 9130 PHB  
Washington, D.C. 20530

James C. Pyles, Esquire  
Powers, Pyles, Sutter & Verville, P.C.  
1875 Eye St., N.W.  
12<sup>th</sup> Floor  
Washington, D.C. 20006

  
Stacy Alison Fols

Dated: September 1, 2004